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# MEMBER STATES AND INTERNATIONAL LEGAL RESPONSIBILITY : DEVELOPMENTS OF THE INSTITUTIONAL VEIL

Catherine Brölmann

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Amsterdam Center for International Law  
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## ***Member States and International Legal Responsibility : Developments of the Institutional Veil***

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### **I. Introduction**

As forms of political organization vary and levels of governance multiply, the subject of international organizations as legal creatures is topical as ever. Part of that topicality is related to scenarios of legal responsibility – traditionally the hallmark of full-fledged participation in a legal system. Actions of the United Nations in Haiti,<sup>1</sup> or in Srebrenica,<sup>2</sup> and of Euratom<sup>3</sup> or the European Patent Office<sup>4</sup> in the Netherlands, have raised high profile questions regarding the legal accountability of international organizations. In the commentary to an early version of the Articles on Responsibility of States for internationally wrongful acts (ARSIWA) the *International Law Commission* (ILC) stated: ‘it must not be forgotten that, *by their very nature*, international organizations normally behave in such a manner as not to commit internationally wrongful acts’.<sup>5</sup> By now, organizations have come of age as independent legal actors, as is epitomized by the adoption in 2011 of the ILC Articles on the Responsibility of International Organizations (ARIO).<sup>6</sup>

A complicating factor in any legal scenario involving international organizations is the dimension of the member states. These are unlike the component elements of any other legal actor, including of the state itself. Prominent international legal persons

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<sup>1</sup> *Center for Economic and Policy Research*, ‘Ban Ki-moon Explains to Congress Why the UN Won’t be Held Accountable for Cholera in Haiti’ (27 February 2015), available at <http://www.cepr.net/index.php/blogs/relief-and-reconstruction-watch/ban-ki-moon-explains-to-congress-why-the-un-wont-be-held-accountable-for-cholera-in-haiti>.

<sup>2</sup> See *infra* notes 58 and 66 and accompanying text.

<sup>3</sup> Supreme Court, *Greenpeace Nederland and Procurator General at the Supreme Court of the Netherlands (intervening) v. Euratom*, 13 November 2007, ILDC 838 (NL 2007) and comment by C. Brölmann (available at <http://www.oup.com/online/ildc/>).

<sup>4</sup> E.g. the at the time of writing most recent decision of the District Court The Hague, *Staff Union of the European Patent Office vs the European Patent Office*, 17 Februari 2015, caseno. 200.141.812/01.

<sup>5</sup> “Text of articles 10 to 15 and commentaries thereto as adopted by the Commission at its twenty-seventh session” *Yearbook of the International Law Commission* 1975, Vol II, former draft art. 13, p. 87 para. 3 (emphasis added); both the Article and the commentary were adopted without change in 1996 (GAOR, Fifty-first Session, Supplement No. 10 (UN Doc A/51/10 and Corr. I, p. 66).

<sup>6</sup> *ILC Report*, Sixty-third Session (UN Doc. A/66/10 (2011) pp. 50-170; UN General Assembly resolution 66/100 of 9 December 2011.

in their own right, member states bring in an additional layer, which however lies behind the legal shell that clothes the international organization as a legal entity. This constitutes also a separation between the institutional legal order of the organization and general international law, which has existed ever since organizations were attributed a separate legal identity,<sup>7</sup> but was not always named as the conceptual linchpin that it arguably is. The metaphor of the ‘institutional veil’ is used to make this tangible (section II).

The growing prominence in our time of international organizations as international actors brings up the question as to whether the institutional veil, too, has been subject to development. This paper aims to address that question and to examine in semi-broad strokes the position of international organizations’ member states in the context of international legal responsibility, with reference to pertinent provisions in the ARIO. This leads to the finding that there are four legal contexts in which the institutional veil of an organization has a central role – the first two being the best known, and therefore discussed with more detail: subsidiary responsibility of member states (section III); the attribution of conduct to member states (section IV); the ‘attribution of responsibility’ to member states (section V), and the bypassing of the institutional veil to establish independent responsibility of member states based on a material link with the wrongful act of the organization or the injurious circumstances (section VI). Whereas in the first case the institutional veil seems to have remained consistently impervious, in the other cases the institutional veil in the last 10 years appears to have been contested, engaged with, and pushed to different degrees of transparency. The paper concludes with some considerations regarding the politics of the institutional veil (section VII).

## **II. The institutional veil of international organizations**

The metaphor of the ‘institutional veil’ was introduced on an earlier occasion,<sup>8</sup> in the context of the law of treaties, for conceptualization of the legal shell that clothes an international organization as a legal entity, in the same way as the ‘sovereign veil’ of the state or the ‘corporate veil’ of a company.<sup>9</sup> That legal shell is also the separation between the institutional legal order of the organization and general international

<sup>7</sup> Paul Reuter, *Institutions internationales* (Presses universitaires de France, Paris, 1975), chapters 1-2.

<sup>8</sup> Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007).

<sup>9</sup> See also Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States* (SHARES Research Paper 28 (2013), ACIL 2013-26 - available at [www.sharesproject.nl](http://www.sharesproject.nl) and SSRN) who addresses organizations’ ‘corporate veil’ (but see, on associative confusion *infra* note 47); and Cedric Ryngaert and Holly Buchanan, ‘Member State Responsibility for the Acts of International Organizations’ (2011) 7 *Utrecht Law Review*, who mention the ‘organizational veil’.

law.<sup>10</sup> The institutional veil can thus serve as an analytical tool for considering the degree of ‘visibility’ of the internal institutional order of international organizations (IGOs), which includes the member states. It notably serves to look at the position of member states and their relation with the organization from the *outside perspective* of general international law, rather than from *within the institutional order* of the organization (as would be traditionally the angle of the sub-discipline of ‘the law of international organizations’). The outside perspective is increasingly relevant in view of the ever more frequent dealings of organizations with third states. Otherwise, for an external examination of the complex interplay between an organization and its member states, the ‘institutional veil’ seems a more helpful conceptual linchpin than for example the organization’s ‘international legal personality’ – the latter legal feature being a binary notion, essentially uncontested when it comes to regular international organizations, while in its contemporary meaning of an *ex post* label the term has little explanatory power.<sup>11</sup>

The ‘institutional veil’ has been used in addition to make some theoretical claims that are relevant in the present context of legal personality as well.<sup>12</sup> The first proposition is that the institutional veil (unlike the ‘sovereign veil’ of states in its classic manifestation) has a transparent quality. Such due to the particular doctrinal and systemic setup of organizations, coupled with their dual function – as vehicles for states and as independent actors. Organizations are “institutions of limited and delegated powers, lacking the plenary rights of sovereigns under international law ....”,<sup>13</sup> and established on a functional, rather than territorial basis. The organization’s legal sphere is less all-encompassing and self-contained than that of a state, and already for that reason conceptualised as more legally permeable.

The second proposition is that this quality is not static, but that the institutional veil of organizations appears with different degrees of transparency, depending on the context. It means that member states in some cases are legally visible, and in other cases less so. This can be gleaned for example in (the legislative history of) several provisions of the 1986 Convention on the Law of Treaties.<sup>14</sup> Such legal transparency on the other hand is seldom found in states in relation to the law of treaties -- a rare example of lifting of the *sovereign* veil is the combination of Articles 51 (Coercion of

<sup>10</sup> This article employs the term ‘institutional (legal order)’ in order to steer clear of the debate on the extent to which the rules of the organization qualify as ‘internal’ and to what extent as ‘international’; this part of the legislative history of the ARIO has been carefully analyzed in Christiane Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’, (2011) 8 *International Organizations Law Review*, pp. 397–482.

<sup>11</sup> See e.g. in Henry Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity* (5<sup>th</sup> rev. ed., Nijhoff-Brill, Leiden, 2011), para. 44.

<sup>12</sup> Brölmann (2007), *supra* note 8.

<sup>13</sup> José Alvarez, *International Organisations as Law-Makers* (OUP, Oxford, 2005) p. 15

<sup>14</sup> Elaborated in detail in Brölmann (2007), *supra* note 8, especially chapters 1-4 and 11.

a representative of a State) and 52 (Coercion of a State) of the 1969 Convention on the Law of Treaties.

The dual imagery and the varying transparency of the institutional veil thus appear in positive law; but they also come up in the social reality of international life (organisations *de facto* appear in two roles, as fora for states and as independent actors); in the legal-institutional structure of organisations (for example in the contrast between the functions and powers of an expert body and those of a state representative body); in institutional law and in international law doctrine (for one, because doctrine hinges on the tenet of state sovereignty); and in the minds of lawyers and policy-makers (who may have an interest in addressing member states directly or, on the other hand, not at all). Doctrine is an especially powerful factor, as it is first of all a mind-set, and all the more complex because of the notorious mixture of descriptive and normative arguments.

The place of international organizations in the system of international law is often marked by a tension between the push for transparency of the institutional veil on the one hand and the one-dimensional set-up of the law, on the other. This is brought out especially clearly in branches of international law such as the law of treaties, that prescribe 'procedural' equality and as a consequence one-dimensional, unitary legal participants. In such cases ultimately the legal system prevails (as is confirmed by the codification process that led to the 1986 Vienna Convention on the Law of Treaties), since a legal system of necessity sets the terms for participation of its legal subjects. The typical example is the tortuous history of draft Article 36*bis* of the 1986 Convention on the position of member states with respect to treaties concluded by the organization. The question that occupied the ILC for years was whether member states would be automatically bound to the treaty, or rather would be regular 'third states', or rather would constitute a new, intermediate category. The latter option could not by rules of general international law be accommodated and eventually the draft article never made it into the Convention.<sup>15</sup>

That tension, between the transparent and opaque institutional veil (or, in other words: the layered and the one-dimensional legal actor), can be seen at work also in the context of legal responsibility. Even if the law of responsibility poses no systemic obstacle, in the way of the law of treaties, to differentiation among legal participants, the challenge remains of formulating a rule of general international law regarding responsibility in relation to member states that holds valid for all international organizations regardless of their institutional setup. Rosalyn Higgins compared this conundrum early on to the story of the aforementioned Article 36 *bis*: 'in my view the analogy is precise'.<sup>16</sup>

<sup>15</sup> Brölmann (2007), *supra* note 8, pp. 212-225.

<sup>16</sup> Rosalyn Higgins, *Problems and Process* (OUP, Oxford, 1994) p. 278 et seq.

The institutional veil can be at issue in a rule of positive law that addresses the member states *vel non*, or in a doctrinal or theoretical construct: in all cases the same spectrum between transparent and opaque is at issue. The transparency of the institutional veil moreover comes up also outside the formal framework of the law of treaties or the law of responsibility – for instance in relation to the exercise of diplomatic protection (*in casu* in relation to the stockholders of a private company) in the 1970 *Barcelona Traction* case.<sup>17</sup> In a conceptually similar vein, the veil of an organization or one of its organs may be lifted as part of a non-formal process, as for instance in the opening up of the UN Security Council<sup>18</sup> or the General Assembly<sup>19</sup> to detect signs of *opinio juris* of individual states on the basis of voting behaviour.

### III. The institutional veil and subsidiary responsibility of member states

When an organization incurs responsibility for a wrongful act, but does not comply (whether because it was unable or unwilling) with the obligations stemming from this responsibility, ‘subsidiary’ or ‘secondary’ responsibility is the mechanism by which the member states are then addressed - especially in a financial context often referred to as ‘liability’.<sup>20</sup> This is the proverbial ‘piercing of the corporate veil’ as we know it from domestic law, when injured parties actively seek to disband the corporate entity’s legal shell with a view to obtaining their due from the shareholders.

International law on this point has been consistently reticent since some thirty years. The question as to whether the member states of an organization may be held responsible in second instance for the wrongful act of an organization came to the fore in a salient manner in the 1980s, in the series of cases on the claims brought by creditors against the member states of the bankrupt Tin Council.<sup>21</sup> First of all, the string of decisions and its reception bear out that, by then, doctrine had fully

<sup>17</sup> *The Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)*, 5 February 1970, International Court of Justice, Second Phase – Judgment, I.C.J. Reports 1970, p. 3 para. 57 ‘...hence, the lifting of the veil is more frequently employed from without...’.

<sup>18</sup> Cf. Walter Schilling, ‘Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats – Möglichkeiten und Grenzen’, in 64 (2004) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* pp. 343-362.

<sup>19</sup> Cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, 27 June 1986, International Court of Justice, Judgment – Merits, I.C.J. Reports 1986, p. 14, paras. 188, 203, 204.

<sup>20</sup> Jan Klabbers, *An Introduction to International Organizations Law* (CUP, Cambridge, 2015), pp 323-24, on responsibility vs liability and NATO.

<sup>21</sup> In the present context most notably Court of Appeal decisions *Maclaine Watson & Co. Ltd v. International Tin Council*, 26 October 1989, United Kingdom House of Lords, 81 ILR 670; for background facts and analysis see e.g. the commentary by Paolo Palchetti in Cedric Ryngaert (ed-in-chief), I. Dekker, R. Wessel, J. Wouters (eds.), *Case Law on International Organizations: Text and Commentary* (Oxford University Press, Oxford, 2016 - forthcoming)



espoused the premise that international organizations are responsible for breaches of obligation in their own right, consistent with the idea that they can be 'bearers' of a right or obligation. In addition, the default rule appeared to be that such responsibility is not coupled with concurrent responsibility on the part of the member states,<sup>22</sup> unless this was provided for in the organisation's constitution.<sup>23</sup> Thus only in second instance obligations stemming from the responsibility would be transferred to the member states, without secondary attribution of conduct.

In the oft-cited 1988 Tin Council appeal decisions<sup>24</sup> and 1989 decision of the House of Lords,<sup>25</sup> the majority of the Court<sup>26</sup> then dismissed the claim of secondary liability on the part of the member states of the Tin Council, *inter alia* on the ground that there was no indication for the existence of a rule in international law to that effect, although the domestic law analogy according to which legal personality and contracting capacity would automatically entail limited liability, was rejected.<sup>27</sup>

Earlier, the International Chamber of Commerce (ICC) in its 1984 interim award on jurisdiction in the *Westland Helicopter* case had rejected the claim that because the Arab Organization for Industrialization (AOI) had been explicitly granted legal personality, liability on the part of the member states would be *eo ipso* excluded. The 1984 Award deserves special mention as the reasoning in part constitutes a true secondary piercing of the institutional veil of the AOI (one could say, comparatively workable with four member states). The fact that third parties such as Westland Helicopters Ltd possibly were led to rely on the guarantees given by the members of the AOI, and more generally a constitutive instrument that especially to anglo-saxon readers could seem inconclusive about the limited liability of the member states, constituted special circumstances.<sup>28</sup> Five years later the Swiss Federal Tribunal overturned the Award, holding that the organization's autonomy in several respects clearly pointed to juridical independence of the AOI, which in turn implied the

<sup>22</sup> 'Concurrent liability' in the sense of 'joint and several liability' is left out of account here. The relation between the concepts of 'liability' and 'responsibility' is complex and 'concurrent liability' would not necessarily imply simultaneous attribution of the wrongful act – see also Klabbbers, *supra* note 20.

<sup>23</sup> See Schermers and Blokker, *supra* note 11, para. 1585; a textbook example would be the 1972 *Convention on International Liability for Damage Caused by Space Objects* which provides for joint and several liability of the organisation and its member states in case of damage caused by space activities of the organization (UN Doc Res 2777 (XXVI), Art XXII.3).

<sup>24</sup> Most notably *In re International Tin Council*, Court of Appeal, Decision of 27 April 1988, 1988 3 WLR 1159, 80 ILR 181, and *Maclaine Watson v. International Tin Council*, Court of Appeal, Decision of 27 April 1988, 80 ILR 191.

<sup>25</sup> *Maclaine Watson & Co. Ltd v. International Tin Council*, 26 October 1989, United Kingdom House of Lords, 81 ILR 670; see commentary by Paolo Palchetti *supra* note 21.

<sup>26</sup> The two other submissions of the creditors, viz. liability of the member states due to absence of legal personality of the Tin Council and liability of the member states due to agency of the organization were dismissed unanimously (80 ILR (1989), p. 49, at pp. 51-53).

<sup>27</sup> As by the Court of Appeal per Lord Justice Kerr (80 ILR (1989) p. 49, at pp. 101-110); cf the House of Lords per LJ Templeman, *ILM* (1990) 29 at p. 675.

<sup>28</sup> 23 ILM 1071 (1984).

exclusion of liability of the member states.<sup>29</sup> In the Partial Award of 1991 the ICC then proceeded to examine the possibility of *additional* liability on the part of the member states on the basis of the constituent instrument(s) in combination with the intention of each individual member state construed from its behaviour. *In casu* it found that liability could not be ruled out, primarily because the constituent instrument of the AOI did not contain a clause explicitly excluding member states' liability.<sup>30</sup>

Put in general terms the *Westland Helicopter* cases reveal a struggle to determine the degree of transparency of the institutional veil of the AOI; this is illustrated by the umpires' grapple, as was pointed out, with the application of domestic analogies and their search for an idiom fitting to describe the constellation of legal facts.<sup>31</sup>

The *Westland Helicopter* arbitrations and the *Tin Council* cases, each only partly connected to the international legal framework,<sup>32</sup> then served as a basis for the conclusions of the *Institut de Droit International* in 1995;<sup>33</sup> these held that in international law there was no residual rule to the effect of either liability for member states or exclusion thereof in the absence of a pertinent treaty provision. Special Rapporteur Higgins, however, did envision an intermediate position for the member states on the basis of a principle of *institutional* law:

“... the members have a legal obligation to pay their share of expenses if a failure to pay such ‘extra’ sums would entail a failure of an obligation to a third party (*Case of Certain Expenses*). But there is no principle of general international law beyond this.”<sup>34</sup>

This rule operates at the institutional level - that is, it prevails between the organization and its members – and at the level of general international law rather

<sup>29</sup> 28 ILM 687 (1989) at p. 691 et seq.

<sup>30</sup> Para. 56 of the Award – quoted in Schermers and Blokker (*supra* note 11 para. 1588); and in the Commentary to the ARIO, Article 62 (UN Doc. A/66/10) p. 98 para. 9.

<sup>31</sup> Christiane Ahlborn, Commentaries to *Westland Helicopters Ltd v. Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, Arbitration, 5 March 1984, 80 ILR 600; and to *Arab Organization for Industrialization and others v. Westland Helicopters Ltd*, Swiss Federal Supreme Court (First Civil Court), 19 July 1988, 80 ILR 652; both in Ryngaert et al (eds), *Case Law, supra* note 21.

<sup>32</sup> It was pointed out early on how the *Westland Helicopters* awards are an example of transnational rather than international arbitration, subject to appeal to national courts (Chittharanjan F. Amerasinghe, “Review of ‘The responsibility of International Organizations toward Third Parties’”, (1996) 45 *International and Comparative Law Quarterly* pp. 752-754, at p. 753).

<sup>33</sup> “The legal consequences for Member States of non-fulfilment by international organizations of their obligations towards third parties: provisional report”, *Annuaire de l’Institut de Droit International*, vol. 66-I (1995).

<sup>34</sup> *Ibid.*, pp. 284-285.

serves as a conductor for the principle of good faith. Also Palchetti<sup>35</sup> proposed a duty of member states to provide the organization with sufficient funds to meet its obligations vis-à-vis third parties. It ultimately found its way into Article 40 of the ARIO. This is a connecting norm with ‘interstitial’ effect<sup>36</sup> – with soft normative force (considering the wording of article 40)– bridging to some extent the interstice between, in this case, the institutional and the general international legal orders.

The question of subsidiary responsibility of member states is addressed by Article 62 of the ARIO, which follows the strict line that had emerged earlier. It may be taken as an indication of the limited urgency of subsidiary responsibility in international practice that the *International Law Commission* two decades after the study of the *Institut de Droit International* relied primarily on the same two strings of cases.<sup>37</sup>

Scholars have dealt with the institutional veil in different ways, even if secondary responsibility (unlike separate responsibility, see below) was generally not accepted. It is perhaps significant that in 1980 (still the heyday of the functional view of international organizations as transparent vehicles for state action)<sup>38</sup> Schermers stated:

“it is ... impossible to create international legal persons in such a way as to limit the responsibility of the individual members. Even though international organizations, as international persons, may be held liable under international law for the acts they perform, this cannot exclude the secondary liability of the Member States themselves.”<sup>39</sup>

Blokker in 2004, in contrast, advocated an opaque institutional veil with a view to safeguarding the functionality of the organization: “Denying or restricting responsabilité distincte can in the end sacrifice the volonté distincte which is sought.”<sup>40</sup> Likewise Ryngaert in 2011 held: “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

<sup>35</sup> Paolo Palchetti, ‘Exploring Alternative Routes: the Obligation of Members to Enable the Organization to Make Reparation’ in: Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Nijhoff-Brill, Dordrecht, 2011), pp. 303, 309, 311.

<sup>36</sup> Along the lines of the ‘interstitial norms’ coined by Vaughan Lowe, ‘The Politics of Law-making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed.), *The Role Of Law In International Politics: Essays In International Relations And International Law* (Oxford, OUP, 2000), p. 207, at pp. 212-221.

<sup>37</sup> ARIO with commentary, *supra* note 30, Article 62 pp. 96-99.

<sup>38</sup> Brölmann, *supra* note 8, chapter 3.

<sup>39</sup> Henry G. Schermers, *International Institutional Law*, (Nijhoff, Dordrecht, 1980), p. 780.

<sup>40</sup> Niels Blokker, ‘International Organizations and Their Members: “International Organizations Belong to All Members and to None” – Variations on a Theme’, (2004) 1 *International Organizations Law Review*, pp. 139-161, at p. 161.

autonomy.”<sup>41</sup> Some authors, especially when proceeding from a human rights perspective, have advocated the settling of what seems a general norm regarding the institutional veil in all contexts, imposing subsidiary responsibility for member states; see for example the “holistic approach” proposed by Olivier De Schutter.<sup>42</sup>

Most likely a rule stating secondary responsibility for the member states has never existed (even if after the Tin Council crisis many commodity agreements were found expressly to exclude liability of member states).<sup>43</sup> Practice also shows several examples of constituent treaties and treaties concluded by international organizations which contain a clause that explicitly excludes the liability of member states,<sup>44</sup> but there is no agreement on the legal consequences of the absence of such a provision.<sup>45</sup>

#### IV. The institutional veil and attribution of conduct to member states

Another scenario that turns on the subtle legal barrier raised by the institutional veil, and which in actual practice is more prominent than the secondary opening of the veil discussed before, is concerned with attribution of the wrongful conduct as such. In the discourse on responsibility of organizations, it seems that attribution of conduct to member states, on the one hand, and for example subsidiary responsibility on the part of member states, on the other, are not always clearly set

<sup>41</sup> Cedric Ryngaert, ‘The Responsibility of Member States in Connection with Acts of International Organizations: Assessing the Recent Case Law of the European Court of Human Rights’ (2011) 60 ICLQ pp. 997–1017.

<sup>42</sup> Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (OUP, Oxford, 2010), ‘alternatives’ mentioned at pp. 228-233; see also Pierre Schmitt, *The right of access to justice for individual victims of human rights violations by international organizations* (Doctoral thesis, Catholic University Leuven, Faculteit Rechtsgeleerdheid, October 2015), who is less radical, even though he concludes in practice remedies are sparse.

<sup>43</sup> A list in Schermers and Blokker, *supra* note 11, para. 1589, fn 127.

<sup>44</sup> Compare e.g. the International Cocoa Agreement of 1986 (1446 UNTS 103) which excludes member states’ liability in Art. 22.5 (the International Cocoa Agreement of 1980 (1245 UNTS 221; 1276 UNTS 520), prior to the tin crisis, is silent on the matter). More examples in Schermers & Blokker, *supra* note 11, para. 1586; several international organizations, most often financial institutions, exclude the liability of member states in their constitutions Amerasinghe, *supra* note 32, p. 270.

<sup>45</sup> E.g., Amerasinghe, *supra* note 32, p. 272 (the scarce practice with regard to inclusion of such a provision is “as consistent with a belief that the absence of such a clause would entail liability of of members [...] as with a desire to make clear *ex abundanti cautela* that members did not assume such liability”).

apart<sup>46</sup> even if these are very different legal scenarios. In this case the institutional veil opens up at an early stage of the process of determining responsibility.<sup>47</sup>

While the ARIO do not expressly address attribution of conduct to member states, they do set out a framework by treating attribution of conduct to international organizations.<sup>48</sup> At this point in time legal scholarship and practice have been animated most by the context of military operations, as appears also from the ILC commentaries. The current article accordingly takes that focus, without prejudice to the fact that organizations in different functional areas, including economic governance or territorial administration, may encounter issues of responsibility.

The ARIO section on attribution of conduct comprises Article 6, which connects attribution to an organ or agent's organic link with the organization (mirroring Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARS)); Article 8 on *ultra vires* acts (mirroring Article 7 ARS); and Article 9 on ex post acknowledgment and adoption of conduct (mirroring Article 11 ARS). No lifting of the institutional veil is envisaged in the scenarios covered by these provisions. This seems uncontroversial, as illustrated for instance by the 2009 Galić case, in which the European Court of Human Rights (ECtHR) held the application to be inadmissible on the ground that acts of the ICTY, as a subsidiary organ of the United Nations, were to be attributed to the Organization and not to the host state.<sup>49</sup>

Of the ARIO section on attribution of conduct Article 7 (*Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization*) has received the most attention. Such in contrast to its pendant Article 6 ARS, which was generally outshone by Articles 4, 5 and 8 on the attribution of conduct to states. On the other hand, in the context of responsibility of organizations the provision on lent organs<sup>50</sup> is quite prominent, likely because of the intricate practice of some organizations and troop contributing nations (TCNs). A central feature of Article 7 ARIO is the requirement of effective control, which does not play a role for organs and agents of the organization (Article 6 ARIO). This brings forth a number of observations. One is that the standard for deciding whether the

<sup>46</sup> See e.g. the –rich- account in José Manuel Cortés Martín, 'The Responsibility of Members Due to Wrongful Acts of International Organizations', (2013) 12 *Chinese Journal of International Law* pp. 679–721.

<sup>47</sup> This is one reason why the expression 'corporate veil' may create associative confusion if it is used to cover the full dynamic between the organization and the member states, and the different ways in which this takes effect in the context of legal responsibility.

<sup>48</sup> Articles 6–9 ARIO.

<sup>49</sup> ECHR, Galić against the Netherlands, Decision on the admissibility, Application No. 22617/07, 9 June 2009.

<sup>50</sup> Art 7 ARIO reads "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization *if the organization exercises effective control over that conduct.*" (emphasis added).

institutional veil of the receiving organization covers also the lent organ, or whether on the other hand, the veil is made transparent so that the lent organ maintains its own identity for legal responsibility purposes, is an open norm.<sup>51</sup> The link of the organ or agent with the lending TCN remains in place (see below), until the effectiveness or factualness of another link prevails and the organ becomes a part of the receiving organization. The mechanism is no different when an organization is the troop contributor.<sup>52</sup> It may be recalled that in the case of organs lent to *states* (Article 6 ARS), ‘control’ is not the deciding factor, but rather the more formal – if essentially contested – qualification of ‘governmental authority’.

A second observation is that while military operations in a United Nations framework are a prime context for the application of Article 7, there is a divergence between the approach of the ILC (based on the ‘effective control’ test in the 1986 *Nicaragua* case and the 2007 *Genocide* case) and the ‘normative control’ or ‘(operational) command and control’ test used by the UN:

“[i]t has been the long-established position of the United Nations ... that forces placed at the disposal of the United Nations are “transformed” into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, “effective.”<sup>53</sup>

The approach taken by the UN appears to have been the point of departure also for leading judicial decisions in this area.<sup>54</sup> As has been pointed out, while in the ARIO scheme conduct is attributed to the TCN *unless* the receiving organization directs the conduct, the *Behrami* and *Saramati*,<sup>55</sup> and *Nuhanović* cases (see below) “adopt the diametrically opposed position, attributing all conduct to the lead organisation (unless a contributor overrides its command and directs the conduct).”<sup>56</sup>

The two strings of cases in Dutch domestic courts following the 1995 tragedy in Srebrenica can be taken as an indication of the state of international law. In the

<sup>51</sup> See also Kristen E. Boon, ‘Are Control Tests Fit For The Future? The Slippage Problem In Attribution Doctrines’ in (2014) 15(2) *Melbourne Journal of International Law*, pp. 330-377.

<sup>52</sup> Cf for example the ECOWAS military mission AFISMA that on 1 July 2013 transferred its authority to, and became part of, the *United Nations Multidimensional Integrated Stabilization Mission in Mali* (MINUSMA); UNSC Resolution 2100 (April 2013).

<sup>53</sup> 17 Feb 2011, UN Doc. A/CN.4/637/Add.1, p 12.

<sup>54</sup> Kjetil Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’, *EJIL* (2008), Vol. 19, pp. 509–531; see also mapping of the debate in Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP, Cambridge, 2012) pp. 116-117.

<sup>55</sup> In which the European Court of Human Rights found the conduct of UNMIK and KFOR troops in Kosovo to be attributable to the United Nations rather than to France or Norway (App. No. 71412/01 *Agim Behrami and Bekir Behrami v. France*, and App. No. 78166/01 *Ruzhdi Saramati v. France, Germany and Norway*, Grand Chamber decision of 2 May 2007, paras. 133 et seq.)

<sup>56</sup> Tom Dannenbaum, ‘Dual Attribution in the Context of Military Operations’, *IOLR* 2015 (2), ([quote at p. 11 Ms]) gives a detailed analysis of different forms of ‘control’ at issue in relation to possible dual attribution.

cases brought by the *Association Mothers of Srebrenica*, conduct of the Dutchbat contingent was consistently attributed to the United Nations (the unfortunate combination with immunity granted to organizations in domestic courts, is addressed in section VII). The courts held that the 7000 Bosniak men who had fled to the woods outside the compound (and, according to several claimants, had done so on the basis of hand signals by Dutch soldiers), had not been under the effective control of Dutchbat, and the conduct that led to the men's fate hence was not attributable to the Dutch state.<sup>57</sup>

The second series of cases were brought by Hasan Nuhanović and by the family of Rizo Mustafić, a UN employee ordered by his employers to leave the Potočari base. The bases of the action include allegations, inter alia, that the Dutch State was involved in genocide and violated fundamental human rights by handing Mustafićs and Nuhanović's family members over to the Bosnian-Serb enemy. The District Court then determined that 'operational command and control' over the Dutchbat troops had been transferred to the United Nations and that the claimants had not submitted anything pointing to restrictions on this transfer of command. The Court of Appeal of The Hague in 2011, however, held differently. This decision was upheld in 2013 by the Dutch Supreme Court, who confirmed that the Netherlands was responsible in relation to the death of three Bosniak men in Srebrenica, attributing the conduct to the Dutch state.<sup>58</sup> Especially relevant in the present context is that the Dutch Supreme Court's findings turned on the given fact that Dutchbat had effective control<sup>59</sup> over the three men who fell victim to the Bosnian-Serb military after they were sent off the compound. Otherwise, the Court opened new doctrinal horizons by recognizing (but not applying) the possibility of multiple attribution.<sup>60</sup>

In 2014, in a new case brought by the *Association Mothers of Srebrenica* the District Court of The Hague found the Netherlands responsible for the deaths of 300 Bosniak men who had been – unlike the 7000 victims mentioned before - within the state's control.<sup>61</sup> Again the concept of effective control (which the Court defined as "factual control")<sup>62</sup> was a central element in the Court's reasoning. The Court also referred to the Nuhanović case to reconfirm that a state and an organization can both have effective control and "hence, potentially, [share] responsibility, despite the UN's

<sup>57</sup> See for the list of cases *infra* note 66.

<sup>58</sup> See *District Court The Hague*, 10 Sept 2008, [M. M.-M.], [D. M.] and [A. M.] v The Netherlands; *Appeals Court The Hague*, 5 July 2011; *N. et al v The Netherlands*; *Dutch Supreme Court*, 6 Sept 2013, *N. et al v The Netherlands*.

<sup>59</sup> Supreme Court case, *ibid.*, para. 3.11.2; see on control and dual attribution Dannenbaum, *supra* note 56.

<sup>60</sup> Cf. Bérénice Boutin, *The Role of Control in Allocating International Responsibility in Collaborative Military Operations*, Doctoral dissertation (University of Amsterdam, October 2015), chapter 4.

<sup>61</sup> ECLI:NL:RBDHA:2014:8748; see paras. 4.87 – 88.

<sup>62</sup> *Ibid.*, para. 4.33.

presumptive immunity.”<sup>63</sup> At the time of writing, the Dutch state has lodged an appeal.

Thus, when it comes to attribution of conduct, current doctrine and practice point to an institutional veil that is rather impermeable. This is clear for example from the provisions in the ARIO, that seems unchallenged by practice. If we look at the specific situation of organizations that make use of lent organs – or, in the example from practice that is used most often, of troupes put at an organization’s disposal by another organization or by states – the image is more fuzzy. According to Article 7 ARIO that the organic link established between the receiving organization and the lent organ becomes relevant only with proof of effective control by the receiving organization. In other words the lent organ moves behind the institutional veil of the receiving (or in this context ‘leading’) organization, to which wrongful conduct would be attributed. The approach of the UN, on the other hand, is that lent troupes will automatically move behind the institutional veil of the Organization, unless there is a clear indication of effective control on the part of the state or organization from where the troupes originate, in which case the institutional veil of the receiving state will be permeated and the wrongful conduct attributed to the original state. Even if recent case law on some points seems to concur with the UN view, it seems safe to say that the stakes are out on what the received approach will be, considering the recent date of the ARIO, the fact that the UN focuses on the field of peace operations and does not seem to be aiming for a principled statement on attribution, and the developments in the field of peace operations.

In the latter field in particular, the debate on responsibility of organizations and member states is complex, and sometimes mixes questions of attribution of conduct with questions of immunity from jurisdiction (which would involve the institutional veil, if at all, only indirectly). For one, this goes to show that political and moral stakes are high. The activity of the United Nations in the last decade has made very clear how the attribution of conduct in the context of a military operation to the organization usually coincides with immunity granted to the organization before domestic courts,<sup>64</sup> and with lack of standing (or: lack of jurisdiction *ratione personae*) before non-domestic courts<sup>65</sup> both of which cause a deplorable gap in the legal protection of individuals.<sup>66</sup>

<sup>63</sup> Kristen Boon, *Opinio Juris* blogpost (<http://opiniojuris.org/2014/07/17/mothers-srebrenica-decision-dutch-high-court-holds-netherlands-responsible-300-deaths-1995-massacre/>).

<sup>64</sup> Cf the work by August Reinisch, first in *International Organizations before National Courts*, Cambridge University Press, 2000.

<sup>65</sup> An early analysis, including claims settlement practices of international organizations in Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Peter Lang, Frankfurt am Main, 2004).

<sup>66</sup> The thread of cases brought by the association Mothers of Srebrenica is an example: *District Court The Hague*, 10 July 2008, *Association Mothers of Srebrenica et al v The Netherlands and the United*



## V. The institutional veil and the 'attribution of responsibility' to member states

An uneasy category generally set apart are scenarios which give rise to 'indirect responsibility' or 'attribution of responsibility' (rather than to attribution of conduct)<sup>67</sup> to member states in relation to a wrongful act committed by the organization. By opening up the institutional veil such a relation can be established.

The ILC has also adopted this approach. Part V of the ARIO comprising Articles 58-62<sup>68</sup> groups together provisions that are geared to states,<sup>69</sup> but engage the responsibility of member states "in connection with" wrongful acts of an organization in different ways.<sup>70</sup> Part V has been likened to

"a conceptual hotchpotch for all those situations that did not fit with the binary concept of wrongfulness but which were still deemed sufficiently problematic to be included into the law of international responsibility."<sup>71</sup>

Indeed, the lens of the institutional veil makes clear that the provisions differ from each other in a fundamental way. The ARIO includes two provisions that look to a situation which involves one and the same breach of obligation ("...is internationally responsible for that act..."), without there being attribution of conduct. This is along

Nations (... concludes that in international-law practice absolute immunity of the UN is the standard and is respected, and that the interpretation of article 105 of the UN Charter offers no basis for restriction of the immunity of the UN. The court declares it has no competence to hear the action instituted against the UN); *Appeals Court The Hague*, 30 March 2010, *Association Mothers of Srebrenica et al v The Netherlands and the United Nations* (r.o. 5.14) "The conclusion must be that no unacceptable infringement exists of Articles 6 ECHR and Art. 14 ICCPR if the Dutch Court upholds the immunity from jurisdiction accorded to the United Nations in this case. [...]"; upheld in Dutch *Supreme Court*, 13 April 2012, *Association Mothers of Srebrenica et al v The Netherlands and the United Nations*; *European Court for Human Rights*, 27 June 2013: "the grant of immunity to the UN served a legitimate purpose and was not disproportionate." [para. 169].

<sup>67</sup> See analysis of indirect responsibility (even if that article focuses on the indirect responsibility of organizations) in Nataša Nedeski and André Nollkaemper, 'Responsibility of International Organizations "in connection with acts of States"', (2012) 9 *International Organizations Law Review*, pp. 33–52.

<sup>68</sup> Articles 58 to 60 are concerned with both member states and third states, which thus could entail opening up the institutional veil but also could not do so.

<sup>69</sup> "In accordance with article 1, paragraph 2, the present draft articles are intended to fill a gap that was deliberately left in the articles on the responsibility of States for internationally wrongful acts...." (*Yearbook of the International Law Commission 2011*, vol. II (Part Two), p. 141).

<sup>70</sup> See the - purposely flexible - title of Part Two - Chapter IV, and of Part Five of the ARIO.

<sup>71</sup> Set out succinctly in Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *International Organizations Law Review* pp. 15–28, at p. 24.

the lines of the 'indirect responsibility' envisioned by Roberto Ago:<sup>72</sup> Article 59 (*Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization*) and Article 60 (*Coercion of an international organization by a State*), which closely follow the text of Articles 17 and 18 ARS. At this point no examples from practice seem to exist. Articles 59 and 60 may be taken as a genuine 'conceptual subterfuge,'<sup>73</sup> in the sense of a third way, out of the binary categorization that hinges on the attribution of wrongful conduct. In these cases the institutional veil is permeated to establish whether the member state is directing, controlling or coercing the organization to commit a particular act.

The remaining provisions in Part Five readily fit in different categories, and it could be argued that it is meaningful and analytically helpful to put them there. As has been discussed above, Article 62 does involve responsibility of member states for the wrongful act of the organization, but the scenario is a special - and classic - case of *subsidiary* 'piercing' of the veil (see section III). The institutional veil is permeated in second instance (even if that could be agreed beforehand), once the organization will not pay its dues to the (in the words of Article 62) "injured party." Articles 58 and 61, on the other hand, envisage legal responsibility for separate conduct (i.e. not attributed to the organization) coupled with a separate breach of obligation on the part of the member state (see below under VI).

## **VI. Bypassing the institutional veil and the material link to responsibility of member states**

In some cases the institutional veil ends up being 'bypassed' rather than permeated or lifted. These are the scenarios in which a member state technically incurs responsibility for its own, separate conduct, which in turns constitutes a breach of obligation separate from the contested act of the organization. Once the institutional veil has been lifted to assess the situation at the level of the member states, it is bypassed as in a formal- legal sense the state is addressed fully independently. There may then be a material link that connects the state's conduct to the organization. In some situations this material link to the wrongful act of the organization or the injurious circumstances has been deemed especially important so as to warrant inclusion in the scheme of the ARIO. This is the case of Articles 58 and 61, where the material link is "aid and assistance" and "circumvention", respectively. Other scenarios are simply not covered by the ARIO. As the ILC said, "[n]ot all the questions that may affect the responsibility of a State in connection

<sup>72</sup> *Report of the International Law Commission on the work of its forty-eight session, 1996 (A/51/10)*, p. 61; see Nedeski and Nollkaemper, *supra* note 67, p. 37.

<sup>73</sup> Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *International Organizations Law Review* pp. 15–28.

with the act of an international organization are examined in the present draft articles. ... “the [ARS] will regulate attribution of conduct to the State.”<sup>74</sup>

The most attention has attracted Article 61,<sup>75</sup> which looks to member state(s) making improper use of the organization (and its pendant Article 17 on an organization abusing the member state(s)).<sup>76</sup> Unlike the complicity provision in Article 58, the proposed rules on ‘circumvention’ have no equivalent in the articles on state responsibility, and it was thus a marked decision of the ILC to lift the institutional veil of the organization. The Commission does not reflect on the insertion of the member state layer in the legal analysis.<sup>77</sup> As has been pointed out, that additional layer did bring to light (and, it may be argued, created) certain tensions in the systematique of the law of responsibility.<sup>78</sup> As for the circumvention scenario, d’Aspremont has proposed a radical breaking through and bypassing the institutional veil in case of abuse of rights by the member states, through “overwhelming and effective control” by member states of the voting process in a manner not foreseen in constitutional procedures of the organization.<sup>79</sup>

The discourse of the Federal Republic of Yugoslavia (FRY) brought against the member states of NATO before the International Court of Justice in 1999 is an example of the bypassing of the institutional veil, in a scenario that is not covered by the ARIO. The FRY implicitly took an approach of ignoring the separate legal personality of the organization (reminiscent of e.g. the former Soviet Union’s dealings with the erstwhile European Communities), and did not bring up for instance an argument that the member states had to step in on a subsidiary basis considering that the organization as such could not be summoned.<sup>80</sup> Interestingly, it seems all parties went along with the deconstruction of NATO. As has been pointed

<sup>74</sup> Commentary to the ARIO, *supra* note 30, Part Five, p. 89, para. 2.

<sup>75</sup> See e.g., Cf. Jean d’Aspremont, “Abuse of the Legal Personality of International Organizations and the Responsibility of Member States” (2007) 4 *International Organizations Law Review* pp. 91-119, which takes issue with an earlier version of Article 61; and Odette Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’ (2011) 8 *International Organizations Law Review*, pp. 291–347.

<sup>76</sup> See the pertinent UN comment in UN Doc. A/CN.4/637/Add.1 (17 Feb 2011). Article 17 (about abuse by the organization of the member states) naturally opens up the institutional veil in the same way as Article 61, but as it does not address responsibility of member states, is not discussed here.

<sup>77</sup> Commentary to the ARIO, *supra* note 30, Articles 17 and 61.

<sup>78</sup> Nedeski and Nollkaemper, *supra* note 67.

<sup>79</sup> Jean d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’ (2007) 4 *International Organizations Law Review*, pp. 91-119, at p. 108; the article takes issue with an earlier version of article 61.

<sup>80</sup> Cf proceedings instituted by the FRY against 8 NATO member states on 29 April 1999, with identical claims of breached ‘inter-state obligations’ in its regard - reproduced in the judgments (in identical paragraphs 21), claiming i.a. that the respondent state “acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;” and “...in breach of its obligation not to intervene in the affairs of another State...”. All judgments were handed down on the same day, e.g. *Case Concerning Legality of Use of Force (Serbia and Montenegro v. The Netherlands)* 15 December 2004, Judgment (preliminary objections), International Court of Justice.

out, neither the respondent states (apart from Canada in the Hearings) nor the Court have addressed the legal fact of NATO's separate legal identity.<sup>81</sup>

In a similar vein, Barros and Ryngaert argue that we “look beneath” the institutional veil so as to enter “a parallel sphere of conduct where acts can be performed that engage the responsibility of the State.”<sup>82</sup> An actual example of an organization's decisionmaking being analyzed and the (for instance voting) behaviour of a state identified, is found in the 2011 ICJ decision in the case between the *Former Yugoslav Republic of Macedonia* ('FYROM') and *Greece*.<sup>83</sup> In this decision the Court permeated and then left aside the institutional veil of NATO to examine possible responsibility of Greece for its behaviour within NATO against Greece's own obligations. This appears to have been “the first time in which the ICJ so assertively identified the individual conduct of a State in the process of institutional decision-making.”<sup>84</sup> The authors give a convincing analysis, which underscores the fact that states are always governed by international law, in casu by the law of state responsibility, also when operating within an organization. In some respects the approach of ‘looking beneath’ the institutional veil is complementary to approaches that ‘engage with’ the institutional veil, in that the former is not geared to tackle the tension that the institutional veil also indicates. Not in all cases it is fair or feasible to resort to a parallel regulatory realm: for example, there may be an issue of a single act that is to be attributed to either the organization or the member states; there may be damages to be paid either by the organization or the member state; or the institutional veil may have to be permeated to establish whether there should be ‘indirect responsibility’ for a member state.

With an exhaustive typology of four scenarios turning on the institutional veil in relation to member state responsibility, the question arises whether the European Union is a special case. Do its political importance, or its degree of integration have implications for the susceptibility of the Union to regulation by the rules proposed in the ARIO? This question is addressed in detail in another article in this journal issue.<sup>85</sup> In very general terms, while recognizing that the Union is institutionally very different from most organizations, the answer would seem to be no – as long as the

<sup>81</sup> Docs CR 19/16, at p. 15 and CR 19/27, at p. 10 – referred to in Schermers and Blokker, *supra* note 23, para. 1590.

<sup>82</sup> See Ana Sofia Barros and Cedric Ryngaert, ‘The Position of Member States in (Autonomous) Institutional Decision-Making: Implications for the Establishment of Responsibility’, (2014) 11 *International Organizations Law Review* pp. 53-82.

<sup>83</sup> *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, 5 December 2011, International Court of Justice, Judgment, I.C.J. Rep. 2011 p. 644.

<sup>84</sup> Barros and Ryngaert, *supra* note 82, at p. 75 -- see analysis (on holding Greece responsible for a separate obligation) at pp. 75-78.

<sup>85</sup> Esa Paasivirta, ‘Responsibility of Member State of an International organization: A Special Case for the European Union?’, IOLR issue 2015(2), [quote at p. 11/12 ms].

European Union continues to identify itself as an ‘international organization’ (and not, for example, a confederative union). As the Union assumes more competences from its member states, the application of Article 6 ARIO would become less complex.<sup>86</sup>

However, mixed agreements, concluded with third states or organizations, to which both the European Union and the member states are a party – and where each have independently assumed commitments under general international law, could be a special variant of the scenario in which the institutional veil is bypassed. In principle both the Union and the member states are independently moving at the international law plane for the part covered by their competence. The complex division of competences between the Union and the member states is oftentimes laid down in a “declaration of competences” which accompanies the treaty conclusion. As these declarations are mostly not updated (if only because this would re-open negotiations between the member states and the Commission on where the competences lie), their value as a source of information to treaty partners is limited.<sup>87</sup> Their legal status is generally considered as existing within the institutional order of the Union only, but not vis-à-vis third states. This might raise expectations as to a general rule on the institutional veil especially in relation to the responsibility for breach of mixed accords. This however is not the case. Arguments of commentators and claims of treaty partners that EU member states and the organization are jointly and severally responsible for breach of treaty obligations, have not been generally honoured. Arrangements seem to be made on a case by case basis.<sup>88</sup> A report of the CAVV concluded no such general rule of international law exists – but that, however, the separation between the legal sphere in which the member states and the Union interact, on the one hand, and the general plane of international where legal relation with third states and organizations are maintained, on the other hand, is and should be bridged by application of the good faith

<sup>86</sup> See comments of the EU to the DARIO ILC, *Responsibility of International Organizations: Comments and Observations received from international organizations* (31 March 2008, UN Doc. A/CN.4/593), p. 4. Cf. Frank Hoffmeister, ‘Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’, (2010) 21 *European Journal of International Law* pp. 723-747; and also Pieter Jan Kuijper and Esa Paasivirta advocating against undue lifting the institutional veil of the European Union for reasons of political viability (‘EU International Responsibility and its Attribution: From the Inside Looking Out’, in Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, (Hart Publishing, Oxford, 2013), pp. 35-71, at p. 68.

<sup>87</sup> Pieter Jan Kuijper, ‘Mixed Agreements Revisited, The EU and its Member States in the World’ in C. Hillion & P. Koutrakos (eds.), *International Responsibility for EU Mixed Agreements* (Hart Publishing, Oxford-Oregon, 2010), pp. 208-227.

<sup>88</sup> As concluded also e.g. in André Nollkaemper, ‘Joint responsibility between the EU and member states for nonperformance of obligations under multilateral environmental agreements’ in Elisa Morgera (ed.), *The External Environmental Policy of the European Union* (CUP, Cambridge, 2012).

principle.<sup>89</sup> The proposition of among others Paasivirta is that “[s]hould the EU/Member States not fulfil the duty of communication, it would be followed by joint responsibility. .... The possibility ... can be seen in a sense as a self-chosen potential external outcome following from internal preference for mixed participation in international treaties.”<sup>90</sup>

## VII. Concluding remarks

The institutional veil has different shades, but in all cases it constitutes a separation between the institutional sphere – in which the states *qua* member states reside – and the sphere of general international law. Authors and commentators have grappled with the institutional veil and have come up with different views, witness some examples mentioned in section III and V above.

The International Law Commission has acknowledged the transparency of the institutional veil:

“...the internal law of an international organisation cannot be sharply differentiated from international law. At least the constituent instrument of the international organisation is a treaty or another instrument governed by international law; some further parts of the internal law of the organisation may be viewed as belonging to international law....”<sup>91</sup>

But the Special Rapporteur had also recognized its impermeable aspect:

... the relations between international law and the internal law of an international organisation appear too complex to be expressed in a *general* principle.<sup>92</sup>

For an external international law perspective on legal responsibility of organizations and their member states, the institutional veil is the conceptual linchpin for analysis – the legal shell that clothes the international organization as a legal entity, to varying degrees leaving the member states legally ‘visible’ and engaged with the level of general international law. A cursory view of the law and practice of international legal responsibility through this lens suggests a number of findings.

*First*, this paper identifies four scenarios that play a role in the theory, doctrine and practice, in which the institutional veil is permeated to some extent: the subsidiary

<sup>89</sup> CAVV Advisory Report no. 24 (May 2014) on European Union external action and international law (translation), available at <http://www.cavv-advies.nl/3bz/home.html>.

<sup>90</sup> Esa Paasivirta, ‘Responsibility of Member State of an International organization: A Special Case for the European Union?’, IOLR issue 2015(2), [quote at p. 11/12 ms].

<sup>91</sup> Commentary to the ARIO, *supra* note 30, Article 5, para. 2.

<sup>92</sup> 2003 ILC Report, UN Doc A/58/10, at p. 48 (emphasis added)

responsibility of member states; the attribution of conduct to member states; the 'attribution of responsibility' to member states; and the bypassing of the institutional veil to establish independent responsibility of a member state with a material link to the organization.

The institutional veil may be the subject of a positive law provision, but it is also present in the mind of lawyers and policymakers whenever there is room for discretion, discussion, theorization or a normative agenda on the division of legal responsibility between organizations and their member states.

*Second*, when it comes to subsidiary responsibility of member states following the wrongful act of an organization, the institutional veil is, and has been, consistently opaque. Judges, drafters and scholars seem to have been generally in agreement on this ever since the 1980s Tin Council cases.

*Third*, when it comes to other scenarios, especially that of attribution of wrongful conduct to the member states, the institutional veil is (it seems, increasingly) challenged for transparency. A likely factor of inspiration in the intense doctrinal explorations and discussions on this point is the combination of attribution of conduct to an international organization, on the one hand, and the organization's immunity from process before a domestic court, or lack of standing before an international court, on the other. The resulting lack of legal remedies for individuals may have been also a push factor for considering, as did the Dutch judiciary in the Mustafić-Nuhanović cases,<sup>93</sup> the possibility of dual attribution or 'shared responsibility' – which in turn trains the discourse towards increased transparency of the institutional veil. In this vein it has been argued that

“the concept of dual attribution has played an odd role. ... [T]he primary value of its theoretical possibility has been in empowering courts to hear cases they might otherwise have avoided, while failing actually to attribute conduct to two or more entities.”<sup>94</sup>

*Fourth*, as the institutional veil also constitutes a separation between the organization's institutional order on the hand and general international law on the other, there is frequently need for interstitial norms to make the connection. The examples of the EU's declarations of competence, and of the general duty for member states to enable the organization to pay it dues suggest that (rules based on) the principle of good faith could be taking up that function.

<sup>93</sup> *Supra* notes 58 and 59.

<sup>94</sup> Dannenbaum, *supra* note 56, [quote at p. 25 ms].