Articles

From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO)— The Responsibility of the WTO and the UN

By Noemi Gal-Or [*] *& Cedric Ryngaert* [**]

A. Introduction[1]

In 2002, the United Nations (UN) International Law Commission (ILC) decided to include the subject of the responsibility of international organizations (IOs) in its program of work. By 2011, the Commission adopted sixty-six draft articles with commentaries, known as the Draft Articles on the Responsibility of International Organizations (DARIO).[2] The adoption of the DARIO represents an enterprise of revolutionary implications for public international law and the future development of both international law and global relations and governance. It may leverage the international personality of the IO to a status previously unknown, particularly when compared to the supreme international actor, the State.

The drafters of DARIO have started from the assumption that there is a common thread which offers guidance to any IO, of whatever inter-governmental nature, regarding the circumstances in which it may incur liability for wrongful acts under the international law of responsibility. This is immediately evident from the title of the DARIO, which is general, and which does not name any particular type of IO. It is not our aim in this article to *conclusively* test whether this assumption indeed holds. Our three goals are more modest because we are testing the DARIO only against two very different IOs in two distinct issue areas: The World Trade Organization (WTO) and the UN in peace keeping operations. First,

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[1] This article represents a shortened version of our broader manuscript (over 26,000 words) "Continuity in Rupture: The International Organisation in the 21st Century," presented at Ruptures in International Law. A Workshop of the European Society of International Law's Interest Group on Legal Theory, 1 – 2 September 2010, Cambridge, UK.

[2] International Law Commission, *Draft Articles on the Responsibility of International Organizations*, May 30, 2011, A/66/10, [hereinafter DARIO]. An earlier version was adopted as International Law Commission, *Draft Articles on the Responsibility of International Organizations* chap. IV, 7 August 2009, (Supplement 10) A/64/10, [hereinafter DARIO 2009].

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we intend to establish that the DARIO are relevant to *any* IO, including those which have not yet been confronted with responsibility issues, as can be gleaned from the submissions of the WTO to the ILC.[3] Therefore, in the first part of the article we argue that the DARIO do not exclude the possibility that the WTO commit internationally wrongful acts that engage its institutional responsibility. Subsequently, and without exhausting the matter, we discuss a number of DARIO articles that could have particular practical relevance for the WTO: (1) The provisions that address the relationship between special rules of institutional responsibility (which could be applicable in a WTO context) and the general framework of institutional responsibility; (2) the provisions that address the extent to which the WTO's responsibility could be engaged should WTO decisions influence Member State action giving rise to internationally wrongful acts; and (3) the provisions that indicate which actors are entitled to invoke the WTO's responsibility.[4]

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[3] International Law Commission, *Draft Article on the Responsibility of International Organizations: Comments and Observations Received From Governments and International Organizations*, 6 2004, UN Doc. A/CN.4/545, 25 [hereinafter ILC Comments 2004]; International Law Commission, *Draft Article on the Responsibility of International Organizations: Comments and Observations Received From Governments and International Organizations*, 5 August 2005, UN Doc. A/CN.4/556, 12 [hereinafter ILC Comments 2005].

The WTO satisfies the definitional requirements of an IO "possessing its own international legal personality" according to DARIO Article 2, matching the WTO's "legal personality" as embodied in the Marrakesh Agreement Establishing the World Trade Organization art. VIII.1,15 April 1994 [hereinafter Marrakesh Agreement].

[4] As it currently stands, the international law on the international responsibility of IOs is under-developed indeed. The responsibility of IOs is normally internally oriented and concerns the relations between the IO and its staff. This is reflected, for instance, in the establishment of administrative tribunals by the chief economic IOs, namely the World Bank Group (*see* The World Bank Group, *World Bank Administrative Tribunal*, available at: http://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf/(resultsweb)/about?opendocument, last accessed: 24 April 2012) and the International Monetary Fund (*see* The International Monetary Fund, IMF Administrative Tribunal, available at: http://www.imf.org/external/imfat/index.htm, last accessed: 24 April 2012— albeit not the WTO). To be sure, the DARIO, non-conclusive as yet, represents the crystallization of an idea that was a hypothetic proposition until very recently. The 1972 "Convention on International Liability for Damage Caused by Space Objects" represents a prudent step in this direction. Its Article XXII.1 reads as follows:

> "In this Convention, […], *references to States shall be deemed to apply* to any international intergovernmental organisation which conducts space activities *if* the organisation declares its acceptance of the rights and obligations provided for in this Convention and *if* a majority of the States members of the organisation are State Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. (Convention on International Liability for Damage Caused by Space Objects art. XXII.1, 29 March 1972, 961 U.N.T.S. 187 [emphasis added]).

The likelihood of international responsibility of an IO was next considered in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not in force as of January 2011). One of the stumbling blocks has been the inability to settle the issue of the rights and/or obligations of Member States of an IO party to a treaty. Nevertheless, the convention has been "generally accepted as the applicable law and is widely used as a handy written guide in practice" (Karl Zemanek, *Introduction on the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), available at: http://untreaty.un.org/cod/avl/ha/vcltsio/vcltsio.html, last accessed: 24 April 2012).

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Our second aim is to shed light on the controversial issue of the apportionment of liability between the organization and Member States,[5] and its treatment in the DARIO. Although issues of apportioning liability may arise in a WTO context,[6] we prefer to discuss the issue in the context of the UN and its peace operations, in particular where both record in practice and theorization have been accumulating. Our intuition suggests that criteria of apportioning liability in a UN context might be transposable to other organizations, such as the WTO. After all, the existing functional differences among organizations should not be overstated.[7] From a conceptual perspective, similar responsibility issues can arise in respect of *prima facie* very different organizations such as the UN or the WTO: Apportioning responsibility between the WTO and its Member States in respect of WTO decisions that are *implemented* by the Member States is not unlike apportioning responsibility in UN peace operations, where *national* troop contingents are put at the disposal of the UN.

Our third question touching on the comparative law of IOs and the implications with regards to the DARIO concerns the competition of *régimes*. Does one IO legal *régime* – the *régime* of the UN, the pre-eminent IO – have *primacy* over another IO responsibility *régime*? Does it pre-empt the obligations of the 'lesser' *régime*? Therefore, in the last part of our article we briefly examine the relationship between the UN Charter (pursuant to

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This short history, which informed the ILC's Working Group report (International Law Commission, *Responsibility of International Organizations Supplement 10* (2002), UN GAOR, 57th Session, UN Doc. A/57/10), and the sparse *opinio juris* in this matter likely explain the heavy reliance of the ILC on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (*Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd Session (2001), and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)). The report, which contains also commentaries on the draft articles, appears as corrected in the YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2001, vol. II (Part Two) [hereinafter DARS]. It certainly intimates the innovative nature of the DARIO enterprise. It should therefore not come as a surprise that the DARIO has been drafted in view of potentially applying to all IOs that engage in unlawful actions which entail a wide spectrum of consequences ranging from the extremely and immediately harmful effects caused during UN peace operations to the medium and long term outcomes of WTO backed sanctions.

[5] Apportioning liability between different actors is in fact one of the most promising research themes in international law. *See notably* the SHARES (Shared Responsibility in International Law) project headed by André Nollkaemper at the Amsterdam Center of International Law*:* Amsterdam Center for International Law, *André Nollkaemper granted an ERC Advanced Grant*, UNIVERSITY OF AMSTERDAM, Dec. 10, 2009, available at: http://www.jur.uva.nl/aciluk/news_new_publications.cfm/78D2F1D5-1321-B0BE-A4818911C56D4103 (last accessed: 24 April 2012).

[6] For instance, as judicial decisions made by the WTO are implemented by the Member States provided that the latter retain some implementing discretion.

[7] These differences ultimately find their basis in the functionally delimited powers and personalities of IOs. It is this principle of specialty which sets IOs so much apart from States, which are (almost all) legally uniform (same rights, duties, powers, and privileges).

which UN Member States' obligations under the UN Charter prevail over any other obligations they might have) and the responsibility *régimes* applicable to other IOs (such as the WTO) to which UN Member States have also acceded.[8]

B. The Relevance of the DARIO to the WTO and IOs Generally

Only twice did the WTO seize the opportunity to respond to the ILC's invitation for comments on the DARIO. It noted the absence in its organizational law of rules for attribution of unlawful conduct "regardless of the source of the violated rule,"[9] and informed the WTO Commission of the absolute lack of any claims filed against it.[10] It attributed this to its young age and the nature of its mandate - a forum for negotiations and dispute resolution between its members.[11] A year later, the WTO commented that its lack of experience with international responsibility claims prevented it from contributing to the ILC's drafting work.

The debate revolving around two fundamental characteristics of the WTO - the essence of the WTO as an IO and the realm of its influence - is crucial to our submission that the WTO does, at least potentially, fall within the purview of the DARIO. In this debate, matching the WTO position above is the view of those[12] who consider the organization to be a 'non-executive' type of IO; a 'forum,' and an organization primarily devoted to trade issues and guided exclusively by pure economic considerations. In contrast, there is a rising tide of voices who argue that the WTO forms part of the international governance system[13] with powers of an executive type, and that its purview stretches far beyond trade and into the realm of labour, health, environment, and other human rights and human security areas.[14]

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[8] Charter of the United Nations art. 103, 26 June 1945, 1 U.N.T.S. XVI.

[9] *See* ILC Comments 2004, *supra* note 3, at 10.

[10] *Id*. at 33.

[11] *Id*.

[12] Joel Trachtman, *The Constitutions of the WTO*, 17 (3) EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 623–646 (on the question of whether to define the WTO functions more firmly). The WTO has been referred to as member-driven, to distinguish the WTO from the executive-type WTO and WB Group, for instance. *See* José Alvarez, *Misadventures in Statehood*, EJIL *TALK!*, Sep. 29, 2010, available at: http://www.ejiltalk.org/misadventures-in-statehood/#more-2621 (last accessed: 24 April 2012); Margaret Liang, *Evolution of the WTO: Decision-Making Process*, 125 SINGAPORE YEARBOOK OF INTERNATIONAL LAW (SYBIL, 2005); Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, The IMF, and the World Bank*, 53(170) INT. SOC. SCI. J. 570 (2002). *See also infra*, Part C. I.

[13] Including the system of public international law.

[14] Selected works include ANNA LANOSZKA, THE WORLD TRADE ORGANIZATION. CHANGING DYNAMICS IN THE GLOBAL POLITICAL ECONOMY (2009); ERROL MENDES & OZAY MEHMET, GLOBAL GOVERNANCE, ECONOMY AND LAW (2003); GARY P. SAMPSON, THE WTO AND SUSTAINABLE DEVELOPMENT (2005); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW

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We subscribe to the latter view for two reasons. Firstly, we consider the WTO to be an organization with its own political and legal personality, in addition to the single personalities of its Member States. Secondly, we maintain that international law is not static, and that its development (*see* the very drafting of the DARIO) suggests that the *status quo* conceptualization adopted by the 'WTO as a forum' typology incorrectly interprets the interplay between the development of the WTO as an organization, including its legal *acquis*, and the development of the international legal order at large.

C. Is the WTO Indeed an Organization that is Unlikely to Commit Wrongful Acts? And if so, Are the DARIO Largely Irrelevant for the WTO?

I. The WTO is an IO with Government-Like Competences

Initially, the Commission's working group contemplated drawing a distinction between types of IOs, by which it sought to delineate a "category of organizations that exercised functions similar to those of States [which] might be referred to as governmental,"[15] namely organizations which were thought to be more likely to have their responsibility engaged. This approach appears to have been abandoned. On its face, then, the DARIO applies to the WTO in spite of the 'WTO as a forum' perception, and it is therefore an IO among equals in matters of international responsibility.

Article VIII.1 of the Marrakech Agreement serves to corroborate the DARIO's uniform approach to IOs, as it provides that "[t]he WTO shall have legal personality."[16] Assuming that "legal personality" incorporates international legal personality, it then accords with the DARIO Article 2 and permits the inference that nothing precludes that the WTO could be held responsible for internationally wrongful acts, since international responsibility forms one of the international personality attributes. This connection between international legal personality and the responsibility of IOs was established in the jurisprudence of the International Court of Justice (ICJ).[17]

WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); KENT JONES, WHO'S AFRAID OF THE WTO? (2004); Robert Howse & Ruti G. Teitel, *Beyond the Divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organization*, *in* THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES (Sarah Joseph, David Kinley, & Jeff Waincymer eds., 2009); FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS (2003).

[15] Summary record of the 2751st meeting, UN Doc. A/CN.4/SR.2751, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, VOL. 1, at 4 (2003) [hereinafter YEARBOOK ILC 2003].

[16] Marrakesh Agreement, art. VIII.1.

[17] Reparations for Injuries Suffered in the Service of the United Nations: Advisory Opinion, 1949 I.C.J. 174 (Apr. 11, 1949)[hereinafter Reparations]; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt: Advisory Opinion, 1980 I.C.J. 73 (Dec. 20, 1980); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 95 (Jul. 8, 1996).

Pundits[18] agree that theoretically the responsibility *régime* is applicable to the WTO, while arguing that in practice the WTO lacks the 'powers' necessary to affect outcomes engaging its international responsibility. However, this tends to ignore several factors concerning the structure and processes of the WTO itself.[19]

First is the argument about the WTO's internal autonomy, and the position that "[t]he WTO must also be investigated from within, as a bureaucracy with its own internal dynamics […] [since] international organizations [are] autonomous actors."[20] This argument finds support in other studies dissecting the working of the organization and the role played by various groups, such as the dynamics between developed and developing countries, officials within the WTO including the Directors General (and especially the Deputy Directors General), and the marginalization of the State ministers in the institutional process.[21]

Secondly, the WTO's structure is comprised of several bodies with varying operational competence. The General Council, for example, is authorized by the Ministerial Conference to conduct the organization's affairs in-between the conferences, and functions also as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB).[22] Observers imply that when appraised against the Preamble of the Marrakesh Agreement[23] and the mandates of these bodies, instances can be identified which reflect failure of the organization to comply with its mandate.[24] The powers of the DSB are more potent and authoritative than those of the TPRB since they involve the enforcement of WTO law by

[18] Anonymous reviewers observed that given the assumption that international responsibility is not a concern for the WTO, owing to its structure and operation, theoretically this represents an excellent question. Consistent with this overall view, no publications are known which have dealt with WTO *responsibility.* This is contradicted with a scholarly literature replete with discussions on WTO's accountability. These studies stretch the spectrum from claims faulting the WTO for lack of legitimacy altogether to specific areas such as development, the environmental protection, human rights, and so on, for which the WTO regime has been found to be culpable. The seminal work summarizing these views has been the WTO's publication, the so-called Sutherland Report; *see* Supachai Panitchpakdi, *Sutherland Report, The Future of the WTO – Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General*, *, XII–2004*, available at: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (last accessed: 24 April 2012).

[19] As well as the impact of the organization, an issue to which we attend in the next section.

[20] LANOSZKA, *supra* note 14, at 9.

[21] JAWARA & KWA, *supra* note 14 at 149-150, 196, 296.

[22] Marrakesh Agreement, supra note 16, Article IV: Structure of the WTO, at paras. 2,3, and 4.

[23] Marrakesh Agreement, *supra* note 16.

[24] For instance, in the case of the 2003 Trade Policy Review of Senegal (*see* HOWSE & TEITEL, *supra* note 14, at 55-56).

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way of sanctions. More specifically, the DSB authorizes compensation and retaliation[25] – the use of sanctions by Member States – following panel awards and Appellate Body reports, and is responsible for their monitoring and implementation. Given that adjudication is compulsory and that the judicial rulings of the WTO are automatically adopted unless there is opposing consensus ('negative' or 'reverse' consensus),[26] the international legal mechanism of the WTO is powerful even if implementation 'on the ground' is carried out by Member States. Indeed, it elicits the likelihood of joint State-IO attribution of responsibility. Moreover, because the General Council and the DSB are not judicial bodies, yet are in charge of the enforcement of judicial rulings of the adjudicative bodies of the WTO, they are perhaps analogous to the UN Security Council's role in overseeing the UN's sanctions regime. In fact, in comparison to the relationship between the UN and the ICJ, the relationship between the WTO's oversight bodies and its adjudicative organs is considerably tight.

A third and final (but not exhaustive) factor which dispels the view that the WTO is an "abstract self-contained entity"[27] and 'member-driven' (which IO is not so?) consists in the fact that there *is* a distinction between WTO treaty norms and the acts of WTO bodies.[28] It drives home the idea that the WTO represents an autonomous body. As has been observed, "acts of WTO organs taken in disrespect of the relevant WTO treaty provisions could be said to be invalid or to be taken *ultra vires*, *even if to date no procedure exists to challenge the validity of WTO acts.*"[29] Such acts may potentially have unlawful consequences and engage the organization's responsibility. To be sure, two provisions of the Marrakesh Agreement[30] indicate that the international responsibility of the WTO was in fact contemplated by the drafters. Article VI. 4 identifies the Secretariat as carrying (exclusively) international responsibilities, while Article VIII.2-4. provides for immunities shielding the WTO, its officials, and Member State representatives against liability claims, hence presupposing WTO liability, and perhaps international responsibility, in the first place.

[25] New procedures require "timely conduct, adoption, possible compensation, or retaliatory actions," *see* LANOSZKA, *supra* note 14, at 53. Retaliation permits 'cross-retaliation' meaning that an aggrieved Member States can retaliate by not reciprocating, through denial of benefit of other treaty provisions, different from those breached by the offending Member State. *See also* MENDES & MEHMET, *supra* note 14, at 83.

[26] Marrakesh Agreement, supra note 16, Article 16: Adoption of Panel Reports.

[27] LANOSZKA, *supra* note 14, at 40.

[28] PAUWELYN, *supra* note 14, at 45.

[29] PAUWELYN, *supra* note 14, at 45.

[30] Marrakesh Agreement, *supra* note 3.

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Finally, the fact that the WTO is underfunded[31] or that its institutional structure is poorly developed[32] and it "remains an unfinished project"[33] cannot absolve the organization from responsibility; to the contrary, these deficiencies lower the threshold for erroneous conduct to occur, which may trigger international responsibility.

II. The WTO Actions May Have Unlawful Consequences

While it is well known that the WTO has suffered harsh criticism, particularly since the 1999 Seattle Ministerial Conference,[34] the reproach, predating the DARIO, has long been couched in terms of want of accountability and legitimacy, rather than responsibility for *internationally wrongful acts* with which the DARIO are concerned. However, the organization's alleged disregard for the deleterious impact of its *régime* on human rights, the environment, societal cultures, and other concerns ('trade plus' effects), has now been conceptualized in such manner as to acquire a dimension of international responsibility. To the extent that the WTO's acts and policies adversely affect interests protected by international law – such as individuals' and groups' enjoyment of human rights (international human rights law), or the environment (international environmental law) – the WTO's responsibility under international law stands a reasonable chance of being engaged should the DARIO become international law.

The substantive arguments addressing the content of WTO rules and international law advance the argument that under certain circumstances, the WTO's impact could be found to be unlawful. For instance, the view that there are three main principles which represent institutional guarantees designed to uphold the legal equality of WTO members[35] implies that failure on the part of the organization to comply with these principles might amount to a legal breach of the organization's duties.[36]

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[31] MENDES & MEHMET, *supra* note 14 at 109.

[32] LANOSZKA, *supra* note 14 at 177.

[33] LANOSZKA, *supra* note 14 at 232.

[34] Selected essays (without order of preference) include: John Jackson, *Dispute Settlement and the WTO: Emerging Problems*, *in* FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM 67 (The WTO Secretariat ed., 2000); James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. OF INT'L. POL. ECON. 542 (2004); THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE (Gary Sampson ed., 2001); Gabrielle Marceau, *WTO Settlement and Human Rights*, 13 EJIL 753 (2002); Steve Charnovitz, *The WTO and Cosmopolitics*, 7 JIEL 675 (2004); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EJIL 621 (2002). Petersmann's article elicited a fierce debate on EJIL's 2002 pages.

[35] LANOSZKA, *supra* note 14, at 51.

[36] For an account of such incidents *see* JAWARA & KWA, *supra* note 14.

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In particular, the 'trade plus' effect of the WTO regime is said to potentially attract the organization's responsibility in various ways. For instance, the Preamble of the Marrakesh Agreement, which refers to the preservation and protection of the environment, the need for sustainable development (which incorporates fair labor standards), and concern for the attainment of economic growth for developing countries is of a force analogous to constitutional principles[37] and hence legally preponderant to the extent that "it may be possible to argue that non-enforcement or complicity in the lax enforcement of labor standards is tantamount to an export subsidy under the existing WTO Charter."[38] Such omission or connivance could, under certain circumstances, be considered as constituting a breach of WTO law as well as international law (for instance, by compromising labor standards governed by ILO law).[39] Arguably, this logic would equally apply in instances where "[a]dverse rulings on government subsidies from WTO dispute settlement panels can throw thousands out of work in local constituencies. Decisions on sanitary and phytosanitary measures can devastate local farming and agricultural practices"[40] as these would be antagonistic to the WTO Preamble, but also cause trade distortion to the detriment of affected Member States.

It has been argued that due to the extension of the WTO *régime* beyond typical trade issues, the scope of WTO influence has been interfacing with other international legal *régimes* (*e.g.* environment, health, labour, *etc*).[41] This may lead to an increased cooperation of the WTO with other IOs,[42] which might trigger international responsibility

[37] MENDES & MEHMET, *supra* note 14, at 74.

[38] MENDES & MEHMET, *supra* note 14, at 88.

[39] MENDES & MEHMET, *supra* note 14, at 88, 105 (where the same argument is applied to environmental standards).

[40] MENDES & MEHMET, *supra* note 14, at 110.

[41] HOWSE & TEITEL, *supra* note 14, at 43, 45.

[42] In this context, *see* the analysis of MENDES & MEHMET, *supra* note 14 at ch. 2, on the likelihood of WTO relationship with the International Labour Organization (ILO), World Health Organization (WHO), and various multilateral environmental treaties, and the similar approaches taken in the following: *see also* HOWSE & TEITEL, *supra* note 14, at chs. 11-13; SAMPSON, *supra* note 14 (who emphasizes the aspect of involvement with other IOs and coherence in the work of IOs). The requirement to cooperate (where appropriate) with the Bretton Woods international financial institutions (World Bank and IMF) is stipulated in Marrakesh Agreement, *supra* note 16 at Article III.5: Functions of the WTO. The cooperation between the Bretton Woods institutions and the WTO, which followed up on Article III.5, was urged in a decision by the WTO General Council in late 1996 (Agreements Between the WTO and the IMF and the World Bank, 18 November 1996, WT/L/194, available at: http://www.wto.org/english/thewto_e/coher_e/wtl194_e.doc, last accessed: 24 April 2012), following which cooperation agreements were signed between the WTO and the IMF (1996), and between the WTO and the World Bank (1997). The agreements were designed to enhance coherence in global economic policymaking and provide for several avenues of cooperation. Cooperation with other international institutions is provided in Marrakesh Agreement, *supra* note 16 at Article V: Relations with Other Organizations, and refers to both "other intergovernmental organizations that have responsibilities related to those of the WTO" (Marrakesh Agreement,

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where treaty provisions are not being complied with, or alternatively, in the instance of intrusion into each other's specific area of competence. Again, the Marrakesh Agreement[43] itself puts the WTO's comments to the ILC in question.

The WTO rulings represent yet another factor in support of the claim that from a substantive viewpoint, the WTO carries with it 'trade plus' obligations, and that such obligations are potentially exercisable against it in international law. Interpretations by the Appellate Body of cases in which trade practices were interfacing with human security concerns evidence acknowledgment by the WTO of commitment to 'non-trade' law rules.[44] Likewise do various WTO pronouncements, including the important Doha Declaration.[45]

III. WTO Responsibility Rules as lex specialis

While the Marrakech Agreement offers some indications to suggest that the WTO founding fathers contemplated subjecting the WTO to an international responsibility *régime*, it is interesting to note DARIO Article 64 *Lex specialis*[46] concerning responsibility rules, which under certain circumstances, might exempt an IO from DARIO's reach. We are therefore asking: Do the DARIO accommodate the *status aparte* of the WTO? Do they exempt the WTO from its scope?

It is recalled that WTO Director-General Pascal Lamy described the WTO legal order as "an integrated and distinctive legal order: it produces a body of legal rules (1), making up a system (2), and governing a community (3)."[47] According to Lamy, the WTO itself was

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supra note 16 at Article V.1 [emphasis added]) and "non-governmental organizations concerned with matters related to those of the WTO" (Marrakesh Agreement, *supra* note 16 at Article V.2).

[43] Marrakesh Agreement, *supra* note 16.

[44] As in the case of medicines and the conflict diamonds (HOWSE & TEITEL, *supra* note 14 at 47, 68); concerning health (*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, 12 March 2001, WT/DS135/AB/R, available at: http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf, last accessed: 24 April 2012); discussed in the context of our argument (MENDES & MEHMET, *supra* note 14 at 107; SAMPSON, supra not 14 at 295); regarding the environment, *see* WTO Appellate Body, *U.S. - Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R; Appellate Body Report, *U.S. - Import Prohibitions of Certain Shrimp & Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 22 October 2001, WT/DS58/AB/RW; discussed in the context of our argument in LANOSZKA, *supra* note 14 at 179; SAMPSON, *supra* note 14 at 295. For additional similar arguments based on WTO rulings *see* PAUWELYN, *supra* note 14 at 20-23.

[45] Doha Declaration on the TRIPS Agreement and Public Health, 14 November 2001, WTO Doc. WT/MIN(01)DEC/W/2.

[46] DARIO, *supra* note 2 at art. 64.

[47] Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EJIL 969, 971 (2006).

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transforming into a source of secondary legislation, notably an "organized legal order",[48] governing a community made up of its members,[49] and consequently representing a unique IO, "*a part* of the international legal order as a *sui generis* legal system,"[50] with an adjudicative body "go[ing] *beyond* general international law on the road to communitizing WTO law."[51]

If the WTO is a 'special' *sui generis* organization, and since Article 64 provides for exemption where an international wrongful act is governed by an IO's special rule of responsibility, it would follow that the DARIO, as *lex generalis*, might not be relevant, or applicable *in its entirety*, to the WTO. On its face, Article 64 shields the WTO against international responsibility claims, therefore the *sui generis* provision may represent the tallest hurdle facing a plaintiff in a potential WTO claim.[52] The ILC even cites the WTO's own panel rulings[53] by way of construing the meaning of *sui generis*.[54] Nevertheless, it is unclear whether the WTO is providing for any *lex specialis* that would govern its

[48] *Id*. at 972.

[49] *Id*.

[50] *Id*. at 977 [emphasis added].

[51] *Id*. at 975 [emphasis added].

[52] We will not discuss the adjudicative bodies with which such claim may be filed, nor will we address the question whether special treaty provisions stipulating the procedural aspects of a dispute settlement mechanism amount to *lex specialis* - all of which are subjects beyond the scope of this paper.

[53] WTO Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, 15 March 2005, para. 7.725 (*"EC - Trademarks and Geographical Indications (US)"*); *see also* DARIO, *supra* note 2, at 162.

[54] Interestingly, at least on its face, Commentary 4 to Article 64 (*see* DARIO, *supra* note 2) makes mention of the WTO's own ruling endorsing the European Communities' position regarding *sui generis* constitutional law. However, pursuant to this special rule – which is, in fact, a singular rule of the EC rather than the WTO, albeit recognized by the WTO – the EC and not the EC Member States would be responsible under WTO and general international law for the execution of EC laws by Member States. Commentary 4 to Article 64 DARIO reads as follows: "A different view was recently endorsed in *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* by a World Trade Organization (WTO) panel, which "*accepted* the European Communities' explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its Member States which, in such a situation, 'act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general.' This approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a Member State, State authorities would be considered as acting as organs of the Community." *See id.* at 167 [emphasis added]. This view was reiterated in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R & WT/DS293/R, 29 September 2006, at 7.101.

institutional responsibility *vis-à-vis* its Member States or third parties.[55] While the WTO dispute settlement mechanism operates on the basis of special rules of responsibility, it is concerned with the responsibility of the *Member States of the WTO* only, not of the WTO *as an organization*.

But even if barred by *lex specialis*,[56] several other DARIO articles might potentially circumscribe this exception and open the gate for attribution of liability to the WTO. For instance, Commentary 7 to the general Article 10 of the DARIO ("Existence of a breach") indicates that "[t]hese special rules *do not necessarily prevail* over principles set out in the present articles," and clarifies that "with regard to the existence of a breach of an international obligation, a special rule of the organization *would not affect* breaches of obligations that an international organization may owe to a non-Member State."[57] It also confirms the limits of *lex specialis* with regard to breaches of an obligation to a non-Member State and of *jus cogens*: "Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation."[58]

Furthermore, Article 10.1, which addresses a breach of an international obligation resulting from the IO's non-conforming act "*regardless of its origin and character*,"[59] additionally limits the scope of *lex specialis.* As Commentary 2 explains, "[t]his is intended to convey that the international obligation 'may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order,'"[60] such as sources of law which may be higher than the *lex specialis*.

[55] Note, however, that while EU law distinguishes European citizens from foreigners concerning access to EU justice, it does not preclude claims against it by its Member States and their citizens. This is an important distinction in the comparison of one *sui generis* IO and another – here the EU and WTO – the former providing for *lex specialis* in matters of responsibility, while the latter does not.

[56] Note that the 'automatic' applicability of the *lex specialis* principle has been fiercely debated, *e.g.* in the area of international humanitarian law and concerning the proliferation of international courts and tribunals.

[57] Referring to Article 10. 2, Part II on the Internationally Wrongful Act of an International Organization, Chapter III Breach of an International Obligation, DARIO *supra* note 2, at 98 [emphasis added].

[58] *Id.*

[59] Part II on the Internationally Wrongful Act of an International Organization, Chapter III Breach of an International Obligation, DARIO 2009, *supra* note 2, at 77 [emphasis added]("regardless of the origin or character of the obligation concerned' *in* DARIO Article 10.1, *id*.)

[60] Article 10.2, DARIO, *id*. at 96-97.

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As it stands, the issues of *sui generis* and *lex specialis* are still left open since Commentary 6 adds and advises in this respect that "paragraph 2 [of Commentary 7] does not attempt to express a clear-cut view on the issue."[61]

In any event, in our view, Article 10 in its entirety could be construed as suggesting that when the organization draws up specific accountability (and responsibility) rules, inspired by international best practices and guidelines, breaches of such rules may be characterized as breaches of the 'special' rules of the organization in the sense of the DARIO, and thereby engage the organization's responsibility in international law. The international responsibility of the WTO, in addition to the organization's constitutional ambit, may be triggered otherwise by public international law.[62]

IV. WTO Decisions Influencing (Member) State Action

Chapter IV of the DARIO governs the responsibility of an IO in connection with the act of a State or another IO, including articles that may be applicable to the WTO in relation to acts that are performed by (member) States. Because the Member State is responsible for the actual implementation of WTO decisions, rulings, and recommendations, the WTO might attract responsibility if the decision, ruling, or recommendation were to be found wrongful *ab initio;* it may share responsibility with the State should the latter be complicit in the wrong committed; or the individual State may be responsible if in the context of such implementation solely it committed a wrongful act.

In Chapter IV DARIO, Article 16 on "Coercion of a State or another international organization"[63] and Article 17 on "Circumvention of international obligations through decisions and authorizations addressed to members" (reflecting a revision of Article 16 of DARIO 2009 on "Decisions, authorizations and recommendations addressed to Member

[61] DARIO, *supra* note 2 at 98.

[62] *See* the interesting analysis by Pauwelyn, *supra* note 14, and his argument to the effect that the WTO is not a "closed legal circuit" (35), and certainly cannot be understood to be "self-contained" in the sense of the Permanent Court of International Justice in the *Wimbledon* case (*id.*) nor could the ICJ concept of "self-contained regime" in the *Teheran Hostages* case be applicable to the responsibility of an IO (*id.*, 36).

[63] An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

> (*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and
>
> (*b*) The coercing international organization does so with knowledge of the circumstances of the act. *See also, id. at* 86.

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States and international organizations")[64] are of particular relevance for the WTO. Read together, they might be interpreted as engaging the WTO DSB's responsibility should an award (to be implemented by the Member States), or its consequences, conflict with, for instance, provisions of the UN International Covenant on Economic, Social, and Cultural Rights and the Universal Declaration of Human Rights.[65]

Article 17 provides that a Member State's action resulting from an IO decision could potentially engage the IO's responsibility *vis-à-vis* third parties if the decision has caused the Member State to commit the act. After all, an IO, which "is a subject of international law distinct from its members"[66] should not be allowed to shirk responsibility by influencing Member States with the aim of "achiev[ing] through them a result that the organization could not lawfully achieve directly."[67] Article 17 casts the net rather wide – and thus plays a strong preventive role – in that the organization's liability for an injury to a third party could be engaged even *before* the Member State's act is committed.[68] This

[64] 1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed. *Id.* at 7.

Note that the word "recommendations" present in Article 16 of DARIO 2009 was deleted for the purpose of Article 17 of DARIO. *See also id.* at 88.

[65] For a possible scenario of how such conflict may play out see, Andy Astritis and Michel Paradis, *The Responsibility of International Financial Institutions and their Member States: The Chixoy Dam Case at the Inter-American Commission on Human Rights,* RESPONSIBILITY OF INDIVIDUALS, STATES AND ORGANIZATIONS. PROCEEDINGS OF THE 25TH ANNUAL CONFERENCE OF THE CANADIAN COUNCIL OF INTERNATIONAL LAW (2006). In their paper, the authors discuss the risks associated with public infrastructure projects, which are financed by the World Bank and the Inter-American Development Bank, and which may cause harm to basic human rights. When such risks were obvious (as they were in the case study before them, of the Chixoy Dam in Guatemala), involved non-State actors (in this case, international financial institutions) which did not consider the risk and went ahead anyway by lending the money to the government, they should be considered to be carrying with international responsibility. *See also* Howse & Teitel, *supra* note 14, at 42-47.

[66] Commentary 1 art. 17 is instructive. DARIO, *supra* note 2, at 106. The subsequent commentary explains the deletion of Article 16 of DARIO 2009, in response to comments received by states and IOs concerning issues different from those discussed here. Eighth report on responsibility of international organizations, A/CN.4/640, 14 March 2011 [hereinafter Eighth Report].

[67] Commentary 1 art. 17, *Id.*

[68] Commentary 5 to Article 17 (interpreting the article as attributing liability to the organization for a third party injury so as to "allow the third party […] to seek a remedy even before the act is committed"). *Id.* at 106.

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provision then, might reasonably apply to the WTO when issuing binding decisions or authorizations to its Member States

The responsibility of the WTO for the actions of its Member States could also be engaged on the basis of Article 16, which addresses "*exceptional circumstances*"[69] of coercion. However, Article 16 does not specify the organizational act which is the source of the coercion (judicial award, administrative decision, and the like). Article 17 on binding decisions is more explicit in this respect.[70]

In any event, an example of a binding decision (whether qualifying as a binding decision under Article 16 or Article 17) is a DSB award, which may engage the responsibility of the WTO if, for instance, upon implementation it conflicts with international human rights law. Non-binding decisions of (one of the organs of) the WTO, such as authorizations, could also, under Article 17, engage the organization's responsibility should they produce adverse consequences.[71]

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[69] Commentary 44 to Article 16 (interpreting the article as attributing liability to the organization for a third party injury so as to "allow the third party […] to seek a remedy even before the act is committed." DARIO, *supra* note 2, at 105 [emphasis added].

[70] Commentary 5 to Article 17, *id.*, clarifies in this respect: "In the case of a binding decision paragraph 1 does not stipulate as a precondition, for the international responsibility of an international organization to arise, that the required act be committed by Member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if international responsibility arises at the time of the taking of the decision, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing on their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility." *See also id.* at 106.

Note that while Commentary 4 explains "coercion" in connection with other DARIO provisions, which may open possibilities for claims of international responsibility of the WTO, we are leaving this theoretical discussion for another time.

While addressing the comments of states and IOs, the Eights Report's specifies that "[n]o proposal of amendment to the text of the draft articles is made in this section, " Commentary 1, art. 17, *supra* note 67, at 39. Accordingly, Article 17 of DARIO stresses the act of circumvention but leaves several aspects of the comments unaddressed.

[71] DARIO, Article 17 Commentary 8 explains in this respect: "Paragraph 2 covers the case in which an international organization circumvents one of its international obligations by authorizing a member State or international organization to commit a certain act. When a member State or organization is authorized to commit an act, it is apparently free not to avail itself of the authorization received. However, *this may be only in theory*, because an authorization often implies the conferral by an organization of certain functions to the member or members concerned so that they would exercise these functions instead of the organization. Moreover, by authorizing an act, the organization generally expects the authorization to be acted upon." DARIO, supra note 2, at 107" [emphasis added]. It can hardly be denied that the global trade (and investment) regime established by the WTO (and the General Agreement on Tariffs and Trade (GATT), and which has been evolving, produced an environment which influences Member States (and non-Member States) in the design of their relevant policies and practices. This influence has been criticized for its detrimental impact, for instance, on states with small economies,

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Notwithstanding, more clarification is required concerning the meaning of acts that are non-binding however influential. Following the comments received from states and IOs, the term recommendations – a form of non-binding acts of an IO – is now absent from the purview of Article 17, presumably leaving authorization as a catch-all term for non-binding actions. But, are all authorizations equal? Certainly, the Commentary anticipates future refinements since it eschews precision but for stating that "[w]hile paragraph 2 uses the term 'authorization,' it does not require an act of an international organization to be so defined under the rules of the organization concerned. The principle expressed in paragraph 2 also applies to acts of an international organization which may be defined by different terms but present a similar character to an authorization."[72] Arguably, a back door is left open to the reintroduction of recommendations. Will the consequences of WTO policy preferences *flowing* from WTO endorsed trade principles stipulated in binding treaty provisions, and arising for instance, from compromises which might eventually be negotiated in the Doha Round concerning trade in agriculture and non-agriculture market access, be understood as binding or non-binding? Will they be considered decisions or authorizations? Will this make any difference as far as institutional responsibility is concerned?

V. Parties Invoking the Responsibility of the WTO

Which actors and stakeholders are entitled to invoke the responsibility addressed in Article 16 or 17 of the DARIO against the WTO? Obviously, States or IOs injured by WTO action could do so,[73] but could non-State actors, such as individuals, NGOs and local communities also invoke the WTO's responsibility?

The DARIO contemplate the invocation of responsibility by actors other than an injured State or IO in Article 49, if *collective interests* are at stake.[74] However, they appear to be

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developing countries, and the public good as related to environmentally sustainable economic growth. *See*, for instance, Aaron Cosbey, *A Sustainable Development Roadmap for the WTO,* INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT PUBLICATIONS CENTRE 36 (2009), available at: http://www.iisd.org/publications/pub.aspx?id=1196 (last accessed: 24 April 2012).

[72] DARIO, Commentary 9, *supra* note 2, at 107.

[73] DARIO, Article 43, *id.*

[74] 1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

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limiting the range of actors who could assert such collective interests to (non-injured) States or IOs. While the ILC Special Rapporteur had stressed that NGOs were deliberately excluded from the definition of IOs,[75] and would thus be barred from invoking an IO's responsibility, Article 50 of the DARIO clarifies that "[t]his Chapter [including Article 49] is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization."[76] Although this clause does not bestow civil society actors with an *entitlement* to invoke the WTO's responsibility, it also does not prohibit it, nor does it suggest that such actors have *locus standi* to bring a liability claim against the WTO before any particular dispute-settlement mechanism.[77] If anything, the insertion of this safeguard into the DARIO reflects the ILC's acknowledgment of the existence of non-State actors and their possible interest in protecting collective (public good) international interests by invoking the responsibility of IOs, including the WTO.

In the alternative, even if the above interpretation of Article 50 as a permissive provision is rejected, the DARIO still offer non-State actors a limited scope to file claims. In particular, although non-State actors cannot be characterized as IOs, Article 2 DARIO does not exclude

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2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) Performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4. Part Four the Implementation of the International Responsibility of an International Organization, Chapter I Invocation of the Responsibility of an International Organization is of relevance to the WTO, *id.* at 16.

[75] YEARBOOK ILC 2003, *supra,* note 15, at 4.

[76] DARIO, *supra* note 2, at 19.

[77] We defer the subject of the judicial forum and instance for claims against the WTO to another time.

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that they become *members* of IOs (and subject to the constituent documents of the IO).[78] Therefore, one could reasonably envisage an NGO seeking to invoke the international responsibility of the WTO directly via its membership in an IO, where special rules of the organization offer an adequate provision.[79] Alternatively, NGOs could *indirectly* invoke the responsibility of the WTO through representation by a Member State lending a sympathetic ear, or even via a non-Member State should the responsibility be of an *erga omnes* type.[80]

D. The Relevance of the DARIO to the UN (or Apportioning of Liability Between the Organization and the Member States in Peacekeeping Operations)[81]

As noted in the introduction, one of the main research questions in international law is how to apportion liability among different actors cooperating in the pursuit of the same goal. In the law of IOs, this question is brought into stark relief in the context of UN peace operations where UN Member States contribute troops to UN peace operations:[82] How, and on the basis of what criterion, can the separate legal personalities of the UN as an IO, and of its single Member States, be demarcated *vis-à-vis* each other for purposes of delineating responsibility when wrongful acts are committed in the course of peace operations deployed under UN authority? Since the concept of 'control' was developed in this particular context and since, as earlier observed, the lessons learned from UN practice may provide guidance for other organizations facing similar issues of allocation or

[78] *Cf.* Article 2 of the DARIO on the "Use of Terms," which defines an IO as follows: "(*a*) 'International organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities." See DARIO, *supra* note 2, at 2. Article 2 Commentary 3 explains that the membership of a growing number of international organizations includes also "entities other than States as well as States," *see* DARIO, *supra* note 2, at 72. One example is the World Tourism Organization, which includes States as "full members," "territories or groups of territories" as "associate members" and "international bodies, both intergovernmental and non-governmental" as "affiliate members." *Cf.* Commentary 14 to Article 2, at 75.

[79] *Cf.* Article 64, DARIO regarding *lex specialis*, *supra* note 2, and the discussion above.

[80] *Cf.* Article 43, DARIO, *id*.

[81] One of the authors has explored this issue further in Cedric Ryngaert, *Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: an Inquiry into the Application of the 'Effective Control' Standard after* Behrami, 45 Israel L. Rev. 151-178 (2012).

[82] Since there is no standing UN army, as Member States never concluded the necessary agreements under Article 43 of the UN Charter, it is a necessity that for every military operation conducted under UN auspices, UN Member States contribute troops (which qualify as State organs under Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts to the UN, which subsequently integrates them within its own subsidiary organs.

apportionment of responsibility – including the WTO – understanding the significance of 'control' in the context of international responsibility is critical.

I. Control

As far as UN peace operations are concerned, it is important to bear in mind that in most cases, the national force commander continues to exercise some measure of command over the national troops placed at the disposal of the UN. Hence, such troops could be considered as hybrids: they are both UN troops and national troops.[83] Accordingly, the general question is where the responsibility locus lies, or should lie, when a particular actor or entity acts in a double capacity, representing both a State and an IO. Theoretically, a just and fair responsibility *régime* would locate responsibility with the actor who is in a position of *control* over the wrongful acts giving rise to responsibility. Where possible, the position of control allows the actor to take measures to prevent the commission of the wrongful act. Eventually, a responsibility *régime* based on control would deter the commission of wrongful acts, and further compliance with the law. Deterrence and compliance are not furthered if the actor who exercises actual control over the operations of the troops is sheltered from liability: Such an actor is tempted to take a 'free ride' on another actor who would consequently and unjustly be held responsible.[84] Ultimately, only a principle of attribution which locates responsibility with the actor who directly ordered, or was authorized and could have prevented the rights violation, appears sound. This is the rationale behind the standard of 'effective control' that has by now been well-established in international law (but of which the theoretical rationale has not fully been explored).

[83] As Sari and Dannenbaum point out, in practice, the UN does only very rarely have 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. Aurel Sari, *Jurisdiction and Responsibility in Peace Support Operations*, 8 HRLR 151, 159-60 (2008); Tom 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*, 51 HARV. ILJ 113, 142-151 (2010).

[84] On the preventative rationale, *see also* Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test*, 19 EJIL 509, 520 (2008) (noting, regarding the *Behrami* case (*Behrami and Behrami v. France* (Appl. No. 71412/01)) before the European Court of Human Rights (ECHR) that the NATO-led Kosovo Force (KFOR), and not the UN, exercised operational command and control, and that "[w]hen a human rights infringement occurs through KFOR actions, the Member States of NATO are undoubtedly in a position to prevent the violation or to respond to it, either through national orders - where the State has retained this authority - or through their involvement in NATO itself"). It is noted that *Behrami* raises the specific issue of UN and NATO Member States initially placing troops at the disposal of NATO, a force that was subsequently placed in UN's charge. The question then is to examine whether it was the UN, NATO, or the Member States who exercised control over the troops and their actions. In fact, the text of Article 6 DARIO itself contemplates the situation of placing at the care of one IO organs or agents of *another IO*.

That which one cannot control, one cannot prevent. And that which one cannot prevent, should not and cannot engage one's responsibility. In practical terms, as far as UN peace operations are concerned, this theoretical premise should yield the result that, if, due to the command structure of a UN operation, sufficient discretion is granted to Member States to exercise control over acts of their troops contributed to the operation, liability should lie with Member States.[85] Should, in contrast, the UN tightly supervise the conduct of Member State troops at an *operational* level by expansively limiting the powers of the national force commander and strengthening the powers of the UN command, then the UN will be deemed to be exercising effective control, hence incurring liability. If, due to the circumstances, both the UN and the Member State exercise joint, parallel, and/or roughly equal control, both will incur joint and several liability (shared responsibility).

It is important not to conflate the theoretically distinct issues of delegation and control in a context of legal responsibility. One may be tempted to locate responsibility for wrongful acts committed by an agent with the principal who has delegated the powers, in the exercise of which the wrongful acts materialized with the agent. The European Court of Human Rights, for instance, held in the *Behrami* case – which concerned Member State responsibility for acts in the context of a UN peace operation – that the UN Security Council had only "*delegated* to NATO the power to establish, as well as the operational command of, the international presence, KFOR,"[86] and thus that the UN "was to retain ultimate control over the security mission."[87]

However, such a delegation approach is misguided, in that the concept of delegation has relevance only to the extent that the agent forfeits its autonomy of action. In an organizational context, delegation as a legal category merely denotes the *institutional* legality of conferring powers on another person or entity.[88] An IO may have lawfully delegated powers to a Member State or another IO, but this does not enlighten us as to

[85] It is a well-established principle that States which exercise control over a territory, *e.g.*, as an occupying power, are responsible for violations of international law committed by their military there. *Cf.* Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116 (December 19). It is similarly well-established that conduct gives rise to legal responsibility of a State if that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. *Cf.* Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J 14 (June 27) at 65; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 91 (February 26).

[86] Behrami v. France (Appl. No. 71412/01) and Saramati v. France, Germany and Norway (Appl. No. 78166/01), 45 EHRR SE10, para. 135 (emphasis added).

[87] *Id.*

[88] SARI, *supra* note 84 at 164; Marko Milanovic and Tatiana Papic, As Bad as it Gets: the European Court of Human Rights' Behrami and Saramati Decision and General International Law, 58 International and Comparative Law Quarterly 267, 275, 281 (2009)

the question of who should be held responsible if something goes wrong in the exercise of the delegated powers. What is relevant is the level of control, *i.e.* authority to make operational decisions and carry them out without seeking further approval from the delegating authority. Such control is exercised by either national contingents or the UN, or sometimes by both of them jointly.[89]

To be sure, agency in international institutional law represents a complex subject for one may wonder who exactly is agent or principal. It can indeed be maintained that the Member States are the principals, and that the organization is merely an agent serving the Member States. After all, in *Reparations,* the ICJ held that "[b]y entrusting certain functions to [the UN], with the attendant duties and responsibilities, [Member States] have clothed it with the competence required to enable those functions to be effectively discharged",[90] suggesting that Member States, as principals, have conferred authority and powers on the IO, the agent. More specifically, in *International Tin Council*, an English court opined that the International Tin Council, an IO, was to be considered as an agent of the Member States, hence liability should lie with the Member States.[91] In the final analysis, one can only conclude that the concept of delegation, unlike the concept of control, is clouding rather than illuminating.

II. DARIO and UN Peace Operations

As covered in the previous section, the DARIO incorporated the control standard in Article 7.[92] Commentary 1 to Article 7 ("Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization") cites in particular "the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation," where "the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent."[93] It specifies that Article 6 ("General rule on attribution of conduct to an international organization") does not apply to such cases. Article 6 relates to the attribution of acts of agents and organs of the IO to the IO itself. It cannot be applicable to national troop contingents as these

[89] In other words, a sort of a 'Rules of Engagement' protocol designed to distinguish UN from Member State responsibility.

[90] Reparations, *supra* note 17 at 179.

[91] Chancery Division of the High Court in MacLaine Watson & Co. Ltd. v. International Tin Council, 13 May 1987, 77 ILR 41, 53.

[92] "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." DARIO, *supra* note 2 at 85.

[93] *Id*.

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contingents wear two hats: a national and a UN hat. Given the substantial autonomy they retain, they cannot be considered as full agents or organs of the organization; therefore, their wrongful acts do not automatically engage the responsibility of the organization.

Pursuant to Article 7, the burden of responsibility lies with the actor who exercises actual control over the military contingents: The IO (here, the UN) or the Member State. It flows from this standard that Member States *can*, in specific circumstances, be held liable for acts carried out in the framework of IOs. Should Member States, within an operational mission supervised by IOs or their organs, exercise effective control over acts harming third parties, they (should) indeed incur liability.

The 'effective control' standard of liability raises two further doctrinal questions. First is whether the principle embraced by Article 7 conflicts with the principle that Member States are not to incur liability for acts of an IO based merely on membership, given the separate legal personality of Member States and IOs.[94] Second is whether the 'effective control' standard can be set aside either by specific arrangement between IO and Member States, or by an IO's unilateral declaration accepting all responsibility where a Member State places its organs at the IO's disposal.

Our answer to the first question is negative: surely, where an organization does not exercise control over certain acts, these cannot be termed 'acts of the organization.' In contrast, where Member States do exercise control, the acts are *theirs* and thus engage *their* responsibility. This responsibility principle prevents Member States from using the IO as a smokescreen to cover up their own wrongful acts. Briefly, the two principles are not in conflict.

Concerning the second question, we reiterate that the DARIO offer Article 64 as a general framework (*lex generalis*) which applies only to the extent that no *lex specialis* rules the relations between IO and Member States.[95] Thus, *prima facie*, an IO could agree to shoulder the entire burden of responsibility. While the Commentary to Article 7 does not directly address the question of unilateral declarations by IOs, it does provide an answer to the related question of whether a lending State and an IO may conclude an agreement allocating responsibility when an organ or agent is placed at the IO's disposal. While remaining neutral concerning this type of agreement, the Commentary notes that it

[94] Article 62, Commentary 2: "It is […] clear that […] membership does not as such entail for Member States international responsibility when the organization commits an internationally wrongful act." DARIO, *supra* note 2, at 162.

[95] Article 64: "These draft articles 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 of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members."

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> is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.[96]

Arguably, the DARIO leans towards preference for the general rules of *attribution* to the detriment of agreements, or unilateral declarations, thus implicitly derogating from the general rule of *control*. In our view, caution is indeed warranted, as a unilateral acceptance of responsibility by the UN may serve to exclude the responsibility of the Member State. Since victims typically have access to justice against States rather than against IOs, to readily recognize an IO's acceptance of responsibility as conclusive may also adversely affect victims' interests and the spirit of justice in general.

We conclude that by laying down the principle of 'effective control' as the applicable standard of apportioning liability between an IO and its Member States regarding wrongful acts of which third parties are victims, the DARIO further develops the standard of 'control' in the law of international responsibility. It had already been recognized that States incur responsibility for the acts of non-State actors when such actors act under the control of a State.[97] Along slightly similar lines, it is generally recognized that individuals fall within the human rights jurisdiction of a State when that State exercises control over the territory in which these individuals are found.[98] And so will States or IOs placing organs (troops) at the disposal of an(other) IO incur responsibility to the extent that they exercise effective control over those troops. In order to further cement this principle of international organizational law, the ILC may have wished to distinguish Article 7 more explicitly from the misguided *Behrami* decision of the ECHR, reference to which has been made above.[99]

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[96] Commentary 3 to Article 7 of DARIO, *supra* note 2 at 85. See the discussion above in the part on the WTO for DARIO's inconclusive conceptualization of the role of *lex specialis* in matters responsibility of IOs, which confirms this construction of Article 64.

[97] DARS, *supra* note 4 at Article 8.

[98] Banković and others v. Belgium and 16 other Contracting States, (Appl. No. 52207/99), 41 ILM (2002), at 517; Issa and others v. Turkey, (Appl. No. 31821/96), 41 EHRR SE27, at para. 71; Ilaşcu and others v. Moldova and Russia, (Appl. No. 4878/99), 40 EHRR SE46, at para. 392.

[99] The ILC states that it does not purport to formulate any criticism concerning the Court's criterion of whether "the United Nations Security Council retained ultimate authority and control so that operational command only was delegated." Commentary 10 to Article 7 of DARIO, *supra* note 2 at 88. Yet in the same paragraph, it cites approvingly the criticism of the Court's criterion formulated by the doctrine: "One may note that, when applying the criterion of effective control, 'operational' control would seem more significant than 'ultimate' control, since the latter hardly implies a role in the act in question" (*Id.*). It also cites (*Id.* at 89) the fact that the UN Secretary-General distanced himself from the ECHR criterion when stating in his 2008 report on Kosovo: "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control." Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354, at para. 16.

The ILC's further development of the control standard, for purposes of the responsibility of IOs, may have particular relevance in the context of UN peace operations, which are ordinarily carried out by Member States' troop contingents being placed at the disposal of the UN. Nonetheless, Article 7 DARIO and the Commentary, which advocate application of the control standard as the appropriate yardstick to solve the conundrum of apportioning responsibility between the Member States and the organization, do not exclude the application of this standard beyond the narrow confines of UN peace operations.[100] That being said, the Commentary offers only one example of such application: the case of the Pan American Sanitary Conference serving as the Regional Committee and the Regional Office of (and thus "placed at the disposal of") the World Health Organization for the Western Hemisphere.[101]

Still, should Member States that implement decisions of an IO be found to retain some policy discretion and take implementation decisions, the scope of Article 7 suddenly becomes much wider. One may, for instance, think of EU Directives, which are by their very nature binding only as to their result, and leave the precise implementation measures to the EU Member States.[102] When those Member States fail to prevent the commission of a wrongful act *vis-à-vis* a third party (outside the EU), their responsibilities could possibly be engaged under Article 7.

III. Rendering 'Effective Control' Operational: Attributing Belgian UN Peacekeepers' Conduct in Rwanda 1994

It is one thing to advocate or lay down 'effective control' as the standard of apportioning liability between an IO and the Member States placing organs at the IO's disposal, yet it is another altogether to render this standard operational. In this last section we briefly discuss the practical circumstances, in a UN peacekeeping operation, relevant to a determination of 'effective control;' in other words, when should control be considered to rest with the IO, the Member State, or both of them jointly.

[100] Commentary 1 of Article 7, DARIO, *supra* note 2 at 85 (emphasis added): "This occurs *for instance* in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation."

[101] Commentary 16 of Article 7, DARIO, *supra* note 2 at 91.

[102] Article 288, § 3 of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/47 (2010): "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

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Arguably, the command and control structure of a military operation as adopted *on paper* should not be deemed as decisive.[103] In the midst of such operation, it may well happen that, due to the chaotic conditions in the field and corresponding communication problems, effective command and control over troop contingents will shift to other actors. In that case, it is only fitting to hold the latter actors responsible if wrongful acts were committed. A very instructive decision in this regard is the recent ruling of the Belgian First Instance Tribunal of Brussels, regarding the apportioning of responsibility between the UN and Belgium for Belgian UN peacekeepers' failure to prevent a massacre in Rwanda in 1994.[104]

Mukeshimana is the first (interim) judgment in a case brought before a Belgian court against the Belgian State by victims of the Rwanda massacre. In this case, the victims requested the court to hold the State liable in tort and to order indemnities to the victims for damages suffered during the massacre which followed the evacuation, by Belgian soldiers from the UN peacekeeping operation 'MINUAR,' of a compound where thousands of Tutsi civilians had sought refuge in the early days of the genocide. The plaintiffs argued that control over the troops stationed at the compound no longer rested with MINUAR but was placed under the exclusive responsibility of the Belgian State.

After implicitly rejecting the analogy with the *Behrami* case and establishing the Court's jurisdiction in the matter,[105] the Court held the following concerning the locus of responsibility in the MINUAR peacekeeping operation:

> It was clear that there was major friction between the Belgian authorities and the MINUAR, and that entire contingents of the Belgian forces *de facto* no longer fell under MINUAR authority. MINUAR general Dallaire explicitly complained that the Belgian soldiers present at the airport and the Belgian officers no longer fell under his authority. General Dallaire also stated that authority over the Belgian blue helmets encamped at the [compound] was withdrawn from him. At no time was the concrete decision to evacuate the ETO the subject of a dialogue between [the Belgian troops'] colonel Marchal and general Dallaire. In fact, there was a

[103] For a fine overview of the command structure of EU military operations, *See*, for an overview of the chains of command in EU operations, Olof Ekman, *Parallel Chains of Command in European Union Operation Headquarters: An Experimental Study of the Drivers behind National Perspectives*, forthcoming in the Journal of Contingencies and Crisis Management (2012, distinguishing three levels of EU command: the Military Committee, which is responsible for providing the Political and Security Committee (PSC) with military advice, the Operation Commander (OpCdr) who is responsible for the military strategic level, and the Force Commander (FCdr) who is responsible at the operational level, using the Force Headquarters (FHQ, without however discussing the possibility of national command at the operational level).

[104] Belgian Court of First Instance of Brussels, Mukeshimana and others v Belgian State and others, 8 December 2010, R.G. no. 04/4807/A & 07/15547/A [hereafter Mukeshimana].

[105] *Id.* at para. 26.

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> permanent dialogue between Marchal and the chiefs of staff of the Belgian army, which did not hesitate to carry on regardless of consultations with the MINUAR. Therefore, the decision to evacuate the [compound] ETO was a decision taken by Belgium and not by MINUAR.[106]

This decision, which examined the *factual* circumstances surrounding the peacekeeping operation in great detail, elucidates that it is immaterial whether command and authority over the UN peace operation may *initially* have been understood to be resting with the UN (commander). What is relevant is who, in the midst of the events unfolding, is *actually* exercising authority over the troops. In Rwanda, the MINUAR troops based at the said compound were under the authority of the national force commander who consulted with the Belgian army's chief of staff and not the UN (commander). Accordingly, responsibility for any internationally wrongful acts committed by the Belgian MINUAR troops lay – and should indeed lie – with Belgium as the troop-contributing State, and/or with the Belgian commanders.[107]

Because the court inquired into who *in fact* exercised effective control and command over the troops, regardless the actor's formal authority in the circumstances, its decision deserves considerable support given the standard enunciated in Article 7 of the DARIO. This judgment strikes us as significantly preferable and much more persuasive than the ill-conceived decisions in two cases with factual circumstances resembling those in *Mukeshimana, namely* the ECHR in *Behrami* (which did not consider the acts of NATO Member State troops acting under 'ultimate UN authority' to be attributable to the Member States), and the Dutch court of first instance in *Srebrenica* (which, relying on *Behrami*, held that the acts of Dutch peacekeepers in Bosnia Herzegovina could not be attributed to the Netherlands, but only to the UN).[108] Quite probably, this Belgian decision represents the first domestic court ruling since a 1969 UK House of Lords decision[109] that locates command and control, and thus responsibility, at the level of a UN *Member State* contributing troops to a UN peace support operation, rather than at the level of the IO.

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[106] *Id.* at para. 38 (authors' own translation of the French text).

[107] Decisions on the blameworthiness of the commanders and the evaluation of the damages to be awarded were reserved for a later date. *Id.* at para 48 *in fine*, at para 52.

[108] HN v Netherlands (Ministry of Defence and Ministry of Foreign Affairs), First instance judgment, LJN: BF0181/265615; ILDC 1092 (NL, 10 September 2008).

[109] UK House of Lords, Attorney-General v. Nissan, 11 February 1969, 2 W.L.R. 926. *See*, for a useful discussion of this case, M. ZWANENBURG, ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS 94-95 (2005).

E. The Prevailing Effect of the UN Charter (or Does One IO Legal Régime Have Primacy Over Another IO Responsibility Régime?)

In the two previous sections, we have addressed the DARIO's approach concerning the scope of IOs which may attract international responsibility, and the desirability of a 'control' test to apportion liability between IOs and Member States where internationally wrongful acts are committed. We now come to discuss our question, namely whether liability, if assigned to an IO – on the basis of Article 6 DARIO or any other relevant DARIO article – could be precluded in special circumstances.

The DARIO, similar to the DARS,[110] duly list a number of circumstances precluding the wrongfulness of the impugned act.[111] However, more controversial in an organizational context is the Article 67 DARIO stipulation, again emulating the DARS regarding State responsibility, that "[t]hese [DARIO] articles are without prejudice to the Charter of the United Nations."[112] Clearly a reference to Article 103 of the UN Charter, which provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail", and self-explanatory when applied to the State, this provision becomes nonetheless problematic when applied to an IO, for it might implicitly establish a hierarchy between the UN and the responsibility *régime* applicable to other organizations (*e.g.*, the WTO) without an adequate theoretical justification.[113]

Before inquiring into the problematic aspects of the effect of the UN Charter on the DARIO *régime*, we wish to briefly highlight that such an effect will typically be invoked in the context of obligations stemming from UN Security Council resolutions adopted under Chapter VII of the UN Charter, for example concerning peace operations, terrorism blacklists, or trade embargoes. It is interesting, at least concerning our joint UN-WTO perspective, that Commentary 2 to Article 67 addresses the issue of trade embargoes. The Commentary clarifies, for instance, that when establishing an arms embargo instructing all its addressees not to comply with a treaty obligation to supply arms, "the Security Council does not distinguish between States and international organizations."[114] To be sure, an

[110] DARS, *supra* note 4, at ch. V, arts. 20-27.

[111] DARIO, *supra* note 2, at ch. V.

[112] *Cf*. DARS, *supra* note 4, at art. 59.

[113] It is noted, however, that Article 67 Commentary 2 attempts to hedge this prevailing effect somewhat: "It is at any event not necessary, for the purpose of the current draft, to determine the extent to which the international responsibility of an international organization is affected, directly or indirectly, by the Charter of the United Nations." Article 67, DARIO, *supra* note 2, at 170.

[114] *Id*. at 170.

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arms supply treaty represents an example of a *trade* treaty, and hence might fall within the ambit of the WTO. A more complex example considers the impact of Article 67 on the EU, which is an IO itself as well as a member of the WTO. Whereas as a WTO member the EU may be under an obligation to permit the supply of arms, or at least not to impede the cross-border flow of arms, Article 67 DARIO may interfere to the contrary, to precisely *preclude* the EU from supplying arms (or allowing arms to be supplied) by virtue of Article 103 of the Charter of the UN, an organization of which the EU is *not* a member (but its Member States are).

Obviously, the drafters of Article 67 DARIO were seeking to secure coherence in a world witnessing the proliferation of international and regional *régimes*.[115] Congruent with the international *régime par excellence*, namely that of the UN (of which the Commission is a body, and by which the DARIO are being drafted), it is understandable that other *régimes*, especially those governing substantive matters of lesser importance than peace and security, must not undermine the pre-eminent role played by the UN. Nevertheless, the effect of the sweeping Article 67 provision seems to create a paradox and raises two main theoretical problems.

One problem relates to inter-IO relations: it is conceptually unclear how IOs could be bound by UN obligations where they are not members of the UN in the first place, or not affiliated with the UN in any other form. Article 67 Commentary 2 would indeed benefit from additional clarification. The comment that "the Security Council does not distinguish between States and international organizations" as well as the temporary waiver that"[i]t is at any event not necessary, for the purpose of the current draft, to determine the extent to which the international responsibility of an international organization is affected, directly or indirectly, by the Charter of the United Nations" are too vague to satisfy a resolution of this problem. [116] Another question arises in the context of IO-*régime* relationships: is it possible for legal *régimes* other than the UN Charter to have a prevailing effect as well, and if so, how could conflicts between both *régimes* be solved? This is not theoretical at all, as such a conflict arose in the well-known *Kadi* case.[117] The question before the EU courts was whether they were required to uphold the blacklisting of Kadi, an alleged terrorist financier, pursuant to a UN Security Council resolution, or whether as bodies of an independent IO, not member of the UN, they were required to grant a remedy

[115] *See* on the fragmentation of international law as a result of the existence of various *régimes* in international law: International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, Part Two (2006).

[116] Article 67, DARIO, *supra* note 2; *Id*. at 170.

[117] Jean d'Aspremont & Frédéric Dopagne, *Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders*, 68 ZEITSCHRIFT FUR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT (ZaÖRV) 939 (2008); PAUWELYN, *supra* note 14, at 337-342.

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as stipulated under EU (and international human rights) law. Interestingly, in this case, the EU Court of First Instance opined that norms of *jus cogens* prevailed over UN obligations (2005),[118] whereas on appeal, the EU Court of Justice ruled that the EU regulation implementing the UN obligations could be reviewed in light of the fundamental rights guarantees of the EU's constitutional order.[119] Both decisions point to the existence of a special legal *régime*, institutional or otherwise, that exists at the same level, or even prevails over, the UN Charter. In this example, at least two 'constitutionalisms' appear to co-exist,[120] of which the international legal community has not yet fully explored the interrelationship.[121]

Indeed, the drafters' heavy reliance on the DARS might explain this outcome. On second reading, the ILC may therefore wish to elaborate on issues arising from a 'legal transplantation' in the law of international responsibility.

F. Conclusion

In the introduction to this paper we set out our three-fold aim of clarifying: (1) The universality of the DARIO by the example of its relevance to the WTO; (2) the desirability of a control standard as the appropriate metric for apportioning liability between an IO and its Member States, and the transposability of this standard beyond the context of UN peace operations where it has been developed (*e.g.* to a WTO context); and (3) the competition of *régimes* under the DARIO, especially in juxtaposition with the UN *régime*. We analyzed these questions with reference to specific DARIO articles. Whilst the DARIO may raise further issues that are relevant to our joint WTO-UN perspective, we contented, by way of example, with an exploration of a number of DARIO provisions that in our view warrant further contemplation and clarification by IOs, students of the law of IOs, and particularly by the ILC.

[118] Case T-306/01, Ahmed Ali Yusuf & Al Barakaat v. Council & Comm'n, 2005 E.C.R. II-3533; Case T-315/01, Kadi v. Council & Comm'n, 2005 E.C.R. II-3649.

[119] Joined Cases C-402/05 P and C-415/05 P, Kadi & Al Barakaat International Foundation v. Council & Comm'n, 2008 E.C.R. I-6351, in particular at paras. 285 and 299.

[120] *See* d'Aspremont & Dopagne, *supra* note 119.

[121] The Commentary to Article 67 is concise. Is it sensible to consider Article 67 as representing a *lex specialis* in relation to any other IO's regime? For the purpose of the international responsibility in international law, does UN law represent *lex specialis*? With regard to which *lex generalis*? And what then is the implication with regard to other instances of *lex specialis*? As is stands, there is no cross-reference between Articles 64 and 67 nor is this issue being raised in their respective commentaries. For an enlightening discussion of the Article 103 as a 'conflict clause' *see*, PAUWELYN, *supra* note 14, at 337-342.

As regards our first research question, we noted that both the WTO's self-conceptualization arising from (a) the Marrakesh Agreement, other WTO instruments, and WTO rulings; (b) the WTO's powers as an IO; and (c) the impact it has been exerting on the world economy, and beyond the economic realm, give us reason to expect that several of the DARIO provisions will prove relevant to the WTO. As our analysis of relevant DARIO articles has shown, the scope for potential liability of the WTO is not that far-fetched: WTO legislative and adjudicative activities are indeed governance activities and might indirectly encumber the WTO with liability where Member States, acting on WTO decisions, fail to comply with international obligations. In practice, the WTO may often find itself sharing responsibility and liability for wrongful acts with other international persons: Member States or another IO with which it cooperates (*e.g.* the 'executive' financial institutions of the World Bank or IMF), a circumstance that obviously does not detract from its own responsibility. We have further argued that WTO liability could be invoked not only by injured States or IOs but, under certain circumstances, by third parties and even non-State actors as well (albeit how they could avail themselves of remedial possibilities and mechanisms to advance claims against the WTO still remains unsettled). In any event, the WTO may be well advised to consider articulating internal rules in preparation for the eventuality of legal claims regarding the organization's international responsibility for unlawful acts.

Concerning our second question, on the apportioning of responsibility between an IO and its Member States, we drew attention to the ILC's emphasis on a standard of 'control' as a test to resolve problems of assigning responsibility when Member States place troops at the disposal of the UN for the purpose of UN-authorized peacekeeping operations. This standard, which locates responsibility with the actor which is best positioned to take adequate measures to prevent the wrongful act from occurring, and not with the actor who only *in name* supervises the activities of the entities that give rise to the wrongful act, is a welcome contribution to the codification of the law on international responsibility. That being said, the control standard, as laid down in Article 7 DARIO is underdeveloped and requires additional elucidation. Such clarification is needed not only with respect to peacekeeping operations, but also with a view to the application of the control standard outside the context of UN peacekeeping. One may in particular cite trade *régimes* developed by the WTO, EU or other regional trade organizations, where Member State agencies are the 'boots on the ground' tasked with the implementation of the IO's decisions.

Thirdly, we have briefly drawn attention to the interplay between UN law and the general law of organizational responsibility as it applies to other IOs, including the WTO. We recalled that the international legal order has bestowed a special legal position on the UN, in that binding UN obligations prevail over any other obligations which UN Member States may have, whether based on the organizational law of other IOs to which they have acceded, or the duty to comply with general principles of the law of international responsibility. While appreciating the rationale for recognizing the prevailing effect of the

UN Charter, namely ensuring that the execution of the peace and security missions entrusted to the UN be unencumbered by various competing international obligations, we also observed that an explanation as to why the law of one IO should prevail over the legal *régime* applicable to other IOs has not yet been fully fleshed out in the DARIO. As it stands, there is a hierarchy between IOs and international *régimes*, and a presumption that the exercise of UN power should not, and cannot, be checked by norms from competing legal orders. These two premises require further justification.

The deadline for the submission of comments regarding the DARIO by governments and IOs was set for 1 January 2011. The year 2011 may therefore symbolize a threshold in the history of international law, the crossing of which could lead to a new development in the international law of IOs (or institutions).[122] Alternatively, the adage that "the absence of a plausible theory of obligation is met by a moralist response"[123] will continue to fill the theoretical void. With this backdrop, we hope to have captured some attention concerning a relatively neglected but nonetheless important issue area in public international law. Our paper was intended to contribute to the "increasing need to think of ways and means to exercise control, both political and judicial, over these exercises of public authority"[124] by international bodies. We hope we succeeded in adding value to the relatively quiet discussion on the responsibility of IOs, and to the understanding of the implications of the proposed parameters of the responsibility of IOs.

[122] Let us leave the debate concerning the difference between the two for another time.

[123] Jan Klabbers, *The Paradox of International Institutional Law*, 5 INT. ORG. L.R. 1, 16 (2008).

[124] *Id*. at 22.

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