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**The Law of International Responsibility and  
Multilayered Institutional Veils: the Case of  
Authorized Regional Peace-Enforcement Operations**

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# THE LAW OF INTERNATIONAL RESPONSIBILITY AND MULTILAYERED INSTITUTIONAL VEILS:

## THE CASE OF AUTHORIZED REGIONAL PEACE-ENFORCEMENT OPERATIONS

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### ABSTRACT:

*This short article sheds some light on the difficulties inherent in the application of international responsibility mechanisms to situations of authorized regional uses of force. It shows the extent to which the double institutional veil that characterizes these situations comes to frustrate the applicability of the specific provisions designed by the International Law Commission to address these situations. It argues that the way some of the articles on the responsibility of international organizations operate and their conditions of application create inconclusiveness which make the narratives accompanying these operations and how they are presented determinative of the functioning of the law of responsibility.*

### KEYWORDS:

International Responsibility, Articles on State Responsibility, Responsibility of International Organizations, International Law Commission, Use of force, Collective Security, Security Council, United Nations, Circumvention, Authorization, International organizations, Regional Organizations, African Union, Mali, Attribution of Conduct, Attribution of Responsibility, Anzilotti.

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The law of international responsibility, carefully, painstakingly and piecemeal designed over the last six decades was meant – according to the original intention of Anzilotti from whom all the architects of the system allegedly borrowed – to be simple, plain and intelligible. It is well known that not only the numerous exceptions made to the original binary system based on non-conformity, but also the multiplication of the functions bestowed upon it ended up steering the law of international responsibility away from the simplicity and efficacy originally envisaged. Moreover, practice came to show that, despite its original virtues, the simplicity inherent in a system built on non-conformity fell short of being a sufficiently wide accountability net when applied to the complexity of contemporary subjects. In other words, in many situations, the system did not prove adequate to apprehend all the dimensions of nonconforming behaviors which were originally meant to be captured in the accountability mechanism created by the law of international responsibility.

It is certainly not the place to elaborate, both conceptually and empirically, on the parameters that thwart or contradict the simplicity of the Anzelottian model of responsibility. This has been done extensively in the literature.<sup>1</sup> It suffices here to stress that, among these complicating parameters, the practice of Security Council authorizations certainly features among those most destabilizing factors for the application of the law of international responsibility to possible wrongful acts committed in the framework (or on the occasion) of an authorized military intervention. It is even more so when the authorized subject proves to be a regional organization. The latter case is probably when the strain on the law of responsibility spikes. This is the situation this paper is grappling with.

The extreme strain encountered by the law of international responsibility in case of wrongful acts committed in the framework (or on the occasion) of an authorized military action by regional organizations can be explained as follows. If one understands the

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<sup>1</sup> This is an exercise that I indulged in elsewhere. See J. d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', 9 *International Organizations Law Review* (2012) 15-28.

practice of authorization as an operation of delegation<sup>2</sup> whereby an international organization – i.e., a secondary subject of international law – authorizes a primary or a secondary subject to carry out an act of violence for the defense or enforcement<sup>3</sup> of the (sub-)collective interest(s) which the authorizing subject seeks to vindicate, authorizations undoubtedly add several layers of intricacy to the operation of the law of international responsibility. Even more so, when the addressee of the authorization is not a member of the organization but another organization. In this case, the authorization issued to such a regional organization can be seen as creating a *double institutional veil*,<sup>4</sup> the piercing of which is required for the law of responsibility to ascertain the normative causality between a nonconforming behavior and the authorizing entity. Needless to say that the possibility to establish such normative causality between an authorizing subject and an entity injured by a breach incurred in the framework of such an authorization is particularly uncertain.<sup>5</sup>

The dilution of the normative causality between the injury and the authorization – and thus the difficulty to capture the behavior of the authorizing organization in the accountability net of the law of international responsibility – would not be a problem if one were to demote the authorization process to a purely factual phenomenon that ought not to bear upon the reparative or restorative functions of the law of international responsibility. In other words, it is only if one seeks to have the authorizing international organizations bear some degree of responsibility for a wrongful acts committed within

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<sup>2</sup> See D. Sarooshi, *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, 1999); D. Sarooshi, 'The Security Council's Authorization of Regional Arrangements to Use Force: the Case of NATO', in V. Lowe (ed.), *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (Oxford University Press, 2008) 226-247, esp. 228.

<sup>3</sup> See J. d'Aspremont, 'The Collective Security System and the Enforcement of International Law' in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2013), available at <http://ssrn.com/abstract=2221477>. See also J. d'Aspremont, 'Herbert Hart and the Enforcement of International Law: Substituting Social Disability to the Austinian Imperative Handicap of the International Legal System', paper available at: <http://ssrn.com/abstract=1995041>.

<sup>4</sup> On the notion of institutional veil, see C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishers, 2007).

<sup>5</sup> On the idea that the law of international responsibility rests on several types of causal links that are entrenched in one another, see J. d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', 9 *International Organizations Law Review* (2012) 15-28. See also D. Anzilotti, 'La Responsabilité internationale des Etats', *Revue générale de droit international public* (1906) 291.

the framework (or on the occasion) of the mandate it has bestowed upon the authorized subject that the abovementioned double institutional veils becomes a complicating factor. Yet, it seems that this is the dominant policy that has been advocated in the epistemic community of international law, especially among the experts and architects of the law of international responsibility. Few of them have vindicated the idea that the practice of authorization was an inconsequential phenomenon that ought to be kept alien to the operation of the law of international responsibility. The reasons thereof probably lies in the teeth with which the UN collective security system seems to endow international law.<sup>6</sup>

Be that as it may, it is noteworthy that the intricacy of the establishment of a responsibility relation between the authorizing and the authorized subjects, particularly in cases of authorized regional interventions, is both factual and normative. This means that the complicating effect of authorization is both a fact of life as well as a fact created by the legal system. Indeed, it is a fact of life that corporate entities move, behave, and make decision through other corporate entities themselves acting through human agents. It is a (self-created) fact of the legal system that the system of responsibility was designed in such a way as to let the capture (and the establishment of responsibility) be hindered by the delegation at the heart of authorizations. Had the system of responsibility been designed on paradigms other than non-conformity and injury – to mention just a few – the question could have not arisen. In the same vein, it is because such situations are understood and apprehended through the prism of authorization and delegation that the operation of the existing law of international responsibility is either frustrated or obfuscated, necessitating adjustments like the one designed in Article 17 of the Articles on the Responsibility of International Organizations which is discussed below.

It is with these caveats in mind that this chapter starts by making a few brief elementary remarks about the factual and normative prerequisites for the question of authorization to

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<sup>6</sup> J. d'Aspremont, 'The Collective Security System and the Enforcement of International Law (or a Catharsis for the Austinian Imperative Complex of International Lawyers)', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2013). Available at SSRN: <http://ssrn.com/abstract=2221477>.

constitute a hindrance to the operation of the law of responsibility (1). It then turns to a few observations on the controversies inherent in the regime of responsibility applicable to cases of authorized intervention by regional organization and, especially, the specific mechanism devised by the International Law Commission in Article 17 of the Articles on the Responsibility of International Organizations (2).

## **I. CONSTRUCTING THE PROBLEM: THE PREREQUISITES OF THE LAW OF INTERNATIONAL RESPONSIBILITY**

As was indicated above, the law of international responsibility is put under strain only to the extent of the paradigms it has been constructed upon. As is well known, in social sciences, paradigms are both the source of problems and the puzzle-solving.<sup>7</sup> In that sense, the stress on the system of responsibility is self-created and internal. It is as long as one approaches the practice of Security Council authorizations from the vantage point of the law of responsibility as designed by the International Law Commission that puzzles arise. The perspective adopted by this chapter is thus purely internal to the paradigms upon which responsibility is traditionally envisaged in the international legal scholarship, namely non-conformity attributable to a personified actor. As is well known, the basic requirements for allowing the law of international responsibility to operate are non-conformity and attribution to a legal subject of the international legal order. In the specific context of the use of force by regional organizations as a result of an authorization of the Security Council, two aspects of these paradigmatic requirements deserve attention.

First, a question of responsibility arises in case of non-conformity by a regional organization – and thus falls within the scope of the paradigm at the heart of the law of international responsibility – if the authorized regional organization is a personified organization. If not, it can be, at best, a joint organ of the States acting within that

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<sup>7</sup> Thomas Kuhn famously made this argument for natural sciences. See T. Kuhn, *The Structure of Scientific Revolutions*, 50<sup>th</sup> anniversary edition (University of Chicago Press, 2012).

framework.<sup>8</sup> This first paradigmatic requirement is traditionally noncontroversial. NATO, ECOWAS, AU – which have been successfully applying for these authorizations – are unanimously recognized as personified international organizations. The doubts shrouding the international legal personality of NATO have long evaporated.<sup>9</sup>

The second paradigmatic requirement for making Security Council authorizations a source of international responsibility is that these regional organizations must be subject to a series of international obligations when they use force within the framework of the mandate. This second condition necessarily brings us to the abiding question of the sources of the obligations that could be potentially breached by regional organizations when carrying out a mandate granted by the Security Council. And this breach constitutes a prerequisite for the application of the law of international responsibility.

As far as international responsibility is concerned, this question of the sources is probably more intricate than one usually thinks and is, too often, overlooked. It is true that there seems to be no doubt that regional organizations are bound by the customary obligations of the *ius in bello*, provided that these obligations are materially and functionally applicable to the international organization.<sup>10</sup> Likewise international organizations are bound by the customary prohibition to use force. This holds at least as far as one espouses the mainstream theory of customary international law and its application to subjects, which did not participate in its creation.<sup>11</sup> Yet, this is as far as we can ascertain the obligations of international organizations with a reasonable degree of confidence. For the rest, much uncertainty remains. For the sake of this chapter, one can particularly

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<sup>8</sup> On this matter, see generally ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, at 240. For some remarks, see I. Scobbie, 'Case concerning certain phosphate lands in Nauru (Nauru v. Australia), preliminary objections judgment', 42 *International and Comparative Law Quarterly* (1993) 710-719; B. Conforti, 'L'arrêt de la Cour internationale de Justice dans l'affaire de certaines terres à phosphates à Nauru (exceptions préliminaires)', 38 *Annuaire Français de Droit International* (1993) 460-467.

<sup>9</sup> For some doubts on the legal personality of NATO, see J. Verhoeven, 'Droit international Public' (2000) 613.

<sup>10</sup> For a discussion on the sources of international obligations of international organizations in situations of conflicts, see J. d'Aspremont and J. de Hemptinne, *Droit international Humanitaire* (Pedone, 2012), chapter 2.

<sup>11</sup> For some critical remarks on the mainstream theory of customary international law, see J. d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2011) esp. 161-174.

wonder whether these regional organizations are bound by the obligations created by the UN collective security system. This is a question whose intricacy is downplayed in the literature and whose answer is often too hastily presupposed. Indeed, there seems to be little debate that these organizations could be bound by the obligations pertaining to the UN collective security system by virtue of a unilateral promise. Probably their self-elevation into a Chapter VIII regional arrangement can suffice for the determination of their unilateral commitment to subjecting themselves to obligations of the UN Charter and, in particular, those prescribed by Chapter VIII mechanisms. But what about organizations like NATO which never formally proclaimed themselves regional arrangements aimed at the maintenance of (regional) collective security? In the case of NATO, the 1999 Strategic Concept, despite bringing about major changes, has remained very ambiguous and it seems difficult to interpret it as a commitment of NATO to transform itself into a regional arrangement.<sup>12</sup> If not through a self-recognition as a regional arrangement, how can we possibly consider NATO bound by the UN security system? The question is a difficult one. Such a commitment probably exists regarding the main obligations of the *ius in bello*<sup>13</sup> but remains elusive with respect to the obligations pertaining to the UN security system. The question of the subjection of regional organizations to the UN system and thus the question of the bindingness of this regime upon organizations that are not member to its legal order also arises in connection to the African Union whose operations under a UN mandate over the last few years have increased significantly.<sup>14</sup>

It is not the place to discuss the question of the sources of the obligations that could be potentially breached by regional organizations when carrying out a mandate granted by the Security Council. It suffices, for the sake of this short chapter, to mention the –

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<sup>12</sup> T. Gazzini, 'NATO's role in the collective security system', 8 *Journal of Conflict and Security Law* (2003) 247-249; D. Sarooshi, 'The Security Council's Authorization of Regional Arrangements to Use Force: the Case of NATO', in V. Lowe (ed.), *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (Oxford University Press, 2008) 226-247, esp. 228.

<sup>13</sup> J. d'Aspremont and J. de Hemptinne, *Droit international Humanitaire* (Pedone, 2012), chapter 7.

<sup>14</sup> C. Riziki Majinge, 'Regional Arrangements and the Maintenance of International Peace and Security: the Role of the African Union Peace and Security Council', 48 *Canadian Yearbook of International Law* (2011) 97-149; F. Soederbaum and R. Tavares (ed.), *Regional Organizations in African Security* (Routledge, 2011); Eki Yemisi Omorogbe, 'Can the African Union Deliver Peace and Security?', 16 *Journal of Conflict and Security Law* (2011) 35-62.



downplayed – difficulties, which swirl around this paradigmatic prerequisite for the application of the law of international responsibility.

## **II. PROCESSING THE PROBLEM: CONFRONTING THE LAW OF INTERNATIONAL RESPONSIBILITY WITH THE PRACTICE OF AUTHORIZED REGIONAL PEACE ENFORCEMENT OPERATIONS**

Once one has ensured the applicability and validity of one's model, comes the moment to confront it to the empirical situation of its choice. In particular, it is only once we can assume that the prerequisites for the application of the law of international responsibility have been met that we can indulge in applying the latter to the practice that constitutes the object of this chapter: the Security Council authorizations of interventions by regional organizations.

As a preliminary consideration, it is good to point out that the cerebral and mental exercise of confronting the law of responsibility with the above-mentioned situation of authorizations, despite the common denial by most members of the epistemic community of international law of the appeal of mathematical engineering, is of a mathematical character. Indeed, it boils down to applying a paradigmatic mathematical blueprint (in this case: the algorithm designed by the International Law Commission) to the new figures produced by the case study selected for this chapter. It is this mathematical dimension of the application of the law of responsibility that explains why toying with the law of international responsibility has usually proved popular among international legal scholars. It gives them the feeling of being, for a short moment, skillful mathematicians of international law able to play with seemingly intricate theorems. This simple observation unveils a paradox. The paradox is that the more that the law of international responsibility has grown complicated, the more palatable it has become for international lawyers to indulge in the algorithm of responsibility. This is why not everyone has a dim outlook on the convoluted distortions of the Anzelottian model

introduced by Roberto Ago and his followers,<sup>15</sup> especially those designed to capture situations which otherwise would have fallen outside the regime of responsibility. Indeed, it is necessary to recall that the liberties taken with the original model were meant to allow the law of international responsibility to generate additional sources of responsibility for complex situations of non-conformity.<sup>16</sup> Those adjustments were later transposed to the law of international responsibility of international organizations.<sup>17</sup>

For the Articles on State Responsibility (2001), the adjustments designed to increase the accountability net boiled down to the creation of mechanisms of responsibility short of attribution of conduct, namely responsibility by virtue of coercion, complicity, or control.<sup>18</sup> This residual subterfuge took the form of attribution of responsibility (also sometimes called, albeit unconvincingly, indirect responsibility, to differentiate it from attribution of conduct).<sup>19</sup> <sup>20</sup> These situations of attribution of responsibility were supplemented by *ad hoc* mechanisms of attribution of conduct like that designed for successful insurgencies or secession movements or in case of acknowledgement of conduct as one's own.<sup>21</sup> It is interesting to note that because these adjustments either related to situations which are textbook cases or were rather limited in their number, they

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<sup>15</sup> See G. Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations', 13 *European Journal of International Law* (2002) 1083-1098.

<sup>16</sup> See Ago, Second report on State Responsibility, A/CN.4/233, *Yearbook of the International Law Commission*, 1970, vol. II, p. 186, para. 29.

<sup>17</sup> For some critical remarks on this idea of transposition, see C. Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the 'Copy-Paste Approach'' 9 *International Organizations Law Review* (2012) 53-66.

<sup>18</sup> For some critical remarks on the notion of complicity, see O. Corten and P. Klein, 'The limits of complicity as a ground for responsibility', in K. Bannelier, T. Christakis and S. Heathcote (eds.), *The ICJ and the Evolution of International Law – The Enduring Impact of the Corfu Channel Case* (London: Routledge, 2012) 315-334.

<sup>19</sup> For a use of that distinction in connection with specific issues of responsibility, see J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 4 *International Organizations Law Review* (2007) 91-119 or J. d'Aspremont, 'Rebellion and State Responsibility', 58 *International and Comparative Law Quarterly* (2009) 427-442.

<sup>20</sup> Rather surprisingly, the commentary on the Articles on State Responsibility (2001) provisions on attribution of responsibility indicates that 'the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II'. See J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002) 147.

<sup>21</sup> See article 11 of the Articles on State Responsibility (2001).

neither seemed to draw much attention nor were found to be overly alarming or threatening for the stability of the regime as a whole.<sup>22</sup>

When applied to situations involving international organizations, the Anzelottian original binary model proved even less satisfactory, especially since these cases always involve multiple participants in the wrong. This is why the architects of the law of international responsibility have been even more creative in situations of non-conformity involving international organizations. Like for the rules on State responsibility, their creativity manifested itself in the use of two types of mechanisms, i.e., *ad hoc* rules of attribution of conduct on the one hand and new rules of attribution of responsibility on the other hand. The apex of architectural creativity was probably reached with the design of a rule of attribution of responsibility meant to address situations of “circumvention of obligations” which conveyed an odd impression of primary rule in all but the wording.<sup>23</sup>

The *ad hoc* rule of attribution of conduct designed on this occasion for situations of peacekeeping missions by universal and regional organizations is well known. It has been the object of abounding literature, especially following its application by the European Court of Human Rights.<sup>24</sup> It does not directly relate to situations of peace enforcement with which this article grapples. Indeed, in the case of an authorized regional peace enforcement mission, it is more regional organizations putting their structure and organs at the disposal of member States as well as the UN than the other way around. This

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<sup>22</sup> See nonetheless A. Nollkaemper, who talks about the ‘breaking point’ through which such distortion for the sake of public law functions have pushed the system of responsibility. A. Nollkaemper, ‘Constitutionalization and the Unity of the Law of International Responsibility’, 16 *Indiana Journal of Global Legal Studies* (2009)28.

<sup>23</sup> Articles 17 and 61 of the Articles on the Responsibility of International Organizations (2011).

<sup>24</sup> See gen. M. Milanović and T. Papić, ‘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* (2009) 267-296; P. Bodeau-Livinec, G. P. Buzzini, and S. Villalpando, ‘ECHR judgment on applicability of European Convention on Human Rights to acts undertaken pursuant to UN Chapter VII operation in Kosovo: Behrami & Behrami v. France; Saramati v. France, Germany & Norway’ 102 *American Journal of International Law* (2008) 323; F. Messineo, ‘Things Could Only Get Better: Al-Jedda beyond Behrami’, 50 *Military Law and the Law of War Review* (Revue de Droit Militaire et de Droit de la Guerre), (2011) 321-346.

finding is well illustrated by the famous NATO “red card holder procedure” which was witnessed during the intervention in Libya.<sup>25</sup>

For the sake of this chapter dedicated to problems of responsibility arising in situations of authorized intervention by regional organizations – more than the specific rule of attribution of conduct for situations of organs put at the disposal of an international organization – it is a specific rule of attribution of responsibility, which deserves attention. In this respect, it must be recalled that the International Law Commission and its special rapporteur took pains to design a specific provision to address situations of authorized intervention which otherwise would have been left out of the accountability net of the law of international responsibility. The particular gimmick created by the International Law Commission on that occasion was enshrined in Article 17 of the Articles on the Responsibility of International Organizations (2011) and has been phrased as follows:

*Article 17*

*Circumvention of an international obligation through decisions and authorizations addressed to members*

- 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.*

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<sup>25</sup> V. Pierre d'Argent, ‘Le droit international humanitaire en tant que régime spécial du droit international: étude des rapports de systèmes’, in R. van Steenberghe (ed.), *Le droit humanitaire en tant que régime spécial de droit international* (forthcoming) (on file with the author).

*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.*

The provision is premised on the distinction between binding decisions and authorizations by international organizations. The difference between the two is that, in the case of the latter, the authorization may not prompt any conduct, as the addressee may not avail itself of the authorization received. This is why it is further required that, in cases of authorizations, the act which is authorized is actually committed and that the act in question be committed “because of that authorization”.<sup>26</sup> The International Law Commission and its special rapporteur justified this proposed secondary rule by submitting that, “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”. They added that, “by authorizing an act, the organization generally expects the authorization to be acted upon”.<sup>27</sup> The question of the source of this specific secondary rule addressing situations of authorization – and that of its possible customary status – are not the ones that need to draw our attention here, for there seems to be little support for disputing that such a rule originates in the progressive development of international law. Nor do we need to discuss the reintroduction – at odds with the Anzelottian objectification of the regime of responsibility – of an idea of *dolus* inherent in Article 17. More interesting for this chapter are the difficulties spawn by the application of Article 17 to situations of authorized use of force by regional organizations. Two sets of problems that frustrate the applicability of the Article need to be mentioned here. One of them pertains to the situation of the authorizing organization, i.e., the United Nations. The other relates to the situation of the addressee of the authorization, i.e., the regional organization.

As far as the conditions of applicability of Article 17 relate to the authorizing organization, it must be pointed out that the conditions set by Article 17 are so strict that

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<sup>26</sup> Commentary of the Articles on the Responsibility of International Organizations (2011), A/66/10, p. 41

<sup>27</sup> Commentary of the Articles on the Responsibility of International Organizations (2011), A/66/10, p. 42.

they jeopardize the usefulness of the whole provision. First, it must be established that there is an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation.<sup>28</sup> Moreover, there is no responsibility attaches to the international organization if the authorization is outdated and not intended to apply to the current circumstances because of substantial changes that have intervened since the adoption. Those strict conditions make the application of Article 17 \ unlikely. As a result, the whole construction seems to be very much of a textbook case.

But the difficulty of fulfilling the conditions of applicability of Article 17 that relate to the authorizing organizations probably pale in comparison to the even greater hurdle on the side of the authorized regional organization. In this respect, two specific flashpoints must be mentioned as they reinforce the stiffness of this construction when applied to authorized regional interventions.

First, the Articles on the Responsibility of International Organizations provide that, for Article 17 to be applicable, the wrongful act committed on the occasion of such an authorized operation must fall within a use of force of a specific nature, i.e., a UN collective security enforcement action, rather than self-defence or an intervention by invitation. This means that the regional authorization must actually be making use of a UN authorization for the question of its responsibility to arise. The transfer of the responsibility referred to in Article 17 is thus not possible if the regional organization is acting in self-defence or on the basis of an invitation. The necessity for the operation to qualify as a UN mission for the sake of Article 17 generates difficulties, which should neither be underestimated nor played down. Indeed, practice shows great intricacy, as interventions carried out at the regional level often present ambiguity. In other words, in practice, it most often seems difficult to clearly characterize regional interventions as being purely of a peaceenforcement, self-defence or consensual nature.

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<sup>28</sup> Commentary of the Articles on the Responsibility of International Organizations (2011), A/66/10, p. 41.

The 2012 Security Council authorization of the deployment of an African-led International Support Mission in Mali (AFISMA) by Security Council Resolution 2085 (2012) is a good illustration of the continuous ambiguities affecting regional interventions. Initially, in the absence of any prospect to set up the regional force envisaged by Security Council Resolution 2085, France – aided by a few others<sup>29</sup> – intervened in Mali, invoking, among other grounds, the authorization. The use by France of such an authorization originally granted to a regional organization remains shrouded in doubt, despite supporting interpretative statements by the members of the Security Council<sup>30</sup> and ECOWAS<sup>31</sup>, and probably explains why France also deemed it necessary to invoke the invitation of the transitional government of Mali to justify its intervention.<sup>32</sup> More interesting, however, for the sake of the argument here, is that shortly after the French intervention and advance of rebels on the ground, ECOWAS immediately decided to deploy the AFISMA mission.<sup>33</sup> The deployment of that mission raised interesting questions as to its legal nature. Indeed, in a letter dated 12 February 2013 to the Secretary General of the United Nations, the interim President of the Republic of Mali wrote: “I request your support for the rapid deployment of AFISMA in accordance with the provisions of United Nations Security Council resolution 2085 (2012) in order to restore the authority and sovereignty of the Malian State throughout its territory”.<sup>34</sup> This request, sent to the Secretary General by the interim president of Mali, raises questions as to the

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<sup>29</sup> See e.g. the transportation of French troops by US military aircrafts reported in the Huffington Post, available at: [http://www.huffingtonpost.com/2013/01/22/mali-intervention-us-planes\\_n\\_2527610.html](http://www.huffingtonpost.com/2013/01/22/mali-intervention-us-planes_n_2527610.html).

<sup>30</sup> SC/10878 AFR/2502, available at: <http://www.un.org/News/Press/docs/2013/sc10878.doc.html>

<sup>31</sup> The ECOWAS published, on 12th January 2013, an official statement declaring that it ‘welcomes UN Security Council Press Release of 10th January 2013 authorizing immediate intervention in Mali to stabilize the situation’ and ‘thanks the French Government for its initiatives to support Mali’, available at: <http://news.ecowas.int/presseshow.php?nb=006&lang=en&annee=2013>.

<sup>32</sup> See the official statement of the President of the French Republic on 14 January 2014, or the declaration by the French Ministry of Foreign Affairs on the same day, available at: <http://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html>.

For some critical remarks on the legality of the use of force by France in Mali, see T. Christakis and K. Bannelier, ‘French Military Intervention in Mali: It’s Legal but... Why? Part I & II’, available at: <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>.

<sup>33</sup> At the date of concluding this chapter, there were reports that UN Peacekeeping force could be deployed in Mali by the summer 2013. See <http://www.un.org/apps/news/story.asp?NewsID=44407&Cr=&Cr1=#.UUa2Vc3grdk>.

<sup>34</sup> See Letter dated 25 February 2013 from the Secretary-General addressed to the President of the Security Council S/2013/113.

exact basis for AFISMA. The position of ECOWAS does not dispel such doubts.<sup>35</sup> Later, the Ministers of the ECOWAS Mediation and Security Council “endorsed the proposed transformation of the African-led International Mission in Mali (AFISMA) into a UN peacekeeping operation and recommended that ECOWAS collaborate with the African Union (AU) to support the Malian government’s request in this regard”, thereby fuelling more uncertainty as to the exact basis of AFISMA.<sup>36</sup>

Maybe with the exception of the famous intervention of NATO in Bosnia-Herzegovina, which could partly be construed as a UN collective security measure,<sup>37</sup> other regional interventions are similarly unclear and demand the use of different narratives.<sup>38</sup> Like in the case of the multidimensional argumentation chosen by France in the case of Mali, the regional intervention of ECOWAS in Liberia<sup>39</sup> – which fell short of any explicit authorization by the Security Council<sup>40</sup> – was equally riven by ambiguity: Ivory Coast invoking self-defense whilst Nigeria said it was a regional operation of peace

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<sup>35</sup> See the letter dated 17 January 2013 from the President of the Commission of the Economic Community of West African States to the Secretary-General annexed to Letter dated 18 January 2013 from the Secretary-General addressed to the President of the Security Council S/2013/35: ‘In this context and in conformity with previous decisions of the Peace and Security Council of the African Union and the ECOWAS Authority of Heads of State and Government on Mali, further to the request of the Malian authorities, and in accordance with Security Council resolution 2085 (2012) of 20 December 2012, authorizing the deployment of an African-led International Support Mission in Mali (AFISMA), I am pleased to inform you that the deployment of AFISMA is under way, with the mandate as provided in resolution 2085 (2012), taking into account the changed context on the ground’.

<sup>36</sup> See Press Release, N°: 050/2013, available at:

<http://news.ecowas.int/presseshow.php?nb=050&lang=en&annee=2013>

<sup>37</sup> See resolution 836 delegating to UN member states, acting individually or through regional arrangements, the power to take military action to protect the six UN-declared safe areas in Bosnia. On the determination of these safe-areas, see Resolution 819 (1993) and Resolution 824 (1993).

<sup>38</sup> See the remarks of R. Kolb, article 53, p. 1410; R. Van Steenberghe, ‘Le Pacte de non-agression et de défense commune de l’Union africaine: entre unilatéralisme et responsabilité collective’, 113 *Revue Générale de Droit International Public*, (2009) 125-146, esp. 135.

<sup>39</sup> See e.g., J. Levitt, ‘Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone’, 12 *Temple International and Comparative Law Journal* (1998) 333, 346; P. Jenkins, ‘The Economic Community of West African States and the Regional Use of Force’, 35 *Denver Journal of International Law and Policy* (2007) 333; J. Alain, ‘The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union’, 8 *Max Planck United Nations Year Book* (2004) 237.

<sup>40</sup> By way of Resolution 788, the Council, '[r]ecalling the provisions of Chapter VIII of the Charter of the United Nations', nonetheless '[c]ommend[ed] ECOWAS for its efforts to restore peace, security and stability to the conflict in Liberia.'



enforcement.<sup>41</sup> The inconclusiveness regarding the nature of regional interventions in practice and the argumentative oscillations between peace-enforcement, (collective) self-defense and consensual interventions show how difficult it is to certify that the conditions of applicability of Article 17 are met, and especially the requirement that the operation be of a collective security nature. The practice demonstrates that there is continuous doubt as to the nature of regional interventions, thereby perpetuating doubts as to the applicability of Article 17 to these situations.<sup>42</sup>

It is argued here that the inconclusiveness affecting the legal basis of these regional operations renders the application of Article 17 indeterminate. The difficulty in identifying the legal basis of these operations plunges the application of Article 17 in great indeterminacy. Against such indeterminacy shrouding the nature and legal basis of regional interventions, this chapter submits that discourses inevitably come to play a determinative role in terms of the effects spawn by the rules concerned. The inconclusiveness created by the rules on the responsibility of international organizations makes the narratives accompanying these operations and how they are presented determinative of the functioning of the law of responsibility. In the specific context of authorized regional operations, this role of discourses can be explained as follows. If the regional intervention is marketed and presented as a purely defensive operation, the application of Article 17 will be excluded and the responsibility for possible wrongful acts committed in the framework (or on the occasion) of an authorization will lie with the authorized regional organization. On the other hand, if the intervention is marketed as a UN peace enforcement operation, Article 17 will apply and the responsibility can potentially lie with the authorizing organization, provided that all other strict conditions are fulfilled. If this is true, the foregoing means that, depending on how one markets and portrays the intervention of regional organizations, one can partly customize the burden and the apportionment of the responsibility in case of regional authorized operations.

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<sup>41</sup> R. Van Steenberghe, 'Le Pacte de non-agression et de défense commune de l'Union africaine: entre unilatéralisme et responsabilité collective', 113 *Revue Générale de Droit International Public* (2009) 125-146, esp. 135.

<sup>42</sup> For some critical remarks about the ambiguous nature of these regional interventions, see R. van Steenberghe, *La légitime défense en droit international public* (Larcier, 2012) 335-339, 364-375, and 382-385.

A second source of doubt as to the applicability of Article 17 to situations of regional peace enforcement missions relates to the status of the authorized regional organization concerned. Indeed, one could argue that the application of Article 17 is precluded if the authorized regional organization does not formally qualify as a regional arrangement for the sake of Chapter VIII of the UN Charter.<sup>43</sup> If the effect of the authorization of regional intervention on the law of international responsibility extends only to the fulfillment of the collective security responsibilities vested in the UN system, why would regional organizations that have refrained from subjecting themselves to the status of Chapter VIII regional organizations<sup>44</sup> enjoy the (partial) shift of responsibility to the UN in case of authorized intervention? In that sense, Article 17's shift of responsibility to the authorizing organization would seem to be structurally conditioned, not only on the collective security nature of the intervention, but also on the qualification of the regional organization concerned as a regional arrangement under the UN Charter. This reading of the system of authorization is certainly quite formalistic, and it is not certain that it would secure a wide argumentative persuasiveness. Yet, it constitutes another argument pointing to the multiple obstacles frustrating the applicability of Article 17 of the Articles on the

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<sup>43</sup> See gen. A. C. Arend, 'The United Nations, Regional Organizations, and Military Operations: Introduction: The United Nations, Regional Organization, and Military Operations: The Past and Present', 7 *Duke Journal of Comparative and International Law* (1996), 3, 5–7, 12–13. It seems that even a simple union of states may qualify as a regional organization if it has 'as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security (Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Rep. (1998) 275 at 307). On this point, see the remarks by T. Gazzini, 'NATO's role in the collective security system', 8 *Journal of Conflict and Security Law* (2003) 247–249.

<sup>44</sup> On the case of NATO, see T. Gazzini, 'NATO's role in the Collective Security System', 8 *Journal of Conflict & Security Law* (2003) 231–263; H. Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?' 45 *American Journal of International Law* (1951) 162; D. Bowett, *Self-Defence in International Law* (1958) 222; M. Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organisation of American States' 42 *British Yearbook of International Law* (1967) 175 at 184.

Among the authors prepared to treat NATO as a regional organization, see U. Villani, 'Les rapports entre l'ONU et les Organisations Régionales dans le domaine du maintien de la paix', 290 *Collected Courses* (2001) 225 at 286 et seq.; N. Blokker & S. Muller, 'NATO as the UN Security Council's Instrument: Question Marks from the Perspective of International Law', 9 *Leiden Journal of International Law* (1996) 417. It has been claimed however that, since the end of the Cold War, the Security Council has treated NATO as a Chapter VIII regional arrangement C. Gray, 'Regional Arrangements and the United Nations Collective Security System' in H. Fox (ed.), *The Changing Constitution of the United Nations* (1997) 92, esp. 115–116; see also G. Ress, 'Article 53' in B. Simma (ed.), *The Charter of the United Nations* (2002) 854 et seq., esp. 862. See also the exchange of letters dated 20 August 1993 between the UN Secretary General and the Security Council; and the UN Secretary General letter dated 18 April 1994 (UN doc. S/1994/466, para. 2) and report dated 19 May 1994 (UN doc. S/1994/600, para. 3).

Responsibility of International Organizations. Indeed, the indeterminacy affecting the status of the regional organizations within the UN framework is not different from the inconclusiveness related to the legal basis of the intervention mentioned above, for it similarly creates inconclusiveness that make discourses about the status about the regional organization determinative of the application of the mechanisms of responsibility. Indeed, if one concurs with the argument that which Article 17 only operates in the framework of the UN collective security system and if the authorized regional organization qualifies as a regional arrangement for the sake of Chapter VIII, discourses about the kinship between a regional organization and the UN bear upon the effects of the particular mechanism envisaged by the International Law Commission. Depending on how one markets the status of a regional organization under the UN system, one can calibrate the burden and apportionment of responsibility in cases of authorized regional interventions.

### **III. CONCLUDING REMARKS: INSTITUTIONAL VEILS AS DISCOURSES**

The abovementioned remarks, with respect to the inconclusive applicability of Article 17 of the Articles on the Responsibility of International Organizations (2011), brings us back to the problem generated by institutional veils in the context of the international law of responsibility mentioned in the introduction. The foregoing has sought to demonstrate that institutional veils – and thus the existence of corporate layers between the wrong and those having contributed to the wrong – cannot be reduced to a question of institutional architecture and legal basis. They also are a matter of discourses. As is exemplified by the questions of responsibility mentioned above, the impact of institutional veils on the effect of responsibility mechanisms, as a result of the dramatic indeterminacy affecting their application, is made more dependent on the discourses accompanying these regional authorized missions. Indeed, against the backdrop of indeterminacy shrouding the nature and legal basis of regional interventions, discourses inevitably come to play a determinative role. It thus does not seem unreasonable to claim that the choices of narratives with respect to the nature of the operation and the nature of the regional organization bear upon the extent to which the (two-fold) institutional veil interferes with

the application of international responsibility. According to the argument made here, the institutional narratives as much as institutional arrangements must inevitably be seen as determinative of the actual effects of the regime of responsibility in case of regional peace enforcement operations authorized by the Security Council.

The argument made here should certainly not be construed as a cynical one. Nor should it be perceived as being provocative. The point made here reflects a simple finding about the functioning of legal systems. Indeterminacy abidingly permeates all rules of legal systems and the application thereof. Yet, indeterminacy varies in degree, however it is constructed. The more indeterminate the rule and its functioning are, the more room is left for a determinative role for discursive practices. Article 17 is certainly one of these mechanisms creating generous inconclusive space for a determinative role of discursive practices – the marketing of the regional intervention as well as the conception of the status of the regional organizations in the UN system inevitably impacting the applicability of that provision. Whilst this is probably nothing more than a reminder of a mundane finding about the functioning of legal systems, it is hoped that the foregoing can serve as an invitation for more anticipation when devising secondary rules of the international legal system.