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Issues of responsibility

Introduction

It is one of the more settled principles of international law, as authoritatively formulated by the Permanent Court of International Justice in the classic *Chorzow Factory* case,[1] that a violation of international law entails responsibility and the obligation to make reparation in one form or another.[2] When it concerns the activities of states, the basic rule is, all sorts of difficulties notwithstanding, relatively straightforward: states are responsible for internationally wrongful acts that can be attributed to them.[3]

With international organizations, however, the question is whether the organization can be held responsible for internationally wrongful acts and, if so, whose acts qualify and upon whom does responsibility eventually come to rest.[4] While states can by and large be treated, for purposes of international law, as unitary actors,[5] the same is not self-evident when it comes

[1] *Case Concerning the Factory at Chorzów (claim for indemnity)*, jurisdiction, [1927] Publ. PCIJ, Series A, judgment no. 8, p. 21: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'

[2] For a general study, see Christine Gray, *Judicial Remedies in International Law* (Oxford, 1987).

[3] ILC Draft Article 2: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.' See UN Doc. A/CN.4/L.602/Rev. 1 of 26 July 2001, containing the draft articles adopted by the Drafting Committee on second reading. One of the surprisingly few (relatively) recent monographs on state responsibility is Ian Brownlie, *System of the Law of Nations Part I: State Responsibility* (Oxford, 1983).

[4] The earlier ILC draft articles on state responsibility, while not specifically addressing the responsibility of international organizations or their member-states, seemed nonetheless predisposed to accept a separate responsibility for the organization. The present draft articles on state responsibility (see previous note) do not address the issue at all. Host states may arguably incur responsibility if they allow organizations to engage in illicit activities, but then the basis of responsibility is this failure to prevent rather than the illicit activity itself. See also Matthias Hartwig, *Die Haftung der Mitgliedstaaten für Internationale Organisationen* (Berlin, 1993), pp. 49–50.

[5] Although with federal states at least this presumption may no longer be tenable, in light of the ICJ's recent pronouncement that certain obligations are incumbent on the Governor of Arizona.

to international organizations, which are, after all, the creations of states. Here, once again, the layered nature of international organizations becomes visible: behind the 'organizational veil' the contours of the organization's member-states can be discerned.[6]

The topic of the responsibility of international organizations had been given scant attention until the mid-1980s, and the few studies that had appeared before then initially found it difficult to come to terms with international organizations to begin with. Thus, Clyde Eagleton, writing in the 1950s, hardly considered the possibility that international organizations might themselves incur responsibility under international law. His lengthy study was based on the premise that the only conceivable form of responsibility in international law would be responsibility of states; organizations, after all, as a general rule, exercise no control over territory.[7] And even as late as 1969, Konrad Ginther's thoughtful study was largely devoted to the question whether organizations could bear responsibility to begin with.[8]

In the mid-1980s, however, the collapse of the International Tin Council, and the voluminous litigation that ensued, in predominantly the English courts, made clear that here was a topic which would require further study and analysis, and in the 1990s alone several monographs have appeared.[9]

One factor complicating the Tin Council litigation was the absence of any clause on responsibility in the constituent document, and this is indeed a general pattern. Few charters of international organizations contain responsibility clauses; the main exceptions are the financial institutions and some commodity agreements as well as some dealing with satellite activities – in

See the *Case Concerning the Vienna Convention on Consular Relations* (Germany v. USA), order, 3 March 1999 (nyr), in particular para. 28.

[6] Incidentally, this applies to all complex organizations: behind the organization, there are always its members (or employees, or participants), and *vice versa*. For a useful study from the field of organization theory, see Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge, 1998).

[7] Clyde Eagleton, 'International Organization and the Law of Responsibility' (1959/I) 76 RdC, 319–425.

[8] Konrad Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Vienna, 1969), esp. pp. 1, 87–8.

[9] These include Hartwig, *Die Haftung der Mitgliedstaaten*; Moshe Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (Dordrecht, 1995); Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, 1998); Rick Lawson, *Het EVRM en de Europese Gemeenschappen* (Deventer, 1999).

short, organizations whose activities entail financial risks.[10] Here, the standard type of clause envisages a limited liability for the member-states.

The International Tin Council litigation makes clear that a first possible distinction to draw is that between responsibility under domestic law and responsibility under international law. The former depends, of course, first and foremost on domestic law (albeit guided perhaps by international law); I will therefore refrain from addressing the issue specifically.[11] Responsibility under international law, however, depends of course on international law.

A second distinction to draw, this time on the international legal level is whether responsibility is invoked by a member-state of the organization concerned, or by a third party, for instance another state, a creditor or perhaps an individual. The former applies predominantly to the UN, to which, after all, there are precious few third parties (or rather, few third states). What follows will deal mostly with responsibility vis-à-vis third parties.

Third, it is useful to distinguish between the responsibility of the organization, and any possible subsidiary responsibility of the member-states for the organization's behaviour. The responsibility of member-states may be subsidiary (German scholars use the wonderful term 'Durchgriffshaftung'[12] or variations thereon, loosely to be translated as 'see-through responsibility'), in that the member-states may be responsible if the organization itself is unwilling or unable to bear responsibility. But it may perhaps also be the case, as some scholars have argued, that the member-states incur direct responsibility: if the member-states fail to exercise proper control over the acts of the organization, then they may be held responsible for negligence.[13]

Finally, there is the situation where an obligation does not, as such, rest upon an organization but does rest upon all of its members, yet wrongful behaviour must be attributed to the organization as it exercises powers instead of its member-states. An example (a somewhat controversial example

[10] See also Hartwig, *Die Haftung der Mitgliedstaaten*, pp. 146–68.

[11] Not everyone appears convinced of the validity or utility of this distinction. Thus, at least in the context of the Tin Council litigation, some doubts are expressed by Ignaz Seidl-Hohenveldern, 'Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals' (1989) 32 GYIL, 43–54, esp. pp. 49–50.

[12] So, e.g., Ginther, *Die völkerrechtliche Verantwortlichkeit*, p. 172 (more accurately, he speaks of 'Durchgriffsmöglichkeit').

[13] See the brilliant study by Romana Sadurska & Christine M. Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?' (1990) 30 VaJIL, 845–90.

perhaps) might be the position of the EC with respect to the European Convention on Human Rights: although the EC is not a party to the European Convention on Human Rights, all its members are. In some areas, the EC's members have transferred powers to the EC, and have done so willingly and wittingly: no one forced them to transfer powers, and thus they should not be allowed to invoke this transfer in order to escape responsibility. Consequently, should the EC violate a norm contained in the European Convention, responsibility rests upon the members jointly.[14]

An illustration: the Tin Council litigation

As noted, the issue of the responsibility of international organizations, and the closely related issue of responsibility of member-states for acts of the organization, assumed prominence in the mid-1980s, with the collapse of the International Tin Council (ITC).[15] The International Tin Council was an organization with thirty-two members (including the EC), based on an International Tin Agreement, the sixth version of which was in force in the mid-1980s. The idea behind the Tin Council was that it should buy and sell tin on the world market in order to promote an orderly market and keep prices stable. In 1985, it ran out of money, and in the UK its debt was held to be several hundred million pounds.

Quite a few court cases followed, especially in the UK where the ITC had its headquarters. Some of those cases involved issues of immunity,[16] but others dealt more specifically with issues of responsibility. Tellingly, the various courts reached essentially different conclusions, and some debated the preliminary problem of trying to decide which law to apply.[17]

[14] For a detailed analysis along these lines, see the excellent study (in Dutch, unfortunately) by Lawson, *Het EVRM*. One might also think of the responsibility of UN members for violations of the laws of armed conflict by UN troops, as the UN is not a party to any convention on humanitarian law. On this topic though, the Secretary-General has unilaterally stated that humanitarian law also applies to UN troops. For the text of the Secretary-General's 'Bulletin', see (1999) 38 ILM 1654. See also UNJY (1992), pp. 430–1.

[15] For an early but useful overview, see Philippe Sands, 'The Tin Council Litigation in the English Courts' (1987) 34 Neth ILR, 367–91.

[16] So, e.g., *Arab Banking Corporation* v. *International Tin Council*, decision of 15 January 1986, High Court, Queen's Bench Division, in 77 ILR 1.

[17] Thus, one of the main (and eventually rejected) arguments in one of the cases was the argument that the Council could, like a company, be wound up by the courts so as to allow creditors to go after the 'shareholders': *In re International Tin Council*, decision of 22 January 1987, High Court, Chancery Division, in 77 ILR 18.

The judgments which are more interesting for present purposes determined that applying international law was more appropriate, but were in disagreement as to what international law says, and more particularly on the question of whether or not the organization must be seen as legally distinct (at international law) from its member-states, or rather as little more than an agent of the member-states. And to complicate matters, the courts were also confronted with such questions (and did their best to avoid giving an answer[18]) as to whether the ITC was legally distinct from its members for purposes of English law, and whether the personality (if any) of the ITC could not only be invoked against third parties, but against its member-states as well.

In *MacLaine Watson* v. *International Tin Council*, the High Court's Chancery Division, *per* Millett J, was unwilling to uphold an application that a receiver be appointed to aid the applicants in retrieving some of the money, awarded them by arbitration, through proceedings against the ITC's member-states. The Court argued that while liability of a principal to a third party is governed by the agency contract between principal (i.e., the member-states) and agent (i.e., the ITC), in the case at hand the agency contract was an international treaty concluded between sovereign states, and such agreements are not, without more, enforceable by English courts. The counter-argument that the ITC is not a party to its own constituent treaty (and therefore some other source of agency must exist) was swept aside, perhaps too hastily, by Millett J, stating that this was one of those questions 'upon which, as a judge of the national courts of one of the member-states only, I have no authority to pronounce'.[19]

After having obtained at least a possibility of assessing the properties and assets of the ITC itself,[20] MacLaine Watson appealed against the earlier decision; the ITC, in the meantime, appealed against the order to disclose information about its properties and assets. Both appeals were dismissed by the Court of Appeal on 27 April 1988, with the Court of Appeals once more underlining that it was not the business of English courts to occupy themselves with applications (such as the receivership claim) which involve

[18] So, e.g., the Chancery Division of the High Court in *MacLaine Watson & Co. Ltd* v. *International Tin Council*, decision of 13 May 1987, in 77 ILR 41, p. 45.

[19] *Ibid.*, p. 53.

[20] *MacLaine Watson & Co. Ltd* v. *International Tin Council (no. 2)*, decision of 9 July 1987, High Court, Chancery Division, in 77 ILR 160. Millett J based himself on the inherent jurisdiction of the Court to order such an assessment.

claims by the ITC against its members. Those are 'clearly not justiciable in an English court', as Nourse LJ summed up.[21]

In the meantime, MacLaine Watson had started separate proceedings against the British Department of Trade and Industry, representing the British government and therewith one of the member-states of the ITC. MacLaine Watson asked for direct payment of the amount awarded in earlier arbitration proceedings, but the High Court's Chancery Division, once again *per* Millett J, dismissed the action.[22] In doing so, Millett J closely followed the reasoning of Staughton J in a similar case brought against the Department of Trade and Industry,[23] and argued that, since the ITC had been granted the special status of a body corporate in English law,[24] it had 'been granted specifically the legal capacities of a body which is separate and distinct from its members'.[25] As a result,

> the ITC has full juridical personality in the sense that it exists as a separate legal entity distinct from its members; though it is sufficient to dispose of this case to say that it has the characteristic attribute of a body corporate which excludes the liability of the members, that is to say the ability to incur liabilities on its own account which are not the liabilities of the members.[26]

And from this it followed that any official or agent pledging the ITC would have authority only to pledge the ITC and not the separate credit of its member-states. Consequently, a direct application against a member-state was bound to fail.

The House of Lords dismissed the appeal lodged by MacLaine Watson and others.[27] It confirmed that the ITC 'is a separate legal personality distinct from its members';[28] that the contracts entered into by the ITC did not involve any liability on non-parties (such as the member-states); and that

[21] *MacLaine Watson & Co. Ltd* v. *International Tin Council*, decision of 27 April 1988, Court of Appeal, in 80 ILR 191; *MacLaine Watson & Co. Ltd* v. *International Tin Council (no. 2)*, decision of 27 April 1988, Court of Appeal, in 80 ILR 211.

[22] *MacLaine Watson & Co. Ltd* v. *Department of Trade and Industry*, decision of 29 July 1987, High Court, Chancery Division, in 80 ILR 39.

[23] *J. H. Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry and others*, decision of 24 June 1987, High Court, Queen's Bench Division, in 77 ILR 55.

[24] This was done by Parliament by Order in Council, in 1972.

[25] *MacLaine Watson* v. *Dept of Trade and Industry*, p. 44.

[26] *Ibid.*

[27] *J. H. Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry and others and related appeals*; *MacLaine Watson & Co Ltd* v. *Department of Trade and Industry*, and *MacLaine Watson & Co. Ltd* v. *International Tin Council*, decision of 26 October 1989, House of Lords, in 81 ILR 670.

[28] *Ibid.*, p. 678, *per* Lord Templeman.

an alleged liability of member-states under international law could not be enforced by English courts. Nonetheless, some of the Lords expressed some dissatisfaction with this state of affairs. As Lord Griffith summed up, 'the appellants have suffered a grave injustice'.[29]

In the end, the Tin Council litigation allows for few conclusions to be drawn. Many of the decisions depended on English law, hinging in particular on the status of the ITC in English law and relying on all kinds of comparisons with other legal personalities. And to the extent that the issue was not covered by English law, it was generally deemed non-justiciable. Nonetheless, the litigation provides a good picture of some of the issues and complexities involved when it comes to responsibility of international organizations and their member-states vis-à-vis third parties.

Whose behaviour?

Any general analysis of the responsibility of organizations and their member-states must start from the premise that, in normal circumstances, international organizations will incur responsibility in cases where they violate international law, as well as in those (still rare) situations where international law creates a regime of strict liability and organizations act within those regimes.[30] Thus, the point of departure must be that there is nothing exotic about holding organizations responsible; indeed, as much follows from a recognition of their claim to be independent actors, having a will distinct from that of their member-states.

Moreover, in some treaty regimes, in particular with respect to outer space,[31] the possible responsibility of international organizations is clearly taken for granted, and the circumstance that the 1986 Vienna Convention on the Law of Treaties provides for remedies in case of a material breach of a treaty to which an international organization is a party[32] also illustrates (although technically the law of treaties at issue here can be distinguished from the law of responsibility) that organizations, at the very least, are

[29] *Ibid.*, p. 683, *per* Lord Griffiths. Compare also Lord Templeman's opinion, where it is noted that proceedings could not be decided by criticism of the conduct of member-states or attaching blame to member-states (p. 682).

[30] Strict liability regimes are to be found mainly in the field of space law and, increasingly, environmental law.

[31] See, e.g., Art. 16 of the Treaty on principles governing the activities of states in the exploration and use of outer space, including the moon and other celestial bodies. Text in (1967) 6 ILM 386.

[32] Article 60. The 1986 Vienna Convention is reproduced in (1986) 25 ILM 543.

deemed capable of wrongdoing, and therewith almost by definition of bearing responsibility.

A first question to ask, then, is this: for what sort of behaviour will an organization incur responsibility under international law?[33] Given the paucity of strict liability regimes, organizations will be responsible largely for their internationally wrongful acts, i.e. violations of international law which can be attributed to the organization.[34]

But here problems already start to surface, for when can acts be attributed to an organization? If, for example, a Dutch customs officer in the port of Rotterdam illicitly seizes a shipment of goods coming from Japan while implementing a Community regulation, is his illicit behaviour attributable to the Community?

On one line of reasoning, it is. After all, the customs officer is implementing Community law; the Community, moreover, has exclusive competence regarding trade in goods, meaning that the member-states have nothing left to say. Thus, the customs officer engages in illicit behaviour while acting, for all practical purposes, as an agent of the Community.

There is, however, a counter argument. The customs officer is, most likely, a Dutch civil servant, whose activities are controlled by Dutch supervisors. Indeed, it may even be the case that he works in accordance with Dutch internal guidelines as to how to handle certain shipments. While those guidelines cannot legally detract from the Community regulation (after all, regulations shall not be touched by domestic authorities[35]), it may be the case that in practice they deviate from the regulation, and that such deviation is the result of careless transposition, by the Dutch customs authorities, of the regulation. Thus, blame may be assigned, ultimately, to the Dutch customs authorities, but does liability follow suit?

Here a new counter argument is conceivable, for, whatever the quality of the Dutch guidelines, the fact remains that the Dutch customs authorities, when handling imported goods, merely act as agents of the Community. And so on and so forth: the argumentation can go to and fro without there necessarily being a solution. And this, in turn, goes to show that matters

[33] Domestic liability is occasionally addressed in the constituent documents; compare Art. 288 (ex-Art. 215) TEC on the European Community's non-contractual liability. Immunity from jurisdiction, incidentally, may go a long way towards ignoring any issues of liability.

[34] So also Sadurska & Chinkin, 'The Collapse of the International Tin Council', esp. pp. 856–8.

[35] See, e.g., case 50/76, *Amsterdam Bulb BV* v. *Produktschap voor Siergewassen* [1977] ECR 137, esp. paras. 5–7.

are rarely clear-cut when it comes to the responsibility of international organizations: even attribution of the wrongful act to an organization may be a difficult affair.[36]

Another scenario is that where a wrongful act is committed by an organ of the organization,[37] or an official on the organization's payroll. Here, at least primarily so, the act will be attributable to the organization, but here too matters are not always clear-cut. As far as organs go, it is probably the case that even ultra vires acts engage the international responsibility of the organization. At any rate, the case-law of the EC Court seems to point in this direction.[38] As far as officials go, though, an intervening factor may be whether they were acting in an official capacity.[39] Thus, it would be far-fetched to hold the UN liable if a UN secretary or interpreter, on his or her Saturday off, attends a demonstration in front of the embassy of Iraq and is seen throwing stones and breaking windows.[40]

Yet another scenario, not uncommon, is that where an organization acts through locally hired agents, or entrusts private companies with the task of carrying out some of the obligations of membership. For instance, peace-keeping troops may hire local civilians as chauffeurs: what to do in case of a traffic accident? The UN, for situations such as these, seems to have adopted a policy of treating the local civilian as a UN official for purposes of insurance, but not for purposes of immunity. Thus, the driver could be sued without being able to claim immunity; if proceedings are successful,

[36] Lawson reasonably concludes, invoking some case-law from the European Human Rights Commission, that states may be held responsible for violating international norms even when only executing international regulations. See Lawson, *Het EVRM*, p. 475. Whether the organization may be held responsible simultaneously for ordering illicit behaviour is a different matter, and much depends on whether the breached norm is actually one that the organization is a party to in its own right.

[37] Where the organ acts on the territory of a state not its host (be it for purposes of keeping the peace, providing technical assistance, or other activities), usually those acts are subject to an agreement between the organization and the state concerned; these agreements will usually contain provisions on liability. See UNJY (1975), pp. 153–5.

[38] So, e.g., case C-327/91, *France* v. *Commission* [1994] ECR I-3641, discussed in more detail in chapter 13 above. In addition, in *Certain expenses*, the ICJ suggested that even where an act is ultra vires an organ, it may still be intra vires the organization at large and, as noted, to claim that the organization itself acts ultra vires is well-nigh impossible.

[39] Indeed, with respect to peace-keepers, the UN does not accept liability for their off-duty acts; see UNJY (1986), pp. 300–1.

[40] The UN's Legal Counsel has accepted that chauffeurs may be held personally liable for gross negligence (but not mere negligence), even when on official business. See UNJY (1975), pp. 186–8.

the insurance will cover the damages.[41] When it comes to activities outsourced to private companies, there is some (albeit old) support for the thesis that an explicitly limited liability of member-states extends to those companies.[42]

The UN will also often use soldiers put at its disposal by the member-states, and there is judicial support for the thesis that they remain members of the armed forces of the contributing states and thus remain subject to that state's disciplinary rules and procedures.[43] Should such a soldier violate international humanitarian law, then he (or she) is thought to be subject to prosecution before national courts.[44]

Similarly, the organization might use aircraft and vehicles put at its disposal by member-states. Here practice seems to point in the direction of initial liability of the carrier (i.e., the organization) towards third parties. Yet, where the activities undertaken are paid for by contributions from participating members (which will usually be the case), it may well be that subsidiary responsibility comes to rest with the member which placed the vehicle at the disposal of the organization to begin with.[45] When the vehicle is destroyed while in service, the organization may have to reimburse the state from which it was 'borrowed'.[46] When the vehicle is the property of the organization, of course, such subsidiary responsibility would be less easy to defend.[47]

[41] See UNJY (1984), pp. 189–90. Where it concerns non-UN personnel being transported by UN vehicles, usually an individual release is required: the passenger shall not hold the UN liable should anything happen. See UNJY (1985), pp. 142–3.

[42] See *Elias and Abdou Noujaim* v. *Eastern Telegraph Co.*, decision of Egypt's Summary Tribunal of Port Said of 21 December 1932, in (1931–2) 6 AD 413. See also *Nader* v. *Marconi Radio Telegraph Co. of Egypt*, decision of 12 March 1934 by the Civil Court of Alexandria (1933–4) 7 AD 471.

[43] See, e.g., Indiana's Southern District Court in *Jennings* v. *Markley, Warden*, decision of 19 September 1960, in 32 ILR 367. With respect to the occupation by British troops of a privately owned hotel on Cyprus, see *Attorney-General* v. *Nissan*, decision of the House of Lords of 11 February 1969, in 44 ILR 359. However, Vienna's Superior Provincial Court has held, in *N. K.* v. *Austria* (decision of 26 February 1979, in 77 ILR 470), that, substantively, a certain act of an Austrian soldier taking part in a UN peace-keeping mission was attributable to the UN.

[44] See the Secretary-General's 'Bulletin', mentioned in note 14 above. See also Daphna Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law' (1998) 5 *International Peacekeeping*, 64–81. For a fine general discussion, see Chanaka Wickremasinghe & Guglielmo Verdirame, 'Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations', in Craig Scott (ed.), *Torture as Tort* (Oxford, 2001), 465–89.

[45] See UNJY (1980), 184–5.

[46] See UNJY (1976), 177–8.

[47] Here, then, the organization's insurance policy (if any) should ideally cover any contingencies. See UNJY (1981), 158–9.

The wrongful act

Much as with the issue of responsibility of states, it does not seem to matter a great deal what sort of wrongful act is committed. In other words, whether the wrongful act amounts to a breach of a treaty or a breach of a customary rule of international law is, for purposes of assigning responsibility, not terribly relevant: in both cases responsibility will be the result. So too when the organization does not live up to unilateral promises it may have made,[48] or when it violates a general principle of law (although the latter are, by their very nature, difficult to violate).

One of the central tenets of contemporary debates concerning the responsibility of states under international law is the question whether responsibility results from each and every violation, or whether some element of blameworthiness (*culpa*, *dolus*) must be present.[49] While opinion is divided, there is much force in the argument that one can hardly hold sovereign states liable for wrongful acts which resulted from accidents, or honestly mistaken interpretations. On the other hand, there is also some force in the claim that, regardless of a state's intent, if another party somehow suffers, that party ought to be compensated.

Similar arguments may recur in the setting of international organizations. While not usually considered sovereigns themselves, they are nonetheless usually deemed worthy of at least some form of respect (at least for exercising the almost-Arendtian function of being engaged in politics, politics being the laudable way in which mankind discusses and manages its common existence[50]). It would follow that they cannot be held responsible for just about everything that goes wrong; instead, on this line of reasoning, *culpa* or *dolus* would be a *conditio sine qua non.*

On the other hand, *culpa* and *dolus* presuppose that it is possible to look into the state of mind of an organization. Whereas with states this is already highly unlikely, it is even less likely with complex entities such as organizations, comprising member-states, a variety of organs, and individuals

[48] This assumes some relevance in light of the circumstance that many of the external political acts of the EU are in the form of unilateral statements.

[49] See, e.g., the brief discussion in Brownlie, *State Responsibility*, pp. 35–52. See also René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, 1996).

[50] Arendt's political philosophy is perhaps most explicitly spelled out in Hannah Arendt, *The Human Condition* (Chicago, 1958). More accessible are the essays brought together in Hannah Arendt, *Between Past and Future* (1961; New York, 1993).

who may aspire to a leading role. Whose state of mind does one eventually look for?

Indirect and secondary responsibility

Perhaps the central question in respect of the responsibility of international organizations (as the Tin Council litigation abundantly illustrates) is to figure out what the position of the member-states of the organization is, and this, in turn, depends to a great extent on how organizations are viewed to begin with.[51] Thus, for those who view the organization to be a distinct entity from its member-states, residuary or subsidiary responsibility of the member-states is not a foregone conclusion.[52] After all, if the organization is distinct, any attempt to hold its member-states responsible is akin to holding state A responsible for the activities of state B; there simply is no proper justification for doing so. Indeed, it would be difficult to reconcile with the basic notion that an entity can only be responsible for behaviour that can be attributed to it.[53]

Those who view organizations to be mere vehicles for their member-states, however, or those who are of the opinion that member-states can control the organization's activities to a large extent, may feel that to exclude member-state responsibility is too artificial to be of much use. Moreover, they may point out that any rigid exclusion of member-state responsibility may give rise to serious unfairness. Surely, a creditor, or a contract partner, or simply the innocent victim of a tort, should have some recourse to justice; to allow member-states to hide behind an entity that is, after all is said and done, their own creation, might end up hurting third parties; and it is difficult to think of a justification for doing so.

Consequently, in the literature two distinct forms of residuary responsibility are devised, to make sure that third parties do not suffer unnecessarily. The first of these is referred to as a regime of secondary member-state responsibility, and described as follows by Hirsch: 'the injured party is

[51] Sadurska & Chinkin demonstrate an awareness of this tension, 'The Collapse of the International Tin Council', p. 855.

[52] So, e.g., the Civil Tribunal of Brussels, in *M.* v. *Organisation des Nations Unies and Etat Belge (Ministre des Affaires Etrangères)*, decision of 11 May 1966 (holding that Belgium was a third party when it came to acts by UN troops in Congo), in 45 ILR 446. See generally also Klein, *La responsabilité*, esp. pp. 490–520.

[53] On the philosophical importance hereof in general, see H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, 1968), esp. ch. 1.

required to present its claim first to the international organization, and then it would be entitled to proceed against the members only if the organization were to default in providing an adequate remedy'.[54] This regime of secondary responsibility finds some support in the (scarce) case-law. Thus, in one of the many Tin Council opinions, Justice Kerr of the Court of Appeals expressed a great deal of sympathy with the idea of secondary responsibility, although expressing doubts in light of the terms of the Tin Agreement and on whether secondary responsibility could be enforced by English courts.[55]

More apposite though is the award of an arbitration court set up by the International Chamber of Commerce in *Westland Helicopters*.[56] Here it concerned the Arab Organization for Industrialization (AOI), established by four Arab states in order to develop their arms industry. The AOI had created a joint venture with Westland Helicopters in 1978; then, a year later, the AOI announced its liquidation. Arbitration followed, and the arbitrators, basing their thoughts on general principles of law and the notion of good faith, held as follows:

> In the absence of any provision [in the AOI's founding documents] expressly or impliedly excluding the liability of the four States, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom. In default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability.

The award was later annulled by the Court of Justice of Geneva[57] (and the annulment upheld by the Federal Supreme Court[58]), for the different, if somewhat related reason that the arbitrators had assumed jurisdiction over Egypt without Egypt's consent: the fact that a panel has jurisdiction over an international organization does not imply that it also has jurisdiction over

[54] Moshe Hirsch, *The Responsibility*, p. 155.

[55] *MacLaine Watson & Co. Ltd* v. *Department of Trade and Industry; J. H. Rayner (Mincing Lane)* v. *Department of Trade and Industry and others, and related appeals*, decision of 27 April 1988, Court of Appeal, in 80 ILR 47, pp. 104, 109.

[56] *Westland Helicopters Ltd and Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, award of 5 March 1984, in 80 ILR 600, p. 613.

[57] *Arab Organization for Industrialization and others* v. *Westland Helicopters Ltd and others*, decision of 23 October 1987, in 80 ILR 622.

[58] *Arab Organization for Industrialization and others* v. *Westland Helicopters Ltd*, decision of 19 July 1988, Federal Supreme Court (First Civil Court), in 80 ILR 652.

the organization's members. In relation to its member-states, the Federal Supreme Court noted, the AOI enjoys 'total legal independence', and while the issue of member-state liability was not explicitly referred to, the Federal Supreme Court nevertheless expressed serious doubts as to whether it was plausible to state that 'when organs of the AOI deal with third parties they *ipso facto* bind the founding States'.[59]

The second form of subsidiary responsibility is usually referred to as 'indirect' responsibility, and refers to the idea that the member-states are responsible to the organization so as to enable the organization to meet its obligations towards third parties.[60] Thus, for example, member-states should pay additional contributions if the organization is financially incapable of meeting its obligations.[61] This option too has found some support in parts of the Tin Council litigation,[62] but other support has remained limited to some of the academic literature.

And support has remained limited for the good reason that a regime of indirect responsibility presupposes too much. It presupposes, for example, that the organization is merely unable to meet its obligations; it is of little avail, however, when the core of the problem is the organization's unwillingness (as opposed to inability) to act. Moreover, it presupposes that all problems are financial in nature, or at least can be cast in financial terms. After all, it is difficult to envisage any other way in which member-states could come to the aid of their organization. Additionally, a regime of indirect responsibility is also somewhat contrived: if indirect responsibility can be accepted, then why not accept direct responsibility? Arguably, a regime of indirect responsibility leaves the separate identity of the organization intact, but if this separate identity is taken seriously, then indirect responsibility is difficult to justify. If the separate identity is not worthy of protection, then indirect responsibility serves no identifiable purpose and may readily be replaced by direct responsibility.

Policy arguments

In the absence of authoritative precedent, writers do not hesitate to invoke policy considerations to buttress their points of view. Needless to say, some

[59] *Ibid.*, p. 658. [60] This is the conclusion reached by Hartwig, *Die Haftung der Mitgliedstaaten*.
[61] Compare the rendition in Moshe Hirsch, *The Reponsibility*, pp. 157–8.
[62] In particular the opinion of Justice Nourse, note 22 above, p. 47.

of those policy considerations are more persuasive than others. One consideration often heard is that, if public international law were to create some form of residual liability of member-states, then international law would interfere with the internal activities of the organization and might even make it unattractive for states to establish or join organizations. In this vision, the main point of restricting the liability of members of organizations is to make it possible for organizations to engage in activities in which the individual member-states would hesitate to participate.[63]

Clearly, there is a domestic analogy here: the limited liability corporation may well have been created to facilitate large-scale investments which would contribute to economic life in general. Where investors might shy away if full liability were to exist, they might take huge risks if their liability would remain limited. And society as a whole would benefit from the impetus such investments could bring to the economy.

That may make some sense in domestic contexts, but the question is whether the underlying idea can readily be transposed to international organizations. After all, international organizations are not usually created as profit-organizations and, moreover, it is far from clear whether international society unequivocally benefits from the existence of organizations. Admittedly, it will benefit from some, but presumably not from all; and it is by no means impossible that different observers reach radically different conclusions about the desirability of particular organizations, as the strong emotions surrounding the WTO suggest.[64] In short, it is too simple to say that co-operation between states is always and necessarily a good thing and, therefore, aggrieved third states should be willing to make a sacrifice in the greater interest.

By way of counter argument, it is sometimes contended that the aggrieved party knew what it did when it entered into an engagement with an international organization, and therefore should not complain about inequitable situations which may arise out of that self-inflicted situation.[65]

[63] So, e.g., C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, 1996), esp. pp. 283–7.

[64] In a similar vein Sadurska & Chinkin, 'The Collapse of the International Tin Council', pp. 875, 878, doubting the moral standing of an organization aimed at developing an arms industry, such as the Arab Organization for Industrialization at issue in the *Westland Helicopters* litigation.

[65] It is this which appears to prompt Moshe Hirsch (*The Responsibility*, ch. 5) to distinguish between voluntary and non-voluntary third parties. Voluntary third parties could invoke the indirect responsibility of member-states, whereas non-voluntary third parties could invoke the (stronger) secondary responsibility.

This argument meets with two objections. First of all, the very existence of a debate concerning responsibility of organizations and their members already indicates that it can hardly be expected of an aggrieved party that it knew what it got itself into when it opted to enter into an undertaking with an organization. Indeed, as far as liability goes, constitutions generally do not address the matter. The main exception relates to the financial organizations, such as the World Bank, the IFAD and similar institutions. These provide in their constituent documents, in various formulations, that their member-states shall not be liable for the activities of the organization. Here, then, liability is explicitly limited, and here it can meaningfully be argued that aggrieved parties knew what they were getting themselves into. It remains doubtful, however, whether the same applies to other organizations.

A second argument is that it is possible that the organization does not engage in breach of contract, but in tort or perhaps even criminal behaviour,[66] victimizing the aggrieved party without that party being in any way responsible for the legal connection with the organization. A victim of aggression by an organization, or of a human rights violation committed by or on behalf of an organization, or even of a simple traffic accident, cannot in any way be deemed to have wittingly sought for a legal relation with the organization. Hence, the type of thinking that is premised on contractual connections cannot without more be transposed to tort settings.[67]

Limited liability and legal personality

As already alluded to above, in some cases the member-states of an organization specifically limit their liability for the activities of organizations of which they are members. Thus, the constituent document of the IBRD provides, *inter alia*, that securities guaranteed or issued by the bank shall explicitly specify that they are not obligations of any government.[68] This, in conjunction with a few other provisions contained in the IBRD's Articles of Agreement, may well be interpreted as evidence that 'it was clearly intended by the parties that members as such should not be liable for the obligations

[66] For an argument coming close to regarding NATO's intervention in Kosovo as criminal, see Jules Lobel, 'Benign Hegemony? Kosovo and Art. 2, para. 4 of the UN Charter' (2000) 1 Chicago JIL, 19–36.

[67] This also happens in other contexts though, with public law litigation (e.g., concerning human rights) being seen as merely a variation on private law litigation. See, e.g., Harold Hongju Koh, 'Transnational Public Law Litigation' (1991) 100 *Yale Law Journal*, 2347–402.

[68] Article IV, para. 9 IBRD.

of the organization'.[69] And, in some cases, the limitation of liability is far more explicit. Thus, Article 3, para. 4, IFAD provides: 'No member shall be liable, by reason of its membership, for acts or obligations of the Fund.'

The question though remains as to the effect of such limited liability provisions on third parties.[70] Surely, as noted earlier, such limited liability provisions (mainly to be found with financial institutions and some commodities arrangements) can serve as warnings to third parties not to rely on the members to clean up after the organization. Still, that does not exhaust the matter: strictly speaking, for any third party, whatever the members of an organization agree remains *res inter alios acta*; it cannot affect those third parties.[71]

On the other hand, and in an intricate irony, the same principle of *pacta tertiis nec nocent nec prosunt* underlies the idea that member-states shall not be liable at all for organizational acts,[72] at least if the theory is accepted that organizations have an identity separate from their member-states.

Here then, according to some, the attribution of legal personality to an organization may provide evidence of the intention to create a separate identity. From this it would follow that the member-states will not be held responsible (at least not at first instance) for activities of the organization: the very fact of endowing personality may be seen to be an act to limit the liability of the member-states.[73] An obvious ramification must be, however, that where legal personality is not explicitly granted by the member-states, those member-states will be responsible for wrongful activities of the organization. And in light of the circumstance that personality is not often granted explicitly, this argument does little to alleviate concerns.

A different way of limiting the liability of member-states is simply to provide so in agreements with third parties. Thus, the United Nations has been known to conclude contracts with private parties which would contain a provision according to which neither the member-states nor any official of the UN 'shall be charged personally . . . or held liable'.[74]

[69] So Amerasinghe, *Principles*, p. 268.

[70] Surely, as Lawson suggests, a group of states creating an organization for purposes of nuclear testing could not dismiss any liability simply through a clause in the constituent document. See Lawson, *Het EVRM*, p. 281.

[71] Compare also Sadurska & Chinkin, 'The Collapse of the International Tin Council'.

[72] As Amerasinghe points out: 'Principles', pp. 256–7.

[73] *Ibid.*, p. 255.

[74] So, e.g., a contract between the UN and a private contractor for construction of a building in Thailand, quoted in Mahnoush H. Arsanjani, 'Claims Against International Organizations:

Useful as such devices may seem, at least two considerations mitigate their usefulness somewhat. One is, that there is a certain power imbalance between a huge organization such as the UN and a private contractor; the contractor may not have much choice but to accept such a clause, which renders it dubious as an expression of mutual intent. Second, the utility of such clauses is limited at any rate to contractual undertakings. By definition, it cannot apply to torts or even crimes committed by the organization.

Piercing the corporate veil

It has sometimes been argued[75] that there may be circumstances where the corporate veil should be pierced. While accepting the starting point that organizations are themselves responsible, rather than their member-states, nonetheless there may be situations where to provide no relief at all to injured third parties would be too unfair to be justifiable.

One of those circumstances would be the situation where the organization violates the most basic principles of international law, for instance by committing genocide or aggression. In such a case, international law should ignore the possible responsibility of the organization and go straight to the member-states, so the argument goes.[76]

Another circumstance is where it is clear that the organization hides behind the corporate veil: where it abuses its separate personality. Although it is difficult to think of concrete examples, one example sometimes mentioned in the literature is where a state is supposed, following an award, to hand over a piece of territory but cedes it to an organization prior to its execution of the award.

Perhaps another circumstance, nice in theory but difficult in practice, is to ignore an organization's separate personality when it is dominated to such an extent by a single state that it becomes virtually that single state's alter ego. The problem here is one of power politics: how realistic was it to expect the USSR to allow for the piercing of the corporate veil in connection

Quis Custodiet Ipsos Custodes' (1981) 7 *Yale Journal of World Public Order*, 131–76, pp. 137–8, note 20.

[75] See in particular Moshe Hirsch, *The Responsibility*, pp. 169–72.

[76] The problem here is that, at least with respect to aggression, it may be difficult to separate lawful uses from unlawful uses: aggression, after all, can be used for good purposes (think of humanitarian intervention). Genocide is, in this light, easier: while there may be an excuse for aggression, it is hard to think of any justification for genocide.

with Comecon or the Warsaw Pact? Or, as some might argue, for the US to allow the corporate veil over NATO to be pierced or lifted?

Case-law is, as expected, scarce, but at least it is worthy of note that some of the judges dealing with the Tin Council litigation, and the arbitrators initially deciding *Westland Helicopters*, apparently found that a piercing of the veil could be justified. In a similar vein, the International Court of Justice, in the second phase of its *Lockerbie* proceedings, refused to accept English hints that, as Libya's complaint was actually about the activities of the Security Council, the United Kingdom should not find itself in the position of the accused. The Court, without wasting its words, failed to honour this particular line of reasoning, therewith evidencing some support in favour of the possibility of lifting the organizational veil.

Concluding remarks

The complicated nature of the relationship between an organization and its members becomes acutely visible where issues of responsibility are at stake. One can imagine an endless shifting of the blame if an organization is accused: the organization can always blame its members (who, after all, are *Herren der Verträge*, or more often *Herren des Vertrags*), while the members can always point to the organization's independence. In the process, the injured third party (be it a third state, or a citizen or company) gets crushed and might look in vain for justice.

With that in mind, and in particular following the Tin Council litigation, it should not come as a surprise that the topic has inspired a great deal of study in recent years, not least within such august bodies as the Institut de Droit International[77] and the International Law Association.[78] Here too the by-now-familiar positions reproduce themselves: whereas the ILA's work, so far, seems to have been inspired above all by a need to protect third parties (leaning towards the conception of organizations being vehicles for their members), the Institut's efforts, more conservatively perhaps, still have state

[77] See the reports by Rosalyn Higgins, in 66 *Annuaire de L'Institut de Droit International* (1995/I) and (1996/II).

[78] The first report of the ILA's Committee on Accountability of International Organisations, prepared by Professors Shaw and Wellens, stressed that the 'exclusive objective of the Committee's work is to consider what measures should be adopted to ensure the accountability' of organizations. See International Law Association, *Report of the Sixty-Eighth Conference (the Taipei Conference)* (London, 1998), 584–608, p. 585.

sovereignty as their point of departure (viewing the member-states as third parties to the organization).

Either way, though, the practicalities of responsibility may remain problematic, in that organizations rarely have standing (either to sue or be sued) before international tribunals, and may often invoke immunity before domestic courts. A rare (and limited) exception is the possibility, within the EC, of starting proceedings against the various institutions, not only in the form of administrative review but also for torts committed by the Community and for situations arising out of contract.[79]

An interesting novelty, moreover, was the creation in 1993 of the World Bank Inspection Panel, enabling groups of individuals to complain about failure on the part of the World Bank (as well as the IDA) to follow its own policies and procedures in developing projects. While the Inspection Panel has only recommendatory powers, its creation nonetheless signifies that organizations can be held accountable, and, what is more, can be held accountable even by private, non-state actors.[80]

[79] See Art. 288 (formerly Art. 215) TEC. For a general discussion, see Trevor M. Hartley, *The Foundations of European Community Law* (3rd edn, Oxford, 1994), ch. 17.

[80] Useful overviews include Daniel D. Bradlow & Sabine Schlemmer-Schulte, 'The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order' (1994) 54 ZaöRV, 392–415, and Ellen Hey, 'The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship to International Law' (1997) 2 *Hofstra Law & Policy Symposium*, 61–74.