1. ‘MEMBER RESPONSIBILITY’

Writing for a book of essays in memory of Oscar Schachter in 2005,1 my former tutor, Sir Ian Brownlie (as he later became), and I chose to tackle the same subject matter. He wrote on the responsibility of States for the acts of international organizations,2 and I on the responsibility of member States for an international organization’s conduct as a result of membership or their normal conduct associated with membership.3 Obviously, this topic has its attraction. The fact that we both wrote on this subject led me to revisit this same topic in these essays in his memory. As a strong champion of the rule of law in international affairs, Sir Ian would certainly have been interested in this revisit.

In the 2005 essay, I had focused on the acts of a member State of an international organization that result from membership or are associated with membership, not other kinds of acts that any State may perform, or the additional acts that a member State may have to perform to be held responsible for acts (including omissions) of an international organization. I termed the responsibility so defined ‘member responsibility’,4 and argued for a concurrent or joint and several responsibility regime, while allowing adjustment based on proportionality. I criticized the position that this issue should be decided by the rules of the

3 S. Yee, ‘The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership’, ibid., 435–54. ‘Member State’ is used interchangeably with ‘State member’.
4 Ibid., 436.
international organization, and argued for applying general international law. In my view, general international law accords under the rationale of *Reparation* some rights to an international organization with independent personality, but does not limit responsibility to that organization only, an issue that the *Reparation* advisory opinion did not address. I wrote: ‘Otherwise, the world would be beautiful for some but ugly for others; States may simply set up an international organization to reap the benefits of organizing their international activities this way and to avoid the responsibility they would have to shoulder if they conduct the same activities without forming an international organization for such purposes.’ Rejecting the view that, since no specific rule mandates member responsibility, the *Lotus* rule would preclude such responsibility, I argued that, in the absence of a specific rule on point, the general framework of international law should be resorted to and that relying on the *Lotus* rule (originally recognized in the context of primary rules—whether a State may act in a certain way) in the context of secondary rules (whether or not a State is responsible after it has acted) is inappropriate. The general operational framework of the international legal system on point is the *Phosphates* rule under which, once a State has acted wrongfully against another on the international plane, ‘international responsibility would be established immediately as between the two States’. A member State is in some way involved in the wrong committed by that organization and is thus covered by the *Phosphates* rule. Furthermore, the analogy, sometimes relied upon, to the limited liability company regime under national law is misguided, as that regime depends on legislation specifically authorizing such companies, whereas in the international legal system there is no such enabling legislation, thus leading us to the default regime in the national legal system, namely unlimited liability. Pointing out that the rise of limited liability in the national legal order is usually accompanied by the rise of the welfare State which serves as the final resort place where injured persons who cannot obtain any remedies from the injuring companies or their shareholders may seek assistance, I argued that, since there is no such final resort place in the international system, limited liability would be unfair, and that, until such a final resort place emerges, international law should not allow limited liability.

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5 See, e.g., arts. 5–7 in Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties (*Institut de Droit International*), 66-II Annuaire (1996), 444–53.
10 *Phosphates in Morocco, Judgment, 1938, PCIJ, Series A/B*, No. 74, 10, at 28.
Shortly after the publication of that essay, the argument for concurrent or joint and several responsibility as the regime for member responsibility did not get reflected in the first set of draft articles provisionally adopted in 2006 by the International Law Commission. Neither did the weaker variant ‘subsidiary responsibility’. This proposed regime of member responsibility, however, did have some followers inside and outside the Commission. Subsequent discussions did not manage to change the Commission’s essential position, but appeared to shift gear a little and attempted to ensure the ability of the international organization to discharge its responsibility, especially financially. Of course, if the international organization were able and willing to do so—a situation not to be assumed because of various considerations, political, financial as well as procedural (such as immunity)—there would not be any need for member responsibility. Apparently, these combined efforts had resulted in the current framework on this issue in the articles on the responsibility of international organizations, which the Commission adopted on second reading in 2011. I will set out this framework and offer some observations in the following pages.

2. The 2011 Articles Framework

The 2011 articles framework on this issue can be considered to have four aspects, short-handed roughly as ‘independent personality’, ‘additional acts approach’, ‘no member responsibility’, and ‘remedy-enabling obligations pursuant to the rules of the international organization’. First of all, independent personality is of foundational importance. The 2011 articles provide, in article 2(a), that ‘international organization’ means ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities’. The most significant point for our purposes is that


the organization has independent legal personality, which is considered the fount of its own independent responsibility. Thus the Commission commented:

The legal personality of an organization which is a precondition of the international responsibility of that organization needs to be “distinct from that of its member States”. [Footnote omitted.] This element is reflected in the requirement in article 2, subparagraph (a), that the international legal personality should be the organization’s “own”, a term that the Commission considers as synonymous with the phrase “distinct from that of its member States”. The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.14

The bulk of the 2011 articles then sets out, almost in parallel to the 2001 articles on State responsibility,15 the conditions for and the content of the responsibility of international organizations as well as its implementation.

The second aspect of the 2011 articles framework is that the responsibility of a member State in connection with the conduct of an international organization arises only from some acts in addition to membership, which can be termed ‘the additional acts approach’. This is set out in Part Five of the 2011 articles, titled ‘Responsibility of a State in connection with the conduct of an international organization’. These additional acts fall into two groups. The first group can be committed by any State including a member State of an international organization. This group comprises: aid or assistance by a State in the commission of an internationally wrongful act by an international organization (article 58), direction and control exercised by a State over the commission of an internationally wrongful act by an international organization (article 59), and coercion of an international organization by a State (article 60). This group of acts need not have anything to do with membership in the international organization at issue and need not detain us long here.

The second group of additional acts is limited to those committed by a member State of an international organization: circumvention of international obligations of a member State of an international organization (article 61),16 and acceptance of responsibility or causing reliance on its responsibility (article 62). This group of acts can be committed by a member State only because of its special

14 Ibid., 76, para. (10) (art. 2(a)).
16 How article 17 (Circumvention of international obligations through decisions and authorizations addressed to members) on the responsibility of an international organization in connection with the act of a State or another international organization figures in this framework (see article 40, commentary, para. (1)) is not dealt with here in this short essay.
position within the international organization, but its membership or its normal
close as a result of membership does not necessarily rise to the level of these
mentioned acts. This is clear from the text of these two articles:

Article 61
Circumvention of international obligations of a State member of an international
organization
1. A State member of an international organization incurs international responsi-
bility if, by taking advantage of the fact that the organization has competence
in relation to the subject-matter of one of the State’s international obligations, it
circumvents that obligation by causing the organization to commit an act that, if
committed by the State, would have constituted a breach of the obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful
for the international organization.

Article 62
Responsibility of a State member of an international organization for an internation-
ally wrongful act of that organization
1. A State member of an international organization is responsible for an internation-
ally wrongful act of that organization if:
   (a) it has accepted responsibility for that act towards the injured party; or
   (b) it has led the injured party to rely on its responsibility.
2. Any international responsibility of a State under paragraph 1 is presumed to be
subsidiary.

Naturally one may ask whether membership alone or the normal conduct asso-
ciated with membership, not rising to the level of the additional acts described
above, may give rise to responsibility on the part of a member State for the acts of
the organization. There is no article among the Commission’s 2011 articles specifi-
cally addressing this point. Nevertheless, the commentary to article 62 provides
the answer.

That answer constitutes the third aspect of the 2011 articles framework on
member responsibility, which essentially is this: there is no member responsibil-
ity. The commentary to article 62, in paragraph (2), states:

Consistently with the approach generally taken by the present draft articles as well
as by the articles on the responsibility of States for internationally wrongful acts,
article 62 positively identifies those cases in which a State incurs responsibility and
does not say when responsibility is not deemed to arise. While it would be thus inap-
propriate to include in the draft a provision stating a residual, and negative, rule for
those cases in which responsibility is not considered to arise for a State in connection
with the act of an international organization, such a rule is clearly implied. Therefore,
membership does not as such entail for member States international responsibility
when the organization commits an internationally wrongful act.17

The commentary proceeds to find support for this position in the following:

1. ‘The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases’;¹⁸
2. ‘A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council (ITC), albeit incidentally in disputes concerning private contracts’;¹⁹ and
3. The Institut de Droit International in 1995 adopted the position that, other than some special exceptions, ‘there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members’.²⁰

The above three aspects of the 2011 articles framework so far point to the conclusion that ‘[i]nternational organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their international wrongful acts’.²¹ And, if the international organization is unable or unwilling to discharge its international obligations, the aggrieved parties will be left with no remedies.

This unappetizing prospect led to some debate in the Commission.²² Article 40 was ultimately added to tackle this issue in some way, resulting in the fourth aspect of the framework: remedy enabling obligations pursuant to the rules of the international organization. This article reads:

**Article 40**
Ensuring the fulfilment of the obligation to make reparation
1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.
2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

In short, the responsible international organization ‘shall take all appropriate measures’ to cause its members to enable it to fulfill its obligations and the members too ‘shall take all appropriate measures’ to enable it to do so, all pursuant to the rules of the organization. The commentary to this article makes it clear that,

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¹⁸ Ibid., para. (3).
¹⁹ Ibid., para. (4).
²⁰ Ibid., 165, para. (5).
²¹ Ibid., 132, para. (1) (art. 40).
[w]hen an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership of a responsible organization only according to the conditions stated in articles 17, 61 and 62. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.\(^\text{23}\)

Furthermore, ‘no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation’.\(^\text{24}\) So the basis for the obligations under article 40, if at all, is the rules of the organization. These rules thus assume an importance that the founders or rule-makers of the organization may or may not have fully appreciated. If these rules provide for no obligations on the part of the members, article 40 may amount to much ado about nothing. If these rules are unclear or simply silent on this question, member States have an implied obligation as provided for under article 40. The commentary to this article explains:

> While the rules of the organization do not necessarily deal with the matter expressly, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be implied under the relevant rules. As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion in the Certain Expenses of the United Nations advisory opinion:

> ‘Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the Injuries to United Nations Servants case, namely ‘by necessary implication as being essential to the performance of its [i.e. the Organization’s] duties’ (I.C.J. Reports 1949, at p. 182).’\(^\text{25}\)

This part of the commentary thus may function as a rule of interpretation, favoring reading into the silent or unclear rules of the organization an implied obligation to enable remedies.

In summary, under the 2011 articles framework an international organization with independent personality will independently shoulder its own responsibility. A member State will be responsible for acts of that organization only on the basis of some additional acts besides membership rising to the level required under the articles. Membership as such does not entail for member States international responsibility when the organization commits an internationally wrongful act. That is, there is no member responsibility. The organization shall take appropriate measures to cause its members to enable remedies, and the members shall take appropriate measures to do so, for any internationally wrongful acts committed by the organization, all according to the rules of the organization. If


\(^\text{24}\) Ibid., para. (2).

\(^\text{25}\) Ibid., I33, para. (5). On the drafting history of this provision, see G. Gaja, ‘Eighth report on responsibility of international organizations’ (A/CN.4/640), 27–28, paras. 82–84; A. Pellet, ‘The ILC’s Articles’, 91.
the rules are unclear or silent, an obligation on the part of the members to do so will (or may?) be read into them.

3. Observations

The net effect of the 2011 articles framework is, when worse comes to worst, that there is no member responsibility for the internationally wrongful acts of an international organization, nor are members necessarily required to provide remedies for those acts if the organization cannot or will not do that. Such a prospect I feared and criticized strongly in my 2005 essay, and I will not repeat all those arguments here but will highlight some as appropriate.

First of all, I cannot resist stressing that this framework at best is an immature one as it opens up a gap in the international legal system. A mature and fair international legal system would maintain a ‘circular whole’, under which international legal relations are defined by rights and obligations and any rupture of those relations must be cured by restoring the status quo ante, or in a better way. At worst, this framework is really an assertion of might makes right, allowing the coming together of some States to form an organization with independent personality to remove responsibility that would otherwise result for those States if they act separately. It would seem that article 61 on the circumvention of international obligations of a member State of an international organization sets up too high a threshold for circumvention and most likely does not catch the original establishment of an international organization simply for the purposes of risk management. That is to say, below conscious circumvention of obligations there is a vast and important space in which responsibility can and should arise for a member State, but is not envisioned under the 2011 articles framework. All this seems to have been due to the independent personality that the international organization enjoys. Giving such personality so much weight really exalts the form of independent personality over the systemic values of the international community as well as the realities of international life.

Providing no article on the issue of member responsibility, but stating in the commentary that a ‘no member responsibility’ rule was ‘clearly implied’ and that ‘membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act’, the Commission seemed to be more fortified in its ‘no member responsibility’ position than was the Institut de Droit International commission on this topic in 1994. That commission’s report expressed the view that there was no specific rule providing for member responsibility, but also noted that ‘the reality was that there was also no rule saying that there was not liability’.26 Apparently, because

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of its stronger position or for another reason, the International Law Commission did not resort to the *Lotus* rule, the reliance on which I criticized in 2005.

Is the International Law Commission’s stronger position on this issue now better than the *Institut* commission’s position when it was expressed in 1994–1995? Probably not. The three main reasons given by the Commission include the fact that some States have argued against member responsibility in contentious cases, the old *International Tin Council* case which was really decided on the basis of national law, and the *Institut*’s resolution adopted in 1995. The only ‘new news’ is that regarding a few States’ arguments in contentious cases, but there was no indication in the Commission’s commentary that those arguments succeeded in any of those cases. This really is too slender a reed to support this stronger position.

The Commission’s positions that there is no member responsibility, that ‘no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation,’ and that ‘[the “no subsidiary obligation”] approach appears to conform to practice, which does not show any support for the existence of such an obligation under international law’, seem to have been reached at the cost of ignoring at least two widely-accepted treaties in force dealing with matters of great importance and gravest magnitude: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967) and the Convention on International Liability for Damage Caused by Space Objects (1972). The 1967 Treaty provides for concurrent responsibility and now commands the adherence of more than one hundred parties. The 1972 Convention provides for joint and several liability while setting up a secondary or subsidiary liability regime as the implementation mechanism, and is now accepted by almost ninety States parties and three inter-governmental organizations. The Commission’s ‘no subsidiary obligation’ position contradicts in express terms the regime provided in the 1972 Convention. Although not on the issue

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28 610 *UNTS* 205, article VI (‘When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.’).
29 961 *UNTS* 187, article XXII(3) (‘If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that…(a) Any claim for compensation in respect of such damage shall be first presented to the organization…(b) Only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.’). See also the interesting formulations in article 139(2) and Annex IX, article 6(2), of the United Nations Convention on the Law of the Sea (1833 *UNTS* 396).
of making reparation only, the regimes provided in these treaties are stronger, because they deal with responsibility in the case of the 1967 Treaty, or ‘liability’ in the case of the 1972 Convention, before the distinction between responsibility and liability became popular, the obligation to make reparation naturally follows from the determination of responsibility or liability in the general sense.

Some have tried to rationalize away these important instances of State practice with wide following by labeling these treaties as *lex specialis*. It is not clear why the International Law Commission simply put them out of sight by ignoring them—a computer search in the pages on this topic in its 2011 report does not yield any reference to them. If the reason for ignoring them is the view that the 1972 Convention deals with ‘liability’—in express terms—and not responsibility, this would be a weak reason for doing so. First of all, the 1972 Convention had been adopted before the distinction between responsibility and liability became popular, and the term ‘liability’ may cover both responsibility and liability in current parlance. Indeed, article III of the 1972 Convention uses the term ‘liable’ to describe a situation resulting from ‘fault’, a sign (sufficient, though not necessary) of responsibility. Furthermore, as late as 1995, the *Institut de Droit International* used the terms ‘liability’ and ‘liable’ in its resolution on this topic, and the International Law Commission quoted, in this very project on the responsibility of international organizations, the language in which these terms were used when it suited its purposes. Secondly, if States were willing to accept such a regime even in liability situations in current terms, covering acts not in violation of international law, they would be more willing to accept such a regime in responsibility situations, which are narrower in scope and less onerous. Finally, even if this were the reason, it would not justify ignoring the 1967 Treaty, because that treaty in express terms provides in article VI for a concurrent responsibility regime.

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30 Apparently, the first proposal to make this distinction at the ILC was made by Kearney at a 1973 session. See J. Barboza, *The Environment, Risk and Liability in International Law* (Leiden and Boston, 2011), 22.

31 For example, responsibility and ‘liability and compensation’ are dealt with in the same document in Principles Relevant to the Use of Nuclear Power Sources in Outer Space (A/RES/47/68) of Dec. 14, 1992, Principles 8 (‘Responsibility’) and 9 (‘Liability and Compensation’).

32 See the 1972 Convention, cited above, art. III, in full: ‘In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.’ See also arts. IV and V.

33 Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties (*Institut de Droit International*), 66-II *Annuaire* (1996), 444–53.

34 ‘Draft articles on the Responsibility of International Organizations’, 165, para. (5) and note 353 (art. 62).
Regarding the *lex specialis* contention, I previously argued to the contrary:

While these special regimes may not be sufficient evidence from which one can infer a general rule, when coupled with the general operational framework discussed above, they can be considered as concrete manifestations of that general framework. These manifestations take on greater importance because these special regimes concern the most important and controversial areas of activities that States care about strongly; these activities have great potential for transboundary damage. Other areas of activities may present lesser problems that States may be able to deal with on their own, and they have decided to pick their more important battles to fight.35

The International Law Commission’s positions also ignore the same regimes provided for in several United Nations General Assembly declarations relating to space activities,36 and in one instance also dealing with nuclear activities in outer space.37

Perhaps the consolation prizes that the Commission has given to the world are article 61 on prevention of circumvention of member States’ obligations and article 40 on ensuring the fulfillment of the obligation to make reparation. As discussed above, neither represents a substantial victory for member responsibility, but each can be considered a half-step forward in that direction. As to article 61, the intention to circumvent obligations may be too high a threshold and may not cover the original establishment of an international organization and thus may not completely solve my ‘beautiful for some but ugly for others’ problem,38 but at least it would catch the overtly villainous States, if any. As to article 40, the ‘take all appropriate measures’ obligation to enable remedies on the part of the international organization as well as its member States may not rise to the level of ‘hard obligations’ because under article 40 these obligations are supposed to be pursuant to the rules of the organization which may reject such obligations. The saving grace is probably the suggestion made in the commentary that an implied obligation to enable remedies should be read into silent or unclear rules of the organization. This can be a powerful idea because silent or unclear rules of

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37 Principles Relevant to the Use of Nuclear Power Sources in Outer Space (A/RES/47/68), of Dec. 14, 1992, Principle 8 (‘When activities in outer space involving the use of nuclear power sources are carried on by an international organization, responsibility for compliance with the aforesaid Treaty and the recommendations contained in these Principles shall be borne both by the international organization and by the States participating in it.’).
38 See the text to note 7, above.
the organizations are the norm, other formulations the exception. This ‘rule of interpretation’ may nudge the law into the direction of providing for remedies where they are due. Hopefully this suggestion will not engender a rash of attempts at revising the rules of the international organizations so as to clearly reject any obligations on the part of their members.

When I was a prospective student scouting around the main building of my future alma mater Columbia Law School, I saw an ugly and thus puzzling statue in front of it. I was told by a student guide that was Pegasus, twisted by the force of reason and physical prowess, and that was the image of law. Is this Pegasus statue a good image of the 2011 articles framework on member responsibility?39

When the 2011 articles were being considered by the United Nations General Assembly, differing opinions were voiced. Several States40 expressed support for a concurrent or joint and several responsibility regime. Hopefully in the fullness of time, this member responsibility regime will get a better airing, a better hearing and, ultimately, a better reception, although I am not too optimistic.41

39 There is a peculiar case in which even members of the coalition of the willing in the Iraqi war, thus not of an international organization with independent personality, seemed to have been held by the European Court of Human Rights as not responsible for acts of that coalition. This is the case of Saddam Hussein. He argued that he was under the jurisdiction within the meaning of the European Convention on Human Rights of twenty-one countries, part of the coalition force holding de facto power in Iraq, and asked the Court for remedies under the Convention. Among other things, the Court held that ‘there is no basis in the Convention’s jurisprudence and the applicant has not invoked any established principle of international law which would mean that he fell within the respondent States’ jurisdiction on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.’ ECHR, Decision as to the Admissibility of Application No. 23276/04 by Saddam Hussein (4th section, Mar. 14, 2006). The Court proceeded to rule that it did not consider it to be established that there had been or was any jurisdictional link between the applicant and the respondent States or therefore that the applicant was capable of falling within the jurisdiction of those States, within the meaning of article 1 of the Convention and declared the application inadmissible. Ibid.


41 The recent rejection by the United Nations of claims relating to the cholera outbreak in Haiti possibly due to the fault of UN personnel involved in the assistance programs there (Letter of the UN Legal Counsel to Brian Concannon, Esq., dated Feb. 21, 2013, online at <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>) seems to be additional, weighty evidence showing the need for such a member responsibility regime.