

Fifth Steinkraus-Cohen International Law Lecture:

Holding International Organisations and Their Members to Account

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Part I. The Accountability Gap

1. Holding international organisations to account for their actions is not a new problem. The need for a law of the responsibility of international organizations was recognized in the ILC in the early 1960s, when work was being carried out on the relations between States and intergovernmental organizations. Abdullah El-Erian, Special Rapporteur on Relations between States and Intergovernmental Organizations, said, “the continuous increase of the scope of activities of international organizations [was] likely to give new dimensions to the problem of responsibility of international organizations”,¹ and he was right. On the other hand the ILC’s work on that subject – like its work on treaties of international organizations – was not very successful. There are hidden difficulties in dealing with the law of international organizations at any general level, as we will see.

2. An international organization may be defined as an entity comprised of States—or of States and other international organizations—and having the capacity for separate action at international level. The first international organization is often said to have been the Danube River Commission, established in 1856 and still in existence. The first general multilateral organization was the Universal Postal Union, established in 1874 (under the title of “General Postal Union”)² and likewise still in existence. The creation of international organizations accelerated after 1945. It is difficult to make a complete list, but there are probably more than two hundred international organizations at present. These cover diverse substantive fields – international banks, regional fisheries agencies, river commissions, joint boundary commissions (like the International Joint Commission between the US and Canada), organisations in the field of security (e.g., NATO) and arms control, and so on. From an international legal point of view, even the EU (or more properly the European Communities) is an international organization.

3. It was once thought that States were the only entities with international legal personality—the only entities capable of bearing rights and obligations in the

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¹ A El-Erian, First Report on Relations between States and Intergovernmental Organizations, ILC Ybk 1963/II, 184 (para 172).

² Treaty relative to the formation of a General Postal Union, Berne, 9 October 1874: 147 CTS 136.

international system. And the fact is that during the 19th century, the vast preponderance of activity at international level was State activity. The law of international responsibility, as it took shape in the late 19th and early 20th centuries as a distinct field, reflected this: it was essentially a law of *State* responsibility. Of course States remain the principal legal persons at international level. But in terms of international action their position now is nowhere near exclusive. The proliferation of international organizations has meant that more and more activity at international level is the activity, not of States, but of international organizations.

4. The intensification of international activity in multilateral frameworks has heightened the gap in accountability, of which responsibility is part. Increasingly, major tasks are undertaken, and it may be that major wrongs are committed, collectively. This may be in the framework of “coalitions of the willing”, but if the willing can persuade an international organisation to adopt their cause it will often be under the auspices of an international organisation. Even when the willing kick things off, as they did in Iraq, they very soon discern the need for international cover.

5. This growth of multilateral activity does not pose a particular problem where it is simply a matter of States acting as a coalition outside the framework of an international organization. For example Australia, New Zealand and the United Kingdom acted jointly in the administration of Nauru: they were partners in the British Phosphate Commission and jointly constituted the Administering Authority. The phosphate mining which the BPC conducted and the Administering Authority oversaw on the island degraded the environment. There was neither a problem of legal principle nor of legal mechanism when Nauru sought an account. The three administering powers had remained just that—three separate States, their action in Nauru being co-ordinated but not under the aegis of an international organisation. So Australia could be sued separately in respect of its own conduct.³

6. The problem arises rather where States acting on a multilateral basis have persuaded an international organisation to adopt their cause—or have established an international organisation through which to pursue it. Then it may be the organisation rather than the States that is the actor.

7. For example in the *Tin Council* case, a group of States established an organisation, the Sixth International Tin Council, to control the price of tin. It ended up as a tin ramp, keeping prices high by contractual manipulation. In the end, the support price collapsed; the Tin Council itself became insolvent, and its creditors sued the member States in the English courts, London having been the headquarters of the Council. They failed. According to Lord Templeman:

“These proceedings cannot... be decided by criticism of the conduct of the member states for establishing the I.T.C., or by attaching blame to the member states for the failure of the I.T.C. to prevent the recurring glut and scarcity of tin metal or by condemning the management of the I.T.C. by the member states or by attributing to the operations of the metal exchanges the fall in tin prices which bankrupted the I.T.C., inflicted a loss of the buffer stock which

³ *Case Concerning Certain Phosphate Lands (Nauru v Australia)*, ICJ Rep 1992 p 240, 258-62 (paras 47-55). Nauru and Australia eventually settled the matter: ICJ Rep 1993 p 322 (Order of discontinuance of proceedings).

should have been worth up to £500m. on the member states and caused poverty and unemployment to the producing states. The courts possess neither the evidence nor the authority to pronounce judgment on these matters. International diplomacy and national policy will decide whether the debts of the I.T.C., an international organisation established by treaty, shall be discharged by the member states and, if so, in what manner the burden should be shared.”⁴

Lord Griffiths agreed with the result, while regretting that “the appellants have suffered a grave injustice which Parliament never envisaged at the time legislation was first enacted to enable international organisations to operate under English law.”⁵ Evidently, fixing accountability was even more difficult than fixing tin prices.

8. The problem in the *Tin Council* case was not one of the responsibility of the Council itself. It had separate legal personality and could be sued for its debts through an arbitral procedure established specifically with respect to the organisation. The problem was that the Tin Council could not pay its debts, and its incorporators had allowed it to behave in such a way that if it had been a private commercial entity they would have been liable. In effect the member States had the benefit of corporate personality and limited liability without any of the associated safeguards.

9. Strangely, the legal personality of international organisations took some time to be acknowledged. It was only finally established in 1949 in *Reparation for Injuries suffered in the service of the United Nations*.⁶ This was a case of a claim by the United Nations against a State—not a claim against the United Nations. Count Bernadotte, the Secretary-General’s envoy to Palestine/Israel, had been assassinated by a paramilitary unit for whose conduct Israel was responsible. Israel was not then a Member State. The question was whether the UN was a legal person, at least to the extent that it could bring a claim against Israel for injuries suffered in its service. The Court said as follows:

“[T]he Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is ‘a super-State’, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”⁷

The *Reparation* decision, however, came after the Charter and the Statute of the International Court. So the emergence of a clear position that international organisations are legal persons was late in the development of the architecture of the judicial system of the UN—too late for that system to include provisions on the standing of the UN or of international organisations generally before the ICJ. A major mechanism of State accountability had been established before the issue of the legal personality of the international organization had been definitively settled.

⁴ *Maclaine Watson & Co Ltd v International Tin Council* [1990] 2 AC 418, 482 (Lord Templeman).

⁵ [1990] 2 AC 418, 483. For comment, see R Sadurska and CM Chinkin, “The Collapse of the International Tin Council: A Case of State Responsibility?” (1990) 30 *Virginia JIL* 845.

⁶ ICJ Rep 1949 p 174.

⁷ ICJ Rep 1949 p 174, 179.

10. *Reparation* answered one part of the larger question concerning responsibility of international organisations: could the UN invoke responsibility against a State? It did not deal with claims *against* international organisations for their public acts. Although it cannot have been in doubt at the level of principle, that issue was only addressed by the Court much later, and then by a side-wind, the sting in the tail of the *Cumaraswamy* advisory opinion:⁸ That case concerned immunity, not responsibility – the immunity of United Nations special rapporteurs for statements supposedly made in the course of their functions. But, the Court added, immunity entails responsibility:

“the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.”⁹

11. The structural problem—the problem of implementation—remains both at the national and international level. At the national level, there is general immunity of international organizations before national courts. No comparable doctrine to restrictive state immunity has yet developed for international organisations, and even if it did it would not address the question of accountability for public as distinct from commercial acts.¹⁰ At the international level, systems for implementing responsibility (including the jurisdiction of international courts and tribunals) have been established almost exclusively by reference to States and not international organizations. If the Statute of the International Court had been drafted today, the restrictive implication of Article 35(1) would probably have been avoided. Rather than saying that “[t]he Court shall be open to the States parties to the present Statute”, a latter-day draft would have made provision for international organisations. But amendment procedures are too cumbersome to be an avenue for opening the Court to international organisations.

12. The difficulties can be seen in the manner in which the EC has been brought into the ambit of international judicial procedure in fields such as the WTO and the law of the sea. The participation of the European Communities in the Law of the Sea Conference, in the first instance, was by special invitation of the General Assembly.¹¹ Participation in the WTO is by virtue of Article XI of the Agreement Establishing the WTO. It has been said that the congruence of functions between the WTO and the Communities is the reason for “parallel membership” of the EC member States and the EC itself.¹² In short the inclusion of the EC in international dispute settlement mechanisms has been by *ad hoc* adjustments, equating the EC to a state for the

⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p. 62.

⁹ ICJ Rep 1999 p 62, pp 88-9 (para 66). That responsibility is the flip side of immunity has been noted elsewhere, for example by Italy in comments on the provisionally adopted draft articles on responsibility of international organisations: Comments and observations received from Governments, 6 August 2004, ILC 56th sess, A/CN.4/547, p 13.

¹⁰ See the decisions of the Corte de Cassazione in *Cristiani v Italian Latin-American Institute* (1985) 87 ILR 21, *Minnini v Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies* (1986) 87 ILR 29 and *Sindacato UIL v Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies* (1986) 87 ILR 37.

¹¹ GA res 3067 (XXVIII), 16 November 1973, para 8(a).

¹² C Dominicé, “Co-ordination between universal and regional organizations,” in NM Blokker & HG Schermers, *Proliferation of International Organizations: Legal Issues* (The Hague, Kluwer, 2001) 65, 72-5.

purposes of these treaties but leaving all other international organizations unaffected.¹³

13. Of course some mechanisms have been created for implementing the responsibility of international organisations, and not only in the employment field. Article VIII of the General Convention on Privileges and Immunities of the United Nations requires the UN to establish a dispute settlement mechanism in relation to “disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party” (Article VII).¹⁴ The concern of the Convention is to provide recourse against the UN in respect of contractual and employment disputes. It does not provide any avenue for redress as to the public activities of the Organization. Thus it creates a dualism in terms of UN accountability.

14. At present, so far as the UN itself is concerned, one route to public accountability is through the advisory jurisdiction of the International Court. Another is through the creation of special tribunals. The Court held in the first *UNAT* opinion that the General Assembly could create independent judicial bodies capable of issuing binding decisions, at least in the employment context.¹⁵ But as to the first route, it may be questioned whether a mechanism of accountability will be dependable if it can only be initiated by the very actor that it is hoped to hold to account. And as to the second, no international organization except the EU has created courts or tribunals with competence over issues of extra-contractual liability.

Part II. Filling the Gap

15. So how to fill the gap? Identifying the problem is a first step to solving it. And the problem is difficult to deny: It is not tenable to say that a legal system can do without mechanisms of accountability for a large number of the entities which it is supposed to govern.

16. First of all, there is a role both for moral criticism and legal responsibility. As to the former, criticism can come from the inside. The United Nations has measured its own conduct in certain instances and has found it wanting. The commissions of independent inquiry respecting Rwanda and Srebrenica are cases in point. As to Rwanda final report adopted in December 1999 set out an extensive description of the Rwandan genocide and stated as follows:

“Each part of the [UN system], in particular the Secretary-General, the Secretariat, the Security Council and the Member States of the organisation, must assume and acknowledge

¹³ See generally K Wellens, *Remedies against International Organisations* (Cambridge, Cambridge University Press, 2002); J Klabbbers, *An Introduction to International Institutional Law* (Cambridge, Cambridge University Press, 2002). Cf comments of the European Commission in Comments and observations received from Governments and international organizations, 12 May 2005, ILC 57th sess, A/CN.4/556, p 5: “[T]he European Community cannot be assimilated to a State, even if its institutions can enforce regulations or other European Community acts that are directly applicable in member States’ legal orders.”

¹⁴ Convention on the Privileges and Immunities of the United Nations, 13 February 1946: 1 UNTS 15.

¹⁵ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Rep 1954 p 47, 59-61.

their respective parts of the responsibility for the failure of the international community in Rwanda.”¹⁶

The Report concluded that the genocide was “a failure by the United Nations system as a whole.”

17. A similar inquiry was undertaken with respect to the atrocities at Srebrenica during the Bosnian civil war.¹⁷ In the introduction to the Srebrenica Report, the Secretary-General stated:

“There is an issue of responsibility, and we in the United Nations share in that responsibility... Equally important, there are lessons to be drawn by all of those involved in the formulation and implementation of international responses to events such as the war in Bosnia and Herzegovina. There are lessons for the Secretariat, and there are lessons for the Member States that shaped the international response to the collapse of the former Yugoslavia.”¹⁸

In its judgment of 26 February 2007 in the Bosnian *Genocide* case, the International Court of Justice said that it “gained substantial assistance” from the Report.¹⁹

18. As acknowledgements of the principle that the United Nations can bear responsibility for its acts and omissions, these are significant statements. The reference in the Rwanda report to “the Member States of the organisation” is particularly significant. Yet such steps are suitable only for the occasional *cause célèbre*: they do not amount to a practical mechanism of accountability for the United Nations, much less for international organizations generally.

19. Secondly, some form of internal auditing mechanism can be established. An example is the World Bank Inspection Panel, which provides a mechanism for non-State entities to challenge World Bank lending activities. The Panel has reviewed matters like the China Western Poverty Reduction Project, an irrigation project financed by the World Bank which, it was alleged by Tibetan groups, had adverse environmental impacts on the regions involved.²⁰ Similar systems have been established by some other development banks.²¹

20. Turning to methods of legal recourse as distinct from internal accountability, there is a third possibility, which is that the States which act on behalf of the organization remain responsible themselves for their own conduct. For example the NATO bombing campaign in relation to Kosovo was coordinated by NATO but actually carried out by the air-forces of certain NATO members. It was only in a

¹⁶ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, p 3: S/1999/1257, Annex, 16 December 1999.

¹⁷ Report of the Secretary-General pursuant to Resolution 53/35 of the General Assembly: The Fall of Srebrenica: A/54/549, 15 November 1999.

¹⁸ Ibid, p 6 (para 5).

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, para 230.

²⁰ A Gowlland Gaultieri, “The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel,” (2001) 72 *BYIL* 213, 238-42.

²¹ E Suzuki & S Nanwani, “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks” (2005) 27 *Michigan JIL* 177, 189 refer to the International Finance Corporation, the Multilateral Investment and Guarantee Agency, the EBRD, and the African Development Bank. They also discuss the inspection function within the Asian Development Bank.

certain sense a NATO operation: there was no secondment of air-force personnel to NATO. Stalin one asked of the Pope, “[h]ow many divisions has *he* got?”;²² well, NATO has no air-force divisions of its own. No doubt – as with the Lockerbie sanctions – a binding resolution of a competent body such as the Security Council may justify conduct which would otherwise be internationally wrongful. But the conduct in carrying out the sanctions is still the conduct of the States concerned, and they remain potentially responsible for their own acts in pursuance of multilateral mandates.²³ To what extent they are jointly and severally responsible is another matter, dealt with by Article 47 of the ILC Articles. Recent judicial and arbitral decisions confirm – what Article 47 implies – that joint and several responsibility is very much the exception and not the rule.

21. A fourth possibility is for the consequences of international action carried out on behalf of a State to be internalised by the State itself. A recent example is the 2006 decision of the Constitutional Court of Bosnia and Herzegovina, in the appeal of *Bilbija and Kalinić*.

22. Under the General Framework Agreement, adopted at Dayton, Ohio in 1995, the High Representative is the senior international official in Bosnia and Herzegovina. The exact status of the High Representative, however, is exquisitely unclear – in particular it is quite unclear what entity he is an official of.

23. Bilbija was the deputy head of the Republika Srpska intelligence and security agency in Banja Luka. Kalinić was chairman of the Serb Democratic Party and speaker of the Republika Srpska parliament. The High Representative had issued decisions in June and December 2004 relieving the appellants from their official positions, stripping them of all rights attendant to those positions, and effectively banning them from public life in the Republic.²⁴ The High Representative’s stated reasons were, *inter alia*, that the appellants were “part of the common scheme within Republika Srpska fostering a culture of silence and deceit wherein war crimes indictees are protected from justice” and were “culpable for the failure ... to purge from the political landscape conditions conducive to the provision of material support and sustenance to individuals indicted under Article 19 of the Statute of the International Criminal Tribunal for the former Yugoslavia.” The appellants sought to challenge the decision of the High Representative before the Bosnian courts, which ruled that decisions of the High Representative were not reviewable by any Bosnian court. The High Representative, the courts said, is “not an institution of Bosnia and Herzegovina.” No provision in the Dayton General Framework Agreement or in Bosnian law provides for judicial review of or, for that matter, any legal remedy against, decisions of the High Representative.²⁵ The Constitutional Court confirmed the position, saying, “it follows that there is no effective legal remedy against the

²² Quoted in WS Churchill, *The Gathering Storm* (1948) ch 8.

²³ Thus the ILA Committee on Accountability of International Organizations proposed that “[t]he responsibility of an international organisation does not preclude any separate or concurrent responsibility of a State or of another international organisation which participated in the performance of the wrongful act...” International Law Association, *Report of the Seventieth Conference held in New Delhi 2-6 April 2002* (2002), 797.

²⁴ *Appeal of Bilbija and Kalinić*, Judgment of 8 July 2006, paras 9, 12.

²⁵ *Ibid*, para 10.

decisions of the High Representative available within the existing legal system of Bosnia and Herzegovina.”²⁶

24. But, the Court said, this cannot mean that the responsibility of a member State has been suspended for acts carried out in its jurisdiction:

“The European Convention does not exclude the transfer of competences to international organizations provided that European Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer.”²⁷

Bosnia’s Constitution conferred certain functions on the High Representative. But the Constitutional Court said, such a transfer cannot render conduct carried out pursuant to those functions immune from any form of review. The applicants still had a right to an effective remedy under Article II(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention of Human Rights. According to the Court:

“[A] decision that the authorities of Bosnia and Herzegovina owe positive obligations to the appellant would not affect in any way the decision of the High Representative, or call in question the legal effectiveness of his binding decision to dismiss the appellant from his post. The Constitutional Court accepts the effectiveness of the decision of the High Representative.”²⁸

Thus a clear distinction was posited between the acts of the High Representative and the acts of the authorities of Bosnia and Herzegovina. Acts of the High Representative “would not in any way” be affected by Bosnian judicial determinations—even as those determinations would impose duties of reparation for conduct of the High Representative. The result would appear to be that the valid acts of the High Representative continue to have effect, while violations of European Convention obligations filter down to the State, are, in effect, semi-constitutionalised.

25. It is doubtful whether *Bilbija* is a model for other cases. The situation of the High Representative under the Dayton Agreement is a special one as well as a transitional one; it is as *sui generis* as it is possible to be. And although the High Representative is the designate of an international organization, he acts in only one State. The decision is a thin basis for the proposition that effective responsibility for the acts of international organisations must be assigned *somewhere*. Unless the locus of responsibility is determined—and in a multilateral context that is rarely done in advance—that somewhere may be somewhere over the rainbow.

26. A fifth possibility is to generalise the notion of secondary responsibility of States for the conduct of international organisations, the issue which the House of Lords held non-justiciable in the *Tin Council* case. And that leads me to the recent work of the ILC on responsibility of international organisations.

Part III. Proposals for responsibility of international organisations for their wrongful acts

27. After the ILC completed its work on State responsibility, the General Assembly recommended that the ILC initiate work on responsibility of international

²⁶ Ibid, para 51.

²⁷ Ibid, para 52.

²⁸ Ibid, para 65.

organizations. The ILC added the topic to its current programme or work in 2002. Giorgio Gaja was appointed Special Rapporteur.

28. Thirty draft articles have been submitted to the ILC and provisionally adopted. The first 24 articles are closely modelled after the articles on Responsibility of States for Internationally Wrongful Acts. For example, articles 17 to 24, concerning circumstances precluding wrongfulness, presented by the Special Rapporteur in the 2006 session, correspond to articles 20 to 27 under the same chapter title in the ILC Articles on Responsibility of States for Internationally Wrongful Acts.²⁹

29. Article 25 through 30, however, address a matter of distinct concern relative to the responsibility of international organisations—the responsibility of a State in connection with the act of an international organisation. They are as follows:

Article 25

Aid or assistance by a State in commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 26

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 27

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of that international organization; and
- (b) That State does so with knowledge of the circumstances of the act.

Article 28

International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 29

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

²⁹

Gaja Fourth Report, para 84.

- (a) It has accepted responsibility for that act; or
 - (b) It has led the injured party to rely on its responsibility.
2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Article 30

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.³⁰

30. These provisions seek to prevent a State from hiding behind an international organisation to shield itself from responsibility for internationally wrongful conduct whether committed by the organization itself or by the State in aid or assistance to the organisation. The provisions thus raise fundamental questions; they also raise intriguing issues of interpretation. For example under draft article 28(1), when does an individual State provide an organization with “competence in relation to an obligation”. Does this mean giving the organisation some facility or resource of the State for the purpose of carrying out the act in question? If so it would cover most if not all cases of the use of force, short of outright secondment.

31. Draft article 29(1)(a) resembles the adoption of conduct provisions seen already in the Article 11 of the ILC Articles on State Responsibility. But it Draft article 29(1)(b) goes considerably further; it covers the case where the State “has led the injured party to rely on its responsibility”.

32. So far governments have been surprisingly reticent in response to these provisional texts. One comment was that of Poland:

“current international practice does not indicate the existence of any rules of general (customary) international law showing a clear solution of the question posed. It seems, therefore, that the International Law Commission must propose a rule expressing a progressive development of international law. That rule must be drafted very carefully, and prima facie it will be relatively casuistic.”³¹

33. Organizations have had a bit to say, but again not much. The Organization for the Prohibition of Chemical Weapons called the matter one of “considerable practical significance,” even as the “legal situation is not entirely clear.”³² INTERPOL thought that “[s]ingling out the responsibility of States for the wrongful acts of international organizations could prove to be unjustifiably selective.”³³ INTERPOL also raised the problem of States abandoning an organization—and leaving creditors with an empty tin.³⁴ An alternate route to filling the accountability gap would be to provide for derivative or secondary liability of the member States by way of special rules in the constitutive instruments of international organisations; INTERPOL cited the case of article 300(7) of the EC Treaty, which provides that agreements of the European

³⁰ Fourth Report, para 90.

³¹ Comments and observations received from Governments, 6 August 2004, ILC 56th sess, A/CN.4/547, 9.

³² Ibid, 15.

³³ Ibid, 10.

³⁴ Ibid, 11-12.

Community are binding on both Community institutions and on member States.³⁵ But as I read it, Article 300(7) has nothing to do with secondary responsibility.

Conclusions

34. To summarise, when international organisations were merely forums for state activity, responsible for preparing agendas but not implementing them, the problem of their accountability could be and was largely ignored. Now however the position has changed, at least for some organisations some of the time. For example the 2005 UN peacekeeping budget was US\$4.47 billion. This was more than the military expenditures in the same period of Belgium (US\$3.9 billion), Denmark (US\$3.1 billion), Indonesia (US\$2.6 billion USD), Ukraine (US\$1.6 billion USD), Argentina (US\$1.6 billion) or South Africa (US\$2.7 billion).³⁶ Yet Germany felt able to say, in an initial response to the ILC, that “In Germany’s opinion, there is no customary international law on the responsibility of international organizations.”³⁷ *Prima facie* this is a surprising remark. There is lots of customary law on State responsibility, and the action of international organizations is by definition linked to the actions or omissions of States. An alternative reading of the situation is that responsibility will out, and that the problem is not going to go away by categorical denials. But it remains to be seen which if any of the various solutions I have outlined will be adopted, and in what combinations.

³⁵ Ibid, 12.

³⁶ See SIPRI Military Expenditure Database (http://first.sipri.org/non_first/milex.php); United Nations Peacekeeping Operations Background Note, 31 March 2005 (<http://www.un.org/peace/bnote010101.pdf>).

³⁷ A/CN.4/556, 12 May 2005, 47. Germany furnished a description of the treatment of responsibility under various international organizations, noting, for example, that the multilateral development banks limit responsibility to the member States’ financial shares paid into and payable to the institutions. *ibid*, 48.