

**ENHANCING ACCOUNTABILITY AT THE  
INTERNATIONAL LEVEL: THE TENSION  
BETWEEN INTERNATIONAL ORGANIZATION  
AND MEMBER STATE RESPONSIBILITY AND THE  
UNDERLYING ISSUES AT STAKE**

*Ralph Wilde\**

I.	INTRODUCTION .....	396
II.	THE CONVENTIONAL POSITION IN INTERNATIONAL LAW: EXCLUSIVE INTERNATIONAL ORGANIZATION RESPONSIBILITY .....	401
III.	THE COMPETING POLITICAL ISSUES AT STAKE AND THE BALANCE STRUCK BETWEEN THEM IN THE RATIONALE FOR THE LEGAL POSITION .....	404
	A. <i>Policy Issue 1: The Operation of International Organizations</i> .....	404
	B. <i>Policy Issue 2: Accountability</i> .....	405
	C. <i>Maintaining Lack of Member State Responsibility and Enhancing the Accountability of International Organizations</i> .....	406
IV.	PROBLEMS WITH THE CURRENT SETTLEMENT .....	408
	A. <i>Lack of Remedies Against International Organizations</i> .....	408
	B. <i>The Prospects for Greater International Organization Accountability</i> .....	411
	C. <i>Revisiting the Settlement and Introducing a Contingent Factor</i> .....	412
	D. <i>The Limits of the Contingency Model</i> .....	413
V.	CONCLUSION .....	414

---

\* Reader, Faculty of Law, University College London, University of London, [www.ucl.ac.uk/laws/wilde](http://www.ucl.ac.uk/laws/wilde). Thanks to Dr. Silvia Borelli for research assistance. This work was supported by a Leverhulme Trust Research Fellowship. This article is a revised version of remarks presented at the American Branch of the International Law Association International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20–22, 2005.

## I. INTRODUCTION

Since 1945, international organizations have come to play a major role in international and national affairs. All states (apart from the Vatican City) are members of the United Nations and subject to the binding resolutions of the Security Council, such as the series of resolutions imposing a broad range of obligations relating to activities prescribed as 'terrorist';<sup>1</sup> many states are subject to the jurisdiction of international courts and tribunals, from the WTO dispute settlement process to the International Tribunal on the Law of the Sea.<sup>2</sup> Since 1945 international organizations have often been involved in the arena of military action, whether in providing legal authority, such as the Iraq war in 1991,<sup>3</sup> or conducting operations on the ground, from all-out military campaigns such as the NATO bombing of the then Federal Republic of Yugoslavia (FRY) in 1999,<sup>4</sup> to peace operations such as the United Nations Mission in Ethiopia and Eritrea (UNMEE) stationed at the Ethiopia-Eritrea border.<sup>5</sup>

For those states that become the target for concerted international intervention, the power wielded by international organizations can be acute, especially in circumstances where international organizations assert administrative prerogatives over territory.<sup>6</sup> Bosnia and Herzegovina, for example, has been subject to a UN-authorized regime of military occupation by NATO (from 1995 to 2004 through SFOR, formerly IFOR)<sup>7</sup> and then the European Union (through the EU Force in Bosnia and Herzegovina (EUFOR), since December

---

1. See, e.g., S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333 U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1373 U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1390 U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1455 U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617 U.N. Doc. S/RES/1617 (July 29, 2005).

2. See generally PHILIPPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* (1999).

3. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

4. See the information contained in the *Legality of Use of Force* cases before the International Court of Justice (ICJ), available at <http://www.icj-cij.org/icjwww/iddecisions.htm> (last visited Mar. 9, 2006).

5. On the United Nations Mission in Ethiopia and Eritrea (UNMEE), see <http://www.un.org/Depts/dpko/missions/unmee> (last visited Nov. 5, 2005).

6. On the range of projects involving the administration of territory by international organizations since the beginning of the League of Nations, see e.g., R. Wilde, *From Danzig to East Timor and Beyond: the Role of International Territorial Administration*, 95 AM. J. INT'L L. 583 (2001) [hereinafter Wilde 2001].

7. See S.C. Res. 1031 U.N. Doc. S/RES/1031 (Dec. 15, 1995) (discussing the establishment of a multinational implementation force (IFOR)); S.C. Res. 1088 U.N. Doc. S/RES/1088 (Dec. 12, 1996) (discussing authorization of the establishment of a multinational stabilization force (SFOR) as legal successor to IFOR); see also the NATO IFOR and SFOR websites: <http://www.nato.int/ifor/ifor.htm> (last visited Nov. 5, 2005) and <http://www.nato.int/sfor> (last visited Nov. 5, 2005).

2, 2004)<sup>8</sup> and partial administration by a range of different international structures, from the *sui generis* international organization called the Office of the High Representative, which asserts the power to dismiss elected officials and impose laws,<sup>9</sup> to foreign nationals appointed by international organizations sitting as members public bodies, such as the three members of the Constitutional Court appointed by the President of the European Court of Human Rights,<sup>10</sup> and an OSCE-run electoral system, which operated from 1996 to 2004.<sup>11</sup>

More recently, international organizations in general, and the United Nations in particular, have been placed under greater critical scrutiny, as reflected in the UN reports on the failure to prevent the 1993 genocide in Rwanda<sup>12</sup> and the July 1995 genocide in Srebrenica,<sup>13</sup> the outcry that followed evidence of involvement of UN peacekeepers in trafficking and forced prostitution<sup>14</sup> and the misuse of funds and corruption relating to the Oil for

---

8. See S.C. Res. 1575, U.N. Doc. S/RES/1575 (Nov. 22, 2004). See also the EUFOR website, <http://www.euforbih.org/index.html> (last visited Nov. 5, 2005).

9. On OHR in Bosnia and Herzegovina, see, e.g., Wilde, *supra* note 6, at 584 n.4 & 8, 585 n.10, 594–96, 599–601, sources cited therein and accompanying text

10. On the international appointments in Bosnia and Herzegovina, see, e.g., Wilde, *supra* note 6, at 584 n.9 sources cited therein and accompanying text, 597, 599.

11. On the OSCE's role in operating the electoral system in Bosnia and Herzegovina, see, e.g., Wilde, *supra* note 6, text accompanying note 91 and sources cited therein. On the first entirely locally-run elections in Bosnia and Herzegovina since Dayton, see, e.g., Bosnia's Nationalists Lead Poll, BRITISH BROADCASTING CORPORATION (BBC), Oct. 3, 2004, available at <http://news.bbc.co.uk/1/hi/world/europe/3709340.stm> (last visited Mar. 22, 2006).

12. See Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, contained in the Letter dated Dec. 15, 1999 from the United Nations Secretary-General addressed to the President of the United Nations Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

13. See United Nations Secretary-General, *Report pursuant to General Assembly Resolution 53/35, The fall of Srebrenica*, U.N. Doc. A/54/549 (Nov. 15, 1999), available at <http://www.un.org/peace/srebrenica.pdf> (last visited Mar. 9, 2006). In its 2004 judgment, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia convicted Radislav Krstic, at the time of the massacre the Chief of Staff and, subsequently, the Commander of the Drina Corps, a formation of the Bosnian Serb Army whose zone of responsibility covered the Srebrenica area, of genocide, thereby providing the first judicial determination that the Srebrenica massacre constituted genocide. See *Prosecutor v. Krstic*, Case No. IT-98-33, Judgment, ¶¶ 353, 688 (Aug. 2, 2004), available at <http://www.un.org/icty/krstic/TrialC1/judgement/index.htm> (last visited Mar. 22, 2006).

14. See, e.g., United Nations Office of Internal Oversight Services, *Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa*, U.N. Doc. A/57/465 (Oct. 11, 2002); United Nations Office of Internal Oversight Services, *Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, U.N. Doc. A/59/661 (Jan. 5, 2005); Prince Zeid Ra'ad Zeid al-Hussein, Special Advisor to the United Nations Secretary-General, A

Food Programme in Iraq which ran from 1996 to 2003.<sup>15</sup> This more critical climate has extended to the ever-expanding activities of the Security Council; for example, in its report of 2004, the expert UN High-level Panel raised concerns with the “terrorist list” which is used by the Council’s so-called 1267 Committee to denominate the individuals and organizations in relation to whom member states are obliged to take certain actions (*e.g.* freezing assets) under some of the aforementioned terrorism resolutions.<sup>16</sup> According to the High-level Panel:

The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raises serious accountability issues and possibly violate fundamental human rights norms and conventions.<sup>17</sup>

---

*comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, U.N. Doc. A/59/710 (Mar. 24, 2004) [hereinafter Report of the S-G’s Special Advisor]; HUMAN RIGHTS WATCH, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION (Nov. 9, 2002), available at <http://www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf> (last visited Mar. 9, 2006).

15. The Oil-for-Food Programme was established by S.C. Res. 986 (1995), UN Doc. S/RES/986 (Apr. 14, 1995); the implementation of the programme started in December 1996, after the signing of the Memorandum of Understanding between the United Nations and the Government of Iraq on 20 May 1996 (U.N. Doc. S/1996/356 (May 20, 1996)). On the phasing down and termination of the Programme, see S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003). See also U.N. OFFICE OF THE IRAQ PROGRAM—OIL-FOR-FOOD, <http://www.un.org/Depts/oip/index.html> (last visited Nov. 5, 2005). The allegations of mismanagement and corruption in the context of the Oil-for-Food Programme have been recently confirmed by the Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on the Management of the United Nations Oil-for-Food Programme* (Sept. 7, 2005), available at [http://www.iic-offp.org/Mgmt\\_Report.htm](http://www.iic-offp.org/Mgmt_Report.htm) (last visited Nov. 5, 2005). See also Press Release, Secretary-General’s statement to the Security Council on receipt of the Independent Inquiry Committee (IIC) report on Oil-for-Food, available at <http://www.un.org/apps/sg/sgstats.asp?nid=1657> (last visited Mar. 9, 2006).

16. The obligations so imposed on Member states include freezing the assets of listed individuals or groups, preventing the entry into or the transit through their territories of listed individuals, and preventing the direct or indirect supply, sale and transfer of arms and military equipment to the individuals or groups included on the list. See S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333 U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1390 U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1455 U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617 U.N. Doc. S/RES/1617 (July 29, 2005). The implementation of these obligations is supervised by the so-called ‘1267 Committee’. On the Committee, see UNITED NATIONS, SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267, <http://www.un.org/Docs/sc/committees/1267Template.htm> (last visited Nov. 5, 2005).

17. Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 152, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel Report]. See also Case T-315/01 *Kadi v. Council and Commission*, European Court of First Instance, Sept. 21, 2005.

In the academy, this shift towards a more critical approach is reflected the decision of the International Law Association (ILA) to create an international research Committee on the “Accountability of International Organizations,” which completed its work in 2004.<sup>18</sup>

UN reform measures and proposals relating to accountability, including those agreed at the Summit of the General Assembly in 2005, essentially concern internal administrative measures, for example strengthening internal oversight mechanisms including the Office of Internal Oversight Services (OIOS),<sup>19</sup> creating a new Oversight Committee to co-ordinate internal accountability mechanisms,<sup>20</sup> introducing a new internal Office of Ethics,<sup>21</sup> and strengthening staff codes of conduct and disciplinary measures.<sup>22</sup> This internal, administrative approach is reflected in the High-level Panel’s prescription for addressing the aforementioned accountability concerns it raised in relation to the terrorist list maintained by the Security Council’s 1267 Committee:<sup>23</sup>

The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.<sup>24</sup>

---

18. See INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF THE COMMITTEE ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS (2004) [hereinafter ILA IO Accountability Report] and Resolution No. 1/2004, both available at [http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm) (last visited Mar. 22, 2006) (follow the ‘Accountability of International Organizations’ link). For further academic debate on the accountability of international organizations, see the academic sources cited *infra* in notes 26 and 59.

19. On mandate, composition and functioning see United Nations Office of Internal Oversight Services (OIOS) website, <http://www.un.org/depts/oios> (last visited Mar. 22, 2006); see also G.A. Res. 48/218B, U.N. Doc. A/RES/48/218B (July 29, 1994); G.A. Res. 54/244, U.N. Doc. A/RES/54/244 (Dec. 23, 1999); G.A. Res. 59/272, U.N. Doc. A/RES/59/272 (Dec. 23, 2004). The 2005 World Summit Outcome (recommended, *inter alia*, that “[t]he expertise, capacity and resources of the Office of Internal Oversight Services in respect of audit and investigations . . . be significantly strengthened as a matter of urgency.”) See G.A. Res. 60/1, ¶ 164(a), U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter 2005 World Summit Outcome].

20. See generally the Report of the United Nations Secretary-General, *Measures to strengthen accountability at the United Nations*, U.N. Doc. A/60/312, ¶¶ 24–28 (Aug. 30, 2005) [hereinafter S-G Report on accountability]; 2005 World Summit Outcome, *supra* note 19, ¶ 164 (c).

21. See generally S-G Report on accountability, *supra* note 20, ¶ 40; see also 2005 World Summit Outcome, *supra* note 19, ¶ 161 (d).

22. See, e.g., G.A. Res. 59/287, ¶ 16, U.N. Doc. A/RES/59/287 (Apr. 13, 2005); UNITED NATIONS, DEPARTMENT OF PEACEKEEPING OPERATIONS, HUMAN TRAFFICKING AND UNITED NATIONS PEACEKEEPING, ¶¶ 20–23 (2004); Report of the S-G’s Special Advisor, *supra* note 14, ¶¶ 68–71.

23. On the Committee, see *supra* note 16.

24. High-Level Panel Report, *supra* note 17, ¶ 152.

The only external, judicial measure being contemplated relates to individual not UN responsibility, concerning the greater use of criminal jurisdiction, with waivers of immunity if necessary, to enable the prosecution of peacekeepers.<sup>25</sup>

The possibilities of using international and national structures to bring the UN and other international organizations to account for their actions are limited when compared to such possibilities existing with respect to states.<sup>26</sup> In the absence of effective legal remedies against international organizations directly, attempts continue to be made to sue the member states, from the *Tin Council* litigation of the 1980s<sup>27</sup> to the cases brought to the International Court of Justice

25. See, e.g., Report of the S-G's Special Advisor, *supra*, note 14, ¶¶ 78–90; S-G Report on accountability, *supra* note 20, ¶ 49.

26. On the issue of remedies against international organizations see, e.g., KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS (2002); James Crawford, *The Charter of the United Nations as a Constitution*, in THE CHANGING CONSTITUTION OF THE UNITED NATIONS 3, 12–15 (Hazel Fox ed., 1997); Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. 12 (Apr. 26); Difference Relating to Immunity from Process of a Special Rapporteur, 1999 I.C.J. 62 (Apr. 29) (hereinafter Special Rapporteur Case); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 14–22 (Oct. 2, 1995); ILA IO Accountability Report, *supra* note 18, § 4. On the supervision of the Security Council by the International Court of Justice see Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K., Libya v. U.S.A.), Provisional Measures, 1992 I.C.J. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K., Libya v. U.S.A.), Preliminary Objections, 1998 I.C.J. 9 (Feb. 27); and the following commentary: T. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality*, 86 AM. J. INT'L L. 321 (1992); V. Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994); B. Graefrath, *Leave to the Court what belongs to the Court: The Libyan Case*, 4 EUR. J. INT'L L. 184 (1993); C. Tomuschat, *The Lockerbie Case before the International Court of Justice*, 48 REVIEW OF THE INTERNATIONAL COMMISSION OF JURISTS 38 (1992); D. Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMP. L.Q. 309 (1997). On remedies in the context of international territorial administration, see, e.g., R. Wilde, *Accountability and International Actors in Bosnia, Kosovo and East Timor*, 7 ILSA J. INT'L & COMP. L. 455 (2001); R. Wilde, *The complex role of the legal adviser when international organizations administer territory*, AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 95TH ANNUAL MEETING 251 (2001); Case U9/00 (Constitutional Court of Bosnia; 20951; 20951 and Herzegovina) (Nov. 3, 2000) (evaluating the Law; 20963; 20963 on State Border Service; 20967; 20967), available at [www.hrc.ba](http://www.hrc.ba) (last visited Mar. 22, 2006). On the law applicable to international organizations, see the sources cited *infra* note 59 and accompanying text.

27. *Maclaine Watson & Co. v. Department of Trade and Industry and related appeals*, Re International Tin Council; *Maclaine Watson & Co Ltd v International Tin Council*; *Maclaine Watson & Co Ltd v. International Tin Council (No 2)* [1988] 3 All ER 257 (Court of Appeal) (hereinafter Tin Council cases (CA)); [1990] 2 AC 418, [1989] 3 All ER 523, 81 I.L.R. 670 (1989) (House of Lords) (hereinafter Tin Council cases (HL)). For commentary, see, e.g., C. Warbrick and I. Cheyne, *The International Tin Council*, 36 INT'L & COMP. L.Q. 931 (1987); I. Cheyne, *The International Tin Council*, 38 INT'L & COMP. L.Q. 417 (1989); I. Cheyne, *International Tin Council (3)*, 39 INT'L & COMP. L.Q. 945 (1990).

and the European Court of Human Rights concerning the 1999 NATO bombing campaign.<sup>28</sup> However, the view of most international lawyers, affirmed in the *Tin Council* cases and endorsed by the *Institut de droit international*, is that member states of an international organization do not incur legal liability for the acts of the organization act by virtue of their membership of it.<sup>29</sup> However, some accept that member state responsibility might be in order if effective remedies against international organizations are lacking.<sup>30</sup>

This piece revisits the long-standing member-state-responsibility issue to consider how advocates of the current legal position on it, and those who countenance the possibility of recourse to member state responsibility, understand the relationship between the two key policy issues at stake: the effective functioning of international organizations, on the one hand, and the promotion of accountability, on the other. I will suggest that both approaches fail to accord due weight to the need for greater support generally by states for enhanced scrutiny of international public policy.

## II. THE CONVENTIONAL POSITION IN INTERNATIONAL LAW: EXCLUSIVE INTERNATIONAL ORGANIZATION RESPONSIBILITY

The traditional approach to the law of international organizations conceals the tension between international organization and individual state responsibility, by conceiving responsibility for the acts of the organization (if a distinct legal person, as with the United Nations) exclusively in terms of the organization itself, not also the individual member states.

In international law, many important international organizations including the UN enjoy distinct legal personality, separate from the legal personalities of their member states.<sup>31</sup> In other words, legally, they are more than the sum of their (state) parts. A corollary to this idea is that the distinct legal person is responsible for the organization's acts.<sup>32</sup> In consequence, when member states

---

28. See the eight similar cases on *Legality of Use of Force* brought by Serbia and Montenegro against the states involved in the military campaign, cited in *supra* note 4). See also *Banković v. Belgium and 16 Other Contracting States*, Eur. Ct. H.R., Admissibility decision, Dec. 12, 2001, *reprinted in* 41 I.L.M. 517 (2002).

29. See discussion and sources cited *infra*, Part 2.

30. See discussion and sources cited *infra*, Part 4(c).

31. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, at 179 (Apr. 11) [hereinafter *Reparation for Injuries*].

32. See *Reparation for Injuries*, *supra* note 31; Special Rapporteur case, *supra* note 26, at ¶ 66. The United Nations International Law Commission (ILC) is currently considering the topic of responsibility of international organizations. For the Reports of the Special Rapporteur, Professor Giorgio Gaja, see First Report on Responsibility of International Organizations, UN doc. A/CN.4/532 (2003); Second Report on Responsibility of International Organizations, UN doc. A/CN.4/541 (2004) Third Report on Responsibility of International Organizations, UN doc. A/CN.4/553 (2005). For consideration of the matter by the ILC, see

perform certain acts as part of the structure of the international organization—for example voting in the UN Security Council—as a matter of law these acts are not state acts at all, but rather form part of the process of the organization, for which the organization is responsible. Similarly, when states act on behalf of the organization, and in the organization's name, as a matter of law these are acts of the organization.

This situation might be denigrated as a “legal fiction” when compared with the idea of state responsibility, but of course the concept of the state, and the idea that state representatives engage the legal responsibility when they perform acts in an official capacity, also involves imputing legal personality to an abstract entity rather than a real person.<sup>33</sup> Most international lawyers accept the concept of legal personality and the correlative notion of distinct legal responsibility on the part of international organizations; disagreement exists, however, on the question of whether in addition to international organization responsibility, member states are also liable for the acts of the organization—in a secondary or concurrent manner—by virtue of their membership.

A minority of academic commentators have suggested that there is a general rule of international law providing for such member state responsibility. Such suggestions have been made in two main ways. In the first place, commentators highlight the absence in international law of specific norms providing for limited liability on the part of international organizations, a position at odds with the treatment of corporations by many municipal legal systems. It is argued that in the absence of such norms, member states are secondarily responsible.<sup>34</sup> This argument is challengeable on the grounds that the absence of positive rules providing for limited liability is matched by the absence of such rules providing for secondary liability. Even if, then, there is a *lacuna* in the law, it is not by itself capable of leading to a conclusion of either secondary or limited liability.<sup>35</sup> Moreover, whether in this respect the position of corporations in municipal law is analogous to the position of

---

Report of the International Law Commission on the work of its fifty-seventh session (May 3 to June 3 and July 11 to Aug. 5, 2005), UN doc. A/60/10 (May 2, 2005), Chapter V.

33. Certain ‘official’ acts can also give rise to individual criminal responsibility in international law. See generally ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* (2003).

34. See HENRY G. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* 780 (2nd ed. 1980) and the discussion in Rosalyn Higgins, Report on the Legal Consequences for Member States of the Non-fulfillment by International Organizations of their Obligations toward Third Parties 66 (1995) *ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL*, vol. I, 252 [hereinafter Higgins 1995], at 266-7; see also IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* 119–20 (1987) [hereinafter Seidl-Hohenveldern].

35. See Higgins 1995, *supra* note 34, at 270, 286.

international organizations in international law is not to be assumed, as this argument seems to suggest.<sup>36</sup>

In the second place, it has been suggested that the presence of limited liability clauses in the constitutions of some international organizations<sup>37</sup> implies that for those constitutions without such clauses, as in the case of the UN Charter, member states would be liable for the acts of the relevant organizations. Thus the clauses modify a general rule of international law providing for member state liability. However, such clauses could merely reflect uncertainty about the state of international law, and/or be motivated by a desire to warn third parties about where liability would lie.<sup>38</sup> In the absence of a detailed examination of the *travaux préparatoires* of all the organizations with such clauses, and a consideration of the overlap of membership of such organizations with other organizations constituted without exclusion clauses, the significance of such clauses in terms of identifying a general rule of secondary liability is unclear.<sup>39</sup>

These two arguments have traditionally formed the exclusive basis for considering the possibility of secondary or concurrent state liability,<sup>40</sup> and their weakness has led most commentators and judicial authorities to hold with a general proposition of non-liability.<sup>41</sup> This majority view, endorsed by the *Institut de droit international* following the report of then Professor Rosalyn Higgins, is that there is no general principle of international law whereby the member states of the organization involved incur legal liability in consequence of the acts of international organizations by virtue of their membership of such organizations.<sup>42</sup> Such liability can only subsist if the constituent instruments of

---

36. See *id.* at 267, 287.

37. For such exclusions, see the discussion in Higgins 1995, *supra* note 34, at 271–72 and Sir Ralph Gibson in the Tin Council cases (CA), *supra* note 27, [1988] 3 All ER 257, at 354.

38. Tin Council Cases (CA), *supra* note 27, [1988] 3 All ER 257, 354–55; Higgins 1995, *supra* note 34, at 267, 271–73.

39. Higgins 1995, *supra* note 34, at 273.

40. An argument has also been made that certain international organizations enjoy legal personality that is only 'subjective,' viz. opposable only to member states, and not 'objective,' viz. opposable to non-member states; because of this, member states are responsible for the acts of the organization as far as non-member states are concerned. See the discussion in *id.* at 274–76.

41. See Tin Council cases (HL), *supra* note 27, 81 I.L.R. 670 (1989), at 679–81 (Lord Templeman); 710–15 (Lord Oliver).

42. See Tin Council Cases (CA) and Tin Council Cases (HL), *supra* note 27. See generally Higgins 1995, *supra* note 34; INSTITUT DE DROIT INTERNATIONAL, RESOLUTION, THE LEGAL CONSEQUENCES FOR MEMBER STATES OF THE NON-FULFILMENT BY INTERNATIONAL ORGANIZATIONS OF THEIR OBLIGATIONS TOWARD THIRD PARTIES (1995) available at [http://www.idi-iil.org/idiE/navig\\_chon1993.html](http://www.idi-iil.org/idiE/navig_chon1993.html) (last visited Oct. 9, 2005) [hereinafter Institut Resolution].

the international organizations explicitly provide for it, something which, as mentioned, the UN Charter does not do in the case of the UN.<sup>43</sup>

Is this a politically supportable position?

### III. THE COMPETING POLITICAL ISSUES AT STAKE AND THE BALANCE STRUCK BETWEEN THEM IN THE RATIONALE FOR THE LEGAL POSITION

When the *Institut de droit international* drew its conclusion as to the absence of a general rule of member state responsibility, it did so having taken into account the two main competing political issues at stake, which it described thus: “the tensions existing between the importance of the independent responsibility of international organizations on the one hand, and the need to protect third parties dealing with such international organizations, on the other hand”.<sup>44</sup>

These competing principles might be understood in terms of the effective operation of international organizations, on the one hand, and accountability, on the other. How have these principles and the effect on them of member state responsibility been understood in international legal discourse? How was an outcome excluding such responsibility reached on the basis that it accommodated both principles?

#### A. Policy Issue 1: The Operation of International Organizations

The first key political issue at stake concerns, in the words of then Professor Higgins, “the efficient and independent functioning of international organizations.”<sup>45</sup>

The *Institut* describes the principle thus: “support for the credibility and independent functioning of international organizations and for the establishment of new international organizations.”<sup>46</sup>

Member state responsibility as traditionally understood is seen as undermining this principle. Professor Higgins points out that:

... if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree

---

43. See Institut Resolution, *supra* note 42, at art. 5; Higgins 1995, *supra* note 34, at 273–74; see also ROSALYN HIGGINS, PROBLEMS AND PROCESS INTERNATIONAL LAW AND HOW WE USE IT 47 (Clarendon Press 1994).

44. Institut Resolution, *supra* note 42, at pml. (emphasis in original).

45. Higgins 1995, *supra* note 34, at 288.

46. Institut Resolution, *supra* note 42, at art. 8.

of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership.<sup>47</sup>

Here, then, we see a potential problem caused by conceiving member state responsibility for the acts of international organizations: paralysis within existing organizations, with consensus required for every decision, and states reluctant to create and support new international organizations in the future out of a fear of running the risk of liability for future acts they may not be able to control. Such responsibility necessarily contradicts the nature of those international organizations conceived in a manner whereby all member states are not necessarily able to control all the acts of the organization, for example when decisions are taken by the Security Council.

### B. Policy Issue 2: Accountability

The functional effectiveness principle is only one half of the picture, however. On the other hand, we have what might be regarded as the accountability principle. In the first place, as Professor Higgins states, third parties should be protected: “from undue exposure to loss and damage, not of their own cause, in relationships with [international] . . . organizations.”<sup>48</sup>

Here the focus is on those affected by the actions of international organizations, who should be provided with legal redress when such actions lead them to suffer harm or some other loss. This victim-orientated approach leads to the related violator-orientated approach of avoiding impunity, promoting the notion that, in the words of Professor Seidl-Hohenveldern: “a state cannot escape its responsibility under international law by entrusting to another legal person [e.g., an international organization] the fulfillment of its international obligations.”<sup>49</sup>

Professor Brownlie argues that “a State cannot by delegation [e.g., to an international organization] . . . avoid responsibility for breaches of its duties under international law. . . . This approach of public international law is not ad hoc but stems directly from the normal concepts of accountability and effectiveness.”<sup>50</sup>

---

47. Higgins 1995, *supra* note 34, at 288.

48. *Id.*

49. Seidl-Hohenveldern, *supra* note 34, at 121, quoted in Higgins 1995, *supra* note 34, at 269.

50. I. Brownlie, *State Responsibility: the Problem of Delegation*, in VÖLKERRECHT ZWISCHEN NORMATIVEN ANSPRUCH UND POLITISCHER REALITÄT. FESTCHRIFT FÜR KARL ZEMANEK, ZUM 65 GEBURTSTAG 300–01 (Konrad Ginther *et al.* eds., 1994), quoted in INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS, REPORT OF THE SEVENTIETH CONFERENCE HELD IN NEW DELHI, 2–6 APRIL 2002 (2002), available at <http://www.ila->

Similarly, in two cases before the European Court of Human Rights, the Court stated that:

where States establish international organizations . . . there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.<sup>51</sup>

In one of the English cases concerning the collapse of the International Tin Council (ITC), an international organization, and the possibility of obtaining remedies from member states of the organization, Lord Justice Nourse stated that “international law would surely presume that states which were willing to join together in such an enterprise [creating an international organization] would intend that they should bear the burdens together no less than the benefits.”<sup>52</sup>

These twin principles—that third parties affected by the acts of international organizations should be given redress, and that states should not be able to evade legal responsibility by transferring competences to international organizations—would clearly be supported if member states were made legally responsible for the acts of organizations of which they are a member.

### *C. Maintaining Lack of Member State Responsibility and Enhancing the Accountability of International Organizations*

How are the two policy issues outlined above accommodated by the traditional position excluding member state responsibility? Certainly such a position promotes the first policy objective of ensuring the effective functioning of international organizations or, rather, fails to undermine this objective, accepting, of course, the assumption that member state responsibility would

---

hq.org/html/main\_listofcomm\_accountability.htm (last visited Mar. 9, 2006) [hereinafter ILA Report] text accompanying note 65.

51. *Beer & Reagan v. Germany*, App. No. 28934/95, Judgment of Feb. 18, 1999, ¶ 57 (1999), available at <http://www.echr.coe.int/eng> (last visited Mar. 22, 2006). *Waite & Kennedy v. Germany*, App. No. 26083/94, Judgment of Feb. 18, 1999, ¶ 67 (1999), available at <http://www.echr.coe.int/eng>. This principle was invoked (by way of application, *mutatis mutandis*, to the creation of treaty obligations, in *T.I. v. United Kingdom*, App. No. 43844/98 (2000), Admissibility Decision, Mar. 7, 2000, available at <http://www.echr.coe.int/eng> (last visited Mar. 22, 2006).

52. *Tin Council* cases (CA), *supra* note 27, [1988] 3 All ER 257, at 333 (Nourse LJ).

indeed have such an undermining effect were it to be introduced. Thus the *Institut de droit international* resolved that

[I]mportant considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of international organizations.<sup>53</sup>

However, those supporting this position do not do so by disregarding the accountability principle; they do not conclude that the effective functioning of international organizations trumps the need to ensure accountability. Rather, they seek to promote accountability through alternative means: greater safeguards for third parties operating in relation to international organizations directly. Professor Higgins argues that “a variety of protective measures should properly be taken—whether insurance, or the demand of specific ad hoc guarantees from members, or other measures . . .”<sup>54</sup> and the *Institut* concludes that:

Important considerations of policy entitle third parties to know, so that they may freely choose their course of action, whether, in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the organization alone or also of the members jointly or subsidiarily. Accordingly, an international organization should specify the position regarding liability

- 1) in its Rules and contracts;
- 2) in communications made to the third party prior to the event or transaction leading to liability; or
- 3) in response to any specific request by any third party for information on the matter.<sup>55</sup>

This approach was formulated in the backdrop of the series of cases before the English courts arising out of the collapse of the ITC mentioned above. These cases concerned contracts freely entered into by private contractors with the ITC. Such a “safeguarding” approach is inappropriate, however, in circumstances where third parties have not chosen the transaction in question—for example when individuals are subject to the control of international

---

53. Institut Resolution, *supra* note 42, at art. 8.

54. Higgins 1995, *supra* note 34, at 288.

55. Institut Resolution, *supra* note 42, at art. 9.

organizations in field operations authorized by Security Council resolutions passed under Chapter VII of the UN Charter, or, more broadly, where the UN fails to act to prevent human rights atrocities, as in Srebrenica and Rwanda.<sup>56</sup> In the case of the conduct of territorial administration by the UN, individuals are placed under the control of international organizations regardless of whether they have accepted such control in the light of the remedies available to them.<sup>57</sup>

Whereas in transactions that are freely entered into, adequate remedies for third parties would not necessarily be required—the key requirement being transparency as to the nature of remedies, so that an informed decision can be made—for transactions that are imposed, adequate remedies are arguably necessary. In the case of a failure to protect, being “on notice” of a lack of responsibility is beside the point; the idea here is that there should be a responsibility to take effective action.<sup>58</sup>

The underlying rationale for the lack of member state responsibility in relation to the acts of international organizations has to be understood, then, in terms of a separate area of international law concerning the responsibility of international organizations and the provision of remedies against these actors directly. When the two are taken together, both policy objectives are seemingly supported: the functioning of international organizations is not compromised, nor is securing accountability and redress.

#### IV. PROBLEMS WITH THE CURRENT SETTLEMENT

##### A. *Lack of Remedies Against International Organizations*

The adequacy of the current legal arrangement in securing both effective international organizations and proper levels of accountability presupposes an adequate regime of responsibility, applicable law and remedies against international organizations. However, as far as the law is concerned, whether and to what extent international organizations are subject to national and international law is relatively unclear;<sup>59</sup> moreover, no standing international

---

56. On ‘responsibility to protect,’ see High-Level Panel Report, *supra* note 17. See also REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://www.iciss.ca/pdf/commission-report.pdf> (last visited Mar. 22, 2006) [hereinafter ICISS Report].

57. On international territorial administration, see, e.g., Wilde 2001, *supra* note 6.

58. On this point see High-Level Panel Report, *supra* note 17, ¶¶ 199–203; see also ICISS Report, *supra* note 56, in particular at 69 ff.

59. On the question of applicable law to international organizations, see generally MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES (1995); HENRY G. SCHERMERS & NEILS BLOKKER INTERNATIONAL INSTITUTIONAL LAW (3rd ed., 1990), §§

court or tribunal enjoys jurisdiction to hear complaints brought directly against international organizations, and such complaints are usually barred on the domestic level due to the enjoyment of privileges and immunities.<sup>60</sup> Even if, then, it is beyond question that international organizations are capable of being legally responsible for their acts by virtue of their possession of international legal personality,<sup>61</sup> what law applies to them, and what judicial body exists to apply this law directly in cases where it is alleged that the law has been breached, remains uncertain.

For example, individuals complaining of a breach of their civil and political rights by a member state of the Council of Europe would be able to invoke the state's obligations under the European Convention of Human Rights (ECHR) (provided the alleged breach took place within the state's 'jurisdiction' for the purposes of the Convention), and if they were denied an effective legal remedy against that state in domestic courts, would be entitled to bring a case to the European Court of Human Rights.<sup>62</sup> Such individuals complaining of a

---

1572–1582; Crawford 1997, *supra* note 26; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1998 (not yet in force), available at <http://www.un.org/law/ilc/texts/trbtstat.htm> (last visited Mar. 22, 2006); Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, at 90 (Dec. 20); Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, ¶ 46 (Oct. 18, 2000); ILA IO Accountability Report, *supra* note 18, pt. II, §§ 1–4 and sources cited therein. On applicable law to peace/field operations in particular, *see. e.g.*, Legal Opinions of the Secretariat of the United Nations, Question of the possible accession of intergovernmental organizations to the Geneva Conventions for the protection of war victims, 1972 U.N. JURID. Y.B. 153; United Nations Secretary-General, *Observance by United Nations Forces of international humanitarian law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999); D. W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 484–516 (1964); D. Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM. J. INT'L L. 406 (2000); U. Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, INTERNATIONAL REVIEW OF THE RED CROSS (1993) 227; Y. Sandoz, *The Application of Humanitarian Law by the Armed Forces of the United Nations Organization*, INTERNATIONAL REVIEW OF THE RED CROSS (1978) 274; D. Schindler, *United Nations Forces and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 521 (Christophe Swinarski ed., 1984); R. Wilde, *Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of 'Development' Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. L.J. 107 (1998).

60. See sources cited *supra* note 26.

61. See sources cited *supra* note 32.

62. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, art. 34, Nov. 4, 1950, 213 U.N.T.S. 222: "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right". For the criteria for admissibility of individual applications, *see generally id.* art. 25.

breach of their civil and political rights by the UN—for example in Kosovo, where the UN is the governmental authority—such a breach is not regulated by the European Convention, domestic remedies are largely absent because of the enjoyment of legal immunities by the UN and its officials, and there is no standing before the European Court of Human Rights to bring cases directly against the UN as opposed to an ECHR contracting state. An Ombudsman can hear complaints against the UN but its decisions are purely recommendatory and it has no powers of enforcement.<sup>63</sup>

It follows that, in general, the legal bar against remedies against the member states of international organizations flowing from the lack of liability on the part of member states is matched by the lack of remedies available against such organizations as a matter of fact. Although, then, states act through international organizations in a broad range of affairs, the remedies obtainable against them or the organizations involved for breaches of international law are severely limited.

It is no doubt in consequence of this general problem that Lord Justice Griffiths remarked in one of the *Tin Council* cases that the appellants, who were barred from suing the individual member states of the Council and had no remedy against the organization itself, “have suffered a grave injustice.”<sup>64</sup>

Those endorsing the general view of a lack of member state responsibility in this broader context have focused their attention on seeking to improve mechanisms for securing the accountability of international organizations. The aforementioned International Law Association study, for example, concluded in 2004 that this regime should be enhanced.<sup>65</sup>

Underlying this approach is perhaps a certain faith that such enhancements are a likely possibility in the medium term; even if, then, the accountability principle will not be secured by retaining a lack of member state responsibility, this is a price worth paying because it ensures the continued functioning of international organizations and will be relatively short-lived.

Is this faith in the prospects for greater overall, externally-enforced UN accountability well-placed, however? One approach to this question is to consider what motivates states to support international organizations, and the potential effect this motivational structure can have on the position taken by them as to the question of international organization accountability.

---

63. The Ombudsperson was established by the Special Representative of the Secretary General in Kosovo in June 2000. See OMBUDSPERSON INSTITUTION IN KOSOVO, UNMIK REGULATION 2000/38, June 30, 2000, as amended by UNMIK REGULATION 2003/8, Apr. 15, 2003, available at [http://www.ombudspersonkosovo.org/regualtion2000\\_38.htm](http://www.ombudspersonkosovo.org/regualtion2000_38.htm) (last visited Mar. 9, 2006). See sources cited *supra* note 26 (discussing accountability issues in the context of international territorial administration).

64. *Tin Council* cases (HL), *supra* note 27, 81 I.L.R. 670 (1989), 683–4.

65. See ILA Report, *supra* note 50.

### *B. The Prospects for Greater International Organization Accountability*

Clearly one motivation for state support of international organizations is the ability to transfer the pursuit of certain policies to the international level. Moreover, one reason why this can be attractive is that states are no longer individually responsible for the promotion of the policy—it is the international organization, not them, that is responsible. So, for example, before the 2003 war against Iraq the idea was put forward by the US and its allies that the UN had failed to disarm Iraq through peaceable means, and that this failure by the global organization—rather than its individual member states—therefore justified unilateral military action by certain states who were, by definition, not responsible for the failure. This idea by itself would not militate against the idea of greater remedies against international organizations.

However, it might even be said that this process of displacement from states to international organizations is also appealing to states because of the comparative lack of accountability that exists *vis à vis* international organizations when compared to states. In the context of an international organization accountability deficit, displacement means that the state is not made responsible for the policy and the entity that *is* responsible is not subject to an effective accountability mechanism. Thus the policy can be promoted without much scrutiny. This is of course an effective means of realizing a particular policy—transfer it onto another actor in relation to whom no effective mechanism for review exists. Because of this, states may well have an interest in keeping international organizations unaccountable.

It is therefore necessary to consider the important role international organizations can play in enabling states to promote policies in an unaccountable fashion. The relatively unaccountable nature of international organizations may be a key structural feature as far as their importance to states is concerned, not something that has come about by accident or, alternatively, solely because of the way states and international organizations are sometimes understood as normative opposites, with international organizations seen, unlike states, as somehow intrinsically humanitarian, selfless and even-handed, and not therefore requiring the kinds of accountability mechanisms that would be in order in the case of states.

The traditional settlement, seeking to enhance the accountability of international organizations rather than opting for member state responsibility, so that both the functioning of such organizations and the existence of effective accountability structures operate, is exposed as problematic because it ignores the possibility that states may wish to block greater international organization accountability as a companion to the lack of member state responsibility. If such greater accountability were to come about, then, states might actually seek

withdraw their support for international organizations. Conceiving member state responsibility is not the only policy prescription jeopardizing the first policy objective of ensuring state support for international organizations, then; promoting greater international organization responsibility might also have this effect.

Attempts to resolve the problem of impunity by focusing exclusive attention on greater international organization responsibility may therefore be misguided, in that their prescriptions may be blocked by states objecting to the underlying policies they promote through international organizations being made subject to greater scrutiny. It may, then, actually be much more difficult to reconcile the effective functioning of international organizations with a greater enhancement of accountability.

### *C. Revisiting the Settlement and Introducing a Contingent Factor*

An alternative approach, accommodating the risk of a failure to enhance structures of accountability in relation to international organizations, is to make the continuance of the traditional settlement denying member state responsibility contingent on improvements in such structures. If improvement is not forthcoming, then the introduction of member state responsibility can be considered. Such an approach can be seen in a series of cases brought to the European Commission and Court of Human Rights concerning the question of state responsibility relating to the acts of international organizations under the European Convention of Human Rights, two of which were mentioned earlier. In one such case, *M*, the European Commission of Human Rights stated that if the transfer of state powers to an international organization necessarily excluded the state's

[R]esponsibility under the Convention with regard to the exercise of the transferred powers . . . the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. . . . Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.<sup>66</sup>

---

66. *M. and Others v. Federal Republic of Germany*, App. No. 13258/87, 64 Eur. Comm'n H.R. Dec. & Rep. 138, 145 (1990).

What is perhaps implicit in this dictum—that if there is no equivalent protection of human rights within the organization, then the transfer of competences to the organization would engage state responsibility—is made explicit in the later *Matthews* case, where the European Court of Human Rights stated that “[t]he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured.’ Member States’ responsibility therefore continues even after such a transfer.”<sup>67</sup>

The possibility of falling back on member state responsibility is also left open by the *Institut*, which asserted a “failure to take any of” the aforementioned actions it prescribed to safeguard the rights of third parties “should be taken as a relevant factor in considering the liability of the States members.”<sup>68</sup>

This suggests, then, that in the traditional settlement the scenario of non member-state responsibility coupled with greater third party safeguards—and, one would add, a strict regime of accountability for those activities of international organizations where the issue of consent by third parties is inapplicable—is posited as an ideal, in that it safeguards both the principle of the smooth operation of international organizations and the principle of accountability. If, however, this ideal is not possible because an effective accountability regime for, and third party safeguards in relation to, international organizations is lacking, then an imperfect alternative should be adopted, whereby the latter principle is promoted through means detrimental to the realization of the former principle.

#### *D. The Limits of the Contingency Model*

According to the assumption that member state responsibility undermines the effective functioning of international organizations, clearly the contingency model assumes that this price will have to be paid to secure accountability if the ideal model of international organization accountability is not forthcoming. It might be said, however, that the negative aspects of this imperfect solution are not too great, because in the medium to long term greater accountability mechanisms operating in relation to international organizations will be forthcoming, something that perhaps might be hastened by the introduction of a regime of responsibility operating against member states. Thus the detrimental effect on the working of international organizations will be short lived. This echoes the earlier assumption made in relation to the conventional view rejecting member state responsibility.

---

67. *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 29, ¶ 32 (1999).

68. *Institut Resolution*, *supra* note 42, at art. 9.

Given what has been said already about the potential benefits for states of a lack of international organization responsibility, however, is it really possible to be confident in assuming the short-lived nature of the contingency model? The strategy of pushing for member state responsibility might *not* actually motivate states to support greater international organization accountability so as to stave off attempts to make states directly liable, because more fundamentally states may not wish any effective accountability mechanisms to operate.

To be sure, as an alternative to direct state responsibility greater international organization accountability would mean that states could preserve the displacement of responsibility onto international organizations, but the much greater accountability that would then operate would mean that the policies that have been displaced would be subjected to greater scrutiny, something which states may not wish to have happen. Instead of leading to a greater push for international organization accountability, then, the member state accountability model might actually precipitate a challenge by states to the existing mechanisms that enforce their own responsibility directly, for example international human rights bodies.

The contingency model, then, may not be a short-term remedy, and as such may come at a higher price in terms of undermining the effective functioning of international organizations than has usually been understood. The nature of dilemma faced by those seeking to promote such effective functioning and accountability is perhaps, therefore, different: not whether the push for immediately enhancing accountability justifies a short period during which the work of international organizations may suffer, but rather how a more long-term perceived conflict between accountability, on the one hand, and the effective functioning of international organizations, on the other, is to be understood.

## V. CONCLUSION

Attempts to rectify the inconsequential nature of international organization liability as far as substantive legal outcomes are concerned—pushing for greater international organization accountability, and possibly falling back on member state responsibility as a stop-gap before such improvements are made—will both make the concept of multilateral liability more costly for states. The international organization accountability model, although retaining the displacement of policy from states to international organizations, would still mean that substantive policy outcomes—or lack of outcomes in the case of a failure to prevent atrocities—are subject to much greater scrutiny than at present. The future prospects of such a model depend in large part on the willingness of states to accept such policies being subject to this enhanced form of scrutiny, something which cannot be assumed.

Equally, the prospects of the member state responsibility stop-gap model depend on states' willingness to accept this greater policy scrutiny and its operation through mechanisms operating in relation to them directly. It also risks undermining the effective functioning of international organizations insofar as member state responsibility is understood to have such an effect. Moreover, it may not lead to greater state support for enhanced international organization accountability as an alternative to direct state responsibility if states are reluctant to see any enhanced policy scrutiny. In such circumstances, states might opt for a diminution in the mechanisms that operate against them directly.

Any transformation of the current accountability deficit in relation to the acts of international organizations depends not only on international organizations themselves accepting greater scrutiny; it is also necessary to acknowledge what is at stake for member states in such a process, and way in which the current settlement enables states to pursue policies with the broader context of a relatively attenuated environment of scrutiny. In seeking to understand the prospects for such a transformation, therefore, one has to take account of the willingness on the part of member states to have the international policy they promote through international organizations subject to a greater regime of accountability than is the case at present.