VOLUME 48, NUMBER 2, SUMMER 2007

Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections

Andrew Stumer*

INTRODUCTION

Over the past sixty years, there has been an exponential growth in the number, scope, and influence of international organizations. This growth has greatly expanded the capacity of international organizations to commit acts that detrimentally affect the interests of States or individuals. As a result, it has become necessary to decide who is responsible, and liable to provide compensation, when an organization breaches international law. Reflecting this concern, the International Law Commission ("ILC"), in response to a request by the United Nations General Assembly, has begun drafting articles to codify the rules on the responsibility of international organizations. One of the most difficult issues under consideration by the ILC in this context is whether Member States bear secondary or concurrent liability to third parties for the acts of an international organization. The terms secondary liability and concurrent liability are used throughout this Note to refer to the attribution of responsibility to a State merely by virtue of its membership in an international organization. These forms of liability stand in con-

* D.Phil. Candidate, Magdalen College, University of Oxford.
trast to the liability a State may incur for its own acts that breach international law.

In July 2006, the Drafting Committee of the ILC Working Group on Responsibility of International Organizations adopted draft articles dealing with the liability of Member States. These draft articles outline various situations in which the conduct of a Member State can cause it to become liable for the act of an international organization. However, the draft articles do not support the imposition of liability on Member States by virtue of membership alone. While the Working Group considered a wide range of matters in reaching this conclusion, some emphasis was placed on the policy consideration that secondary or concurrent liability would interfere with the autonomy of international organizations by encouraging interference from the Member States.

This policy consideration has been referred to so frequently in the literature on secondary and concurrent liability that it has obtained almost axiomatic status. It is often placed alongside a related concern that secondary or concurrent liability would undermine the separate personality of international organizations. The purpose of this Note is to examine whether these policy considerations provide a sound basis for denying secondary or concurrent liability. Part I of this Note clarifies the meaning of secondary and concurrent liability and distinguishes those concepts from other forms of liability a State may incur for the acts of an international organization. Part II outlines the views of the commentators who have contended that secondary or concurrent liability would be detrimental to the separate personality and independence of international organizations. Part III demonstrates that the effect of secondary or concurrent liability of Member States on the personality or independence of international organizations has been exaggerated. It does not follow from this conclusion that a general principle of Member State liability must be recognized under international law. However, unsubstantiated claims about a detrimental impact on the personality or independence of international organizations should not be permitted to influence the ILC deliberations on the legal question of secondary or concurrent liability.

6. See infra text accompanying notes 44-53.
I. DEFINING AND DISTINGUISHING SECONDARY AND CONCURRENT LIABILITY

Since the decision of the International Court of Justice ("ICJ") in the Reparation case,\(^7\) it has come to be accepted that an international organization is capable of possessing personality under international law, separate from the personality of the organization’s Member States.\(^8\) One of the consequences of separate personality is that an international organization may be held responsible for its acts under international law.\(^9\) However, the fact that an organization may be held responsible for its acts does not automatically preclude the possibility that the Member States could bear liability for those same acts.\(^10\)

The question of the secondary or concurrent liability of Member States was excluded from the scope of the ILC Articles on State Responsibility. Article 57 states that the Articles "are without prejudice to any question of the responsibility. . . of any State for the conduct of an international organization."\(^11\) This topic was considered to raise "controversial substantive questions as to the functioning of international organizations and the relations between their members."\(^12\) The ILC, therefore, postponed discussion of this topic until May 2002 when work began on Draft Articles on the Responsibility of International Organizations.\(^13\) The Working Group described the question of whether Member States may be held responsible for the acts of an international organization as "probably the most contentious issue of the topic under consideration."\(^14\)

The Special Rapporteur addressed the question of State responsibility for the acts of an international organization in his Fourth Report,\(^15\) which

---

\(^9\) AMERASINGHE, supra note 8, at 399; KLABBERS, supra note 8, at 306; SANDS & KLEIN, supra note 8, at 513; SCHEMERS & BLOKKER, supra note 8, at 1006.
\(^12\) JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 311 (2002).
\(^15\) Fourth Report of Special Rapporteur Gaja, supra note 5.
culminated in the adoption by the Drafting Committee, in July 2006, of Draft Articles 25–30. In these draft articles, two distinct categories of analysis emerge by which a Member State could be held responsible for acts undertaken by or involving an international organization. The first category is where the act of the organization is attributable to a Member State as a result of the general rules on attribution under international law. The second category is where the Member State has itself committed a wrongful act, in parallel to the act of the organization. There is nothing in the draft articles supporting a general principle of secondary or concurrent liability, and its absence may be taken as an implied assertion that no such principle exists.

The following discussion provides working definitions of secondary and concurrent liability and establishes the clear distinction between those forms of liability and the two categories recognized by the ILC.

A. Secondary and Concurrent Liability

In contrast to the two categories of liability recognized by the ILC, secondary and concurrent liability are not derived from any specific conduct of the State. Both forms of liability, if they exist under international law, require only that the State is a member of the organization. Member States, it is said, which benefit from the activities of the organization ought also to bear the burden of accounting to third parties for losses caused by a wrongful act. In the case of secondary liability, a third party with a legal claim against an international organization would first be required to pursue its remedy against the organization. Only if the organization defaulted in fulfillment of its obligation could the third party enforce its rights against any or all of the Member States. Concurrent liability would permit an aggrieved third party to pursue a remedy, at its election, against either the organization or the Member States.


17. Draft Article 29(1) proposed by the Special Rapporteur would have made this point more explicit by stating: “Except as provided in the preceding articles of this chapter, a State that is a member of an international organization is not responsible for an internationally wrongful act of that organization unless: (a) It has accepted with regard to the injured party that it could be held responsible; or (b) It has led the injured third party to rely on its responsibility.” See Fourth Report of Special Rapporteur Gaja, supra note 5, ¶ 96.


2007 / Liability of Member States

20. There is a further layer of complexity concerning whether liability of Member States is joint and several or proportionate to the funding contribution of each Member State. In Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240, 258 (June 26), the ICJ reserved its opinion on whether liability of States was joint and several. In Maclaine Watson & Co. v. Dep’t of Trade & Indus., [1988] 3 All ER 257, 354 (A.C.) (Eng.), Lord Justice Nourse argued in dissent that the liability of the Member States of the ITC was joint and several. One scholar warns that it is important not to assume that the domestic law concepts of joint and several liability can be applied directly in international law. Crawford, supra note 12, at 272. The majority of the Institute of International Law was of the view that any liability of Member States could only be in proportion to their share in the budget of the organization. Inst. of Int’l Law, supra note 10, at 420; id. at 313 (Shihata commentary); id. at 328 (Zemanek); cf. id. at 359 (Amerasinghe) (stating that secondary or concurrent liability, if it applied, would be joint and several). R


24. The arguments regarding secondary or concurrent liability were based on the assumption that the ICJ would find that NATO possessed separate legal personality. At least one commentator has argued that NATO does not have separate personality. See Tarcisio Gazzini, NATO COERCIVE MILITARY ACTIVITIES IN THE YUGOSLAV CRISIS (1992-1999), 12 EUR. J. INT’L L. 391, 425 (2001). Italian courts have held that NATO has personality in Italian law but it has personality in international law. See Branno v. Ministry of War, 22 I.L.R. 756 (Ct. of Cassation 1954) (Italy); Mazzanti v. H.A.F.S.E. & Ministry of Def., 22 I.L.R. 758 (Trib. of Florence 1954) (Italy).
zation, or for the acts of other States acting within such an organization, cannot be established unless the relevant treaty provides for such liability.\textsuperscript{25} In late 2004, the ICJ dismissed the action due to an absence of jurisdiction and the opportunity for authoritative clarification on the issues of liability was lost.\textsuperscript{26}

The case nevertheless illustrates the potential significance of the controversy over secondary and concurrent liability. Arguments of this nature could be made in relation to many other international organizations, including the United Nations, for example, in the context of its peacekeeping operations.\textsuperscript{27} The division of responsibility between an international organization and its Member States may arise where the organization has negligently caused death, injury, or destruction of property.\textsuperscript{28} Questions of secondary and concurrent liability may also arise when an international organization incurs debts to third parties in the conduct of its operations. Many international organizations are established for the purpose of conducting trade in various commodities, or providing finance. When such an organization, having incurred debts to third party States or private individuals, no longer has the financial wherewithal to meet its obligations, the question arises whether the debtors may seek recovery from the Member States.

The first reported litigation over this question took place in relation to the Arab Organization for Industrialization ("AOI"), which was established in 1975 by the United Arab Emirates, Saudi Arabia, Qatar, and Egypt in order to develop an arms industry. AOI concluded an agreement with Westland Helicopters Ltd. ("Westland") to create a joint stock company for the purpose of manufacturing and selling helicopters developed by Westland. The agreement included a clause requiring the parties to refer any dispute to arbitration. In 1979, following the conclusion of a peace treaty between Israel and Egypt, the Member States announced that AOI would cease to operate. Westland filed a request for arbitration naming AOI and the four


\textsuperscript{27} The conduct of U.N. peacekeeping forces has routinely been attributed to the United Nations rather than the Member States. See The Secretary General, Report of the Secretary-General on the Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations, ¶ 7, delivered to the General Assembly, U.N. Doc. A/51/389 (Sept. 20, 1996). However, the United Nations reserves the right to seek recovery from a Member State if the damage was caused by gross negligence, willful misconduct or conduct entailing international criminal responsibility. See id. ¶ 42; see also ILA REPORT, supra note 2, at 190; DEREK W. BOWETT, UNITED NATIONS FORCES—A LEGAL STUDY OF UNITED NATIONS PRACTICE 246-47 (1964); FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 119 (1966).

\textsuperscript{28} See Schermers & Blokker, supra note 8, at 1006 n.86.
Member States as respondents and claiming £126,000,000 in damages. The Arbitral Tribunal held that while AOI had legal personality,29 the absence of a provision in its constituent instrument excluding liability of the Member States meant the States were liable under general principles of law.30 Egypt appealed to the Court of Justice of Geneva, which held that the Arbitral Tribunal did not have jurisdiction over the Member States because they had not signed the arbitration agreement.31 This ruling was affirmed on appeal by the Federal Supreme Court, which noted that the “total legal independence” of the AOI precluded the possibility that its acts could be regarded as undertaken on behalf of the Member States.32

Similar issues were litigated in the English Courts following the collapse of the International Tin Council ("ITC") in 1985.33 The ITC was founded under the Sixth International Tin Agreement with the purpose of preventing excessive fluctuations in the world price of tin. The principal mechanism for regulating prices was the maintenance of a “buffer stock” that was financed by contributions from Member States and loans from banks. When the buffer stock system ran out of funds, the ITC was left with debts of £900 million and its creditors sought, among other forms of relief, to recover monies owed by the ITC from the Member States.34 Two judges of the High Court held that English law governed the dispute and that the separate personality of the ITC protected the Member States from liability.35

30. Id. at 613.
35. J.H. Rayner (Mincing Lane) Ltd. v. Dept of Trade & Indus., [1987] B.C.L.C. 667, 697 (Q.B) (Eng.). Justice Staughton stated that it was open to question whether legal personality excluded liability of Member States under international law. Id. at 689; see also Maclaine Watson & Co. v. Dept of Trade & Indus., [1987] B.C.L.C. 707, 713–14 (Ch.) (Millet, J.) (Eng.).
By contrast, in the Court of Appeal, there was extensive discussion of secondary and concurrent liability under international law. After considering the authorities, Lord Justice Kerr held there was “no clearly settled jurisprudence” and that English courts could not legislate to create rules of liability under international law. Lord Justice Ralph Gibson took the stronger view that the separate personality of the ITC excluded the liability of the Member States. In a dissenting opinion, Lord Justice Nourse argued that, in accordance with principles of international law, the Member States were jointly and severally liable. The House of Lords reverted to the view that English law governed the dispute and that the Member States could not be liable for the acts of an organization that possessed separate personality. As to international law, Lord Oliver noted only that the writings of international jurists did not establish any generally accepted rule regarding secondary or concurrent liability.

The AOI and ITC cases illustrate the lack of consensus among judicial and arbitral bodies in relation to secondary and concurrent liability and highlight the potential significance of the issues involved. In order to understand the scope of the controversy, it is vital to distinguish secondary and concurrent liability from other forms of liability that a State may incur as a result of acts involving an international organization. A State must engage in conduct beyond mere membership in order to fall within either of the two categories of liability discussed below. By contrast, if secondary or concurrent liability were to be recognized as a principle of international law, liability would be imposed in the absence of any additional conduct on the part of the State.

B. Attribution under Customary International Law

Secondary and concurrent liability were excluded from the scope of the ILC Articles on State Responsibility. Nevertheless, the Articles are applicable to the situation where the act of an international organization is attributable to a State by virtue of the ordinary customary law rules on attribution. In preparing Draft Articles on the Responsibility of International Organizations, the ILC Drafting Committee considered it useful to include provisions expressly dealing with issues of attribution. For the most part, the draft articles apply the general rules on attribution to the specific

37. Id. at 306.
38. Id. at 307.
39. Id. at 353.
40. Id. at 332-34.
41. J.H. Rayner (Mincing Lane) Ltd. v. Dep’t of Trade & Indus., [1990] 2 A.C. 418 (H.L.) (Eng.).
42. Id. at 482 (Lord Templeman); id. at 507 (Lord Oliver). Lords Griffith, Keith, and Brandon concurred.
43. Id. at 512-13 (Lord Oliver); see also id. at 480 (Lord Templeman).
44. CRAWFORD, supra note 12, at 311.
2007 / Liability of Member States

situation of acts committed by international organizations. It is notable that all the forms of liability recognized in the draft articles involve some positive act by the State.

Draft Article 26 assigns responsibility to a State when the State directs and controls the commission of an act by an international organization. Similarly, Draft Article 27 provides that a State which coerces an international organization will be responsible for the ensuing act. These draft articles give specific expression to the rule that the conduct of an entity is attributable to a State if the entity was acting on the instructions of, or under the direction or control of, the State in carrying out the conduct. In Nicaragua, the ICJ held that this form of attribution required evidence that the State was in a relationship of “effective control” over the third party, to the extent that it directed the third party in the performance of the allegedly wrongful act. Under normal conditions, an international organization does not act under the direction or control of its Member States since the distinct will of the organization is an important criterion of separate personality. Nevertheless, it is possible to envisage circumstances in which an international organization acts under the direction of a State or group of States. For instance, an ad hoc treaty could confer power on an international organization to undertake specific tasks on behalf of the Member States. Given that the relationship of Member States to the organization is defined primarily by the constituent instrument, it is perhaps more likely that such a treaty would be formed between an international organization and a non-Member State. A treaty of this nature would facilitate a limited series of actions by the organization on behalf of the non-Member State. The potential in this scenario for an international organization to act under the direction or control of a non-Member State illustrates that attribution on the basis of direction or control is not dependent upon the foundational relationship between the organization and the State. Rather, it depends upon the precise factual circumstances subsisting at the time of the conduct in question.

Draft Article 29(1)(a) recognizes that a State could be deemed responsible for the conduct of an international organization if the State has accepted responsibility. This appears to be a specific instance of the customary international law rule that conduct may be attributable to a State if the State

45. ILC Articles on State Responsibility, supra note 11, art. 8.
46. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 63 (June 27); see also id. at 189 (separate opinion of Judge Ago). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has held that a lesser degree of control could suffice. Prosecutor v. Tadic, Case No. ICTY-94-1-A, ¶ 117 (July 15, 1999). This divergence has been explained on the basis that the ICTY was concerned with the degree of control necessary to invoke international humanitarian law, rather than the degree of control required for State responsibility. See Crawford, supra note 12, at 112; Sarooshi (2005), supra note 21, at 39 n.25; Sarooshi (2003), supra note 21, at 316 n.69. The Appeals Chamber, however, disavowed any such distinction, stating that the two questions “logically” necessitated the same test. Id. ¶ 104.
47. See Sarooshi (2005), supra note 21, at 49–50; Sarooshi (2003), supra note 21, at 528–29.
acknowledges and adopts the conduct. Attribution on this basis requires not only acknowledgement of a factual situation, but also that the State identifies itself with the conduct in question and makes it its own. For example, in the Diplomatic and Consular Staff case, the Islamic Republic of Iran was held responsible for the occupation by revolutionary students of the U.S. embassy in Tehran because it had issued a decree endorsing and approving their acts. Under this form of international responsibility, the liability of the State would be a result of its conduct in adopting the action or accepting responsibility; it would not result from the mere membership of the State in the organization.

Another relevant form of attribution, not mentioned in the ILC Draft Articles, may be found by analogy to the principle that the conduct of an organ of one State, placed at the disposal of a second State and exercising elements of the second State’s governmental authority, is attributable to the second State. It might be argued by extension that the conduct of an organ of an international organization placed at the disposal of a State and exercising elements of the State’s governmental authority would be attributable to the State. However, it is not certain that this result would follow. If it did, the attribution would flow from the agreement, express or implied, between the State and the organization for the use by the State of the organ placed at its disposal. The liability of the State would be dependent upon its own act in the use of the organ placed at its disposal, and membership in the organization would only be relevant to the extent that it provided factual background in establishing that the organ was placed at the State’s disposal.

C. Wrongful Act of the State

The ILC Articles on State Responsibility recognize that a State can be responsible if it “aids or assists another State in the commission of an internationally wrongful act.” Similarly, Draft Article 25 of the ILC Draft Articles on Responsibility of International Organizations provides that a State which aids or assists an international organization in the commission of an internationally wrongful act is responsible for doing so. It is uncontroversial that when a State commits an internationally wrongful act in conjunction with an international organization, or lends assistance to such an act, the

49. ILC Articles on State Responsibility, supra note 11, art. 11.
50. CRAWFORD, supra note 12, at 123.
52. ILC Articles on State Responsibility, supra note 11, art. 6.
53. The responsibility of a State for the conduct of an organ of an international organization placed at the disposal of the State is excluded from the scope of the ILC Articles on State Responsibility by Article 57. CRAWFORD, supra note 12, at 105. For further discussion of this question, see id. at 310 n.877.
54. ILC Articles on State Responsibility, supra note 11, art. 16.
2007 / Liability of Member States

State may be held liable for its own participation in the conduct. In such a case, the responsibility of the State is not for the act of the international organization but for its own act.

Further, Draft Article 28 provides that a State will bear international responsibility if it attempts to circumvent an obligation by providing competence to an international organization with respect to that obligation. States that transfer competences to an international organization are under a duty of “due diligence” to ensure that the transfer does not amount to avoidance by the State of its obligations under international law. For example, in Matthews v United Kingdom, it was alleged before the European Court of Human Rights that the United Kingdom had breached its obligation to allow free expression in the choice of the legislature by failing to ensure that citizens of Gibraltar could vote in the elections for the European Parliament. The United Kingdom argued that the exclusion of Gibraltar was a consequence of a decision taken by the Council of the European Community and that the decision could not be imputed to any Member State. The Court found against the United Kingdom, holding that when competences are transferred to an international organization, the State continues to be responsible for securing rights protected under the ECHR. In such a case, the responsibility of the Member State is, strictly speaking, not for the act of the international organization, but for the failure to ensure that the transfer of power to the organization was consistent with the State’s international obligations.

Finally, Draft Article 29(1)(b) states that a Member State of an international organization is responsible for an internationally wrongful act of the organization if it has led the injured party to rely on its responsibility. The form of liability envisaged by Draft Article 29(1)(b) seems to come within the principle of estoppel, or venire contra factum proprium. The Fourth Report of Special Rapporteur Gaja states that only those Member States whose conduct caused reliance on the part of the injured party would be liable. An unresolved question in this area is whether a provision in the constituent

56. SANDS & KLEIN, supra note 8, at 524–25.
58. Id. at 264-65.
59. Id. at 265; see also Waite and Kennedy v. Germany, 1999-I Eur. Ct. H.R. 393, 410.
60. ILA REPORT, supra note 2, at 186-87; SANDS & KLEIN, supra note 8, at 525. The division of responsibility between the E.C. and its Member States raises some unique issues that will not be further addressed in this Note. For further discussion, see Pieter J. Kuiper & Esa Paasivirta, Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations, 1 INT’L ORG. L. REV. 111 (2004).
instrument stating that Member States would be liable for the debts of the organization could be relied upon by a third party. Similarly, it is unclear whether a provision stating that the Member States are not so liable would be effective in defeating an allegation of responsibility founded on Draft Article 29(1)(b). In any case, liability of this nature would not be imposed merely by virtue of membership in the organization; the relevant facts would be constituted by the conduct of the Member State alleged to have induced reliance by a third party.

In each form of Member State liability envisaged by the ILC, there is some conduct on the part of the State which justifies the imposition of liability. In contrast, secondary or concurrent liability would require no conduct on the part of the State other than the act of acceding to membership in the organization. On principle, it is difficult to justify imposing liability on a State for conduct in which it had no direct involvement. This is a sound reason for rejecting a general principle of secondary or concurrent liability. However, international lawyers have introduced the further concern that secondary or concurrent liability would jeopardize the separate personality and independence of international organizations. The following section shows how commentators have these policy concerns. Part III explains why these concerns are exaggerated and should not form part of the reasoning process of the ILC while it is codifying the law on liability of international organizations.

II. Concerns over Personality and Independence of International Organizations

Since 1996, three international legal bodies have addressed the question of secondary or concurrent liability of Member States. Beginning with the Institute of International Law, each body expressed concern that secondary or concurrent liability would be inconsistent with the separate personality of an organization or undermine the independence of an organization by prompting interference from the Member States. Commentators have also emphasized this problem and used it as a basis for rejecting the liability of Member States. This section aims to distill the concerns expressed by the various international bodies and the commentators in order to facilitate the reconsideration of those concerns. An extended critique of the arguments related to personality and independence is undertaken in Part III.

In 1996, the Institute of International Law, after lengthy and reasoned consideration of the question of secondary and concurrent liability, adopted a resolution stating that "there is no general rule of international law whereby States members are, due solely to their membership, liable . . . for the obligations of an international organization of which they are mem-
bers. The work of the Institute was greatly influenced by the provisional report of Rapporteur Higgins.

Among the factors considered by Higgins were the conflicting equitable considerations of “the efficient and independent functioning of international organizations” and “the protection of third parties from undue exposure to loss and damage.” In relation to the independence of international organizations, Higgins expressed the concern that Member States faced with potential liability for contractual damages or tortious harm would interfere in the decision-making process of the organization. Higgins continued:

It is hard to see how the degree 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. If members were liable for the defaults of the organization, its independent personality would be likely to become increasingly a sham.

Higgins went on to conclude that there ought not to be a general principle of international law imposing liability on Member States for the acts of an international organization. The resolution adopted by the Institute referred to “[i]mportant considerations of policy, including support for the credibility and independent functioning of international organizations.” These considerations were said to justify denying a general and comprehensive rule imposing liability on Member States for obligations incurred by the organization.

The resolution of the Institute did not rule out the possibility of a Member State being held liable for the acts of an international organization. Primarily, the liability of Member States was said to depend upon the rules of the organization, which would typically be found in the organization’s constituent instrument. In the majority of cases, the constituent instruments of international organizations are silent on the question of Member State liability to third parties. However, the constituent instruments of some trading and financial organizations contain provisions expressly excluding the liability of Member States to third parties. Hence, in those cases where

---

63. Inst. of Int’l Law, supra note 19, at 449, art. 6(a).
64. Inst. of Int’l Law, supra note 10, at 373 (Higgins, Provisional Report); see also id. at 249 (Higgins, Preliminary Report).
65. Id. at 419 (Higgins, Provisional Report).
66. Id.
67. Id.
68. Id.
69. Inst. of Int’l Law, supra note 19, at 451, art. 8.
70. Id.
71. Id. at 451, art. 5(a).
the liability of Member States is addressed in the rules of the organization, the result is most likely to be a restriction of liability. According to the Institute, a Member State might also be liable where other principles of international law—such as acquiescence or agency—result in liability, or where the circumstances at the time of a transaction, including any communications between a Member State and a third party, suggested that the Member State had accepted liability for the transaction.

Policy considerations relating to the personality and independence of international organizations have since carried significant weight with other institutions considering the problem of secondary and concurrent liability. In his Fourth Report on Responsibility of International Organizations, Special Rapporteur Gaja quoted Higgins’s concerns that secondary or concurrent liability would induce Member States to interfere in the decision-making process of international organizations. This “policy reason” was said to support the exclusion of secondary or concurrent liability from the Draft Articles. Similarly, in 2004, the International Law Association (“ILA”) endorsed the conclusions of the Institute as to secondary and concurrent liability, finding it unnecessary to investigate the question in detail for itself. It referred to the “important considerations of policy” cited by the Institute including support for the “credibility and independent functioning” of international organizations. The ILA was of the opinion that the Institute had struck the correct balance between the autonomy of the
decision-making process in international organizations and the need for "an accountability regime without loopholes." 79

Higgins’ analysis has also been influential among academic writers. For example, Ignaz Seidl-Hohenveldern—who was involved in the 1996 deliberations of the Institute of International Law on the question of Member State liability—had initially expressed the view that Member States would normally assume joint and several liability for the acts of an international organization. 80 He maintained this position throughout most of the debates of the Institute 81 before conceding that the policy considerations highlighted by Higgins had caused him to change his mind. 82 More recently, he has adopted the view that liability of the Member States is a matter to be determined in light of all the circumstances of the transaction. 83 The reason for this shift, according to Seidl-Hohenveldern, was that he had been convinced that secondary or concurrent liability would jeopardize the impartiality of international organizations. 84

Similarly, Henry Schermers and Niels Blokker, in their encyclopedic text on international organizations, quote Higgins’ remarks to the effect that secondary or concurrent liability of Member States would make a “sham” of separate legal personality. 85 The authors do not express any conclusive view on secondary and concurrent liability, although this omission is in itself significant since Schermers previously took a strong view that Member States could not avoid responsibility for the acts of an international organization. The 1980 edition of his text stated:

It is . . . impossible to create international legal persons in such a way as to limit the responsibility of the individual Members. Even though international organizations, as international persons, may be held liable under international law for the acts they perform, this cannot exclude the secondary liability of the Member States themselves. 86

In contrast, the most recent edition of the text steps back from this position, stating instead that, as a general rule, acts of an international organization cannot be treated as acts of the Member States because “[t]o hold otherwise would unduly and unnecessarily dismantle the organization’s personality.” 87

79. Id. at 210–11.
80. SEIDL-HOHENVELDERN (1987), supra note 18, at 121; Seidl-Hohenveldern, supra note 54, at 52.
82. Id. at 435.
83. Seidl-Hohenveldern (2001), supra note 18, at 739. Seidl-Hohenveldern purports to follow Shihata in this respect. Shihata was discussing international commercial ventures, but Seidl-Hohenveldern applies Shihata’s reasoning to international organizations “stricto sensu.” Id. at 727. Higgins suggests that Shihata’s formulation applies a fortiori to international organizations properly so called. Inst. of Int’l Law, supra note 10, at 401 (Higgins, Provisional Report).
85. SCHERMERS & BLOKKER, supra note 8, at 1008.
86. HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 780 (2d ed. 1980).
87. SCHERMERS & BLOKKER, supra note 8, at 1007.
C.F. Amerasinghe, a prominent international law jurist, has also adopted the view that secondary or concurrent liability of Member States would be detrimental to the independence and personality of international organizations. He states that if Member States are faced with the legal certainty of secondary or concurrent liability "they may be inclined to attempt to control the daily transactions of the organization in such a way as to jeopardize, and virtually cripple, its smooth operation as an independent entity with a separate identity."88 Further, Amerasinghe argues that the prospect of secondary or concurrent liability "would deter most states, particularly the poorer ones, from becoming members of international organizations and participating in international co-operation."89 On this view, restricting the liability of Member States bears instrumental value in promoting greater international co-operation through the use of international organizations.

The principal policy consideration in conflict with the separate personality and independence of international organizations is the position of third parties. Generally, third parties stand to lose the most from the conclusion that Member States are not liable for wrongful acts of an international organization. If Member States could shelter behind the separate personality of an international organization, third parties would have no effective remedy when an international organization lacks the financial means to provide compensation for loss. Further, if the organization is not subject to the jurisdiction of the relevant international tribunal, the third party will be deprived of a forum to bring its claim. For example, since only States may be parties to contentious cases before the ICJ,90 an injured State is deprived of this avenue for pursuing claims against an international organization. This, of course, explains why, in the NATO Bombing Case, FRY brought its claim for compensation against the individual Member States.

It has been suggested that third parties who contract with international organizations are generally aware of the principle of limited liability, accept the organization as the debtor, and therefore have no right to pursue a remedy against the Member States.91 However, the question of whether a third party enters into a contract with knowledge, actual or constructive, that the only remedy is against the organization is a question of fact dependent on the circumstances existing at the time of the contract. When the constituent instrument expressly excludes the liability of the Member States, there may perhaps be a presumption of the requisite knowledge.92 This argument is

89. Amerasinghe, supra note 8, at 443.
91. Amerasinghe, supra note 8, at 441.
92. Inst. of Int’l Law, supra note 10, at 569 (Seidl-Hohenveldern commentary). The constituent instruments of some organizations expressly provide that third parties are deemed to have knowledge of provisions limiting liability of the Member States. See, e.g., International Cocoa Agreement, 2001 art. 24,
unpersuasive, however, when a third party who has not previously dealt with
the organization alleges injury as the result of the organization’s tortious or
criminal conduct. Accordingly, it has been suggested that a distinction
should be drawn between voluntary and non-voluntary third parties, with
the former group restricted to remedies against the organization and the
latter group having a right to proceed against the Member States in the
event of default by the organization.93

Arguments based on policy in this area of international law, as in most
others, are extremely complex. In her preliminary report to the Institute,
Higgins stated: “While I would regard it as entirely appropriate to look at
policy considerations, it is not clear to me that they necessarily lead in one
direction rather than another.”94 While the ILC Working Group on Re-
 sponsibility of International Organizations has not based its conclusions on
the question of secondary and concurrent liability exclusively on policy con-
siderations, it remains the case that concern for the separate personality and
independence of international organizations is an important factor weighing
on the minds of those considering the legal rules governing liability of
Member States.

Before examining whether these concerns are well-founded, it is useful to
distinguish between the different types of concerns voiced by commentators
on international law. First, there is the suggestion that secondary or concur-
rent liability is inconsistent with and jeopardizes the well-recognized legal
principle that an international organization has a personality separate from
its Member States. Second, it is argued that Member States faced with the
prospect of liability would interfere in the operation of international organi-
zations, depriving them of independence and impartiality. This second con-
cern feeds into the first, since the independence of an organization may be
diminished to such an extent that it ceases to have separate personality. Lack
of independence carries further significance, though, because it reduces the
efficiency of the organization and its efficacy as a tool of international co-
operation. Concern over efficiency in international relations has been carried
so far as to suggest that States would be deterred from participating as
members of international organizations.95 Part III isolates these concerns
from the broader debate over secondary and concurrent liability and exam-
ines each of the arguments in turn.

U.N.T.S. 312.
93. HIRSCH, supra note 19, at 163–68.
94. Inst. of Int’l Law, supra note 10, at 288 (Higgins, Preliminary Report). This qualification was,
however, removed from the Provisional Report.
95. Klabbers characterizes this concern as a contention that liability of Member States should be
restricted “to make it possible for organizations to engage in activities in which the individual member-
states would hesitate to participate.” However, he regards this as an unjustified reason for requiring an
injured third party to sacrifice its right to a remedy. KLABBERS, supra note 8, at 314.
III. CRITIQUING THE COMMENTATORS: THE CONCERNS EXPOSED

A. Liability of Member States is not Inconsistent with the Separate Personality of an International Organization

The first concern is that secondary or concurrent liability is inconsistent with and jeopardizes the well-recognized legal principle of separate personality. Though no commentator has outlined or explained in any detail why secondary or concurrent liability is inconsistent with separate personality, the assumption appears in several works that assert that separate personality would be “dismantled”96 or become a “sham.”97 However, the suggestion that separate personality of an organization is inconsistent with secondary or concurrent liability of the Member States is unsustainable. The concepts of secondary and concurrent liability both presuppose that the organization is responsible for its acts. The capacity to bear responsibility under international law is an incident of legal personality, and consequently, far from undermining separate personality, the concepts of secondary and concurrent liability assume it. A brief examination of the principle of separate personality and its connection to responsibility will demonstrate this point.

At the outset, it is necessary to draw a distinction between personality in the domestic law of the Member States, and personality under international law. The constituent instruments of numerous international organizations contain provisions endowing the organizations with personality in the domestic law of the Member States.98 Such provisions typically have the effect of allowing the organization to possess rights and duties in domestic law, such as those created by contracts for goods and services, or for the leasing of premises. The vast majority of constituent instruments provide for personality in the domestic sphere.99 As far as international law principles are concerned, the Member States are bound by their own agreement to recognize that personality.100 Since personality in the domestic law of the Member States is governed by treaty obligations, there can be no serious concern that secondary or concurrent liability would undermine personality in the domestic sphere. By contrast, subject to some limited exceptions,101 the con-

96. SCHERMERS & BLOKKER, supra note 8, at 1007.
97. Inst. of Int’l Law, supra note 10, at 419 (Higgins, Provisional Report).
98. The archetype is U.N. Charter art. 104. Further examples are collected in SANDS & KLEIN, supra note 8, at 471 n.10.
99. SANDS & KLEIN, supra note 8, at 475.
100. In a monist State, the international obligations of the State have automatic effect in domestic law. See UNRRA v. Daan, 16 I.L.R. 337 (Sup. Ct. 1950) (Neth.). In a dualist State like the U.K., a further legislative or executive act is required before obligations, including the obligation to recognize personality, are enforceable in domestic law. See J.H. Rayner Ltd. v. Dep’t of Trade & Indus., [1990] 2 A.C. 418, 510 (H.L.) (Eng.) (Lord Oliver). In either case, a State may not invoke its internal law as a justification for failure to comply with a treaty. See Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331; ILC Articles on State Responsibility, supra note 11, art. 32.
stituent instruments of international organizations do not address the question of personality in international law. Accordingly, the discussion below relates to the principle of separate personality in the international sphere.

Prior to 1949, there was controversy over whether an international organization was capable of possessing legal personality in the international arena. This question arose for consideration by the ICJ in the Reparation case, in which the General Assembly requested an advisory opinion on whether the United Nations had the capacity to bring an international claim against a State responsible for causing injury to a U.N. agent. As a preliminary point, the ICJ took the view that the United Nations could only possess the capacity to bring such a claim if it was endowed with international legal personality. In relation to personality, the ICJ stated that the United Nations “was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.” Although this decision related only to the personality of the United Nations, there is little doubt that the reasoning of the ICJ can be extended to other international organizations possessing functions, rights or duties that necessitate legal personality. It is now generally accepted that international organizations are capable of possessing international legal personality, separate from the personality of the Member States.

While the notion of an organization possessing international personality has come to be accepted, there is no consensus as to the criteria to be satis-
fied in order to demonstrate personality.\textsuperscript{108} Formal criteria such as permanent association and the existence of legal powers exercisable on the international plane are no doubt necessary.\textsuperscript{109} The most distinctive and significant requirements, however, are that the organization, or at least one organ of the organization, expresses a will distinct from that of the Member States, and that the organization is not subject to the authority of the Member States.\textsuperscript{110} Where an organization does not possess a distinct will, or acts only under the authority of the Member States, it will be regarded as a mere extension of the Member States with no independent personality.

An important consequence of the possession of personality is that an international organization may be held responsible for its acts under international law.\textsuperscript{111} The responsibility of an international organization is the corollary of the ability of the organization to bring claims to enforce its rights under international law.\textsuperscript{112} For example, the U.N. Secretary-General has stated that: “The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations.”\textsuperscript{113} The principles governing the responsibility of international organizations are, so far as practical, the same as the principles governing the responsibility of States.\textsuperscript{114}

There is some degree of controversy over whether the personality of an international organization is objective, and therefore binding on third parties. In the \textit{Reparation} case, the ICJ held that the United Nations possessed “objective international personality” and was therefore capable of bringing a claim in international law against a non-member State.\textsuperscript{115} However, it has been argued that the objective personality of the United Nations is the unique result of its near-universal membership, and the fact that its activities cover “all possible areas of international concern.”\textsuperscript{116} On this argument,

\begin{itemize}
  \item \textsuperscript{108} Klabbers, supra note 8, at 52–57.
  \item \textsuperscript{109} Commentators have derived these requirements from the \textit{Reparation} case. Amerasinghe, supra note 8, at 83; Brownlie, supra note 61, at 649.
  \item \textsuperscript{111} Amerasinghe, supra note 8, at 399; Klabbers, supra note 8, at 306; Sands & Klein, supra note 8, at 513; Schermers & Blokker, supra note 8, at 1006. The connection between the personality of international organizations and responsibility was noted soon after the \textit{Reparation} case. See Clyde Eagleton, \textit{International Organization and the Law of Responsibility}, 76 \textit{Recueil des Cours D’Académie de Droit International}, 319, 325 (1950).
  \item \textsuperscript{112} Amerasinghe, supra note 8, at 399.
  \item \textsuperscript{113} The Secretary-General, supra note 27, ¶ 6.
  \item \textsuperscript{114} First Report of Special Rapporteur Gaja, supra note 53, ¶ 11; Sands & Klein, supra note 8, at 519-20; Schermers & Blokker, supra note 8, at 1006.
  \item \textsuperscript{115} Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11).
  \item \textsuperscript{116} Seidl-Hohenveldern (2001), supra note 18, at 733.
\end{itemize}
a treaty creating an international organization, and providing expressly or implicitly for its international personality, is a res inter alios acta as regards a third party, and therefore cannot affect rights or obligations other than those of the Member States. As a consequence, it is argued that a third party cannot be required to accept the international organization as a substitute debtor for the Member States, which have a greater aggregate wealth than the organization. If correct, this argument would all but eliminate the need for secondary or concurrent liability to third parties, since a third party could ignore the separate personality of the organization and proceed directly against the Member States.

While controversy over the nature and indicia of international legal personality remains, the better view is that the separate personality of an international organization is binding upon third parties. International organizations deal with third parties in a manner that is explicable only on the basis that the organization has its own personality. Negotiations are conducted and contracts concluded with the organization rather than the Member States. International organizations fulfill obligations to third parties and routinely accept responsibility for failure to perform. The capacity to take part in international relations and the related capacity to bear responsibility for those acts necessitates objective personality. The most stringent view is that all international organizations have objective personality by virtue of their existence. A more equivocal view is that the constituent instrument of the organization is capable of imposing the organization’s personality upon a third party. At the very least, a third party that has expressly or implicitly recognized the organization by conducting dealings with it will be bound to the extent that separate personality is conferred on the organization under international law. Hence, if the personality of international organizations is objective, third parties cannot bypass the personality of an organization and proceed directly against the Member States. If

117. Id. at 732; Seidl-Hohenveldern (1987), supra note 18, at 121.
119. Seidl-Hohenveldern concedes that when a third party contracts with an international organization this constitutes recognition of the personality of the organization. Seidl-Hohenveldern (2001), supra note 18, at 733. In such cases, it might still be open to the third party to assert secondary or concurrent liability of the Member States.
120. Amerasinghe, supra note 8, at 91; Finn Seyersted, Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon the Conventions Establishing Them?, 34 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 1, 45 (1964); see Schermers & Blokker, supra note 8, at 990 (stating that an international organization with membership open to all States will have objective personality); cf. Jan Klabbers, Presumptive Personality: The European Union in International Law in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 231 (Martti Koskenniemi ed., 1998) (explaining alternative theories of personality not necessarily inconsistent with objective personality, such as presumptive personality theory, which holds that an organization has international personality as soon as it performs acts that can only be explained on the basis of personality).
122. Sands & Klein, supra note 8, at 476.
the organization has separate personality, the liability of the Member States can only be secondary to or concurrent with the liability of the organization. It is apparent that in the division of responsibility between an international organization and its Member States, the separate personality of the organization takes on vital importance. If an international organization has no distinct personality, it cannot be liable for obligations, even if the obligations are incurred in its name. In such a situation, the Member States will be directly liable for all obligations incurred in the name of the organization. For example, in the Certain Phosphate Lands in Nauru Case, it was implied that any of the States involved in a tripartite administering organization could be held directly responsible for the acts of the organization. The ICJ stressed that the administering authority “did not have an international legal personality” distinct from the three administering States. Similarly, the Belgo-Luxembourg Economic Union, which is represented by Belgium in its international relations, does not have separate personality, with the probable effect that the two Member States are jointly and severally liable for its acts. A further example is the U.N. Command in Korea, which did not possess distinct personality, meaning the United States and its allies were liable for the conduct of its operations.

While it is clear that personality has important consequences for responsibility, it does not follow that the principle of separate personality would be endangered by the secondary or concurrent liability of Member States. If the Member States, and only the Member States, were responsible for the activities of the organization it would be difficult to maintain the notion of separate personality. An international organization that was not responsible for its own acts could not be said to have separate personality, since the capacity for responsibility is concomitant with personality. However, it does not undermine the responsibility of international organizations to suggest that Member States might bear secondary or concurrent liability. The notions of secondary and concurrent liability both presuppose that the organization is itself responsible for its acts. Liability of the Member States would arise either alongside the liability of the organization (concurrent liability), or as a fallback when the organization is unable to meet its obligations (secondary liability). Therefore, it cannot be said that secondary or concurrent liability, as propositions of law, are inconsistent with the concept of separate personality. Insofar as the commentators have relied upon any such inconsistency, their concerns are entirely unfounded.

124. Id.; see also Seyersted, supra note 120, at 41.
126. Id. at 258 (per curiam); id. at 271 (separate opinion of Judge Shahabuddeen).
127. Amerasinghe, supra note 8, at 412.
B. Liability of Member States will not Restrict the Independence of International Organizations

The second and more forceful concern of the commentators is that secondary or concurrent liability would diminish the independence of international organizations by prompting the Member States to interfere in internal workings. It is argued that Member States facing the prospect of financial liability for the actions of an international organization will want greater control over those actions. If the degree of control by the Member States is sufficient, the organization will cease to have a distinct will and its separate personality will be forfeited. The concern of the commentators over loss of personality almost certainly derives from this argument, rather than from any perceived inconsistency between personality of an international organization and secondary or concurrent liability, although this is not made clear from their writings. There is a certain amount of force behind this concern. An organization controlled by its Member States will lack a distinct will, the most important criteria for personality. In addition to the concern over personality, the commentators argue that the benefits of efficiency and impartiality that come with an international organization would be disrupted if the Member States interfered excessively with the organization’s operation.

There may be good reasons to believe that international organizations would operate less efficiently if controlled by their Member States. The crucial question, however, is whether secondary or concurrent liability would, in fact, lead to greater interference by Member States in the workings of international organizations. Commentators assume that Member States will insist on greater control if they are to be expected to face the financial consequences of the actions taken by the organization. This assumption overlooks the position that, secondary and concurrent liability aside, there is already a broad consensus in international law and practice imposing liability on Member States for costs incurred by an international organization.

The most authoritative statement of this principle is in the Certain Expenses case decided by the ICJ in 1962. In that case, the ICJ was requested to render an advisory opinion as to whether expenses incurred in the course of U.N. peacekeeping operations in the Congo and the Middle East constituted “expenses of the Organization” within the meaning of Article 17(2) of the U.N. Charter. Under Article 17(2), such expenses were to be borne by the Member States as apportioned by the General Assembly. The ICJ held that, in general, the expenses of an organization are the “amounts paid out to defray the costs of carrying out its purposes” and in the case of the United Nations this included its political, economic, social and humanitarian pur-
poses. There was to be a presumption that an action taken by the United Nations was not \textit{ultra vires}, and even where an action was not in conformity with the internal procedures of the United Nations, it would nevertheless be an “expense” provided it was in accordance with the purposes of the United Nations. Member States of the United Nations were consequently obliged to contribute to the peacekeeping expenses in accordance with the formula of apportionment adopted by the General Assembly.

The constituent instruments of most international organizations provide for financial contributions from the Member States, though the precise form of the obligation may differ among organizations. If the broad interpretation given by the ICJ to “expenses” under the U.N. Charter is carried over to other international organizations, the obligation to contribute could cover any expenses incurred in the course of activities related to the organization’s purposes. Further, in a separate opinion in the \textit{Certain Expenses} case, Judge Fitzmaurice argued that, even in the absence of Article 17(2), the collective obligation of the Member States to finance the United Nations would have arisen by necessary implication. The same reasoning may be applied to other international organizations such that in most cases Member States are obliged to contribute to the financial expenses of an organization. In general, an international organization will incur obligations to third parties in pursuance of its purposes. Consequently, Member States stand liable to each other and the organization to contribute to debts to third parties incurred by the organization.

Commentators refer to the obligation to fund an organization so that it may pay its debts—rather than its running costs—as “indirect” liability. This form of liability creates an obligation enforceable only by other Member States, or by the organization itself, in accordance with the express or implied terms of the constituent instrument. It does not confer a right on

\begin{thebibliography}{99}
\bibitem{130} Id. at 158.
\bibitem{131} Id. at 167–68 (per curiam); \textit{see also} id. at 223–24 (separate opinion of Judge Morelli); id. at 199–200 (separate opinion of Judge Fitzmaurice) (expressing no final view on the question of actions taken by an organ in contravention of internal rules); \textit{cf.} id. at 230 (Winiarski, P.J., dissenting).
\bibitem{132} AMERASINGHE, supra note 8, at 359–65; SANDS & KLEIN, supra note 8, at 569–73; SCHERMERS & BLOCKER, supra note 8, at 620–35.
\bibitem{133} Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151, 208 (July 20). Judge Fitzmaurice argued that even Member States that voted against a decision or abstained would nonetheless be obliged to contribute to the financing. Id. at 210. \textit{See also} id. at 248 (Moreno Quintana, J., dissenting) (arguing that Article 17(2) lays down a rule “common to almost all types of international organization”). Judge Moreno Quintana also argued that the costs to be paid were only the administrative costs. Id. at 252.
\bibitem{134} SANDS & KLEIN, supra note 8, at 525. Inst. of Int'l Law, supra note 10, at 415 (Higgins, Provisional Report). Higgins notes, however, that this may not be the case where the Member States, by the terms of the constituent instrument, are only liable to make fixed capital contributions. \textit{Id.} at 396.
\bibitem{135} AMERASINGHE, supra note 8, at 374; SANDS & KLEIN, supra note 8, at 523.
\bibitem{136} HIRSCH, supra note 19, at 142; SCHERMERS & BLOCKER, supra note 8, at 1007; Henry Schermers, \textit{Liability of International Organizations}, 1 LEIDEN J. INT'L L. 3, 14 (1988). \textit{But cf.} KLABBERS, supra note 8, at 313 (criticizing indirect liability on the basis that if one accepts indirect liability there is no reason not to accept direct liability).
\end{thebibliography}
third parties to seek recovery directly from the Member States. In this sense, indirect liability is distinguishable from secondary and concurrent liability. While indirect liability does not confer rights on third parties, it is nonetheless an obligation that binds Member States under international law. In the debates of the Institute of International Law regarding responsibility of international organizations, the view was expressed on several occasions that Member States would be obliged to contribute to the funds of an organization in order to put it in a position to meet its creditors. The Resolution adopted by the Institute stated that unless the rules of an organization provided otherwise, or prevailing facts indicated otherwise, the Member States would be obliged to discharge the outstanding debts of an organization upon its dissolution. According to the Institute, where the Member States are liable fund an organization, the contribution of each Member State should be proportionate to its contribution to the regular budget or to its capital subscription.

The prospect of indirect liability was raised throughout the ITC litigation. It was argued before the High Court that the ITC could be placed in receivership and then pursue a cause of action against the Member States. In the Court of Appeal, Lord Justice Ralph Gibson was of the view that the Member States of the ITC were liable under international law to provide sufficient funds to the ITC to enable it to meet its debts. This liability could only be enforced at the State level and therefore did not provide a direct remedy for creditors. Similarly, Lord Griffiths considered that the “obvious just solution” to the problem was for the governments who contributed to the trading funds of the ITC to settle its debts in proportion to their contributions. Indirect liability furnished the ultimate solution to the ITC litigation. The Member States funded the organization to enable it to settle its debts, insisting that those payments could not be regarded as discharge of any obligation owed by them directly to third parties.
Given that Member States bear indirect liability for the debts of an international organization, it is unlikely that the prospect of secondary or concurrent liability would be an additional burden prompting interference in the internal working of the organization. Member States, in establishing and maintaining an international organization, must be taken to understand that under general principles of international law, and in many cases under the terms of the constituent instrument, they may be required to fund the organization so that it can meet its debts. Although there are legal and procedural differences between indirect liability and secondary or concurrent liability, the substance of the obligation, that is, to ensure that the debts of the organization are repaid, is the same. This obligation can be enforced either by the organization itself or by any of the Member States. It seems an unjustified assumption that the difference between secondary and concurrent liability and the generally accepted principle of indirect liability would be sufficient to prompt Member States into a greater degree of interference with the operations of international organizations. Member States that recognize the value of independent and efficiently functioning international organizations are unlikely to jeopardize those qualities through excessive interference.\(^{145}\)

Is this conclusion altered if the international organization in question was intended to make a profit, such that the Member States expected that they would not incur any financial obligations beyond the initial establishment costs\(^{146}\)? Certain international organizations are funded on the basis that the Member States will contribute a fixed capital sum for the establishment of the organization, after which the organization is intended to be self-funding\(^{147}\). However, organizations of this nature are not generally intended solely to make profit, but rather to advance the policy objectives of the Member States. For example, the International Monetary Fund and World Bank are engaged in the lending of money at interest, but this task is intended to achieve broader policy objectives. The ITC was engaged in the buying and selling of tin, not primarily for profit but rather to ensure a stable world market\(^{148}\). If governments are prepared to establish such organizations, one might assume that they are willing to fund the organizations so that they can achieve their objectives.\(^{149}\) Further, the ultimate resolution of the ITC litigation demonstrates that even when an organization is in-

\(^{145}\) Sadurska & Chinkin, supra note 34, at 889.

\(^{146}\) The possibility of other sources of income was addressed by the ICJ in Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151, 158 (July 20).

\(^{147}\) Inst. of Int’l Law, supra note 10, at 396 (Higgins, Provisional Report). Higgins argues that it is not clear from the Certain Expenses case that in such organizations there is an obligation to cover the organization for debts beyond what can be met from the fixed contribution.

\(^{148}\) In dissent, Lord Justice Nourse considered that the ITC was a “hybrid” organization carrying out \textit{jure imperii} and \textit{jure gestionis} functions. Maclaine Watson & Co. v. Dep’t of Trade & Indus., [1988] 3 All E.R. 257, 327 (A.C.) (Eng.).

\(^{149}\) Lord Justice Nourse found this argument compelling. \textit{Id.} at 333.
tended to be self-funding, the Member States will retain indirect liability for its debts. Hence, the additional prospect of secondary or concurrent liability is no further motivation to interfere in the workings of a profit-making organization, than in those of a non-profit-making organization.

Finally, it must be considered whether the prospect of joint and several liability, as opposed to liability in proportion to the financial contributions of the Member States, might induce Member States to interfere in the workings of an international organization. One of the main advantages of international organizations is that they allow for the spreading of cost and risk between States. However, if Member States bear joint and several liability, a creditor could pursue one Member State for the whole of the debts incurred by the organization. This prospect might be unattractive for poorer States that are incapable of bearing the full cost of an enterprise. It might also be unattractive for wealthier States, which are more likely to be pursued by a creditor in the event of the insolvency of the organization. However, any single Member State pursued by a debtor could presumably maintain an action against the other Member States to enforce their contribution to the debt, or even seek to join the other Member States to the action commenced by the third party. Therefore, joint and several liability would not necessarily result in the elimination of cost-spreading between States. Pursuit of other Member States for their contribution to a debt, either through the courts or by diplomacy, might be a complex task. However, it need not be any more complex than disputes over the contributions owed by Member States under the organization’s constituent instrument. Hence, even if liability of Member States were joint and several, there is no compelling reason to think this would provoke interference by the Member States in the workings of the organization.

CONCLUSION

This Note has responded to the concern that secondary or concurrent liability would undermine the personality and independence of international organizations, concluding that the impact upon personality and independence has been exaggerated. Rejection of the principles of secondary and

---

150. Opinion is divided over whether secondary or concurrent liability, if either existed, would be joint and several. See supra note 20.

151. BROWNLIE, supra note 61, at 656.

152. The ICJ has held that where more than one State is liable, the fact that only one State is sued does not make the claim inadmissible in limine litis. Certain Phosphate Lands in Nauru (Nauru v. Austl.) 1992 I.C.J. 240, 258-59 (June 26). See also ILC Articles on State Responsibility, supra note 11, art. 47(1).

153. AMERASINGHE, supra note 8, at 443.

154. The rule that each State may be sued severally, see supra note 152, is without prejudice to any right of recourse against other responsible States. See ILC Articles on State Responsibility, supra note 11, art. 47(2)(b). This proviso does not itself govern the question of contribution among States, but preserves any existing rule of international law. CRAWFORD, supra note 12, at 275.

155. Sadurska & Chinkin, supra note 34, at 889.
concurrent liability on the basis of these policy considerations ought therefore to be reconsidered. As stressed in the introduction, this conclusion is not sufficient to prove the existence of a rule of secondary or concurrent liability in international law. This Note has the more limited objective of demonstrating that concern for the personality or independence of international organizations is not a sound reason for denying such liability. Even if one accepts this argument, one may conclude on other grounds that secondary and concurrent liability are not principles of international law. One such ground may be that secondary or concurrent liability would involve the imposition of liability on Member States for acts that they have not committed. As discussed in Part I, all of the alternative bases for establishing the liability of a Member State for the act of an international organization depend upon involvement by the Member State in the commission of the wrongful act. Secondary or concurrent liability would be a significant departure from this pattern.