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# State and Individual Secondary Liability in Case of International Organizations' Responsibility

## The Challenge of Fairness Unveiled

Samantha Besson

**Abstract.** The regime of international responsibility of States has been questioned by philosophers of international law. Their main critique pertains to the fairness of the burden of its implementation on blameless individuals in that State, and especially to the fairness of their secondary (mostly financial) liability under domestic or international law (e.g., through taxation in order to pay war reparations). This has been coined the Individualist Challenge to State responsibility. This essay starts by debunking that challenge, before taking the discussion a step further to discuss a related (albeit yet unmade) argument of fairness that one may refer to, by analogy, as the Statist Argument. The Statist Argument would endorse the fairness of the current regime of international responsibility of international organizations (IOs), and in particular the absence of secondary liability of member States of a responsible IO. Addressing the Individualist Challenge and Statist Argument together, and understanding why regimes of international responsibility law and our moral intuitions about them each pull in different directions, are the two aims of this essay. The essay turns the Statist Argument on its head and argues that secondary liabilities of member States actually amount to a requirement of fairness to the individuals in those States. It thereby contributes to taking further the debate about the reform of IO responsibility law by drawing on arguments in moral and political philosophy, on the one hand, and does so from the integrative perspective of the moral interests of the individual by discussing both State and IO responsibility law together, on the other.

**Keywords:** International Responsibility Law, International Organizations, Secondary Liability, Fairness, Democracy.

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Where talk of responsibility makes sense at all, we will need to think about people. A state or a nation may or may not be conceived as an entity “over and above” the people who make it up, but if nations and states can act, and be held responsible, this is only because there are people involved. This is true even if legal doctrine, in treating corporate entities such as states as legal persons, averts its eyes from the relationship those entities have to people. The effect of the law on people still needs justification. This does not mean that all responsibility is, in the end, individual responsibility. It means that practices of ascribing responsibility to collectives of people or to states or to nations must make moral sense – which in turn means that the point of view of individuals cannot be ignored.

(Murphy 2010, 301)

## 1. Introduction

Under international responsibility law, and especially the 2011 Draft Articles on the Responsibility of International Organizations (ARIO)<sup>1</sup>, international organizations<sup>2</sup> (IOs) may incur responsibility by attribution of conduct (Arts. 6-9 ARIO) or responsibility of its member States (Arts. 14-19 ARIO). Of course, those States may be held responsible, alone or concurrently<sup>3</sup>, for the injury caused by the responsible IO, through the joint attribution of conduct to both the IO and its member States (Art. 7 ARIO) or through other grounds of attribution of responsibility of the IO to its member States (Arts. 59, 60, and 62 ARIO). They may also be responsible for their own wrongful acts in relation to the IO’s conduct<sup>4</sup>. Importantly, however, outside of those

<sup>1</sup> The ARIO (adopted as a resolution by the UN General Assembly on 9 December 2011, Doc A/RES/66/10) were drafted on the model of the *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA) adopted as a resolution by the UN General Assembly on 12 December 2001 (International Law Commission, A/RES/56/83).

<sup>2</sup> This essay understands IOs as an encompassing group despite obvious disparities in size, scope, and institutions between IOs. See Klabbers 2015b.

<sup>3</sup> I have discussed those different constellations of plural (concurrent or joint) responsibility between IOs and States and their implications in terms of joint and several responsibility (under Arts. 47 ARSIWA/48 ARIO) elsewhere (see Besson 2007; 2017a; 2017b), and am focusing here on cases where the IO is solely responsible and its member States acquire secondary liability on that basis.

<sup>4</sup> Under Arts. 58 (aid or assistance) and 61 (circumvention of duties) ARIO. Some authors have argued for extending the range of cases where member are held responsible for their own wrongful acts: see, e.g., d’Aspremont 2007 for an interpretation of Art. 61 ARIO as including the “abuse of legal personality” by member States controlling an IO; Besson 2017b for an interpretation of the same provision as including the violation of due diligence by mem-

cases of States' responsibility either for an IO's wrongful acts or for their own wrongful acts, member States are not, concurrently or subsidiarily<sup>5</sup>, responsible for the wrongful acts of the IO by virtue of the mere fact of their membership in that IO<sup>6</sup>.

To that extent, IO responsibility is comparable to State responsibility under international law: the distinct legal personality of IOs and States implies that their responsibility for wrongful acts is individual, and not collective. Just like individual citizens in the case of State responsibility, member States of an IO do not bear collective responsibility for the wrongful acts of the IO. The only exception, as we have just seen, is when they are responsible for their own wrongful acts in relation to the IO or when the conduct or the responsibility of the IO may be attributed to them under specific circumstances. Besides fitting the general legal framework of responsibility under both domestic and international law, this exclusion of collective responsibility of States and, by extension, of individuals in those States for the acts of the corporate entities they constitute, be they States or IOs, is also morally justified (May and Hoffman 1991).

What is surprising under the current international law regime of responsibility of IOs, however, is how member States may escape any financial liability<sup>7</sup>, under both general international law and the internal rules

ber States of an IO that have failed to make sure their independent duties under international law receive equal protection under IO law. See also Brölmann 2015, 375-379. Importantly, IOs do not incur the same duties as States under international law (e.g., under international human rights law: see Besson 2015; 2017a; 2017b) and this may imply that States are often the sole subjects that may be held responsible for a given injury even though that injury has been caused by IO law or in the context of IO activities. This may explain why so much focus has been placed on the responsibility of independent States for their own wrongful acts in the context of IO activity, including under the ARIIO (e.g., Art. 61 ARIIO), and especially in international human rights litigation (e.g., European Court of Human Rights, Grand Chamber, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Application no. 45036/98, 30 June 2005, and European Court of Human Rights, Grand Chamber, *Al-Dulimi and Montana Inc. v. Switzerland*, Application no. 5809/08, 21 June 2016).

<sup>5</sup> See the reference to "subsidiarity" in Art. 62(2) ARIIO.

<sup>6</sup> See ILC 2011, 164: "Membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act" (emphasis added).

<sup>7</sup> In this essay, I understand *responsibility* to mean the secondary duties that under international law arise from the breach of primary duties: responsibility so defined attaches to States or IOs, imposing on them duties of cessation, non-repetition, and reparation. It should be distinguished from the notion of "liability," which is used to refer to the financial duties of another international legal subject, i.e., States or individuals, to assist a responsible subject, i.e., IOs or States, in implementing their responsibilities, and which arises under general international law, the internal rules of the IO, or domestic law. On this distinction, see Brownlie 2005, 362; Pellet 2013, 51. While "secondary liability" is in this respect subsidiary to "primary responsibility," I will not refer to the "subsidiary responsibility" of member States of an IO unless those member States incur a responsibility of their own, either by attribution of

of the IO<sup>8</sup>, and, more generally, avoid the material burden of their IOs' responsibility. Of course, obligations of reparation are one of the main consequences of the international responsibility of an IO<sup>9</sup>, and should be paid by the IO out of its budget, which itself consists of contributions paid in by its member States. What we know by now, however, is that, by comparison to States, IOs, under the scope of their sphere of competence, may not only cause very costly injuries to third States and individuals (e.g., in peacekeeping operations), but also, due the functional limitations of their budget, have disproportionately limited means with which to compensate for those injuries (see Pellet 2013, 50).

A few examples may help illustrate the situation, and in particular the responsibilities and, in some cases, the reparations owed by IOs in the following contexts: Euratom and criminal environmental harm in the Netherlands<sup>10</sup>, the United Nations (UN) and the genocide in Srebrenica<sup>11</sup>, the International Monetary Fund (IMF) and debt restructuring in Greece (Salomon 2015), the UN and the Cholera epidemic in Haiti<sup>12</sup>, or the European Patent Office (EPO) and labour protection violations in the Netherlands<sup>13</sup>. Importantly, what is striking about these cases is not so much the lack of (international or, due to IO immunities, domestic) judicial remedies available to the injured third States and/or individuals to claim reparations from the relevant IO or the limited number thereof – although this sharpens the problem, of course, because injured parties tend to go after member States straightaway (see, e.g., Ryngaert 2015, 501 ff.; Blokker 2015; Klabbers 2015a, 55 ff., 65 ff.) – but the fact that, whether those remedies were available or not, the targeted IOs have been largely “unable or unwilling”<sup>14</sup>

conduct or responsibility of the IO or by virtue of its own wrongful act. *Contra*: Brölmann 2015, 363.

<sup>8</sup> The internal rules of the IO or “internal IO law” amount to a form of (inter-State) international law (treaty-based, but not only) that has a specific personal and material scope, and may therefore be contrasted with general international law.

<sup>9</sup> See Part III ARIIO on the content of IO responsibility, and especially on the duties of cessation (Art. 30), non-repetition (Art. 30), and reparation (Art. 31, including the duties of restitution (Art. 35), compensation (Art. 36), and satisfaction (Art. 37)).

<sup>10</sup> See Supreme Court (NL), *Greenpeace Nederland and Procurator General at the Supreme Court of the Netherlands (intervening) v Euratom*, Judgment on Appeal in Cassation, 13 November 2007, Decision no. LJN: BA9173. See also Brölmann 2007b.

<sup>11</sup> See Supreme Court (NL), *Mothers of Srebrenica et al. v. The Netherlands and the United Nations*, 13 April 2012, Case no. 10/04437. See also Spijkers 2014.

<sup>12</sup> See Second Circuit Court of Appeal (US), *Georges v. United Nations*, 18 August 2016. See Daugirdas 2016 and Alvarez 2014. See also Klabbers 2015a, 65-74.

<sup>13</sup> See District Court The Hague (NL), *Staff Union of the European Patent Office v. The European Patent Office*, 17 February 2015, pending appeal. See Alihusain 2016.

<sup>14</sup> On these terms, see, e.g., Yee 2013; Pellet 2013; Murray 2017. For an early occurrence, see, e.g., Lauterpacht 1976, 412-413.

to implement their (objective) obligations of reparation, thereby leaving the injured parties without reparation.

The problem in practice, however, is that when an IO does not have the means available to meet its secondary obligation to provide full reparation to injured third parties, its member States may incur no secondary liability in this respect. Of course, member States have a duty under the internal rules of the IO to pay their share into the budget and expenses of the IO. Moreover, the explicit secondary liability of member States may sometimes arise under the internal rules of the IO<sup>15</sup>. However, in the absence thereof, there is no specific rule or principle, under the ARIO or under the default internal rules of the IOs, establishing member States' secondary financial liability, and, arguably, although this will have to be discussed, there is no general rule of international law in that regard, either<sup>16</sup>. As a matter of fact, most IO internal rules exclude the secondary liability of their member States<sup>17</sup>.

This legal situation should be contrasted with the ways in which individuals are held liable, under both international and domestic law, for their States' secondary obligations under international responsibility law (see d'Argent 2002, 535; Kelsen 1948, 349). For instance, individuals may be called on to contribute to implementing their States' war-reparations obligations through taxation, but also in other ways. So, to borrow Brölmann's (2007a and 2015, 360-363) "institutional veil" analogy to the corporate veil (see also Murphy 2010, 306), while the State's institutional veil in case of responsibility is opaque to the extent that individuals share its financial burden – albeit not as responsible individuals: the veil, as a result, is not completely transparent (see d'Argent 2002, 536) –, the IO's institutional veil in case of responsibility is absolutely dark.

As a matter of fact, the fairness of that burden weighing on blameless individuals has long been criticized in the philosophy of international law (Cassese 2005, 241). The burden of a State's responsibility indeed weighs on all individuals who are citizens of that State, including individuals other than those whose conduct has been attributed to the responsible State. This critique has been coined the "Individualist Challenge" (Crawford and Watkins 2010; Murphy 2010). If this challenge were to be accepted, and

<sup>15</sup> See, e.g., the 1972 Convention on International Liability for Damage Caused by Space Objects (UN Treaty Series, vol. 961, I-13810) Article XXII.3.

<sup>16</sup> See the two (contradictory) judicial decisions on the subject: UK House of Lords, *Maclaine Watson & Co Ltd v. International Tin Council*, 26 October 1989 (81 International Law Report 670), and International Chamber of Commerce, *Westland Helicopters v. Arab Organization for Industrialization and others*, Interim Award no. 3879/AS of 5 March 1984 (*International Law Materials* 23, 1071). See Klabbers 2015a, 63-64.

<sup>17</sup> See, e.g., the 1986 *International Cocoa Agreement* (UN Treaty Series, vol. 1446, 1-24604). See also Amerasinghe 1991, 270-272.

transposing it one rung up to IO responsibility, one may actually consider that the current regime of international responsibility of IOs, and the absence of secondary liability of States in case of responsibility of the IO, is fair to blameless States and, by extension, to their populations. Indeed, were it otherwise, the latter may have to bear the burden of the reparations of wrongful acts they have not contributed to (see, indirectly, Ryngaert 2015, 503-504). Echoing the Individualist Challenge, such considerations may be described as the “Statist Argument” against the secondary liability of States for their responsible IOs.

In this essay, I aim to debunk the Individualist Challenge, and, on that basis, to take the debate in the philosophy of international law one step further, turning the Statist Argument on its head: individual fairness arguably requires the secondary liability of States in case of IO responsibility, just as it justifies the secondary liability of individuals in case of State responsibility. What the essay develops, therefore, is a reverse Statist Challenge against IO responsibility law. In short, referring to the opening quote by Murphy (2010, 301), it is because responsibility is always ultimately an individual matter that our States and we, through them, should bear the burden of the responsibilities of the IOs they have constituted to fulfil their functions (Besson 2009). In other words, what needs to be unveiled is not so much the States behind IOs (or the individuals behind those States) as individual fairness in all instances of responsibility in international law.

This essay’s argument is three-pronged. In a first section, (1) I discuss the Individualist Challenge to State responsibility and its individual fairness concern, and argue against it on political grounds. A second step (2) in the argument rejects, on the same grounds, the extension of the Individualist Challenge to the realm of IO responsibility, thereby debunking what one may refer to as the Statist Argument on grounds of individual fairness and rebutting the other arguments against the secondary liability of States in case of IO responsibility, including the legal personality argument. Finally, (3) I discuss different ways to reform the current legal regime of IO responsibility, while paying due attention to the concern of individual fairness identified in the foregoing.

Methodologically, this essay’s argument, and the legal reform it proposes, complement existing discussions in international law defending the same proposition (see, e.g., Brownlie 2005; Yee 2013, 449-451; Pellet 2013, 49 ff.; Murray 2017). It does so, however, by adding a philosophical layer to those discussions and thereby contributing to the nascent field of the philosophy of international law. More specifically, the argument, on the one hand, considers the moral interests of the (even blameless) population of member States rather than only the innocent injured parties, and, on the other, integrates the concern for fairness to those individuals, and their relationship to States,

into the discussion of the relationship between IOs and their member States, thereby addressing the two regimes of international responsibility together.

## 2. Debunking the Individualist Challenge against Individual Liability for State Responsibility

When a State is held responsible under international law, it is the individuals in that State who are liable for its obligations under international responsibility law. Indeed, when it comes to situating themselves materially, and especially financially, States do not amount to anything but a group of individuals. To take just one example, individuals may be called on to contribute financially and materially to their State's war reparations, sometimes in enormous proportions and over more than a generation. It suffices to think of the contribution of the German people to the war reparations owed by Germany after World War II or, more recently, the contribution of the Iraqi population to the compensations owed by Iraq after the invasion of Kuwait (see, e.g., Falk 2006, 486).

Of course, legally speaking, State responsibility is not collective (see, e.g., May and Hoffman 1991; Sverdlík 1987; Lewis 1948; see also Crawford and Watkins 2010, 289-290): the State *qua* distinct legal person is solely responsible under international law, and it would be wrong to think that, under international law, all individuals in a responsible State are responsible for the State's wrongful act<sup>18</sup>. This would undermine the whole point of States having a distinct legal personality. Under international law, States may acquire responsibility by attribution of the conduct of individuals, but the reverse is not true. However, just as States' international obligations end up being diffused into individual domestic obligations through domestic (private, public, or criminal) law, a State's international responsibility also gives rise to individual domestic liabilities (see d'Argent 2002, 533 ff.). Following d'Argent (*ibid.*, 535), one may draw a very useful opposition between a State's "duty for the debt" ("obligation de la dette," or responsibility *stricto sensu*) and its individual citizens' "contribution to the debt" ("contribution à la dette," or secondary liability). Individual secondary liabilities arise mostly from domestic law (e.g., tax or land law) and are owed to the State, but may also be required exceptionally under international law itself and owed to the injured party (*ibid.*, 536-537, 723-743). Thus, injured third parties, i.e., mostly third States, may rely on international law, for instance, to obtain and seize foreign goods in the context of war reparations. Or, conversely, the payment capaci-

<sup>18</sup> But see Kelsen 1952, 114 and 116, and 1948, 349, for an intentional conflation between "collective responsibility" and secondary liabilities.

ty of a State may be factored into the calculation of reparations under general international law, and this implies looking into the population's members' individual ability to contribute (*ibid.*, 723 ff.).

The fairness of that burden weighing on blameless individuals<sup>19</sup>, i.e., all individuals other than those whose conduct has been attributed to the responsible State, has been criticized from a moral perspective<sup>20</sup>. More specifically, that critique has been coined the "Individualist Challenge" in recent discussions of the philosophy of the international law on State responsibility (Crawford and Watkins 2010; Murphy 2010). In short, the challenge pertains to the moral cost of a State's responsibility for the entire citizenry of that State and not only for those individuals whose conduct has been attributed to the State (Crawford and Watkins 2010, 289-290).

Interestingly, there have been attempts to disqualify this moral critique on other grounds (see *ibid.*, 289-294). None of these attempts have been fully successful, however.

One may argue, first of all, and on factual grounds, that the financial burden of State responsibility on every single individual in the population of a State is often quite reduced in practice. The difficulty with this approach, however, is that the moral burden on the blameless should not be measured by financial impact, but is a matter of principle. The financial burden of war reparations is an impressive counterexample, in any case, and there is no indication that the financial ambit of such compensations will decrease in the future<sup>21</sup>. Secondly, some may shift attention away from the blameless citizenry and refer instead to innocent third parties, whether States or individuals, injured by a State's wrongful act and whose moral and legal right to reparations should not be impaired by considerations of fairness towards other innocent individual citizens of the responsible State. The difficulty here, however, is that moral considerations should not be approached in this way and as part of an instrumental calculus. Both types of individual interests, those of the innocent injured individual and those of the blameless citizen of a responsible State, should be taken equally into account. After all, in certain cases, as we will see, the moral burden of individual liabilities for State responsibility may be said to constitute a violation of the moral and legal rights to subsistence and social protection of that State's citizens,

<sup>19</sup> Scope precludes addressing the issue of the concurrent responsibility of individuals under international criminal law (under Art. 58 ARSIWA). See Crawford and Watkins 2010, 291-293.

<sup>20</sup> See, e.g., Cassese 2005, 241: "The international community is so primitive that the archaic concept of collective responsibility still prevails. Where States breach an international rule, the whole collectivity to which the individual State official belongs, who materially infringed that rule, bears responsibility."

<sup>21</sup> See Murphy's (2010, 302-303) reply to Crawford and Watkins 2010, 294.

thereby leading to a conflict of equal human rights in practice. Thirdly, some may want to argue that fairness towards the blameless citizens of responsible States is a moral ideal that is unattainable in practice. This is not true, however, to the extent that fairness need not be approached as an absolute requirement. Finally, some may argue that fairness is not so much a problem for duties of cessation and non-repetition under international responsibility law, for no individual will be made worse off from their implementation. However, the duties at issue in this essay are duties of reparation, and their implementation definitely generates burdens on individuals domestically. As a matter of fact, this is especially the case with duties of (financial) compensation and duties of restitution, but even with duties of satisfaction (e.g., apologies, memorials), that are usually symbolic and not material, but that in terms of burden may be transferred onto individuals (see Murphy 2010, 301; *contra*: Crawford and Watkins 2010, 294).

Turning to the Individualist Challenge, different moral arguments may be put forward to defend the individual fairness of the regime of State responsibility in international law and to debunk the challenge<sup>22</sup>.

First of all, the political argument. On a certain view of the State in political theory, the State serves as the institutional face and, consequently, as a personification (from the Latin *persona*, i.e., mask or veil) of the political community – political communities having intrinsic moral significance. The moral justification for States speaking and acting in our name in this way, and thereby potentially binding and coercing us, is that we are all treated according to some appropriate conception of social and economic equality. Indeed, it is only if people are treated as equal members of a political community that the State's use of coercion can be said to be made in its members' name and be justified. What this means in case of State responsibility is that, provided the conditions of political equality are fulfilled, it could be considered fair for people to be liable for their State's wrongful acts even in cases where they cannot be blamed individually for them (see, e.g., Miller 2004, 240; Dworkin 1986, 167-175).

This argument for the political fairness of secondary individual liability in case of State responsibility should not be conflated with two other related justifications. It is distinct from consent-based accounts of political legitimacy and from fair-play theories thereof. Both accounts have been contested on other grounds, of course, and here I restrict myself to a responsibility-specific critique. First of all, with respect to consent, it suffices to emphasize that few people actually consent to State authority in practice and that reasonable disagreement makes hypothetical consent implausible. Second, regarding fair-play duties, the weighing and balancing of the benefits and burdens

<sup>22</sup> For further arguments, see Crawford and Watkins 2010; Murphy 2010.

of State coercion, aside from its contestable instrumental dimension (see, e.g., Crawford and Watkins 2010, 296-297), cannot warrant a sufficiently general justification of State authority and hence of individual liability that applies to all individuals and not only to those who have benefited.

Importantly, one of the implications of the political argument of fairness so described is respect for social and economic equality, and the regime most likely to ensure public or political equality is democracy. The same may then be said about the condition of democratic representation for the State's personification of the political community and for individual liability arising from a State's responsibility, as a result. The problem is that international law itself is agnostic as to the nature of a State's regime, and secondary liabilities of individuals arise under international law for all responsible States independently of their democratic credentials. This therefore leaves the fairness of individual liability for the responsibility of nondemocratic States unaccounted for. This need not worry us, however. The upshot of the proposed argument of fairness should not be to undermine the equality of States, and their citizens, before international responsibility law and detract from the latter's generality. It merely shows once more, and if need be, how dependent the legitimacy of international law is on the moral justification and legitimacy of a State, and how illegitimate international law may be in nondemocratic ones (Besson 2009). This is a more general shortcoming of international law, and one that is independent of the present discussion. Of course, as I will explain in the third section of this essay, there is a way of taking the democratic origins of a given State's responsibility into account in the individual burdens it may give rise to (e.g., in the individual financial contributions to the implementation of war reparations when the war in question was one of democratic liberation), albeit without threatening the generality of State responsibility and its independence from the nature of a given State's political regime in all other cases.

Secondly, the collective action argument. A distinct argument for the fairness of the burden of State responsibility on blameless individuals and their secondary liabilities could be that States enable individuals to conduct collective action and coordinate to pursue common goals they could not achieve individually. Unlike governments, States persist over time and can provide their actions with security and predictability in the long term. Given how much coordination is needed in many areas of our lives, and given that such coordination may actually amount to a moral duty in certain circumstances, this could provide another justification for the authority that States exercise over us<sup>23</sup>, and in turn for our secondary liabilities for their international responsibility when they breach international law.

<sup>23</sup> For a coordination-based argument, see Besson 2005 and 2009.

What this second argument for the fairness of individual liability for a State's responsibility should *not* be held to imply, however, is a corporate analogy under which individuals should be liable for their States because they have benefited from them (*contra*: Miller 2004, 253; Crawford and Watkins 2010, 296-297). As I argued before, States cannot be reduced to a set of benefits and burdens as in public-choice or game theory, and as a result, the justification for their authority is not (only) instrumental. Further, unlike corporations, States cannot disappear. When they do, their obligations, and their responsibilities for breach of those obligations, are merely shifted to the next State(s) personifying (part of) their population over (part of) their territory. The disanalogy is particularly striking in the context of State responsibility: unlike the corporate veil<sup>24</sup>, the State's institutional veil is opaque or semi-transparent from the very beginning (hence the secondary liabilities of individual members of the political community for their State's responsibility) and not only in case of bankruptcy, as would be the case for the limited liability of a corporation's individual members<sup>25</sup>.

Of course, once individual fairness in a State has been reinterpreted along those lines, and even once the Individualist Challenge is debunked, the individual fairness of the burden of State responsibility ought to remain a concern in the legalization of the regime of State responsibility. It is individual fairness that accounts for the secondary liabilities of the individual members of the political community, but only provided the latter reflect the political justifications and their conditions (those just discussed). In the third section of this essay, I will come back to this consideration of individual fairness in the context of the proposal made for reforming the legal regime of IO and State responsibility.

### **3. Challenging the Statist Argument against State Liability for IO Responsibility**

Unlike what applies to individual liability in case of State responsibility, member States, and by extension their citizens, may, in case their IO is unable or unwilling to comply with its responsibilities, escape financial liability for the responsibility of their IO and hence the material burden of their IO's reparation obligations. This is a source of concern for injured third parties, including individuals, because, by comparison to States, IOs, by virtue of the scope of their sphere of competence, may not only cause

<sup>24</sup> On the analogy with the "corporate veil" or "limited liability," see Brölmann 2007a and 2015, 360; Murray 2017.

<sup>25</sup> On the "corporate fallacy," see Kelsen 1948, 349.

very costly injuries to third parties (e.g., in peacekeeping operations), but also have disproportionately limited means with which to compensate for those injuries, being constrained internally by their budget. Quoting Pellet (2013, 49-50), “international organizations have no power to raise taxes or to issue coinage, and can only get the sums necessary to compensate through their membership.”

Of course, member States contribute to their IOs’ budget through their own power to raise taxes domestically, thereby raising the previously discussed issue of the secondary liabilities of citizens. Moreover, the explicit secondary liability of member States may sometimes arise under the internal rules of the IO<sup>26</sup>. However, in its absence, there is no specific rule or principle, under the ARIO or under the default internal rules of the IOs, establishing the secondary financial liability of member States<sup>27</sup>, and arguably no general rule of international law in that regard, either<sup>28</sup>. As a matter of fact, most IO internal rules exclude the secondary liability of their member States<sup>29</sup>. What this means when such liability is not specifically excluded, and what it means for the existence of a potential residual rule of secondary liability, however, is contested. The only relevant provision under the ARIO, i.e., Article 40 ARIO, sets forth a duty for the IO (par. 1) and its member States (par. 2) to make sure, albeit exclusively under their IO’s internal rules, that the IO has effective means to fulfil its responsibilities. The outcome of a compromise at the International Law Commission (ILC), the exact normative purview of that provision, when the internal rules of the IO are silent, remains controversial (see, e.g., Brölmann 2015, 366; Palchetti 2013, 303, 309-311; Pellet 2013, 53). Following Yee (2013, 331, 335-336), one may think that there is an implied obligation of member States of an IO to enable remedies by financing the organization as part of the general international law duty of cooperation with their organization. Such an obligation, were it generally accepted, would remain internal to the IO, however, and hence would apply to the internal relationship between the IO and its member

<sup>26</sup> See, e.g., the 1972 *Convention on International Liability for Damage Caused by Space Objects* (note 15 above), Article XXII.3.

<sup>27</sup> See the two (contradictory) judicial decisions on the subject, i.e., the *Tin Council* and *Westland Helicopters* cases.

<sup>28</sup> See, e.g., ICC, *Westland Helicopters v. Arab Organization for Industrialisation and others* (1989) par. 56. See also Article 6(a) of the Resolution on “The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties” 66-II (*Annuaire de l’Institut de droit international* 1996, 449): “There is no general rule of international law whereby States members are, due solely to their membership, *liable*, concurrently or subsidiarily, for the obligations of an international organization of which they are members” (emphasis added).

<sup>29</sup> See, e.g., the 1986 *International Cocoa Agreement*. See also Amerasinghe 1991, 270-272.

States: it could not imply an external secondary liability towards injured third parties<sup>30</sup>.

What this means in practice, therefore, is that an IO may not have the means available to fulfil its secondary obligation to provide full reparation to injured third parties, while its member States, and their citizens, may incur no secondary liability under current international law or internal IO law in this respect.

What we are facing, as a result, is the reverse situation from the one discussed before and arising from individual secondary liability for State responsibility. Of course, this time, international law and internal IO law are situated on the side of the Individualist Challenge, were it to be transposed to an IO's member States *qua* statist version of the Individualist Challenge. Defenders of something we could refer to as the Statist Argument<sup>31</sup> may therefore consider that the current regime of international responsibility of IOs, and the absence of secondary liability of States in case of responsibility of the IO, is fair to blameless States and, by extension, to their populations that would otherwise have to bear the burden of reparations for wrongful acts they have not contributed to (see, indirectly, Ryngaert 2015, 503-504).

Now that the Individualist Challenge has been debunked, however, and that the fairness of secondary individual liabilities for State responsibility has been revisited and defended through the political and collective action arguments, it is easy to see why, *mutatis mutandis*, the Statist Argument should be rejected. Not only should it not be accepted, but individual fairness actually requires the secondary liability of States in case of IO responsibility, just as it requires the secondary liability of individuals in case of State responsibility. It is actually because responsibility is always ultimately an individual matter that our States, and actually we through them, should bear the burden of the responsibilities of the IOs which they, and we, by extension, have constituted to fulfil their functions.

Of course, certain features of IO personality and responsibility make the transposition of the counterarguments discussed before difficult, and objections may be made that correspond to the specific relationship between IOs and their member States.

<sup>30</sup> See ILC 2011, 132: "Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly, *no subsidiary obligation* of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation" (emphasis added). For a restatement of the discussion to date, see Murray 2017; Brölmann 2015, 363-368; Cortés Martín 2013.

<sup>31</sup> Because international responsibility law is grounded in a statist approach to justice and statehood (e.g., Nagel 2005; Cohen and Sabel 2006), this is also the approach this essay is endorsing. For a critique, see Murphy 2010, 309-311, 313-315.

First of all, the political critique. The previously defended fairness argument for the secondary liability of individuals relies on a political conception of justice in a State. As a result, its transposition to IOs that are not (necessarily) political (and, by extension, democratic) entities to the extent that they do not personify or represent a political community of (equal) individuals may be contested.

In reaction, one may argue that States remain political communities even when they constitute IOs and become members thereof (see Brownlie 2005, 361). To that extent, the fairness argument still plays a role in the member State-individual relationship, requiring that States behave internationally so as to be able to bind their citizens through their conduct, whether that conduct is inter-State or mediated by IO membership. It is therefore a requirement of domestic political justice that States be liable for their IOs' responsibility, and not so much a requirement of IO internal political justice. To quote Brownlie (2005, 360), "the applicable legal category," in this context, "is that of State responsibility, and not the law of international organizations."

Of course, some IOs may develop so as to personify their own political community, and this could affect their internal relationship to States *qua* intermediary political entities in a larger political community. If that were the case, the political argument could also apply to the IO-individual relationship, and the requirement of secondary liability of both States and individuals based on individual fairness would become even more direct. A confirmation thereof may be found in the European Union (EU) and its idiosyncratic international responsibility regime (see, e.g., Kuijper 2013; Paasivirta 2015). Even though the personification of the EU and hence its institutional veil are even thicker than in other IOs, to the extent that the internal allocation of responsibilities is usually also projected onto the outside towards injured third parties under international law, EU law clearly foresees default mechanisms of secondary liability of Member States towards those injured third States or individuals in case of international responsibility of the EU. One may mention, for instance, the joint and several liability principle that applies to injured third parties, unless a clear allocation of liabilities has been specified by treaty between the EU and those third parties<sup>32</sup>. An internal allocation of liabilities can then ensue between the EU and its Member States on grounds of the internal division of powers and

<sup>32</sup> See, e.g., Article 3 of EU Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, 121-134; or Article 6(2) of the 1982 United Nations Convention on the Law of the Sea (UN Treaty Series, vol. 1833, 1-31363).

the corresponding EU budgetary resources. This may be interpreted as a normative consequence of the political (and democratic) nature of the EU and its personification of the community of EU citizens (Articles 9 and 14 of the Treaty on European Union).

Interestingly, this political fairness argument for the secondary liabilities of States for IO responsibility fits and justifies the functionalist understanding of IOs that underpins the international law on IOs<sup>33</sup>. If the legal personality of IOs is justified by reference to how it enables States to fulfil their functions, then the justificatory link to States' political communities and individuals is clearly unveiled, and so should their liability for the IOs' wrongful acts when fulfilling those conferred functions and powers (see Pellet 2013, 46). Functionalism has normative implications, as Virally (1974, 299) explained long ago, and not only for IOs, but also for its member States; the secondary liabilities of member States are one of them.

Secondly, and relatedly, the legal personality critique. Some authors may consider that the fairness argument for secondary liabilities of member States in case of IO responsibility risks undermining the distinct legal personality of IOs and their independence or autonomy (see, e.g., Brölmann 2015; Ryngaert 2015, 504; see also Higgins 1995, 288).

This critique, however, conflates this essay's argument for member States' secondary liabilities for their IO's responsibility, on the one hand, with a distinct argument, which it is not making, for lifting or piercing the institutional veil of IOs and securing the collective (member)<sup>34</sup> responsibility of States for that of an IO, on the other<sup>35</sup>. The latter would indeed threaten the independent legal personality of IOs and, to some extent, violate the political justification for having States *qua* legal persons and their further institutional constructions in the first place. After all, the legal personality of IOs amounts to a way for our States to further our collective aims on the international plane. It is important, therefore, to stress that IOs should be held independently responsible for their wrongful acts and that this is the normative consequence of their legal personality. Greater effort should actually go into strengthening the independent obligations and responsibilities of IOs, together with the procedural, including judicial, mechanisms for holding them responsible under international law. What should be clear by now, however, is that the secondary liability of an IO's member State in case the responsible IO is unable or unwilling to meet its reparation obligations

<sup>33</sup> I am not endorsing functionalism as a general theory of IOs, however. For a critique, see Klabbers 2015a, 10.

<sup>34</sup> On the term "member responsibility," see Yee 2013, 325-327.

<sup>35</sup> On this distinction, see, e.g., Pellet 2013, 51. See also Yee 2013, 331; Brownlie 2005, 359.

does not detract from its responsibility, which remains intact. It merely affects the latter's implementation and full reparation of the injury of innocent third parties. This is also, after all, the way it works for States: their distinct legal personality is not threatened by the fact that citizens bear secondary liabilities for their responsibilities, but is, on the contrary, thereby enhanced and conditioned on the latter.

Interestingly, this alleged opposition between legal personality and secondary liability is reminiscent of a famous quandary in IO law, i.e., that between recognizing more autonomy for IOs, coupled with more duties and responsibilities, on the one hand, and retaining more State control, coupled with the functionalist and derivative approach to the legal personality of IOs, on the other. The difficulty with this opposition is that it has become so entrenched (see, e.g., Brölmann 2007a and 2015, 360-363; see also Klabbbers 2015a, 11) that authors tend to gloss over the possibility and desirability of both being equally applicable, just as they are in the case of States. An IO could be considered both as being constituted and controlled by member States (and their citizens) *qua* political community, on the one hand, and as an independent legal person created to fulfil their functions and responsible for the latter, on the other. This is, after all, the way States work as well: they are at once independent and responsible legal persons and are made up of individuals as a political community that control them. So the problem lies not so much in the IOs' legal personality – which is, as just explained, entirely compatible with member States incurring secondary liabilities – as in States themselves *qua* sole international lawmakers, sole sovereigns, and sole general subjects of international legal duties and responsibilities. This has led States to develop a conception of IOs' functions that shelters IOs, but as a result mostly themselves, from the conceptual or structural ability to harm third parties and hence from being held responsible for those injuries (see Brownlie 2005, 362; see also Schermers 1980, 780). Unlike what may at first seem to be the case, therefore, the problem with functionalism in IO law lies in the States, and not the IOs.

True, an increase in the exercise of control over IOs by their member States could be a consequence of their incurring secondary liability for their IOs' responsibility. Some authors have feared that this could pose another threat to the legal personality of the IO (for this critique, see Ryngaert 2015, 504; Higgins 1995, 287-288). However, this concern misunderstands what legal personality in a political community is about. Indeed, to the extent that the legal personality of IOs amounts to a personification of the citizens of States and, by delegation, a personification of those States, developing greater State control over IOs amounts, not to a threat to legal personality, but to a condition of their personality (see also Yee 2013, 449-551). This is also the way the personification of a political community by a State works, under both domestic and international law, to the extent that States have not only

sovereign rights but also sovereign duties, and respect for the latter may and should be controlled by citizens.

Finally, the “vanishing legal subject” critique. On the basis of the corporate analogy of “limited liability,” some authors may be tempted to claim that member States could be deemed to incur secondary liabilities only in cases where the responsible IO is bankrupt or dissolved for other reasons, but not in the other cases of IO responsibility. Indeed, most of the previously mentioned cases of IO responsibility raising concern about the fairness of States’ secondary liabilities pertain to IOs which could, technically speaking, be dismantled, but which were not dismantled, because they had become institutional frameworks through which States, and indirectly individuals through them, conduct collective action and defend their rights as a political community on the international plane. Thus, while it is correct to say that, legally, the UN or the EU could disappear, it is likely that they would be replaced by a successor organization made up of the same States and hence of (more or less) the same people or territories. This has been the case once before with the League of Nations. To that extent, most IOs are like States: they cannot vanish entirely in terms of the populations and territories they personify institutionally.

The problem with this critique is three-pronged. First of all, as I previously argued, corporate analogies do not fit the political fairness argument defended in this essay. The kind of public responsibility at stake when the responsible subject is an institution like a State or an IO, constituted to personify a political community and fulfil public functions, requires us to revise our private law paradigms in international responsibility law (see also Klabbers 2015a, 73). Secondly, the critique does not even apply very well to instances of IO responsibility that do seem to fit the corporate analogy. This may be exemplified by the two cases that have shaped the ILC position on this issue, i.e., the *Tin Council* and *Westland Helicopters* cases (see note 16 above). Despite the corporate analogy, the conclusion defended by the majority in the two cases has been that there could be no secondary liability of member States despite the inability of the responsible IO to respond. A final difficulty with the analogy with domestic bankruptcy law and the limited liability of a corporation’s members is that it may actually be turned on its head. It is precisely because States, and by extension IOs, do not amount to corporations, and because there is no legal mechanism for settling their debts in case of bankruptcy under international law (Crawford 2000, par. 161), that member States should be held liable in case their IO is unable to fulfil its responsibility towards injured third parties. Indeed, the default solution of a legal void left by States under international law cannot be the absence of liability of those States.

Last but not least, an explanation is called for to explain why legal regimes differ so drastically between secondary liabilities for State and IO

responsibilities, and, in turn, to explain why our moral intuitions pull in radically opposite directions in both cases, with the Individualist Challenge being expressly made against the former and the Statist Argument for the latter being criticized.

Explaining that discrepancy is not difficult, however. Not only does the current legal situation come close to giving States a “licence to harm,” to quote Brownlie (2005, 361; see also Besson 2017b). After all, they have constituted IOs to shift the implementation of some of their functions, but without vesting them with all the corresponding duties and all the responsibilities that go with their breach. As I have argued elsewhere (Besson 2017b), the institutional veil of IOs has become their member States’ “veil of irresponsibility.” They have no incentive, therefore, to reform the legal situation so as to incur secondary liabilities in those rare cases where their IOs incur responsibility. States, in other words, take advantage of their monopolistic situation as sole international lawmakers, and as sovereigns under international law, in order not to do anything about it. Furthermore, as citizens of those States we also benefit unduly from this liability gap, and this decreases the probability of civil society pressure on those lawmaking States. Nevertheless, reforming the international law on the responsibility of States and IOs so as to bring it into line with the proposed moral requirements comes at a cost that we, and our States for us, should be ready to bear.

## **4. Reforming International Responsibility Law to Introduce Secondary Individual and State Liabilities for IO Responsibility**

This section draws on the fairness argument proposed in the previous section to discuss potential reforms of international responsibility law. What the Individualist Challenge and the Statist Argument have shown, indeed, is that individual fairness should be taken seriously in international responsibility law. While that principle is not opposed to secondary liabilities of individuals for State responsibility and of States for IO responsibility, and in the latter case actually *supports* their introduction (Section 4.1), its protection should also amount to a constraint on those international law reforms (Section 4.2).

### **4.1. Introducing Secondary Individual and State Liabilities on Grounds of Fairness**

Introducing fairness-based secondary liabilities for member States in case of IO responsibility means taking up three tasks: identifying the sources of

those liabilities; setting their personal scope; and organizing their articulation with IOs' distinct responsibility and among themselves.

First, the sources of secondary liability. As I explained before, the state of the discussion under Article 40(2) ARIO is that States incur an obligation, under general international law – provided the ARIO may be considered customary – to draft the internal rules of the IO so as to bring into being an obligation for themselves to enable their IO to fulfil its responsibilities. What remains unclear is whether, as I argued should be the case, in the absence of such an internal rule of the IO, there could be an implied obligation to do so based on the general obligation of every IO member State to support its IO under general international law (see Yee 2013, 331, 335-336). Alternatively, one may consider that the *non liquet* principle applies in this case, waiting for a judicial discussion of the issue (see Higgins 1995, 285-286).

This distinction between secondary liabilities arising either from IO internal law or from general international law should not come as a surprise. It echoes the distinction, discussed in the first section, between individual secondary liability for State responsibility arising from domestic law and that arising from international law directly (see d'Argent 2002, 536-337, 723-743). The opposition should not be overplayed, however, to the extent that internal IO law remains inter-State in the making and is not as different from international law as domestic law. A way of supporting the case for the secondary liability of member States under general international law would be to consider it a general principle of (international) law. This could be argued for either on grounds of an analogy with the domestic law principle of secondary individual liabilities for State responsibility, or by reference to the moral-political justification of the principle and its grounding in individual fairness in the political circumstances of States and IOs in international law.

Secondly, the personal scope of member States' secondary liabilities. Provided the general legal validity of secondary liabilities of member States can be secured along those lines, the next question is whether their personal scope expands beyond the internal relationship between the IO and its member States in order to encompass external liabilities towards injured third parties directly.

If their existence amounts to a general principle of international law, as I have argued, one may claim that, unlike what applies to the internal rules of the IO that do not bind or create rights for third parties outside the IO, secondary liabilities may be invoked by injured third parties (see also Brownlie 2005, 361). It is the point of international responsibility law to be such and to generate *erga omnes* rights and duties. To that extent, however, and as I explained before, the international law on the responsibility of IOs would have to be emancipated from a civil tort law paradigm and shifted towards a

public law model that goes beyond the boundaries of the IO and its member States.

Finally, the articulation of secondary liabilities with the independent international responsibility of IOs. As I argued before, the secondary liabilities of member States should not be conflated with the collective (member) responsibility of those States. They are merely there to complement the distinct and independent responsibility of IOs in the context of implementation and in case the latter are “unable” (e.g., because they have run out of resources) or “unwilling” to implement their responsibilities. What triggers them, in other words, is the lack of implementation of the responsibility of the IO.

A question that arises in this context is whether member States should incur a joint and several liability with the IO, along the lines of what is foreseen in case of a plurality of responsible States and/or IOs (Arts. 47 AR-SIWA / 48 ARIIO). As I have argued elsewhere (Besson 2007, 2017b), this kind of responsibility is particularly justified, on grounds of solidarity, in the institutional circumstances of an IO. Indeed, responsibility is usually triggered by a single wrongful act of the IO (and its member States), on the one hand, and member States and the IO share an institutional framework and the capacity to coordinate before and after to allocate internal responsibilities, on the other. However, in order for joint and several responsibility to apply, member States would need to be responsible in the first place, either for the wrongful act of the IO, by joint attribution of conduct or responsibility, or for their own acts, which is not the case in the circumstances discussed in this essay (Besson 2017b). Of course, as I explained before, instituting such a regime of joint and several liability, under the internal rules of an IO or under an international treaty<sup>36</sup>, may be a way to protect injured third parties against the inability of the IO to respond effectively or against its unwillingness to do so. At the same time, however, it creates the danger of contributing to the confusion between the secondary liability of member States and their collective responsibility. Moreover, in a context where IOs’ international law duties are still limited and where judicial and procedural remedies against IOs under international law are even more so, the joint and several liability of member States and IOs may actually bring injured parties, and the international dispute settlement mechanisms available, to hold States responsible for wrongful acts they are not (fully) responsible for<sup>37</sup>.

Of course, and by contrast, secondary liabilities of member States themselves (independently of the IO’s responsibility) should be owed in a joint and several fashion. This may be justified by reference to the very grounds

<sup>36</sup> See, e.g., the 1972 *Convention on International Liability for Damage Caused by Space Objects*, Article XXII.3; or Article 3 EU of Regulation 912/2014.

<sup>37</sup> In international human rights law, see, e.g., Besson 2016 and 2017a.

for (political or in this case even democratic) solidarity I have just given, and especially joint action and institutional coordination (Besson 2017b), but also out of justice towards injured third parties (see also Palchetti 2013, 311). The actual sharing of costs between the IO and its member States could then follow internally, based on the internal rules of the IO and, for instance, the internal budgetary allocation.

#### **4.2. Constraining Secondary Individual and State Liabilities on Grounds of Fairness**

While individual fairness justifies and even requires the secondary liabilities of member States for their responsible IOs, it also sets constraints on what may be required of them and their respective populations under those secondary liabilities. Some of these constraints are similar to those that apply to the secondary liabilities of individuals for their responsible State, while others reflect the institutional specificities of IOs and their relationship to their member States.

A first way to alleviate the unfair burden on blameless individuals may be to consider the political regime of the State in question and, respectively, that of the IO at stake, provided it is politicized.

Indeed, what should have become clear from the political argument for individual secondary liabilities defended in the first section is the nexus between political equality and the justification of the political community's personification by the State. What this implies, I explained, is that democratic regimes are those in which the justification of secondary liabilities is the strongest. What one may consider out of fairness, therefore, is not so much a limitation of individual secondary liabilities in case the State is nondemocratic. This is what has been suggested in case of odious debts incurred by a people by the fact of a dictatorial government, for instance (see, e.g., Howse 2007). A better way would be to limit secondary liability in case of a regime change towards democracy (see Murphy 2010, 312). Thus, a suggestion would be to limit secondary liabilities when State responsibility is incurred because of the people's self-determination (e.g., following a war of liberation). This is, after all, something that international law knows from the law on State succession when a newly independent State has exercised its right to self-determination (the so-called *tabula rasa* principle).

A second consideration of fairness when devising individual and State secondary liabilities for a responsible IO is payment capacity.

This is a consideration that has been considered in the context of individual secondary liabilities for State responsibility (see d'Argent 2002, 723 ff.) and may easily be transposed onto member States' liability for their IOs' re-

sponsibility, since an IO's payment capacity is even more limited than that of a State, thereby burdening member States even more (see Pellet 2013, 50). After all, not all populations and not all States have the same payment capacity. The burden of reparations on a poor State and population may have disastrous consequences on its reconstruction and economic and political future, thereby influencing the prospects of international peace and security. Iraq is a recent example, of course.

Curiously, the obligation of full reparation (under Article 31 ARIO) only focuses on the right of the injured party, without taking into account the capacity of the responsible IO, and by extension that of its member States. This could still be done later on, however, by way of a reservation of the "means of subsistence of the population." This would work as a limit not so much on the amount of reparations owed as on the scope of its implementation and in particular on the scope of the secondary liabilities of member States regarding potentially unpaid reparations. This limitation was considered during the ILC's work on ARSIWA but was not retained in the final version of the articles. It may, however, be founded in general international law<sup>38</sup>. Another way of weighing on the scope of the implementation of responsibility could be a limitation in time, e.g., over a generation and not more (see d'Argent 2002, 740-743). Yet another limitation one may consider could consist of restrictions on the secondary liabilities of member States, justified by respect for other concurrent State obligations, and in particular for conflicting human rights obligations (*ibid.*, 738-739). An obvious example is State duties owed to the individual holders of property rights, but also, more generally, to holders of social and economic human rights.

## 5. Conclusions

Individual fairness should be a core concern of any regime of responsibility, and this also applies to the international law regimes of State responsibility and IO responsibility.

While the implications of individual fairness for the former have been debated around the Individualist Challenge to State responsibility, this essay has broached the issue of individual fairness in another, and as of yet unexplored, area in the philosophy of international law: the responsibility of IOs. Echoing the structure of the Individualist Challenge, the essay has coined that argument about the fairness of the burden of IO responsibility on States the "Statist Argument." Based on its debunking of the first challenge, it has

<sup>38</sup> See Permanent Court of Arbitration, *Russian Claim for Indemnities (Turkey v. Russia)*, 11 November 1912, RIAA, vol. XI, 443. See also d'Argent 2002, 726-727.

turned the second argument on its head by actually arguing for a reform of the existing regime of IO responsibility and State liability on grounds of individual fairness. The upshot of the proposed argument is a reverse Statist Challenge.

In short, the essay's argument has been that individual secondary liabilities arising under domestic and international law for a State's responsibility may be considered fair, and this should be the case on grounds of both political and coordination-based justifications of State authority (argument made in the first section). To the extent that this argument applies, the same may be said about member States' secondary liabilities arising under internal IO law or general international law for their IO's responsibility, and this is actually based on the political justification of a State's authority over its citizens and the functional relationship between States and the IOs they constitute. Because member States' secondary liabilities pertain to the implementation of their IO responsibility and do not therefore amount to their collective (member) responsibility, this argument does not threaten the legal personality of IOs but, on the contrary, bolsters it in conditioning and constraining it (argument made in the second section). On the basis of the fairness argument, the essay then made a proposal for reforming the current international law regime of IO and State responsibility, especially in order to identify the sources, the personal scope, and the articulation of those secondary liabilities of member States in case of IO responsibility, while also constraining them to take due account of individual fairness, and in particular of the States' political regime and payment capacity (argument made in the third and final section).

*Qua* argument anchored in the philosophy of international law, the essay starts with rules and principles of international law, justifies them, and proposes directions for reforming them. To that extent, it may be described as internal to the international law on responsibility and does not shy away from legal technicalities; it is the price of nonideal theory and one of the prides of legal philosophers to be able to provide such arguments. The proposed argument actually nicely complements existing critiques of IO responsibility law by international lawyers that tend to be policy-oriented and focused on IOs only, and does so in two ways. First of all, it clarifies what the moral problem is and proposes moral and legal philosophical arguments to address it and, secondly, it does so in a way that integrates the two regimes of State and IO responsibility by drawing attention to the single ultimate moral subject of liability, i.e., the individual in the domestic political communities bearing the burden of State and IO responsibilities. To that extent, it is a contribution to fast-developing debates in the philosophy of international law, but also a first incursion into an almost uncharted territory: the philosophy of international responsibility law.

An important conclusion should be drawn from this essay, and it is that State responsibility and, in general, States themselves are at the core of the fairness critique of the current regime of IO responsibility. A first implication is the necessity to overcome the private or corporate law paradigm used when devising the international law regime of IO responsibility and, accordingly, when this regime is being discussed by international lawyers. That regime should be conceived anew as a regime of public responsibility that corresponds to the political justification of the personality of IOs defended in this essay. What this conclusion also means, secondly, is that we, as citizens of those States, should act to reform IO and State responsibility law so as not to evade our liability any longer. The cholera case is often quoted in this debate, but it is only the tip of the iceberg, and more cases are coming.

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## References

- Alihusain, Candice. 2016. "European Patent Office: An International Organisation before a National Court." *Peace Palace Library* 7 May. <https://www.peacepalancelibrary.nl/2016/05/european-patent-office-an-international-organization-before-a-national-court/>.
- Alvarez, José. 2014. "The United Nations in the Time of Cholera." *American Society of International Law* (blog) 4 April. <https://www.asil.org/blogs/united-nations-time-cholera>.
- Amerasinghe, F. Chittaranjan. 1991. "Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent." *American Journal of International Law* 85 (2): 259-280.
- Besson, Samantha. 2005. *The Morality of Conflict. Reasonable Disagreement and the Law*. Oxford: Hart Publishing.
- 2007. "La pluralité d'Etats responsables. Vers une solidarité internationale?" *Revue suisse de droit international et de droit européen* 1: 13-38.
- 2009. "The Authority of International Law: Lifting the State Veil." *Sydney Law Review* 31 (3): 343-380.
- 2015. "The Bearers of Human Rights Duties and Responsibilities for Human Rights – a Quiet (R)Evolution." *Social Philosophy & Policy* 32 (1): 244-268.
- 2016. "L'application extra-territoriale des droits de l'homme internationaux en pratique: juridictions concurrentes, obligations conjointes et responsabilités

- partagées.” In *Droit des frontières internationales. Actes des Journées franco-allemandes de droit international 2014*, edited by Pierre d’Argent, 245-259. Paris: Pedone.
- 2017a. “Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities.” In *The ECHR and General International Law*, edited by Iulia Motoc and Anne van Aaken. Oxford: Oxford University Press. Forthcoming.
- 2017b. “La responsabilité solidaire des organisations internationales et des Etats – une institution négligée.” In *La responsabilité solidaire*, edited by Alain Supiot. Paris: Publications du Collège de France. Forthcoming.
- Blokker, Niels. 2015. “Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion?” *International Organizations Law Review* 12 (2): 319-332.
- Brölmann, Catherine. 2007a. *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties*. Oxford: Hart Publishing.
- 2007b. “Euratom Case, Greenpeace Nederland and Procurator General at the Supreme Court of the Netherlands (intervening) v Euratom, Judgment on Appeal in Cassation, Decision N. LJN: BA 9173” (Comment), 13 November; <http://opil.ouplaw.com/view/10.1093/law-ildc/838nl07.case.1/law-ildc-838nl07>.
- 2015. “Member States and International Legal Responsibility: Developments of the Institutional Veil.” *International Organizations Law Review* 12 (2): 358-381.
- Brownlie, Ian. 2005. “The Responsibility of States for the Acts of International Organizations.” In *International Responsibility Today. Essays in Memory of Oscar Schachter*, edited by Maurizio Ragazzi, 355-362. Leiden: Martinus Nijhoff.
- Cassese, Antonio. 2005. *International Law*, 2nd ed. Oxford: Oxford University Press.
- Cohen, Joshua, and Charles Sabel. 2006. “Extra Rempublicam Nulla Justitia?” *Philosophy & Public Affairs* 34 (2): 147-175.
- Cortés Martín, José Manuel. 2013. “The Responsibility of Members Due to Wrongful Acts of International Organizations.” *Chinese Journal of International Law* 12 (4): 679-721.
- Crawford, James. 2000. *Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur*, Documents of the fifty-second session of the International Law Commission, A/CN.4/507/Add. 1. [http://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_507.pdf&lang=EFSXY1](http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_507.pdf&lang=EFSXY1).
- Crawford, James, and Jeremy Watkins. 2010. “International Responsibility.” In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 283-298. Oxford: Oxford University Press.
- Daugirdas, Kristina. 2016. “The United Nations’ Efforts to Restore a Reputation Tarnished by Cholera.” *Blog of European Journal of International Law (EJIL:Talk!)* 9 December. <http://www.ejiltalk.org/the-united-nations-efforts-to-restore-a-reputation-tarnished-by-cholera/>.
- Dworkin, Ronald. 1986. *Law’s Empire*. Cambridge (MA): Harvard University Press.
- D’Argent, Pierre. 2002. *Les réparations de guerre en droit international public. La responsabilité internationale des États à l’épreuve de la guerre*. Brussels: Bruylant.

- D'Aspremont, Jean. 2007. "Abuse of Legal Personality of International Organizations and the Responsibility of Member States." *International Organizations Law Review* 4 (1): 91-119.
- Falk, Richard. 2006. "Reparations, International Law and Global Justice: A New Frontier." In *The Oxford Handbook of Reparations*, edited by Pablo De Greiff, 478-503. Oxford: Oxford University Press.
- Higgins, Rosalyn. 1995. "Preliminary Exposé." *Annuaire de l'Institut du droit international* 66 (1): 251-289.
- Howse, Robert. 2007. "The Concept of Odious Debt in Public International Law." *United Nations Conference on Trade and Development Discussion Paper* 185. [http://unctad.org/en/docs/osgdp20074\\_en.pdf](http://unctad.org/en/docs/osgdp20074_en.pdf).
- ILC (International Law Commission). 2011. "Draft Articles on Responsibility of International Organizations with Commentaries." *Report of the International Law Commission on the Work of Its Sixty-Third Session, Official Records of the General Assembly, 66th Session, Supp. 10, A/66/10*: 54-172.
- Kelsen, Hans. 1948. "Collective and Individual Responsibility for the Acts of States in International Law." *The Jewish Yearbook of International Law* 1: 226-239.
- 1952. *Principles of International Law*. New York: Rinehart and Co.
- Klabbers, Jan. 2015a. "The Transformation of International Organizations Law." *European Journal of International Law* 26 (1): 9-82.
- 2015b. *An Introduction to International Organizations Law*. 3rd ed. Cambridge (UK): Cambridge University Press.
- Kuijper, P. Jan. 2013. "Attribution – Responsibility – Remedy: Some Comments on the EU in Different International Regimes." *Revue belge de droit international* 46 (1): 57-77.
- Lauterpacht, Elihu. 1976. "The Development of the Law of International Organization by the Decisions of International Tribunals." *Recueil des cours de l'Académie du droit international de La Haye* 152: 377-478.
- Lewis, H. David. 1948. "Collective Responsibility." *Philosophy* 23 (84): 3-18.
- May, Larry, and Stacey Hoffman (eds). 1991. *Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics*. Lanham: Rowman and Littlefield.
- Miller, David. 2004. "Holding Nations Responsible." *Ethics* 114 (2): 240-268.
- Murphy, Liam. 2010. "International Responsibility." In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 299-315. Oxford: Oxford University Press.
- Murray, Odette. 2017. "Challenging the Presumption of 'Limited Liability' of Member States of International Organizations." In *International Responsibility. Essays in Law, Philosophy and History*, edited by Samantha Besson. Bern: Schulthess. Forthcoming.
- Nagel, Thomas. 2005. "The Problem of Global Justice." *Philosophy and Public Affairs* 33 (2): 113-147.
- Paasivirta, Esa. 2015. "The Responsibility of Member States of International Organizations? A Special Case for the European Union." *International Organizations Law Review* 12 (2): 448-467.
- Palchetti, Paolo. 2013. "Exploring Alternative Routes: The Obligation of Members to Enable the Organization to Make Reparation." In *Responsibility of Interna-*

- tional Organizations. Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, 303-312. Leiden: Martinus Nijhoff.
- Pellet, Alain. 2013. "International Organizations Are Definitely Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations." In *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, 41-53. Leiden: Martinus Nijhoff.
- Ryngaert, Cedric. 2015. "The Responsibility of Member States of International Organizations: Concluding Observations." *International Organizations Law Review* 12 (2): 502-517.
- Salomon, E. Margot. 2015. "Of Austerity, Human Rights and International Institutions." *LSE Law, Society and Economy Working Papers* 2/2015. <http://www.lse.ac.uk/humanRights/documents/2015/salomonWpsAusterity.pdf>.
- Schermers, Henry G. 1980. *International Institutional Law*. 2nd ed. Leiden: Martinus Nijhoff.
- Spijkers, Otto. 2014. "Emerging Voices. The Responsibility of the Netherlands for the Genocide in Srebrenica." *Opinio Juris* 23 July. <http://opiniojuris.org/2014/07/23/emerging-voices-responsibility-netherlands-genocide-srebrenica-nuhanovic-mothers-srebrenica-cases-compared/>.
- Sverdlik, Steven. 1987. "Collective Responsibility." *Philosophical Studies* 51 (1): 61-76.
- Virally, Michel. 1974. "La notion de fonction dans la théorie de l'organisation internationale." In *Mélanges offerts à Charles Rousseau. La communauté internationale*, 277-300. Paris: A. Pedone.
- Yee, Sienho. 2013. "Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations." In *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, 325-336. Leiden: Martinus Nijhoff.

