

Oct. 27th, 2006

Luncheon Address, Canadian Council of International Law, 35th
Annual Conference on Responsibility of Individuals, States and
Organizations¹

International Organizations: Accountability or Responsibility?

José E. Alvarez

Comme c'est évident, je suis à peine capable de parler français. Je serais certainement beaucoup plus à l'aise si je parlais devant la Société Espagnole de Droit International. Je vous remercie de me donner une nouvelle fois l'occasion de m'adresser à vous. Je promets de ne pas vous torturer plus longtemps avec mon horrible français. C'est pourquoi tout en présentant mes excuses aux francophones, je poursuivrai ici en anglais.

The last time I was before you my luncheon remarks addressed "The Closing of the American Mind." I fear that after today's address, you will consider my own mind to be exhibit one.

¹ All rights reserved. A version of this speech, with citations, will be published in the CCIL's Proceedings in due course.

I am a big fan of James Crawford's magisterial articles of state responsibility (henceforth "ASR"). Those articles and the treasure trove of practice and judicial decisions in their commentaries are an international law geek's idea of ideal bedside reading. As an expert witness in a number of recent ICSID cases, I have been an avid consumer of the ASR. They are indispensable. As my teenager would say, Crawford's rules *rock*.

The International Law Commission (ILC)'s current effort to draft comparable rules delineating the "Responsibility of International Organizations" does not rock. It is more like a slow motion train wreck. This nearly six year effort has turned into a "find and replace" exercise in which some of the world's leading lawyers sit around in Geneva, presumably drinking good wine, while replacing "international organization" wherever the word "state" originally appeared in the ASR. Seldom has so much high priced legal talent been put to poorer use – always excepting the very special case of the number of U.S. lawyers engaged in justifying what they euphemistically call "alternative" methods of

interrogation. I am tempted to say that the ILC's latest effort may itself be an internationally wrongful act; indeed, given the broad way that their draft article 4(2) defines IO agents, it would appear that the ILC itself might agree.

Now let's admit at the outset that the ILC's effort makes some doctrinal (if not practical) sense. The notion of "responsibility" has a grip on the legal imagination that the vague and suspiciously political term, "accountability," does not. It is also tempting to draw grand conclusions from the fact that at least since 1949 when the ICJ told us so, IOs are "international legal persons" with distinct subject-hood. Doctrinally, it is logical to say that if, as the Court found, the UN can bring claims for harms done to its interests, it should be liable for harms that it inflicts on third parties. The Institut de Droit International so affirmed back in 1995. And indeed there is some IO/state practice supporting this principle, especially with respect to harms committed by UN peacekeepers under the UN's operational control or with respect to harms committed by these organizations vis-a-vis their employees

and contractors. (The last has led to arbitral clauses in UN contracts since, given that organization's immunity from suit, contractors would be denied a forum to vindicate their rights otherwise.) And quite apart from the *sui generis* liability scheme within the European Community, there are a few cases suggesting IO responsibility when the Organization acts as an administrator of territory, see e.g., decisions issued by the Constitutional Court of Bosnia and Hercegovina and its Human Rights Chamber vis-à-vis the High Representative or by the UN's own ombudsperson with respect to the UNMIK in Kosovo.

But the Institut de droit also affirmed, in accord with the *Tin Council* cases, that members of an IO are not normally liable concurrently or on a subsidiary basis for the actions of an IO unless the rules of the organization so provide or unless the rules of general international law so provide. This exception, which is suggested by the ILC's draft article 28, is supported by intriguing dicta in some European cases suggesting that a member state may be responsible when it complies or acquiesces in wrongful action

taken by an IO (see, e.g., *Application of M v. Germany* in the European commission of Human Rights), or where states commit a wrongful act by transferring competences to an IO (see dicta in *Waite and Kennedy v. Germany* and *Matthews v. United Kingdom* in the European Court of Human Rights).

Draft article 28 is one of the few provisions in the the ILC's current effort that I think is worth taking seriously and developing. It might indeed be desirable progressive development of the law to indicate that states are responsible should they "circumvent" their international obligations by using an IO as article 28 states (assuming that we clarify a bit more what "circumvent" means). Enforcing this principle when appropriate may create incentives for states to devise internal mechanisms that either prevent their IOs from acting wrongfully or that provide remedies when they do.

But draft article 28 is one of the very few provisions in the ILC's on-going effort that has no counterpart in the ASR. It is one of the only instances in which the ILC thought outside the misleading state responsibility box to get at a real problem:

namely the unique interplay between primary duty-holders (states) and their organizational principal/agents to give content to the common sense, equitable notion that states should not be able to escape responsibility simply by deploying agents, whether these are private contractors who run detention camps or UN officials.

The ILC's and the GA's interest in making IOs responsible is understandable. The increased levels of legally significant legal activity by our Frankenstein monsters, our IOs, are making people notice them and more people do not like what they see. Recent events suggest that states (like a gang of drunken teenagers) can do more harm sometimes when they act as a group. Our beloved "representatives of the international community" do not always respect the law. Our international financial institutions are charged with malfeasance. UN peacekeepers engage in trafficking and forced prostitution. Multilateral sanctions programs – such as the Oil for Food Program for Iraq can be just as corrupt as comparable efforts by government agencies and still do a very effective job of undermining the economic and social rights of women and

children – almost as much as less effectual, unilateral efforts. Even the alternative to those --“smart” UN sanctions that focus on individual perpetrators, such as the SC’s 1267 list of alleged terrorists – have a dark side: these can be nearly as contemptuous of due process and the need for independent review over “executive” action as the actions of P-1 with respect to unlawful combatants. We have also learned – as if we didn’t know from the long Cold War paralysis of SC -- that the omissions of our international organizations – whether in Rwanda in 1993 or Srebrenica in 1995 – can be devastating.

But a good motive does not excuse bad execution. The draft articles so far provisionally adopted by the ILC, to the extent that they go beyond the circumspect effort of the Institute de Droit make huge leaps of judgment not supported by the behavior of states or IOs.

I have put the articles that have so far been provisionally adopted on your tables to better permit target practice. Let’s take a look at them briefly to appreciate their broad scope.

Article 1 (1): The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

As the special rapporteur explains, these draft articles are extremely ambitious. The intent is to go beyond acts that an organization itself commits. (Compare earlier rejected language: “for its internationally wrongful act”). From the start the ILC is contemplating the possibility that IOs might be “responsible” for wrongful actions taken by all of some of their members comparable to those that are the subject of ILC Articles of State Responsibility (henceforth ASR), 16-18. That is, the ILC is contemplating cases where the organization aids, assists, directs or controls acts taken by states that are wrongful (see articles 12-13) and even cases where IOs coerce states or other international organizations into committing wrongful acts (see article 14). As the special rapporteur explains, 1(1) is general enough to include situations in which an organization undertakes certain obligations which have to be performed by one of its members (e.g., a SC

order directing the US to organize a coalition of the willing to defend South Korea or Kuwait) but the member does not comply and therefore the organization is responsible. (The rapporteur indicates that while the wrongful act may, in principle, be attributable to the State, in certain (undefined) circumstances the organization would have to bear responsibility.)

Article 1: (2) The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

As confirmed by the rapporteur and articles 25-27, the ILC is indicating that in cases where member or even non-member states of an organization use an organization (direct, assist, or coerce) to commit a wrongful act, those states may be responsible. This is so the ILC explains, notwithstanding the general rule, taken from the Institut de droit, indicating that state members are not normally responsible for the acts of their organizations unless they have accepted such responsibility (see draft article 29). Note that while

these terms –direct, assist, and coerce – have certain core meanings as applied to states, we are not given much indication of what they mean in the organizational context.

Article 2 explains that the articles apply to all organizations “established by treaty” and possessing “its own international legal personality” and including states or other entities as members.

The ILC’s ambition is clearly to formulate rules that apply equally to all inter-governmental organizations on the planet, irrespective of type of membership or purpose – just like the ASR covers all states.

Article 3: General Principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) Is attributed to the international organization under international law; and**
- (b) Constitutes a breach of an international obligation of that international organization.**

Article 3, like most of the subsequent articles, begin to parrot the comparable provisions in the ASR. This article for example mirrors articles 1-2 of the ASR. The rapporteur explains that the general intent is to present a “sequel” to Crawford’s effort – what Hollywood would call “The Rules of State Responsibility: Part II.” He states that the ILC will be applying a presumption in favor of the specific text and organization of the original ASR unless there are specific reasons to deviate.

This approach is taken not only with respect to attributing IO responsibility. It also applies to the “circumstances precluding wrongfulness” so that the ILC’s IO effort parrots, virtually word for word, the ASR with respect to exceptions for consent, self-defense, force majeure, distress, and necessity (see articles 17-18, 20-22).

So what's wrong with all this?

Crawford and his colleagues' rock star achievement was due to five salient facts:

(1) In the case of the ASR, the ILC was building secondary rules atop primary rules of obligation that emerged from the real world -- the considerable practice of states.

(2) Crawford's secondary rules were also based on the real world practice of states, which had generally accepted responsibility (along with liability). The ASR have a legitimate claim to being a mere codification of what actually existed, with progressive development occurring as always, but only on the margins.

(3) The ASR's secondary rules were also solidly grounded in the Vienna Convention on Treaties, including its rules that internal law is not an excuse but other excuses, from duress to necessity, are legitimate and have established core meanings.

(4) The ASR could rely on the wonderful, albeit artificial, principle of sovereign equality, wherein all states can be assumed

to have the same general capacities and duties vis-a-vis one another.

And finally, (5) the ASR were generally consistent with what states wanted. Long before the ILC started its more than 40 year old effort that culminated in the state responsibility rules, states had sought to give effect to their mutual and reciprocal interests in affirming their responsibilities to one another. States may not always have enjoyed being found responsible, they understood that this was the price they had to pay for having other states be found responsible to them.

None of these five preconditions apply with respect to general rules of IO responsibility.

As becomes clear when the rapporteur tries to give real world examples of what these rules are about, unlike most of the rules of state responsibility, most of these articles appear to have emerged, fully formed, only from the heads of ILC members and not the real world. The extensive practice that made Crawford's effort real is missing. Instances involving states incurring international

responsibility for actions or omissions taken by their IOs, while intellectually conceivable, are rare – as are cases involving IOs incurring responsibility for anything, including what their members direct or force it to do. This is one reason why the ILC originally omitted references to IOs in their rules of state responsibility, even when temptation loomed – as in connection with article 16 (in which states “aid” or “assist” another to commit a wrongful act).

Why are actual examples of finding IOs legally responsible so rare? One reason is that it is highly unusual for international law – from human rights instruments to general rules of custom – to address international organizations as subjects. Article 3(2)(b) of the new draft IO rules (which relies on the existence of international obligations that apply to IOs) may be exceedingly shallow. Even with respect to the general rules of international law with the strongest claim to applicability to IOs – human rights – the law of international human rights remains as even Andrew Clapham acknowledges, “of ambiguous applicability” to IOs. Most human rights instruments are directed at state action and

anticipate only states as parties; and even the Universal Declaration of Human Rights, which is stated in less state-centric terms, was intended to target abuses of state power. Similarly the principles of international humanitarian law were drafted with state armies in mind and have had to be adapted to modern peacekeeping operations – haphazardly and not fully and mostly through soft law instruments like proclamations by the UN Secretary General. And even in such cases, when IOs accept the “spirit and principles” of state-centric treaties, one can read such principles as indicating the need for specific consent by IOs and not automatic application of specific treaty duties.

If the ILC drafters are assuming that the UN, including its Security Council, needs to abide by “international human rights,” they do not indicate the basis for their assumption. Because the UN is bound by customary international law? Because the UN Charter or the UN’s practice achieves this result? Because the organization should be derivatively liable for members’ obligations? Note that each of these models suggests different

implications – including with respect to the specific human rights that are to be applied to the organization. Given the notorious disagreements among states with respect to the content of customary human rights, advocates of the human rights accountability of the UN rely on the human rights covenants or other human rights treaties but it is quite a leap to suggest that the UN, a third party to such treaties, can possibly be bound by agreements that not all of its members have ratified and that, even when they have, are subject to diverse (and sometimes quite extensive) reservations.

And even if we were inclined for the sake of argument to say that, for example, the UN must be “deemed” a party to all or some human rights treaties, it would involve considerable imaginative leaps to connect those enumerated state-centric rights to what IOs actually do. (Given the controversies that have emerged with respect to what is expected of governments, which have full control over their territories and branches of governments, in terms of “respecting” and “ensuring” the rights in the ICCPR, does

anyone think that it is clear what it means to have the World Bank or the IMF or the Security Council be obligated “to respect and ensure” such rights?)

So the first problem is that, unlike with respect to the ASR, the primary rules of obligation on which these secondary rules of responsibility would be built are hard to find, ambiguous, and controversial.

The second problem emerges from the first: practice is also sparse concerning the secondary rules being discussed ostensibly codified. If we ask “what are these proposed articles supposed to accomplish?” The answer is surprisingly tentative and uncertain. While “responsibility” is not tantamount to determining liability, at least in the case of the rules of state responsibility, there was a strong connection between the two. The ASR have proven to be valuable (as in contemporary investor/state arbitrations) precisely because they were based on substantial evidence that state responsibility has been connected to distinct forms of recompense

by states – from the rare apology to the more usual award of or settlement involving damages.

The ASR perform a valuable function: given that the presumptive remedy for incurring state responsibility is financial and abundant state and judicial practice indicating that cannot usually declare inability to pay as an excuse, the ASR have proven singularly useful in determining when states owe money to one another when tangible injury results.

When it comes to IO, some of which are purposely kept by their members at the edge of bankruptcy, the concept of responsibility-cum-liability seems something only a law professor (or the writer of a Jessup Moot problem) would love. Since most IOs do not raise their own funds but are financially beholden to their members' dues, what is actually accomplished by establishing the proposition that, for example, the UN Security Council acted “wrongfully” in not preventing the Rwandan genocide and therefore is “responsible,” especially if the residual rule in article 29 (members normally not liable) applies? Is this elaborate multi-

year exercise by the ILC only about the possibility of a securing an apology from the UN Secretary-General, much like the one President Bill Clinton gave the Rwandan people? While as an academic I can appreciate talking about such apologies, as someone who would like the ILC to focus on viable projects of use in the real world and not another futile effort reminiscent of ILC failings of ages past (did anyone say state secession?), I would like a better answer to “what are these rules supposed to accomplish”?

Consider, for example, the rapporteur’s report on draft article 3, which points to the Security Council’s failure to act in Rwanda as a potential instance where an IO “omission” should be regarded as wrongful. Quite apart from other objections that might be raised to this proposition from both a legal and, and dare I say even a moral, point of view – should the UN as a whole really be held responsible or only the Security Council? Or should responsibility really lie with the UN Secretary-General as an individual for failing to act despite clear notice? Or should the responsibility lie with those states on the Council (for example, the United States)

that were in a position to lead but did not? The ILC effort to craft secondary rules leading to such a conclusion is an instance where the tail is wagging the dog.

I do not need to tell Canadians—who invented the concept – that the international community is still wrestling with the proposition that there is such a thing as a “responsibility to protect.” Your diplomats are hard at work trying to give this laudable principle political, moral, and ultimately legal content. Many now agree that at least the UN Security Council would not be violating the Charter (including articles 2(4) or 2(7)) should it respond to ethnic cleansing inside a country, even with force. I regard that effort as akin to national laws that encourage good Samaritans by removing the prospect of civil liability should they, for example, assist an injured motorist. But what we have not done, at least in most jurisdictions, is to *require* good Samaritans to act; that is, to make good Samaritans legally “responsible” for a failure to act, even at the risk of their lives. I seriously question whether the international community is ready for the equivalent at

the international level -- where the stakes for the Samaritan are often a great deal higher. The practice of the Security Council to date does not imply that sovereign states *must* use force when directed by the UN and I doubt that this is the way that body will evolve since it has a tough enough time *authorizing* states to act.

But even if you disagree with me on this, I believe that the debate should be about whether that responsibility to protect can ever be imposed on those in a position to act – namely states. I do not expect that debate about such a fundamental proposition of primary law can or will be resolved through the backdoor – by settling on secondary rules of responsibility for the UN. Only when we resolve that the primary rule is workable—and work out little “kinks” such as whether any and all states in a position to prevent a genocide are really required to have their own citizens killed in order to do so – we would be ready to work out the secondary rules suggested by the ILC’s current draft.

Questions like whether IOs generally should be held responsible for their failures to act are too significant to be left to

secondary rules. What are the relevant “omissions” that should elicit responsibility by the WTO? A failure to respect the precautionary principle? Should the ILO be held responsible for the fact that its mobilization of shame commissions as authorized by that organization’s rules are shamefully inadequate to enforce core labor rights? Should ICAO be found responsible for negligently failing to prevent the shoot downs of civilian planes by the United States and the then-USSR respectively? Do we really expect draft article 3 to contribute to the resolution of such fundamental questions, at the core of what these organizations are all about?

This slow train to nowhere goes off the rails for a third reason. Unlike the ASR, the secondary rules under discussion cannot rely on other rules with core or settled meanings. Although Crawford was able to rely on customary international law for the unremarkable proposition (stated in ASR, article 32) that a state’s internal law provides no excuse; the rules of an organization are simultaneously “internal law” *and* international law. The ILC’s

draft article 8 appears to assume that an IO can engage in a wrongful action even when it acts in conformity with its own internal rules. In the real world it is not at all clear whether an organization that acts in accord with its rules – e.g., the Security Council, which in accord with standard voting procedures, refuses to act in Rwanda because of the veto or an IMF decision taken in accord with its voting rules that refuses to extend a nation-saving loan – should or can be found to have acted “wrongfully.” Just when IO action that is not *ultra vires* under the organization’s own rules or practice can nonetheless be “wrongful” is not something neatly resolved by the Vienna Convention on the Law of Treaties.

The same needs to be said with respect to established excuses from compliance such as force majeure and necessity which Crawford was able to rely upon from both customary law and the VCT. We have a fair amount of law explaining what these concepts mean with respect to states; it is very unclear that such excuses can be extrapolated to IOs without radically changing what they mean. While arbitrations have generally suggested that

a state cannot claim necessity on the basis of an inability to pay – because states generally cannot be bankrupt – IOs can and have become bankrupt and the very meaning of the necessity defense (as well as whether it the burden of proving it should be as arduous for IOs as it is for states) needs to be carefully considered.

The latest ILC effort also makes the mistake of assuming that all IOs are alike – or that the law should treat them as if they were. This is bizarre even from the black letter perspective that appears to be driving this positivist wet dream.² The black letter law that we have with respect to the legal personality of IOs indicates that such legal persons are not and should not be treated as if they were states. As the Reparation Opinion itself states, the legal conclusion that the UN was a legal person was not in the ICJ’s view tantamount to a determination that the UN (or any IO) was a legal person for all purposes. As any reader of that opinion knows, the Court’s decision to attribute treaty-making powers to the UN in that case involved circular reasoning. The ICJ court found that

² While I realize that this is a gendered description, the ILC has been for much of its history, although not at present, all male.

power (and support for its general conclusion that the UN was a legal person) from the fact that the UN had engaged, even by that time, in treaty-making and the UN Charter recognized such a possibility in a few specific instances. The practice of the UN, the text of its particular constitutive instrument, and not only the UN's need to have the power to bring claims on its own behalf were all part of the Court's reasoning. Since that time, as the Vienna Convention on treaties between IOs and states and IOs affirms, we have assumed that IOs do not have the identical inherent powers all states have to make treaties (or to enjoy any other rights and duties as legal persons) but only those rights and duties that can be attributed to them given their respective charters and their rules, along with the institutional practice that has evolved around them.

The legal personhood of IOs is, *unlike with respect to states*, contextual. The ILC is wrong to presume so much – so many articles -- from the mere fact that IOs are legal persons. Indeed a more promising way to attribute responsibility to IOs may be to radically depart from the narrow concept of demarcated

international legal subjects altogether – and begin to think afresh, as Andrew Clapham begins to do in a new book, about the responsibility of all non-state actors, from IOs to TNCs.³ It is a mistake of the first magnitude for the members of the ILC to attempt a general theory of responsibility grounded on the existing and limited concept of IO personhood.

If the members of the ILC were to take their eyes off their books and look around them they might question whether at this stage in the evolution of our primitive international legal system it is possible to draft general rules applicable to the wide gamut of IOs that exist – from regional IOs to those that aspire to universal membership, to those charged with international peace and security to those restricted to ensuring health, protecting international civil aviation, labor standards, or foiling trade protectionism. And it is not just that IOs differ among themselves with respect to type of members, purposes, mandate and delegated powers. IOs differ with respect to how states have defined their own relationship with their

³ Andrew Clapham, Human Rights Obligations of Non-State Actors (2006).

institutional creations. In some instances or with respect to some organs -- creating “independent” international courts, the ILC itself, or the international civil service -- states established entities whose value lay precisely in their independence from them.

Institutions like the ICJ are valued because they are capable of autonomous action and are not merely the agents of states. But not all such entities can or should be treated as “responsible.” Does anyone want to suggest that an ICJ judge or his/her Court ought to be held “responsible” for reaching a wrong verdict?

Other IOs or organs within them may be intended to be more akin to the agents of states. In some such cases states are like collective principals who ought to be seen as the only, or at least the principal, bearers of responsibility. This may be the case under the language of article 24(1) of the Charter which states that “in carrying out its duties . . . the Security Council acts on their behalf.” (Of course this does not resolve the fact that the Council is specifically licensed to violate international law and states charged with obeying it under the UN Charter’s article 103.)

Whether or not one agrees with this view of the Security Council, the rhetoric if not the reality of principal/agent exists only with respect to some IOs and some IO organs but not others. The ILC draft, which blithely assumes that all international organizations can be addressed through rules that apply to all states, ignores such distinctions. But if national laws are any guide, it is difficult if not impossible to generate uniform or general rules of responsibility to govern such diverse sets of relationships.

The final reason these rules fail is that it is not at all clear that states want their IOs to be found “responsible.” While it is easy to point to obvious counter examples as rhetorical foils— “states could not have intended to license the Security Council to commit genocide” – once we get beyond a few obvious cases (usually involving the least controversial examples of jus cogens) or cases in which states and IOs have accepted certain obligations (as with respect to UN peacekeepers or when administering territory), there is considerable evidence that those who created IOs did so

sometimes to immunize those organizations from traditional notions of responsibility, to create alternative mechanisms for making those IOs accountable distinct from those used for states, or, as with respect to organizations as different as the UN Security Council and the WTO Contracting Parties, to permit their collective bodies to do things that are denied to members individually.

Although states and commentators have agreed that third parties who deal with IOs ought to be protected from “undue exposure and damage” in their relationships with IOs and indeed without such protections they would refuse to deal with IOs as contractors, states have purposely avoided clarifying what parts of international law apply to IOs, especially when it comes to those who are harmed by IOs but are not predictable contractors but bystanders – such as victims of the UN’s collective or smart sanctions. Even in this day of victim-centered international jurisprudence it is not at all clear that all or most UN members would agree that victims of SC sanctions should be able to find the

UN “responsible” or, even if that were the case, that responsibility should mean the same thing with respect to the SC as it means to a state that, for example, were to unilaterally impose comparable measures.

What is clear is that states have had plenty of opportunity to accord judicial remedies for those injured by IO action but have generally refused to do so. With some exceptions dealing with European institutions and complaints brought by some IO employees before internal IO administrative bodies, the international tribunals thus far established lack the jurisdiction to consider binding decisions directed at IOs and even the advisory jurisdiction of the ICJ is premised on being of assistance to the IO that presents a question and does not anticipate putting the IO, in effect, on the dock. This is true not only for the ICJ, but for ad hoc war crimes tribunals, the ICC, and UN human rights treaty bodies. The limited ombudsman-type remedies so far adapted within the UN or international financial institutions (e.g., the World Bank’s inspection panel) have only the power to make recommendations

and ironically are intended to make those organizations adhere to their own internal rules which only sporadically include references to general international law. (Of course, IOs enjoy generous grants of immunity both as institutions and for their individual agents that severely limits the power of national courts over them as defendants.)

While it is true that the lack of remedies sometimes reflects merely a political but not a doctrinal problem, in this instance it is both. There is a very strong probability that many states do not intend their rules of obligation to apply to their IOs – at least outside a few pockets of the law dealing with specific issues such as responsibility towards predictable third parties who need to have reassurance that they are dealing with a responsible entity. As Ralph Wilde points out, “The relatively unaccountable nature of international organizations may be a key structural feature as far as their importance to states is concerned, not something that has come about by accident or, alternatively, solely because of the way states and international organizations are sometimes understood as

normative opposites, with international organizations seen, unlike states, as somehow intrinsically humanitarian, selfless and even-handed, and not therefore requiring the kinds of accountability mechanisms that would be in order in the case of states.”⁴

Conclusion

Perhaps one day I might look back on my reactions to the ILC’s current effort and recall Crawford’s remarks when he first saw Ago’s grand ambitions for the project that became the ASR. It is possible that, forty years hence, state practice will have caught up and my current skepticism will appear, in retrospect, to reflect only a common lawyer’s limited vision of what codified rules can accomplish.

I would not take my criticisms of the ILC to mean that it is hopeless to try to make IOs doctrinally responsible. My point is that those who want to make IOs more responsible actors should turn to more carefully tailored attempts to make particular IOs or

⁴ Ralph Wilde, “Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake,” 12 *ILSA J. Int’l & Comp. L.* 396, 402 (2006).

organs doctrinally responsible—keeping a keen eye on what these institutions are intended to accomplish and the limits of their respective mandates. I do not believe that even the ILC can successfully go over the heads of states and achieve ends that they will not tolerate or accept. We might be better off elaborating when states, which are the real deep pockets here, should be found liable on the basis of a rule like Article 28 in the ILC’s draft. Of course even this rule needs to be a contextually grounded and not based on generalizations subject only to a *lex specialis* exception as the ILC apparently now intends. I fear that premature generalization of responsibility for IOs not sensitive to differing context may prove meaningless and only make it easier for the real and principal stakeholders, the states, to evade responsibility. I also fear not merely a detour but a train wreck—if, for example, the ILC’s anticipated provision with respect to countermeasures directed at wrongful IO action will provide new justifications for those who, such as certain members of the U.S. Congress, have

long been inclined to “sanction” the UN by, for example, withholding U.S. dues.

My second fundamental point is that accountability and responsibility are not alternatives. Lawyers should not cede the pursuit of good governance, enhanced accountability, or improved transparency to the politicians. We surely have something useful to contribute with respect to reforming voting procedures and oversight mechanisms; creating effective internal audits and ombudsmen procedures; or enhancing participation and access. Pursuing the will of the wisp of *general* responsibility rules is not the only way – and may be the worse way -- to enhance the legitimacy of our Frankenstein monsters.

Thank you.