‘Member Responsibility’ and the ILC Articles on the Responsibility of International Organizations: Some Observations*

1. ‘Member Responsibility’

Writing for a book of essays in memory of Oscar Schachter in 2005, my former tutor, Sir Ian Brownlie (as he later became), and I chose to tackle the same subject matter. He wrote on the responsibility of States for the acts of international organizations, and I on the responsibility of member States for an international organization’s conduct as a result of membership or their normal conduct associated with membership. Obviously, this topic has its attraction. The fact that we both wrote on this subject led me to revisit this same topic in these essays in his memory. As a strong champion of the rule of law in international affairs, Sir Ian would certainly have been interested in this revisit.

In the 2005 essay, I had focused on the acts of a member State of an international organization that result from membership or are associated with membership, not other kinds of acts that any State may perform, or the

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3 S. Yee, ‘The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership’, ibid., 435-54. ‘Member State’ is used interchangeably with ‘State member’.
additional acts that a member State may have to perform to be held responsible for acts (including omissions) of an international organization. I termed the responsibility so defined ‘member responsibility’, and argued for a concurrent or joint and several responsibility regime, while allowing adjustment based on proportionality. I criticized the position that this issue should be decided by the rules of the international organization, and argued for applying general international law. In my view, general international law accords under the rationale of Reparation some rights to an international organization with independent personality, but does not limit responsibility to that organization only, an issue that the Reparation advisory opinion did not address. I wrote: ‘Otherwise, the world would be beautiful for some but ugly for others; States may simply set up an international organization to reap the benefits of organizing their international activities this way and to avoid the responsibility they would have to shoulder if they conduct the same activities without forming an international organization for such purposes.’ Rejecting the view that, since no specific rule mandates member responsibility, the Lotus rule would preclude such responsibility, I argued that, in the absence of a specific rule on point, the general framework of international law should be resorted to and that relying on the Lotus rule (originally recognized in the context of primary rules—whether a State may act in a certain way) in the context of secondary rules (whether or not a State is responsible after it has acted) is inappropriate. The general operational framework of the international legal system on point is the Phosphates rule under which, once a State has acted wrongfully against another on the international plane, ‘international responsibility would be established immediately as between the two States’. A member State is in some way involved in the wrong

4 Ibid., 436.
5 See, e.g., arts. 5-7 in Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties (Institut de Droit International), 66-II Annuaire (1996), 444-53.
7 S. Yee, ‘The Responsibility of States Members’, n.3 above, 440.
10 Phosphates in Morocco, Judgment, 1938, PCIJ, Series A/B, No. 74, 10, at 28.