I. Introduction

In a statement he made in his capacity as a member of the International Law Commission, Ian Brownlie once observed that ‘[a] State could not be requested to bear the damage caused by an organization without having any possibility of recourse against member States of the organization if the necessary measures had not been taken’.1 According to Brownlie, under current international law there is no ‘general principle of the non-responsibility of States members of an international organization in connection with an internationally wrongful act of that organization’.2 He therefore opposed the inclusion in the draft articles on the responsibility of international organizations of a residual rule referring, even if only indirectly, to a principle of non-responsibility of the members for acts of the organization. His view did not find support in the Commission. The articles that the Commission adopted in 2011 admit that members may be held responsible for an internationally wrongful act of the organization, but this possibility is restricted to rather exceptional situations.3 Unlike the resolution adopted in 1995 by the Institut de Droit International,4 the articles do not include a residual rule on the non-responsibility of the members for acts of the organization. However,

4. Article 6(a) of the resolution on ‘Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations towards Third Parties’ reads as follows: ‘Save as specified in article 5, 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’. 66-II Annuaire (1996), 444–53, at 445.
as the commentary makes clear, ‘such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act’.5

The view that Sir Ian advocated reflects an image of international organizations as ‘transparent’ bodies,6 whose members must be held responsible for the conduct of the organization whenever it is not possible to obtain from the organization the fulfillment of its obligations vis-à-vis the injured State. While this view is not mirrored in the articles, the ‘transparency’ of international organizations resurfaces in a different form in the work of the Commission. While limiting to exceptional cases the possibility of holding members responsible for a wrongful act of the organization, the articles take into account the fact that members may be held responsible for their own conduct when they act within an international organization.7 In this respect, the work of the Commission appears to be premised on the idea that the institutional veil of the organization does not preclude the possibility of ‘seeing’ the legal duties of members when they act in that capacity within the organization.

This particular perspective on the transparency of international organizations emerges with clarity from the provisions dealing with the question of reparation in case of an internationally wrongful act committed by international organizations. In this context, the articles do not limit themselves to setting out the general principle according to which the organization must bear the consequences of its wrongful act and has therefore the obligation to make full reparation for any injury caused. They also include a provision on the role of members in the reparation owed by the organization. Thus, alongside article 31, which expresses the general principle, article 40, paragraph 2, provides that ‘[t]he members of a responsible organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfill its obligations under this Chapter’.

The inclusion in the draft articles of the provision which later became article 40, paragraph 2, was mainly motivated by the concern to protect those who suffered injury as a consequence of a wrongful act of an international organization.

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6 For this expression, see the intervention of Koskenniemi, A/CN.4/SR.2893, at 3.