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ARE ALL INTERNATIONAL ORGANIZATIONS CREATED EQUAL? REFLECTIONS ON THE ILC'S DRAFT ARTICLES OF RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Jan Wouters
Jed Odermatt

(Global Governance Opinions only represent the views of the author(s) and not of the Leuven Centre for Global Governance Studies.)

Jan Wouters

Jean Monnet Chair Ad Personam 'EU and Global Governance'

Professor of International Law and International Organizations

Director of the Leuven Centre for Global Governance Studies and Institute for International Law, K.U. Leuven

Jed Odermatt

Research fellow and Phd Candidate at the Leuven Centre for Global Governance Studies.

ARE ALL INTERNATIONAL ORGANIZATIONS CREATED EQUAL? REFLECTIONS ON THE ILC'S DRAFT ARTICLES OF RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

On 26 April 2011 the International Law Commission ('ILC' or 'Commission') adopted on second reading its Draft Articles on the Responsibility of International Organizations ('Draft Articles' or 'DARIO'). These articles aim to codify a set of secondary rules that are applicable to the very wide variety of international organizations ('IOs') that now exist. The aim of this Global Governance Opinion is

not to analyze in detail any particular aspect of the Draft Articles; rather, we will discuss briefly some of the methodological and conceptual issues faced by ILC, and how this has impacted the final outcome of its work.

In 2000 the ILC decided that the topic "Responsibility of international organizations" should be included in its long term programme of work, and in 2001 the UN General Assembly formally requested the ILC to begin work on the topic.[1] The Commission took up this project at the time when its Draft Articles on State Responsibility ('DASR') were nearing completion. The topic of responsibility of international organizations was viewed as being a 'necessary counterpart' to this work, as it would logically flow on from its work on state responsibility.[2] This approach mirrors the way in which the ILC took up its work on the law of treaties between states and international organizations after it had it completed work on the law of treaties between states. In a similar way, the ILC would use the DASR as a logical starting point for drafting its articles relating to IOs.

From the start it can be questioned whether there really was a need for a set of draft articles on the responsibility of IOs. According to the ILC's Statute, the Commission should consider codification of topics that are "necessary and desirable".[3] In addition, the Commission has itself established some criteria for the selection of topics. To be included in its programme, a proposed topic should (i) "reflect the needs of States in respect of the progressive development and codification of international law"; (ii) "be sufficiently advanced in stage in terms of State practice to permit progressive development and codification" and should be (iii) "concrete and feasible for progressive development and codification".[4] It can be doubted seriously whether the topic of the responsibility of IOs met these criteria.

In 2000 Alain Pellet addressed the subject of the desirability of the proposed topic

[1] UNGA, Report of the International Law Commission on the work of its fifty-second session, UN Doc. A/Res/55/152, para 8.: "*Requests* the International Law Commission, taking into account paragraph 259 of its report, to begin its work on the topic "Responsibility of international organizations" and to give further consideration to the remaining topics to be included in its long-term programme of work, having due regard to comments made by Governments."

[2] Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10. UN Doc. A/55/10, p. 135.

[3] Statute of the International Law Commission (1947) Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, Art. 18 (2).

[4] Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10. UN Doc. A/55/10.

with reference to the ILC criteria and concluded that the topic meets these criteria "in every respect".[5] He stated that the topic "is sufficiently advanced in stage in terms of State practice, which is not well known, but now quite abundant" although he provided no examples of such state practice except for a general reference to the United Nations Juridical Yearbook. Of the practice that has been cited subsequently, it is often not directly related to the issue of responsibility, but on related issues such as the legal personality of IOs.[6] It turned out that this lack of practice proved to be one of the greatest difficulties the ILC faced. The ILC states in its commentary that "[o]ne of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice."[7] Much of the criticism of the DARIO stems from the fact that the ILC undertook a project to codify an area of law that is seriously lacking in relevant international practice.[8] Whereas the topic of state responsibility is relatively advanced and is based on an extensive body of state practice, the topic of responsibility for international organizations remains far less developed.

With regard to the desirability of the topic, there never seemed to be a strong desire from states themselves for such a topic to be addressed by the ILC. One may argue that the topic was ripe for codification because international organizations are becoming more numerous, more complex, and ever capable of causing serious harm through their acts and omissions. This is a common argument, based on the fact that IOs are now involved in acts such as peacekeeping missions that might lead to the commission of internationally wrongful acts, as well as the lack of legal mechanisms to bring IOs to account.[9] However, the need for accountability mechanisms should not be equated with the requirement for codified secondary rules on responsibility, which the ILC has produced. The DARIO do not address the real obstacles preventing individuals from bringing IOs to account, such as the lack of available judicial forums or

[5] Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10, p. 135.
[6] G. Hafner, "Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks", in U. Fastenrath et. al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 700-701.
[7] DARIO, General Commentary, p. 2, para. 5.
[8] G. Hafner, "Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks", in U. Fastenrath et. al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 700.
[9] This is reflected in Pellet's comments that "many specific problems arise in this regard and they should become increasingly numerous in view of the resumption of the operational activities of international organizations and, in particular, activities by the United Nations to maintain international peace and security." Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10, p. 135.

procedural obstacles such as the immunity of IOs before domestic courts.[10]

It can also be questioned whether the topic was in fact "feasible for progressive development and codification". This subject matter is extremely complex and fraught with conceptual difficulties. Probably the main difficulty faced by the ILC relates to the diversity of international organizations. In his final report, Special Rapporteur Gaja noted that:

> There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound. Because of this diversity and its implications, the draft articles where appropriate give weight to the specific character of the organization (…).[11]

The issue of diversity was often brought up by international organizations themselves in the comments they submitted to the ILC. The Secretariat of the United Nations pointed to the need to take into account the "specificities of the various international organizations".[12] The strongest supporter of this argument was the European Community/Union, which argued that the Draft Articles failed to take into account the unique nature of the EU, specifically its role as a regional economic integration organization (REIO).[13] The European Commission consistently argued that it was inappropriate to establish universal rules for IOs:

> The European Commission expresses some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which the

[10] J. Wouters, E. Brems, S. Smis and P. Schmitt, "Introductory Remarks", in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations,* Antwerp-Oxford, Intersentia, 2010, 11.
[11] DARIO General Commentary, p. 3, para. 7.
[12] Eighth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, International Law Commission Sixty-third session Geneva, 26 April-3 June and 4 July-12 August 2011.
[13] See E. Paasivirta and P. J. Kuijper, "Does One Size Fit All?", 36 *Netherlands Yearbook of International Law* (2005), pp. 169–226.

> European Community is itself an example.[14]

In this respect, the ILC had several options with regard to its approach to institutional diversity. Firstly, it could have limited the Draft Articles to a limited range of organizations. It could have focused, for example, on the more 'traditional' intergovernmental organizations such as the United Nations. This would have reflected one of the main driving forces behind the codification process, namely responsibility arising from the conduct of peacekeeping and peace enforcement operations.[15] Another approach could have been to develop different rules for different types of organizations. Such an approach was considered at an early stage in the ILC's work:

> The definition of international organizations given above comprises entities of a quite different nature. Membership, functions, ways of deliberating and means at their disposal vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all intergovernmental organizations, especially with regard to the issue of responsibility into which States may incur for activities of the organization of which they are members. It may be necessary to devise specific rules for different categories of international organizations.[16]

The proposal of devising different rules for different types of organizations was never followed, however. Attempts within academic literature to 'categorize' IOs into different types proved extremely difficult. Instead, the ILC has attempted to establish *universal* rules that can be applicable to the wide variety of IOs, irrespective of type. It rejected an approach that would treat IOs differently, such

[14] International Law Commission Sixtieth session Geneva, 5 May-6 June and 7 July-8 August 2007 Responsibility of international organizations Comments and observations received from international organizations, p. 4.

[15] "A further reason for a need for the codification of responsibility of international organisations seems to be the call for growing accountability of international organisations conducting military-like operations such as peacekeeping operations": G. Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks', in U. Fastenrath et. al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 700; Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10, p. 135.

[16] Report of the International Law Commission, Fifty-fourth session, (29 April-7 June and 22 July-16 August 2002) para. 470.

as including special rules for organizations like the EU.[17] Blokker, too, has argued in favour of establishing one set of general rules[18], reasoning that just as the many differences between states do not require different rules of state responsibility, the diversity of IOs does not necessitate different rules. However, from the viewpoint of public international law, states are identical legal entities irrespective of their culture, political system, or size. The same cannot be said of IOs, which, although they may have (some degree of) international legal personality, remain very heterogeneous legal entities.

By taking this approach, the ILC was faced with the challenge of developing rules that are both broad enough to have universal application, yet capable of taking into account the institutional diversity of IOs. The ILC therefore drafted the articles, including the definition of 'international organization' in a broad manner, seeking to capture a wide variety of IOs. The definition adopted includes all international organizations, not just 'intergovernmental organizations'.[19] It includes bodies that have non-states as members[20] as well as bodies that might be established upon a basis other than a treaty.[21] While the ambit remains very wide, the ILC sought to include rules that would still take into account the diversity of IOs, including instances where the internal rules of the IO are taken into account. For example, the DARIO includes numerous references to the 'rules of the organization'[22] and a specific rule on *lex specialis*.[23] Despite these rules, international organizations like the EU continue to be of the opinion that there is not enough in the DARIO to take into account the diversity of IOs. This includes complex questions regarding rules of attribution between the EU and its Member States and the conferral of powers to the EU. Noting that the Draft Articles will likely have a significant effect on it, the EU noted that "the draft articles do not sufficiently address the special

[17] On this topic see S. Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Leiden, Brill, 2005), 405-421.
[18] "[W]hile it is true that there is a great variety of international organizations, it may be questioned why this should imply that there should be a great variety of responsibility rules for these organizations and why there could not be one set of rules": N. M. Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously? A mid-term review', in J. Klabbers and A. Wallendahl (eds.), *Research Handbook On the Law of International Organizations* (Cheltenham, Edward Elgar, 2011), p. 335.
[19] Draft articles on the responsibility of international organizations, with commentaries (2011) Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10), Article 2(a).
[20] DARIO, Art. 2(a): "… International organizations may include as members, in addition to States, other entities..".
[21] DARIO, Art. 2(a) :"'international organization' means an organization established by a treaty *or other instrument governed by international law*".
[22] See C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', Amsterdam Law School Legal Studies Research Paper No. 2011-04.
[23] DARIO, Art. 64.

characteristics of the European Union as a regional integration organisation."[24]

Another common criticism is that the ILC followed too closely the DASR. This criticism that the Commission has 'slavishly' copied from the ASR might be overstated. In many cases the ILC has ensured that it has made appropriate changes to adapt the rules to the situation of IOs. Our criticism does not lie with how well the ILC 'adapted' specific articles, however. The flaw lies in the way the ILC used the DASR as its logical starting point. The Commission gives little justification for basing its work on rules developed in the context of state responsibility. This approach assumes that IOs and states can be treated in a similar manner since they are both international legal persons. Importantly, this means that where gaps exist in practice, the DASR would be used to fill these gaps and would provide the basis of new rules. This approach helps to brush over the fact that in many areas international practice gives no guidance whatsoever. Simply basing a rule on the DASR in the absence of applicable practice, especially when that rule was developed in a context only applicable to states, may lead to unforeseen difficulties for IOs. This approach pushes the DARIO far closer toward 'progressive development' of the law than to codification.

Since the Draft Articles will likely have a real impact on the functioning of IOs, the IOs themselves should have been given a greater voice in developing the articles. The ILC attempted to include international organizations in its work, for instance, by inviting IOs to submit comments on the draft articles. Having given IOs this opportunity, it seems that in many cases these comments were not addressed, either in the articles themselves or the commentary. This gives the impression that the ILC gave a much higher status to the opinions of states, who in addition to submitting comments to the Commission, also have the chance to discuss its work within the 6th Committee of the UN General Assembly. In this way, the ILC's methodology remains overwhelmingly state-oriented. Moreover, out of the hundreds of IOs that exist, only a small number actually provided comments. This probably shows both the lack of practice available as well as the view among a majority of IOs that the DARIO will simply not be relevant to them.

[24] EU Statement - United Nations 6th Committee: Report of the International Law Commission on Responsibility of International Organisations, Statement on behalf of the European Union by Lucio Gussetti, Director, Principal Legal Adviser, European Commission, at the UN General Assembly 6th Committee (Legal) 66th Session: Report of the International Law Commission on the work of its sixty-third session on Responsibility of International Organisations, 24 October 2011.

CONCLUSION

While much of the ILC's work has been well-received and has been extremely influential on international law, other work has been abandoned or disregarded. To avoid this, the ILC developed criteria that should be fulfilled before embarking upon new areas of codification. The success of the DASR and the desire to complete its work on international responsibility were obvious reasons for the ILC to take up the topic of responsibility of IOs. One can understand the desire to complete this capstone work, which at first glance seems to flow logically from the ILC's previous work on state responsibility as well as its codification of the law of treaties applicable to states and IOs. Yet there remain important conceptual questions about the status of IOs in international law which make this subject a poor candidate for codification. More importantly, there is a serious lack of relevant practice on which to develop universally applicable rules. This has led the ILC to over-rely on the structure and substantive rules that were included in the DASR. Importantly, while the issue of accountability of IOs remains an important one for international law, the DARIO does little to combat this problem. It has been suggested that the ILC could have begun instead with a more general study on international organizations, similar to the one it conducted on fragmentation of international law, in order to further explore the topic before embarking on the more ambitious project of codification. Such an approach may have been far more useful for international lawyers than what sometimes appears to be a 'cut and paste' from its earlier work on state responsibility.

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Or Contact the Centre:
Leuven Centre for Global Governance Studies
Huis De Dorlodot, C. Deberiotstraat 34, 3000 Leuven, Belgium
Tel. ++32 16 32 87 25 Fax ++32 16 32 87 26
info@ggs.kuleuven.be