An introduction to the Articles on the Responsibility of International Organisations

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Introduction

As subjects of international law, international organisations are capable of incurring international responsibility for the commission of internationally wrongful acts. Even though this consequence of their status under international law has always been implied, it is only recently that it has been the subject of sustained examination. In 2011, the International Law Commission (ILC) adopted the 'Draft Articles on the Responsibility of International Organisations' (2011 RIO articles),[1] which represent a major attempt at elaborating the consequences of breaches of international obligations owed by an international organisation to another subject of international law – whether a state or states or another international organisation. Their elaboration, which has not been without a measure of controversy, also serves as an interesting case-study on the contemporary process of the elaboration of international norms, and the promotion of their progressive development and codification within the context of the ILC.

Brief history of the 2011 articles

To understand the 2011 RIO articles properly, it is necessary to begin with the 'Articles on the Responsibility of States for Internationally Wrongful Acts',

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[1]Report of the ILC (2011) GAOR 66th Session Supplement No 10 (A/66/10 and Add.1) 54 available at the website of the ILC http://www.un.org/law/ilc/. The United Nations General Assembly took note of the draft articles, in resolution 66/100 of 9 December 2011, and annexed them to the resolution as the 'Articles on the Responsibility of International Organizations'.

adopted by the ILC ten years earlier (2001 articles).[2] Although ostensibly limited to the actions of states, those articles, elaborated over a period of nearly fifty years, established the basic framework within which the question of responsibility for international wrongful acts is dealt with today. The 2001 articles are generally viewed as an authoritative restatement of the law, with many of their provisions seen to reflect customary international law.

The ILC recognised that the nature, functions and activities of international organisations raised complex issues of law and policy which could not easily be dealt with in a text dedicated primarily to the actions of states. Accordingly, the position of international organisations was excluded from the scope of the 2001 articles through a saving clause, which not only preserved the question of the responsibility of international organisations, but also explicitly recognised that the 2001 articles were incomplete as regards the responsibility of states that may arise from the conduct of international organisations.[3]

In 2002 the ILC decided to embark on a second phase of its consideration of the broader topic of international responsibility, this time focusing on the responsibility of international organisations. This two-step approach mirrored the pattern of work followed by the ILC in its consideration of the law of treaties where a basic distinction had also been drawn between the law regulating treaties between states and treaties to which international organisations were parties.[4] The work started in 2002 with the appointment of Giorgio Gaja of Italy as Special Rapporteur for the topic, and culminated in 2011 with the adoption of the 2011 RIO articles.[5]

In developing the RIO draft articles the ILC drew upon the rules elaborated for the responsibility of states, by way of analogy. This was done on the basic assumption that such rules are largely axiomatic, reflecting legal propositions applicable not only to states, but also to other subjects of international law. Hence, the 2011 RIO articles follow the structure of the 2001 articles closely, with a number of provisions having been transposed *verbatim* from that text, with necessary modifications, and presented in an expository manner.[6] At the same time, the ILC included a number of provisions specific to the legal position of international organisations.

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[2]See UN GA res 56/83 of 12 December 2001, annex.

[3]Article 57.

[4]See 1969 Vienna Convention on the Law of Treaties and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[5]The ILC proceeded through a process of two readings, the first completed in 2009 and the second (final) completed in 2011.

[6]On the concept of 'expository codification' see Pronto 'Some thoughts on the making of international law' (2008) 19 *European Journal of International Law* 601 at 614.

Structure of the 2011 RIO articles

The 2011 RIO articles are organised in six parts. The first establishes their scope and defines certain common terms, including what is meant by 'international organisation' and 'rules of the organisation'. The law of responsibility is triggered by the occurrence of an internationally wrongful act, which is regulated by Part Two. The first chapter establishes several general principles, including the basic principle that '[e]very international wrongful act of an international organization entails the international responsibility of that organization'.[7] An international organisation incurs responsibility most commonly through the actions of its officials (designated as 'agents') or organs, which are attributed to the organisation (chapter II). An internationally wrongful act arises out of a breach of an international obligation (chapter III), ie, 'when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned'.[8] It is also possible that an international organisation may incur responsibility as an accomplice (chapter IV) to the act of another international organisation or state by, for example, aiding or assisting, directing and controlling, or even coercing, the state or other organisation to commit an internationally wrongful act. Responsibility also arises where the international organisation seeks to 'circumvent' its obligations through the actions of its members. Furthermore, to the extent that an international organisation is a member of another organisation, the former may, in certain circumstances, incur responsibility for the internationally wrongful acts of the latter. As with states, wrongdoing international organisations have a series of defences which can be raised to preclude the wrongfulness of their acts (collectively known as 'circumstances precluding wrongfulness'). These include consent, self-defence, the taking of countermeasures, *force majeure*, distress, and necessity (chapter V).

Part Three elaborates on the consequence of the international responsibility of an international organisation arising from an internationally wrongful act established under Part Two, ie, the 'content' of responsibility. Two general obligations arise (chapter I). The first, looking to the future, is an obligation to cease any continuing wrongful conduct and to offer assurances and guarantees of non-repetition of the conduct. The second, looking back, is a general obligation to make full reparation for the injury caused by the internationally wrongful act. Furthermore, as a general rule, such consequences of the occurrence of an internationally wrongful act do not affect the continued duty to perform the obligation.

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[7] Article 3.
[8] Article 10(1).

Reparation can take one of three forms: restitution, compensation, and satisfaction. Provision is also made for ensuring that international organisations have the resources to make full reparation (chapter II). Serious breaches of peremptory norms of international law entail the additional obligations on states and international organisations to cooperate to bring such breaches to an end by lawful means and not to recognise the lawfulness of the situation created by the breach (chapter III).

Part Four deals with the modalities for the 'implementation' of international responsibility, including for its invocation (chapter I), and for the taking of countermeasures (chapter II). An 'injured' state or international organisation is entitled to invoke the responsibility of the wrongdoing organisation.[9] This may arise in respect of the garden-variety obligation owed by the wrongdoing organisation to a state or international organisation individually. It may also occur in the context of a collective obligation owed by the wrongdoing organisation to a group of states or international organisations (*erga omnes partes*), or to the international community as a whole (*erga omnes*), when the state or organisation invoking responsibility is specially affected by the breach of the obligation.[10] Furthermore, states or international organisations which have not been injured by the wrongful act, but which have a legal interest in the performance of the obligation in question – for example, because it is owed to the international community as a whole (*erga omnes*) – may claim from the responsible international organisation cessation of the wrongful act and assurances and guarantees of non-repetition, as well as reparation for the injured state or international organisation, or of the beneficiaries of the obligation breached.[11]

A state or international organisation injured by the wrongful act of an international organisation may take countermeasures to induce the wrongdoing organisation to comply with its obligations under Part Three. This is subject to certain restrictions (for example, on the ability of a member of an international organisation to take countermeasures against the organisation) and conditions, and is qualified by the general requirement of proportionality.[12] Non-compliance with certain obligations (such as to refrain from the threat or use of force, obligations for the protection of human rights or of a humanitarian character prohibiting reprisals, and obligations of a peremptory nature (*jus cogens*)), by way of the taking of countermeasures is not permitted.[13]

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[9]Article 43.
[10]Or where the obligation is of an 'integral' nature whereby its breach radically changes the position of all the other states and international organisations to which the obligation is owed. See art 43(b)(ii).
[11]Article 49.
[12]Article 54.
[13]Article 52.

Part Five concerns the possibility that states may also incur responsibility in connection with the conduct of an international organisation, by, for example, aiding or assisting, directing and controlling, or coercing, the international organisation to commit an internationally wrongful act. As with international organisations, the 2011 RIO articles envisage the responsibility of member states for the 'circumvention' of an obligation by causing the organisation to commit an act that, if committed by the state, would have constituted a breach of that obligation.[14] A member state of an international organisation may be responsible for the wrongful acts of the organisation – even if those acts would not have been wrongful had they been committed by the state – where the state has accepted the responsibility or has led the injured party to rely on its responsibility.[15]

Part Six comprises of several general clauses, the most important of which, for purposes of the responsibility of international organisations, is article 64 which recognises the possibility of the modification of the rules under the articles by special rules of international law (*lex specialis*), which may be contained in the rules which govern the internal functioning of international organisations ('rules of the organisation').

Key concepts

International legal personality

The 2011 RIO articles are premised on the existence of separate international legal personality for international organisations.[16] Without this an international organisation is juridically indistinguishable from its members, and would not enjoy the capacity to enter into international agreements in its own right, or be able to commit wrongs (delicts) as a matter of international law. Any agreements entered into by it (or wrongs committed by it) would be undertaken in the capacity of 'agent' of the member states, and be attributable to them (under the 2001 articles). It is precisely because international organisations enjoying international personality can incur responsibility separately from their member states that there was a need to develop a distinct set of rules governing such responsibility.

It must be borne in mind, however, that in the Reparation advisory opinion, the International Court of Justice qualified its holding with the general observation that 'subjects of law in any legal system are not necessarily identical in their

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[14]Article 61.

[15]Article 62.

[16]Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion 1949 ICJ Rep 174 at 179 – 'it is a subject of international law and capable of possessing international rights and duties, and ... it has capacity to maintain its rights by bringing international claims'.

nature *or in the extent of their rights*, and their nature depends on the needs of the community'.[17] This is the case with international organisations which, unlike states, do not have a general competence under international law,[18] but instead possess the capacity on the international plane to carry out the rights and duties necessary to fulfill the mandates and functions demarcated in their respective foundational documents or 'constituent instruments' (for example, the Charter of the United Nations).

Responsibility for internationally wrongful acts

The rules on international responsibility apply as 'secondary rules' of international law. This means that they only operate in the context of the breach of a 'primary rule' establishing an obligation under international law. Until an international obligation has been violated, the rules on responsibility are not engaged. As a consequence of this distinction, the 'secondary' rules are posited in neutral terms, ie without regard to the nature and content of the primary rules. Therefore, they apply generally to the entire corpus of international obligations assumed by states and international organisations, and accordingly provide the context in which international responsibility arises and is implemented.

This occurs by operation of law, ie the very fact of the breach of an international obligation (whether contractual or delictual) renders the rules on responsibility applicable. The analogy is to the law of contract or that of tort/delict under domestic law. It seldom happens that the parties to a contract seek to regulate the rules governing the consequences of breach by its own terms. As with injurious actions, such rules apply by the very operation of the legal system within which the acts take place, and are established and developed through the common law or by statute. They are, in a significant sense, part of the very legal context within which the contract exists, or within which claims for injury are recognised. So it is with the rules on responsibility under international law.

It also means that such rules apply residually, to cover the situation (which is generally the case) where no specific provision is made in the primary rules for the consequences of breach. The general rules on responsibility may be modified by special rules (*lex specialis*) to the extent permissible under international law. This flexibility allows a margin of discretion for specialised areas of international law in which specific consequences of breach have been expressly provided. The possibility of modification is not seen as a limitation

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[17]*Id* at 178 (emphasis supplied).

[18]Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion 1996 ICJ Rep 66 at 78.

on the system of generalised rules, but rather as a necessary consequence of the decentralised nature of international law.

Scope

The scope of the 2011 RIO articles *ratione materiae* covers the question of the international responsibility of an international organisation as a consequence of an internationally wrongful act arising out of the breach of an international obligation owed by the organisation to another organisation, or to a state, or to a group of organisations or states, or to the international community as a whole. As such rules are posited as secondary, residual rules, the scope of the 2011 RIO articles may vary from primary rule to primary rule, depending on the extent to which they have been set aside by special rules (*lex specialis*) of international law. Furthermore, an internationally wrongful act can only exist as a consequence of the breach of an obligation existing under international law While obvious on the face of it, this requirement is particularly relevant in the case of international organisations which may assume obligations under other legal orders.

Furthermore, the 2011 RIO articles do not claim to be exhaustive. Instead, they specifically preserve the application of other secondary rules applicable to questions on the responsibility of an international organisation or state not governed by the draft articles.[19] Similarly, many of the provisions are presented in an expository manner, in the sense of providing *a renvoi* to more specific sets of rules. Therefore, as those other rules change over time, so too will the overall purport and impact of the 2011 RIO articles evolve.

The scope of *ratione personae* articles is not as straightforward as would appear. Even though the 2011 RIO draft articles refer in their title to the responsibility of international organisations, they also provide for state responsibility in connection with the wrongful acts of international organisations. Likewise, the articles also consider the position of injured states following the commission of an internationally wrongful act by an international organisation. What is missing is the converse situation of the international organisation injured by the act of a state (only injury suffered by an international organisation arising from the wrongful act of another organisation is provided for). The 2001 articles may be applied by analogy to the question of state responsibility for injury to an international organisation.[20]

Definition of an international organisation

Traditionally, the concept of 'international organisation' has been synonymous with 'intergovernmental organisation', ie an organisation established by states

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[19]Article 65.
[20]Note 1 above at 73 commentary to art 1 par (10).

and whose members are states. This was the approach taken by the ILC in its earlier work on international organisations.[21] It remains the case that many (if not most) international organisations are intergovernmental. Nonetheless, the ILC has since recognised that international organisations are not necessarily exclusively established by states with some opening their membership to non-state entities[22] and possibly even to other international organisations. Such entities could therefore not be excluded from the scope of the draft articles solely on the basis of their mixed membership.

During its deliberations, the ILC considered two other ways of defining an international organisation. First, by reference to its method of establishment: as most international organisations are established by treaty, particularly those of the traditional intergovernmental type, the establishment of the founding instrument by means of the adoption of a treaty carries with it the inference that the entity established is an international organisation under international law. For example, the African Union was established by a treaty[23] adopted by the member states of the former Organization of African Unity. Yet, here too there are exceptions with entities having been created by other instruments, such as a resolution adopted by a conference of states as in the case of the Organization of the Petroleum Exporting Countries (OPEC).

Secondly, the fact that an entity is an international organisation may be deduced by implication from the existence of separate legal personality: an entity may be considered an international organisation if it is recognised as enjoying separate legal personality under international law. Strictly speaking, such an approach is circular as separate legal personality is a consequence, recognised by law, of the fact that the entity in question is an international organisation. It does not describe how the organisation came to enjoy separate legal personality, but focuses on this personality as proof of the existence of the organisation as a subject of international law.

The ILC adopted a combined approach in its proposed definition which reads,

> 'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own

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[21]See art 2(i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[22] For example, article 3(d)(e)(f) of the World Meteorological Organization's (WMO) Constitution envisages entities other than states ('territories' or 'groups of territories') becoming members. Some entities, like the International Labour Organization (ILO), give enhanced participation rights to non-state entities, in the case of the ILO representatives of labour movements and employers' organizations. See the comment of the ILO UN doc A/CN.4/637 at 17 ('The tripartite structure of the members' representations within ILO.').

[23]Constitutive Act of the African Union of 11 July 2000.

> international legal personality. International organizations may include as members, in addition to States, other entities.[24]

While some definitional elements are provided, the need for international legal personality is the key threshold requirement.

Applicable law and the concept 'rules of the organisation'

The applicable law governing the actions of states is either international law or domestic law (their own or that of other states). For international organisations there is a third possible set of applicable rules. Collectively known as the 'rules of the organisation', these typically refer to the constituent instrument, as well as rules developed within the context of the work of the organisation. The latter include decisions, resolutions, regulations, internal rules, and other instruments adopted by its organs in accordance with its constituent instrument together with the established practice of the organisation. Included here are agreements concluded with third parties and judicial or arbitral decisions binding the organisation.

The 2011 RIO articles recognise that the rules of the organisation may have a bearing on several issues. These include: determining the functions of the organs and agents of an organisation for purposes of establishing the attribution of the acts of such organs or agents to the organisation itself;[25] establishing the existence of an internationally wrongful act arising from the breach of an international obligation under the rules of the organisation;[26] and establishing whether the organisation may take countermeasures.[27] It is also recognised that the rules of the organisation may constitute *lex specialis*, ie special rules which override the articles to the extent that they will apply in the context of the existence of an internationally wrongful act, or the content and implementation of international responsibility.[28]

The rules of an organisation have a *sui generis* character not easily analogised with the internal laws of states, which cannot be the source of international obligation. Nor are the internal laws of a state (which are subject to its will) relevant in determining the responsibility of the state at the international level.[29] The position is different (and decidedly more complex) when it comes to international organisations: their rules cannot be as sharply distinguished from

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[24] Article 2(a).
[25] Article 6(2).
[26] Article 10(2).
[27] Articles 22(2)(b) and (3), as well as art 52(1)(b) and (2).
[28] Article 64.
[29] Article 3 of the 2001 articles.

international law.[30] Some rules, such as constituent instruments adopted in the form of treaties, and rights and facilities (such as privileges and immunities) conferred on international organisations by treaty, are clearly part of international law and accordingly may give rise to international obligations and concomitant international responsibility in the case of breach. What is less clear, is whether all rules of international organisations are part of international law.

Different views exist on this point, and the ILC refrained from taking a definitive position by maintaining that the articles apply to the extent that an obligation arising from the rules of the organisation is found to be an obligation under international law.[31] At the same time, it recognised that even rules of the organisation which are technically not part of international law could, nonetheless be relevant to the application of the draft articles: for example, in determining competence or regulating the granting of consent.[32]

However, those rules of the organisation can only give rise to, or affect, the international obligations existing between the organisation and its members. They cannot be the source of or affect obligations owed to non-members[33] – unless non-members have accepted then as binding. Similarly, while it is possible for the rules of an organisation to modify the articles by prescribing (by way of art 64 – *lex specialis*) separate secondary rules, such special rules could be opposable only to members of the organisation and not non-members.[34] This is confirmed by article 32 which repeats the basic policy position just described in the context of the obligations arising in Part Three (the 'content' of international responsibility) such as the obligation to make full reparation: a responsible international organisation may not, in principle, rely on its rules as justification for failure to comply with its obligations under Part Three. However, in the relations between the organisation and its members, the rules of an organisation may vary the obligations in Part Three. This possibility only arises

> insofar as the obligations in Part Three relate to the international responsibility that an international organization may have *towards its member States and organizations*. It cannot affect in any manner the legal consequences entailed by an internationally wrongful act towards a non-member State or organization. Nor can it affect the consequences relating to breaches of obligations under peremptory norms as these breaches would affect the international community as a whole.[35]

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[30] Note 1 above at 82 commentary to art 5 par (2).
[31] Article 10(2). See n 1 above at 100 commentary to art 10 par (7).
[32] See 'Statement of the Chairman of the Drafting Committee' 3 June 2011 at 5 available at http://www.un.org/law/ilc.
[33] Note 1 above at 82 commentary to art 5 par (3). See art 10(2) which was amended during the second reading so as to refer to an obligation that may arise for an international organisation 'towards its members'.
[34] *Id* at 100-101 commentary to art 10 par (9).
[35] *Id* at 126 commentary to art 32 par (5) (emphasis supplied).

Furthermore, article 5 prevents the application of the *lex specialis* rule in a way that would give rise to the more extreme interpretation that if an act is lawful under the rules of an international organisation, it would necessarily be lawful under international law. While the rules of an organisation may be the source of international obligation (or may be relevant to international obligations), the question of the characterisation of an act as wrongful is governed solely by international law.

Even when considering matters typically covered by the rules of the organisation, the ILC was reluctant to recognise their exclusive application. For example, during the second reading the ILC refined the scope of article 6(2) so as to indicate that while the rules of the organisation necessarily apply in the determination of the functions of its organs and agents, they do not do so exclusively. This was done to allow for the possibility that 'in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization'.[36] The net effect of this treatment of the rules of international organisations within the 2011 RIO articles is that, even though some account is taken of their effect on the legal position, the rules of international law enjoy priority.

Privileged position of members of an international organisation

In certain situations, the rules of the organisation may establish a more favourable position for its members. In other words, unlike the 2001 articles, their 2011 counterpart distinguishes between two classes of state or organisation: members and non-members. As a general proposition, members enjoy a privileged position in relation to non-members to the extent that the rules of the organisation, only applicable to members, may vary, limit or even bar the application of some of the provisions of the 2011 RIO articles. This arises from a general recognition that there is a special relationship between an organisation and its members, with implications for the applicability of the general rules on the consequences of a breach of an international obligation.

For example, when coming to the question of the taking of countermeasures by an international organisation to induce compliance, the ILC was faced with the thorny issue of whether it was possible, or even desirable, to recognise the possibility of an international organisation taking countermeasures against its members. During the second reading, the ILC decided to restructure article 22 so as to distinguish three scenarios:

(1) countermeasures taken by an international organisation against non-members, to which the regular requirements and limitations apply;
(2) an intermediate situation of countermeasures taken by an international

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[36] *Id* at 86 commentary to art 6 par (9).

organisation against a member for the breach of an obligation unrelated to that state or organisation's membership, for example, arising from an agreement between the organisation and a state which happens to be one of its members, where the subject-matter of the agreement is unrelated to the state or organisation's membership; and

(3) countermeasures taken by an international organisation against a member for the breach of an obligation arising as a consequence of that state or organisation's membership.

The Commission felt it appropriate to adopt a progressively more restrictive position in relation to the invocation by an international organisation of the taking of countermeasures against its members, in the second and third scenarios, as a circumstance precluding wrongfulness. As regards the former, the ILC was of the view that there were policy considerations for limiting the possibility of countermeasures so as to preserve the relationship between the organisation and the member.[37] Accordingly, the defence of taking countermeasures is subject to the fulfilment of certain conditions (including that they not be inconsistent with the rules of the organisation). The ILC decided to limit the defence of taking of countermeasures in the context of obligations arising as a consequence of membership to instances where such possibility is expressly permitted by the rules of the organisation, in light of the 'obligations of close cooperation that generally exist between an international organisation and its members'.[38]

Other examples of favourable treatment for members include listing the 'interest of its member States' (but not of non-member states) among the interests the safeguarding of which an international organisation may consider when justifying its invocation of necessity as a ground for the preclusion of the wrongfulness of its acts.[39] As already discussed, article 32 admits the possibility that the obligations under Part Three – such as to make full reparation – assumed by members of an organisation may be modified (presumably mitigated) by the rules of that organisation. Such a possibility does not arise for non-members given the limited application of the rules of the organisation. Furthermore, the acts of member states of an international organisation amounting to aiding or assisting, or directing and controlling, the organisation in its commission of an internationally wrongful act, may be

[37]'Statement of the Chairman of the Drafting Committee' n 31 above at 19-20.

[38]Note 1 above at 115-116 commentary to art 22 par (6). Conversely, art 52 restricts the possibility of the members of an international organisation taking countermeasures against the organisation to the same two scenarios established in art 22. In this case, it is the non-members which enjoy a more privileged position as they are not likewise restricted in their ability to take countermeasures against the organisation.

[39]Article 25(1)(a).

excused if those acts were performed in accordance with the rules of the organisation[40] – a possibility which does not exist for non-member states or organisations.[41]

Circumstances under which responsibility may arise for an international organisation

The 2011 RIO articles envisage several scenarios under which an international organisation may incur international responsibility. As an organisation is a legal entity in the sense that it acts through its organs and agents, responsibility (as in the case of states) is typically vicarious in that it is incurred by the organisation through attribution. While attribution is the primary vehicle, the draft articles recognise other ways in which an international organisation may incur responsibility.

Attribution

As with state responsibility, the rules on the attribution of conduct lie at the heart of the 2011 RIO articles. The relevant provisions are transposed almost verbatim from the 2001 articles. For an international organisation to be held responsible for an act or omission, the conduct in question must not only be internationally wrongful, but should also be attributable to it.[42] Such questions of attribution of conduct can be complex for large international organisations, like the United Nations, with a global presence typically carried out in a number of guises (by organs and entities such as the Secretariat, Funds, Programmes, etc) and represented by several categories of staff, experts, and other individuals through whom the organisation acts, collectively referred to as its 'agents'.[43] In principle, the conduct of one of its organs or agents in performing their functions under the rules of the organisation, is attributable to an international organisation regardless of the position of the organ or agent in the organisation.[44] It is rare, however, that actions undertaken by organs or agents in conformity with their functions amount to an internationally wrongful act. A more likely scenario is that of an agent acting in excess of his or her authority, or an organ acting contrary to the division of functions within

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[40] Articles 58(2) and 59(2).

[41] It does not even seem to exist for the acts of member organisations. No provision made in the equivalent provisions dealing with the acts of international organisations, ie arts 14 and 15, for the exclusion of responsibility of an international organisation, acting *qua* member of another organisation, which aids or assists, or directs and controls, the latter organisation in the commission of an internationally wrongful act, where such act was undertaken in accordance with the rules of the wrongdoing organisation.

[42] Article 4(a).

[43] See art 2(d). The term 'agent' was employed by the International Court of Justice in Reparation for Injuries n 16 above at 177.

[44] Article 6.

the organisation. While such ultra vires conduct may be in contravention of the rules of the organisation, the conduct will nonetheless be attributable to it if it was undertaken by the agent or organ acting in such capacity. As a matter of policy, had the draft articles granted the organisation the ability to deny attribution for the conduct of its agents or organs in contravention of its internal rules, it would have deprived third parties the right of redress.[45] Conversely, acts of an agent not performed in his or her official capacity are not attributable to the international organisation, unless it acknowledges and adopts the conduct in question as its own.[46]

Wrongful conduct may also be attributed to an international organisation where it exercises effective control over an organ of a state or an organ or agent of another international organisation which was placed at its (the controlling organisation's) disposal.[47] While the conduct of organs and agents which have been 'seconded' to an international organisation is attributable to it (and not the lending state or organisation), the position is less clear with regard to entities such as military contingents that are placed at the disposal of an international organisation but which continue to be subject to the control of their national states. Here the ILC has followed the practice developed by the United Nations of applying the 'exercise of effective control' test in determining to which entity the wrongful conduct is to be attributed. This is essentially a factual test turning on the actual control exercised over the specific conduct in question.

This position has been challenged by the European Court of Human Rights in several cases[48] relating to the conduct of forces in Kosovo placed at the disposal of the United Nations Interim Administration Mission in Kosovo (UNMIK) or authorised by the United Nations (Kosovo Force (KFOR)), but under the operational command of NATO. In attributing the conduct of KFOR to the United Nations (and not to NATO), the court took the position that the UNSC, despite delegating operational command to NATO, had retained 'ultimate control'.[49] It is not easy to imagine a scenario in which wrongful

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[45]Article 8. See Certain Expenses of the United Nations (art 17 par 2 of the Charter), Advisory Opinion 1962 ICJ Rep151 at 168 – 'both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent'.

[46]Article 9.

[47]Article 7.

[48]*Behrami and Behrami v France* and *Saramati v France, Germany and Norway* ECHR Decision (Grand Chamber) of 2 May 2007 on admissibility. See too *Kasumaj v Greece* ECHR Decision of 5 July 2007 on admissibility; *Gajić v Germany* ECHR Decision of 28 August 2007 on admissibility; and *Beric v Bosnia and Herzegovina* ECHR Decision of 16 October 2007 on admissibility.

[49]More recently, the ECHR would appear to have moderated its stance. See case of *Al-Jedda v The United Kingdom* ECHR Judgment of 7 July 2011 (Grand Chamber) at par 84, in which the

conduct would not be attributed to the United Nations if the test of ultimate control were to be applied. Such a test does not necessarily accord with the reality of operational command on the ground, especially as regards joint operations. The ILC, for its part, continued to prefer the 'effective control' test, as better suited for the attribution of conduct to an international organisation (and hence for the equitable distribution of responsibility).

Responsibility in connection with an act of a state or other international organisation

As in the case of state responsibility, the 2011 RIO articles admit the possibility of the equivalent to accomplice liability. Under certain circumstances, an international organisation may incur international responsibility for aiding or assisting a state or another organisation in committing an internationally wrongful act,[50] or for directing and controlling a state or other organisation in the commission of the act.[51] Likewise, an international organisation may be held internationally responsible for coercing a state or other international organisation to commit an internationally wrongful act.[52] Such categories of responsibility, based on the act of participation in the commission of an internationally wrongful act, were developed in the context of state responsibility, and subsequently transposed to that of the responsibility of international organisations. Common to all three is the requirement that for such responsibility to arise the assisting, directing or coercing organisation should be doing so 'with knowledge of the circumstances of the internationally wrongful act'.[53] Furthermore, for aid or assistance and direction and control, responsibility only arises if the act would have been internationally wrongful had it been committed by the aiding or

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court agreed with the House of Lords, in a case arising out of the actions of British troops in Iraq – *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* 2007 UKHL 58 – that the conduct in question was attributable to the United Kingdom, since in the situation prevailing in Iraq (as opposed to that in Kosovo) the United Nations Security Council 'had neither effective control nor ultimate authority and control'.

[50]Article 14.

[51]Article 15.

[52]Article 16.

[53]The concept of international responsibility, developed by the ILC in the 2001 articles, and upon which the 2011 RIO articles are modelled, is not fault-based (ie no *mens rea* is required). Nonetheless, the ILC hinted at the possibility that intention may play a role, as a component of 'knowledge of the circumstances', when, in the commentary to art 16 of the 2001 articles, it acknowledged the requirement that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. A State is not responsible for aid or assistance ... unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct ...'. (emphasis supplied). See (2001) II/Part Two *Yearbook of the International Law Commission* 66 commentary to art 16 at par (5). A similar reference was included in the commentary to art 14 of the 2011 RIO articles. See n 1 above at 104 commentary to art 14 at par (4).

directing organisation – in other words, if the organisation was not itself bound by the obligation breached, it would not incur responsibility for aiding or directing. In the case for coercion, as the coerced state or international organisation can raise the defence of *force majeure*, it is required that the act would have been an internationally wrongful act of the coerced state or organisation had not the coercion resulted in the preclusion of wrongfulness.[54]

As an international organisation exists as an entity distinct from its members, it is theoretically possible that it could seek to influence its members 'in order to achieve through them a result that the organisation could not lawfully achieve directly, and thus circumvent one of its international obligations'.[55] An international organisation can thus also incur responsibility for 'circumvention' arising from the adoption of a decision binding or authorising its members to commit an act in violation of its (the organisation's) international obligations.[56]

Finally, international organisations can themselves be members of another international organisation, and also incur international responsibility *qua* member of the latter organisation.[57] As a member of another international organisation, it may likewise be responsible for using that organisation to circumvent its own international obligations[58] and incur the residual responsibility for the wrongful acts of the organisation under article 62.

Residual responsibility of members of an international organisation for the acts of the organisation

One of the more difficult questions faced by the ILC related to the issue of whether members of an international organisation (states and international organisations) can themselves incur international responsibility arising from the wrongful acts of the organisation. The ILC took the position that international law did not, in principle, recognise the possibility of 'piercing the veil' so as to allow for residual responsibility of the members of an international organisation for the internationally wrongful acts of the organisation.[59] Nonetheless, it allowed two exceptions to the rule: (1) where

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[54]Article 16(a).
[55]Note 1 above at 107, commentary to art 16 par (1).
[56]Article 17.
[57]Article 18.
[58]Articles 18 and 61.
[59]It found support for this proposition in the series of cases relating to the demise of the International Tin Council. See *Maclaine Watson and Co Ltd v Department of Trade and Industry*; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* (1988) 80 ILR 109; and *Australia and New Zealand Banking Group Ltd v Commonwealth of Australia*; *Amalgamated Metal Trading Ltd v Department of Trade and Industry*; *Maclaine Watson and*

a member has accepted international responsibility for the act of the international organisation, and (2) where the member gave the third party reason to rely on its responsibility, for example, where the member provided an assurance that it would stand in if the responsible organisation did not have the necessary funds.[60] Such responsibility would be subsidiary in nature.[61]

State responsibility in connection with the conduct of an international organisation

Even though the 2011 RIO articles focus on the responsibility of international organisations, the ILC decided also to cover the responsibility of states for their acts undertaken in connection with internationally wrongful conduct of an international organisation – an issue not directly addressed in the 2001 articles. In addition to the residual responsibility of a state member of an international organisation, the draft articles recognise the possibility that states may incur responsibility as accomplices by aiding or assisting, or directing and controlling, an international organisation in the commission of an internationally wrongful act.[62] This is in line with the corresponding provisions of the 2001 articles (arts 16 and 17), with the exception discussed above, that as a consequence of their membership in the organisation, such responsibility may not arise if the acts were committed in accordance with the rules of the organisation. State responsibility also arises for member states which coerce the international organisation to commit an internationally wrongful act,[63] or where a state member seeks to circumvent one of its international obligations by 'causing the organisation to commit an act that, if committed by the State, would have constituted a breach of the obligation', regardless of whether the act is internationally wrongful for the organisation itself.[64]

Overview of the approach taken in the 2011 RIO articles

The 2011 RIO articles have been the subject of significant analysis and commentary – some of which has been critical – throughout their elaboration. While no attempt is made here to provide a comprehensive overview of all the criticisms and suggestions for modification raised, it is, nonetheless, possible to identify several broad themes in the comments made in the context of the second reading of the articles, particularly those submitted by international

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Co Ltd v Department of Trade and Industry; *Maclaine Watson and Co Ltd v International Tin Council* (1990) 29 *ILM* 675.

[60] Note 1 above at 166 commentary to art 62 par (8). See *Arab Organization for Industrialization, Arab British Helicopter Company and Arab Republic of Egypt v Westland Helicopters Ltd, United Arab Emirates, Kingdom of Saudi Arabia and State of Qatar* (1987) 80 ILR 622.

[61] Article 62(2).

[62] Articles 58 and 59.

[63] Article 60 corresponding to art 18 of the 2001 articles.

[64] Article 61.

organisations. The reaction of the ILC to these criticisms is not only interesting in understanding the general orientation taken in the articles, but also instructive of the approach it takes to the norm-generating process.

Linkage to the 2001 state responsibility articles and the problem of the a contrario *interpretation*

The ILC's reliance on the 2001 articles was contentious during the elaboration of 2011 RIO articles, notably in that it seemingly revealed a lack of appreciation for the differences between states and international organisations.[65] Such criticism revealed a gap in the perception of the task being undertaken by the ILC. From its perspective, the linkage with the 2001 articles was a virtue rather than a vice. Its work on the 2001 articles is generally considered one of its most successful projects. Moreover, the reality is that the ILC may have had little choice. Doing so was in line with its existing practice: the ILC has previously considered the question of the legal position of international organisations, as a sequel to that of states, in other topics, but always on the basis of the prior work done on states. This accords with its philosophy of viewing international law in an holistic manner, with, to the extent possible, the same rules applying to all subjects of international law. This means proceeding from the assumption of co-applicability of the same rules while considering differences at the margins.

Its work on international responsibility, with regard to both states and international organisations, is an example par excellence of this approach. As already alluded to, the ILC's understanding of the legal concept of international responsibility, as developed by Roberto Ago in the 1960s and 70s, is subject-neutral in the sense that it was not developed as a consequence of statehood, but rather posited as an autonomous body of rules applicable by operation of law to states as subjects of international law. That there are provisions in the 2001 articles which are tailored to states does not negate this, but is rather a manifestation of the fact that states too are, in a sense, beneficiaries of the concept of 'speciality'. Therefore, the ILC's decision to follow the 2001 articles was not based solely on a need for consistency in its overall approach to international law, but was also a consequence of its underlying approach to international responsibility. It was never seriously on the cards that the ILC would develop a distinct conception of responsibility tailored only for international organisations.

This is not to say that the ILC was insensitive to the inherent differences between states and international organisations. The very fact that it decided

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[65] See, eg, the views of the International Labour Organization, UN doc A/CN 4/637 8 par 1; and International Monetary Fund *id* at 9 par 1.

not to cover international organisations in the 2001 articles was an acknowledgment of such differences. While the ILC proceeded from the stance of co-applicability, it did not simply make an across-the-board presumption that the same principles apply. Instead, it evaluated the applicability of each provision to the case of international organisations, and in some instances came to the conclusion that an identical or similar solution to that elaborated for state responsibility should apply.[66] Nevertheless, this approach was fundamentally different from that preferred by several international organisations which called for one which took, as its starting point, the 'principle of speciality'. As discussed below, the ILC, while not disputing the relevance of that concept for international organisations, was not able to discern what specific changes were required to implement such an alternative approach, short of eschewing the very concept of international responsibility on which it was basing the entire project.

The ILC's reliance on the 2001 articles was significant for another reason: once established it served both as useful guide and as straightjacket of sorts. The ILC was limited in the extent to which it could depart from the 2001 articles for fear of giving rise to adverse *a contrario* interpretations. Two sets of concerns arose: first, that by not including something in the 2011 RIO articles, or by making a major modification, it risked the interpretation that somehow the position of international organisations was indeed intrinsically different – thus giving more weight to the argument that the entire set of articles warranted a re-orientation. This led the ILC to be somewhat conservative in what it decided to exclude. Only those provisions of the 2001 articles which were clearly not applicable to international organisations were deleted, whereas those which it was technically possible to apply, even if the likelihood of their realistically arising was low, were retained. So, for example, the ILC did not include an equivalent to article 5 of the 2001 articles, dealing with the attribution of conduct of persons or entities exercising elements of governmental authority, which it considered irrelevant in the case of international organisations. It did, however, include a provision on direction and control, as well as one on coercion over a state or another international organisation, even though the chances of such events occurring are remote. To do otherwise risked an interpretation that direction and control, or coercion, were grounds for responsibility in the context of states, but not if committed by international organisations.

The second set of concerns related to the possible impact of the 2011 RIO articles on the 2001 articles, even if only *a contrario*. On several occasions the ILC rejected proposals for drafting changes for fear that doing otherwise could

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[66]Note 1 above at 69 general commentary par (4).

support claims that it had it changed its mind on the 2001 text. This at times involved questions of drafting: for example, a proposal on article 10 which would replace the reference to 'international law' with 'obligation under international law' so as to capture more clearly the nuance that breaches of the rules of an organisation are not as such breaches of international law, was rejected on the basis of its possible effect, *a contrario*, on the 2001 articles.[67] At other times, more fundamental issues were involved: for example, it rejected a call to reintroduce the criterion of intention (fault) in the articles,[68] precisely as it could be perceived as the ILC changing its mind on the basic concept of international responsibility developed in the context of the 2001 articles. Furthermore, while it sought, on the one hand, to limit unintended *a contrario* interpretations, on the other, it made some choices with the deliberate intention of affecting the 2001 articles by either modifying or supplementing them. Besides several references in the commentary to interpretations of the 2001 articles, to the extent that the commentary to those articles should now be read in conjunction with those adopted in 2011, the ILC also consciously decided, for example, to 'fix' a gap pertaining to the applicability of the nationality of claims requirement to claims based on collective obligations.[69] It further included in the 2011 RIO articles an entire part (Part Five) on state responsibility which expands the scope of the law developed in the 2001 articles.[70]

Speciality

The specific concern arising from reliance on the 2001 articles was that it suggested a one-size-fits-all approach, without giving due deference to the 'principle of speciality' which the International Court of Justice held as governing the rules applicable to international organisations.[71] Many international organisations emphasised the importance of making allowance for their special nature.[72]

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[67]Note 31 above at 13.

[68]See n 52 above.

[69]Note 1 above at 148 commentary to art 49 par (13).

[70]Article 56 of the 2001 articles on state responsibility expressly envisages the existence of other rules of international law, not regulated by those articles, governing questions concerning the responsibility of a state.

[71]Legality of the Use by a State of Nuclear Weapons in Armed Conflict n 18 above at 78 –'[i]nternational organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'. See too Reparation for Injuries n 16 above at 180.

[72]See, for example, the comments of the Council of Europe UN doc A/CN.4/637 at 7; European Commission *id* at 8; International Labour Organization *id* at 38; International Monetary Fund *id* at 9; and Organization for Economic Cooperation and Development *id* at 13.

In point of fact, the ILC did not dispute the idea that international organisations have a 'special' character; it merely adopted a different understanding of what this implies. For example, while the articles provide for the possibility of special rules modifying the general rules, the ILC declined to equate the *lex specialis* rule with a 'principle of speciality'. *Lex specialis* may be one way in which speciality is operationalised, but it is not the only or necessarily the principal way. The *lex specialis* mechanism has a relatively narrow technical function, anticipating the specific modification of particular general rules, regardless of any general 'orientation'. The ILC rejected a proposal to give the *lex specialis* provision a broader purport by moving it to the beginning of the articles to indicate that the figurative 'default position' would be the existence of special rules. This would have undermined the very basis of the project, and (short of producing a catalogue of specific rules for specific organisations, which was not realistic), call into question its usefulness. The ILC also did not accept a proposal to include a general provision requiring that the 'special characteristics' of an organisation be taken into account.[73] It was simply not clear what consequences such a provision would have on the articles. Any attempt to incorporate the concept of speciality expressly would also create the impression, *a contrario*, that the draft articles did not already anticipate that idea.

From the ILC's perspective, speciality was not an alternative approach, but rather a concept inherent to the articles. In fact, the concept is reflected throughout the articles, in particular, through the prominence given to the rules of the organisation. As already described, in a number of contexts specific account is taken of the possibility of variation through the application of the rules of the organisation (even to the extent that they may themselves constitute *lex specialis*[74]). Even so, very few, if any, international organisations use their rules to regulate comprehensively the consequences of breaches of international obligations owed to their members. And even if some do have more elaborate rules than others, the ILC had to proceed on the assumption that to be relevant, the articles had to provide a complete set of rules for those organisations that have none at all. Should the occasion arise, therefore, the choice is between a *non liquet*, or falling back on the residual rules of general international law including those elaborated in the 2011 RIO articles.

It is also important to reiterate the inherent limitation on relying on the rules of the organisation to establish the significance of the notion of speciality: such rules are, in principle, not opposable to third states or organisations. In other

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[73]Made by the United Kingdom during the debate on the topic in the Sixth Committee of the General Assembly in 2009. See UN Document A/C.6/64/SR.16 par 27.
[74]Note 1 above at 170 commentary to art 64 par (8).

words, they may provide for special treatment only in the context of international obligations between the organisation and its members arising as a consequence of such membership. Yet, the articles necessarily also cover the legal relations with third states or organisations. International organisations have the power, implied from the very fact of being a subject of international law, to enter into international agreements giving rise to obligations with other subjects of international law to the extent that this is not prohibited by the rules of the organisation. When an organisation does take on such obligations, the relevance of its own rules is largely limited to questions of competence, ie the capacity of its agents to enter into the obligation on its behalf. These are treated as precursor issues related more to the law of treaties than that of responsibility (even if they may affect the consequences arising from breach). In short, when an international organisation owes an international obligation to a non-member state or organisation, the analysis shifts from the special sphere of the rules of the organisation to that of the general rules applicable to all international organisations qua subjects of international law. Such nuances in the interplay between the 'special' and the 'general' contexts in which responsibility may arise was in the collective mind of the ILC throughout its work on the articles.

This need to take into account the special nature of international organisations against the backdrop of the general rules, is inherent to the expository method of norm-elaboration followed by the ILC. Simply put, the rules posited are sufficiently general to allow for variation. Sometimes such flexibility is implicit: for example, article 36 recognises compensation as one of the forms of reparation, without providing guidance on the determination of quantum, which is presumably left to the applicable rules which may vary from organisation to organisation. A more explicit example is to be found in article 32 which, on the one hand, confirms that an organisation cannot invoke its rules to justify non-compliance with its obligations under international law arising from its commission of an internationally wrongful act, but at the same time recognises that the rules of the organisation could affect the application of Part Three of the 2011 RIO articles, for example, 'by modifying the rules on the forms of reparation that a responsible organisation may have to make towards its members'.[75] Accordingly, it would not be necessary for an international organisation to cite the *lex specialis* principle when its own rules vary the legal consequences of wrongful acts it has committed against its members. Such variation is already envisaged by the very way in which the general rule is qualified.

To a certain extent this approach was a matter of necessity: the ILC was faced with competing demands for the recognition of the 'special' nature of different

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[75]*Id* at 125-126 commentary to art 32 par (3).

organisations. It was accused by regional integration organisations of being too UN-centric, and by the UN organisations of taking too much account of the practice of regional integration organisations. In other words, it was faced with the dilemma that by focusing on the 'special' practice of one or a few organisations, it risked violating the concept of speciality in relation to other organisations. Despite accusations to the contrary, pitching the articles at a level of generality applicable to all international organisations, albeit in a flexible manner, and without implying the applicability of any particular primary rule of international law,[76] was, in fact, seen as the best way of preserving speciality.

Furthermore, where more specific provisions were included, it was understood that not all provisions apply to the same extent to all international organisations (exactly because of the application of the concept of speciality). Some do not apply at all by the very nature of the mandate and functions of the organisations in question. For example, the ILC included article 21 on self-defence as a circumstance precluding wrongfulness. For many international organisations, the provision will simply not apply because they are not empowered by their own rules to undertake activities in which the question of self-defence would arise.[77] However, as a subsidiary organ of the United Nations, the ILC felt that it was nonetheless relevant for the United Nations (and other organisations with similar functions), given the organisation's mandate and range of activities.

Role of practice and the characterisation as progressive development of international law

A further difficulty confronting the ILC was the relative paucity of international practice on which to base its proposals. This left the ILC open to criticism by several international organisations (and others) who questioned the legal basis of its conclusions. The ILC had extended an open-ended request to international organisations to provide examples of their practice with relatively little response – including from organisations which criticised the articles for a lack of substantiation in practice. The issue is what inference should be drawn from the factual relative lack of practice. For many international organisations, this meant that the articles took on a more discernibly progressive developmental character, by which they meant that many of its provisions were more hortatory in nature, and not (yet) generally accepted.

The ILC was ambivalent on this point: on the one hand, a lack of positive practice can also be interpreted as a lack of practice to the contrary. Certainly,

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[76]Note 1 above at 69 general commentary par (3).
[77]*Id* at 113 commentary to art 21 par (2).

the ILC took comfort, when deciding to hew closely to the state responsibility line, that little evidence of specific practice to the contrary was proferred by international organisations and states alike. To a certain degree, the claims of 'speciality' were likewise based on theoretical assumptions and constructions. Nonetheless, the ILC, in its general commentary, conceded that

> [t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter ... [and that] the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.[78]

However, the link between the role of practice and the nature of the ILC's work bears examination. While certainly attempts are made at identifying relevant practice from which to draw inferences as to general rules, in an inductive manner, the ILC does, on occasion, also rely on more deductive methods by which rules are elaborated on the basis of general principles, or by analogy, or operation of logic. This was certainly the case with the 2011 RIO articles. As already indicated, the rules on responsibility operate at the secondary level, and are applicable by operation of law as a consequence of the existence of legal personality under international law. While this structure rests, at some level, on the practice of subjects of international law, it is nonetheless also a matter of legal principle and logic. In other words, one should not need confirmation through practice to establish, for example, the general obligation of reparation as a consequence of the commission of an internationally wrongful act. And even in the case of rules specific to international organisations, such as those on the attribution of responsibility, a divergent practice does not necessarily mean the inapplicability of the rules in the 2011 RIO articles in toto: it may simply justify their inapplicability to a particular organisation by virtue of its rules or the *lex specialis* provision.

Subjecting legal principle to the requirement of proof through practice risks undermining the principle of legality. It is also contrary to the basic approach taken by the ILC in its work on international responsibility of seeking to develop a single, uniform, and internally consistent, 'system' of rules. In fact, given the diversity of international organisations in terms of their activities and mandates, it is not clear what practice would be relevant and sufficient for the development of rules of general application. If the ILC were limited to setting out only rules enjoying a basis in practice, the articles would have been much shorter and far more disjointed. The ILC chose to develop a fuller set of articles, even if it meant 'filling-in' the gaps by drawing on the analogy of the 2001 articles.

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[78]*Ibid*.

The question, then, is whether such provisions are included by way of 'progressive development', and what, if anything, this means. While the distinction between the progressive development of international law and its codification lies at the heart of the work of the ILC, it no longer draws a sharp distinction between the two. To a certain extent, what qualifies as progressive development is a matter of opinion.[79] It is also an ambiguous concept as there are, at least two senses in which the label 'progressive development' is used by the ILC (in those rare instances when it actually articulates this). Reference has already been made to the first: a lack of established legal basis (whether in practice or otherwise) suggests that a provision is being proposed *de lege ferenda*. Also common, however, is the second sense, in which the ILC employs the concept as an indicator of change: that an existing rule is being modified by way of progressive development. For example, in its elaboration of the articles on diplomatic protection, the ILC decided to propose the modification – by way of progressive development – of the well-established requirement of nationality of claims so as to allow an exception in the case of refugees and stateless persons.[80]

Certainly, what was being attempted by resort to the 'progressive development' reference was to give the 2011 RIO articles a certain 'orientation' so as to ensure that those applying the law in the future, consider them to be recommendatory. The difficulty with this is that it really depends on which provision(s) are being referred to. It is doubtful that such a position can be maintained, for example, with regard to the general obligation to provide full reparation or to the provision recognising *force majeure* as a circumstance precluding wrongfulness, which are well-established principles of international law. If it cannot be said that the articles are recommendatory in their entirety, then which provisions can be so regarded? Can one assume from the fact that a significant number of provisions drew no adverse comments, that they are considered to enjoy a firmer basis in law? The ILC declined to take a position either way at the level of individual articles. With a few exceptions, the comments of the international organisations also shed little light on the matter.

Accordingly, from a legal perspective the impact of such general assertions as to the nature of the articles is somewhat diminished, as are their usefulness to the law-applier in seeking to ascertain what weight to accord them. In fact, the

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[79]For example, in my view, certain provisions (such as arts 17 and 61 on 'circumvention', as well as art 40 on 'ensuring the fulfillment of the obligation to make reparation') were more clearly in the realm of progressive development than others.

[80]See 'Draft Articles on Diplomatic Protection 2006' art 3(2) Report of the ILC (2006) GAOR 61st Session, Supplement No 10 (A/61/10) 16, subsequently annexed to GA res 62/67 of 6 December 2007, as the 'articles on diplomatic protection'.

very presence of a strong notion of 'speciality' in this field injects an element of relativity thereby limiting the meaningfulness of such assertions: whether a rule is evidence of codification or progressive development may vary from organisation to organisation. For some organisations, a rule may be of no or limited relevance to their practice (and will accordingly be viewed as more recommendatory in nature). For others, it might more clearly conform to their practice, and accordingly, in their view, take on the appearance of *lex lata*. An example of this dynamic is to be found in the rules on the attribution of conduct, and the question of the exercise of effective control (art 7) which are posited largely with the practice of the United Nations in mind. For other organisations, such rules may not conform to their practice, and, accordingly will more likely be depicted as recommendatory. What matters, therefore, is less their supposed 'nature' and more their actual impact.

Conclusion

The likelihood of the 2011 RIO articles being adopted in the form of a treaty is, at present, low – not least because their adoption as a treaty is linked to the fate of the 2001 articles. Their impact on the prevailing legal position will instead depend on the reception they receive from those applying the law. To a certain extent, the articles have already been influential in that, as in the case of their 2001 counterpart, they have provided a 'language' within which to frame the consideration of assertions of international responsibility of international organisations for internationally wrongful acts.