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## Meeting Summary

# Legal Responsibility of International Organisations in International Law

Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011

Speakers:

**Sir Michael Wood**

Barrister

**Maria Vicien-Milburn**

Legal Counsel, UNESCO

**Chair: Elizabeth Wilmshurst**

Associate Fellow, Chatham House

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The event was organized to discuss the legal responsibility of international organisations in international law. In the context of the International Law Commission's Draft Articles on the Responsibility of International Organisations<sup>1</sup>, the speakers discussed the circumstances in which the United Nations and other organisations are legally responsible for their 'own' actions and for what their member states do.

The participants included representatives of government, embassies, NGOs, media, academics and practising lawyers. Both speakers spoke in their personal capacities, except that the remarks made by Ms Vicien-Milburn about UNESCO practice were on behalf of the organisation.

### **Introduction**

What happens if an international organisation breaches its international obligations? According to the International Court of Justice (ICJ) 1949 Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the UN*<sup>2</sup>, the UN possesses an objective legal personality, separate from that of its members. It is a subject of international law and has a capacity to maintain its rights by bringing international claims. Logically, if the UN can bring claims for harm suffered to its interests, it is also liable for harm inflicted by it on third parties, especially in well-established activities such as peacekeeping operations in relation to the conduct of UN peacekeepers or UN administration of territories, such as East Timor or Kosovo. However, the scope, limitations and practical application of the principle of international responsibility have not been determined, particularly in new areas, such as establishment of judicial and non-judicial accountability mechanisms or the responsibility for projects undertaken in culture, education or science, where e.g. UNESCO's responsibility has never before been anticipated.

### **Draft Articles on the Responsibility of International Organisations**

It is important to define the scope of the discussion in the International Law Commission (ILC) on the responsibility of international organisations. It deals solely with legal responsibility and does not purport to cover issues such as governance and accountability. These were comprehensively dealt with in the 2004 report of the International Law Association on the accountability of international organisations, drawn up by a committee chaired by Sir Franklin Berman.

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<sup>1</sup> International Law Commission, Report of the Sixty-first Session (2009), A/64/10, p.19

<sup>2</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Rep 1949, p.174

Equally, the ILC is not dealing with criminal responsibility of individuals for violations of international or domestic law, such as allegations of sexual offences against UN peacekeepers. Similarly, the discussion is not about immunities or responsibility of international organisations under national laws.

The topic of the discussion is limited to *legal* responsibility of international organisations under *international* law, which raises a number of difficult questions. For example, if the United Nations (UN) Security Council requires a state to act in breach of its human rights obligations, is the UN liable? If the Security Council merely authorizes states to act, does that entail potential legal responsibility of the UN? Or if it recommends an action, such as the General Assembly often does? Can the European Union be responsible for instigating a breach of the UN Charter if its courts preclude member states from complying with mandatory decisions of the Security Council? If an international financial institution funds the construction of a dam, which leads to human rights violations, such as the destruction of property without compensation, is it liable?

As a preliminary matter, it is important to distinguish between primary and secondary rules of international law. The primary rules concern the substantive rights and obligations binding on international organisations (which itself raises difficult issues), whilst the secondary rules define when an international organisation is responsible for any such breach and what are the remedies available.

The International Law Commission has been dealing with the issue since 2002 and in 2009, it adopted on first reading a set of 66 draft articles with commentaries. Although the commentaries are essential to the reading of the text itself, they are often very sparse. The commentary also stipulates that where draft articles correspond to their counterparts on state responsibility, the commentaries from the Articles on State Responsibility should be consulted where appropriate.

### **General concerns about the Draft Articles**

This leads us to the first general concern with regard to the Draft Articles on the Responsibility of International Organisations (“Draft Articles”). Whilst the Articles on State Responsibility were well-received and are often cited in courts, the current Draft Articles do not and should not have the same status at this point. It is a matter for concern that

they have already been referred to by courts in e.g. *Behrami*<sup>3</sup> and *Al-Jedda*<sup>4</sup> cases in the European Court of Human Rights and the House of Lords respectively.

Four main problems with the Draft Articles were identified.

**1. The ILC does not recognise sufficiently the differences between States and international organisations.**

The Draft Articles proceed on the assumption that international organisations should operate under almost the same regime of responsibility as states. The problem originates in part because the ILC took the Articles on State Responsibility as a point of departure, even though states and international organisations are very different in many aspects. Most notably, international organisations cannot exercise general powers, but are governed by the principle of speciality. According to the ICJ's *Nuclear Weapons Advisory Opinion*<sup>5</sup>, international organisations are invested by states with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.

In this regard, characteristics of the rules on state responsibility, which cannot apply to the responsibility of international organisations, include:

- The rules on state responsibility were solidly grounded in the Vienna Convention on the Law of Treaties (including the rule that internal law cannot excuse non-performance of treaty obligation, or those on duress and necessity)
- The rules on state responsibility could rely on the principle of sovereign equality, whereby all states can be assumed to have the same legal capacities and duties *vis-à-vis* one another
- The rules on state responsibility were based on the premise that states had sought to give effect to their mutual and reciprocal interests in affirming their responsibilities to one another. Although states might not enjoy being held liable

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<sup>3</sup> *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (Decision on Admissibility), European Court of Human Rights, 2 May 2007, Application No 71412/01 and 78166/01

<sup>4</sup> *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58

<sup>5</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) ICJ Rep 1996, p.66

for breaches of their obligations, it is a price to pay for other states being liable to them.<sup>6</sup>

International organisations have limited and varied powers; they are composed of organs not traditionally divided alongside the legislative/executive/judiciary lines. Similarly, they are subject to very different dispute settlement regimes, not having access to the International Court of Justice.

In short, international organisations are very different from states and it is far from obvious that the same rules should apply to both.

## **2. The failure to address the differences between various international organisations**

The second problematic presumption is that international organisations should all be subject to the same legal regime as each other, although they are infinitely varied. International organisations operate under different legal frameworks and only within the specific limits of their mandate. Although the ICJ acknowledged in its 1949 Advisory Opinion that international organisations are not necessarily identical in nature, the Draft Articles do not address this issue. The United Nations, the European Union, the International Oil Pollution Compensation Funds or international financial institutions are all very different in their internal arrangements and obligations; is it therefore reasonable to apply a single set of rules to all of them?

## **3. There is a lack of consistent practice with regard to international organisations.**

There are some examples from the European Union and the UN, and some references can be made to responsibility under national law. However, even if there may be some limited practice with regard to e.g. peacekeeping operations, there is virtually none for organisations such as UNESCO. And much of the practice cited concerns liability under national law, not responsibility under international law. There is therefore very little practice on which to base the rules. The Articles on State Responsibility, on the other hand, were adopted after a 45 year long process of reflection upon existent practice,

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<sup>6</sup> Speech made by Professor José Alvarez, previous President of the American Society of International Law, before the Canadian Council of International Law, International Organisations: Accountability or Responsibility? 27 October 2006, available at <http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf>

whereas the current Draft Articles represent a rather hypothetical development of international law.

#### **4. There is no certainty about the primary rules**

The substantive law applying to international organisations is not clear. It is unusual for international law instruments to address international organisations as subjects. For example, most human rights instruments only anticipate states as their parties. Furthermore, it is often far from established which rules of customary international law apply to international organisations and in what way.

#### **Specific problems**

There is a number of provisions that warrant special attention.

#### **Article 2**

#### **Use of terms**

*For the purposes of the present draft articles, (...)*

- (c) *“Agent” includes officials and other persons or entities through whom the organization acts.*

The definition of “agent” contained in the Draft Articles raises particular concerns for UNESCO. Such a wide definition, based on the ICJ’s Advisory Opinion in the *Reparations* case, covers not only UNESCO’s officials and experts on mission, but also *other persons or entities through whom the organisation acts*. Consequently, this definition implies that any individual or entity working for UNESCO could potentially expose it to liability, even if the Organization does not retain effective control or direction over some categories of persons. For example, the wording of the definition could create a misleading impression that the National Commissions for UNESCO, as independent contractors, can nevertheless be considered as agents. In fact, the National Commissions for UNESCO are state entities or organs with which UNESCO may contract to carry out specific tasks and projects using UNESCO’s name, but which do not operate under its effective control.

### **Article 6**

#### ***Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization***

*The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.*

The question of organs or agents placed at the disposal of an international organisation is particularly relevant in military actions and has already been the subject of litigation, e.g. regarding the responsibility for the actions of KFOR. There is substantial disagreement about the application of this article in particular cases, when both states and the UN attempt to avoid responsibility by pointing in the opposite direction.

With regard to the interpretation of Article 6, a question was raised in the discussion whether the European Court of Human Rights (ECtHR) was correct in the *Behrami* case to conclude that because the Security Council retained the ultimate authority over the KFOR mission by authorizing it, the responsibility for its actions lies with the UN. It has been noted that whilst the ECtHR explicitly cited Article 6, it interpreted effective control as meaning ultimate control. The ILC has reflected on the ECtHR decision in the commentary to Article 6, stating that the decision was rendered in a specific context of the European Convention on Human Rights. Despite the ECtHR decision being widely criticized, it is a realistic reflection on the factual and legal situation in military actions conducted under the auspices of the UN by multinational forces.

### **Article 13**

#### ***Aid or assistance in the commission of an internationally wrongful act***

*An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:*

- (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and*
- (b) The act would be internationally wrongful if committed by that organization.*

Article 13 deals with the aid or assistance in the commission of an internationally wrongful act. The major question is how far the international organisation is responsible, e.g. when it helps to build a dam which leads to human rights violations.

It is also a provision that presents potential difficulties for UNESCO. To date, there has been no case where international responsibility of UNESCO was invoked on such basis. It however provides technical and financial assistance to member states in the areas of education, science and culture. Recently, UNESCO provided technical assistance to a public institution in Brazil. Upon completion of the project, the Brazilian Federal Prosecution Service brought a claim against UNESCO in Brazil for alleged acts of administrative impropriety. The outcome of this case is not yet known.

Article 16 is another extraordinary provision, according to which an international organisation can incur responsibility if it authorizes or recommends a particular action. This is unrealistic in practice. There is no counterpart to this article in the Articles on State Responsibility.

Finally, Article 21 provides a basis for international organisations to resort to countermeasures. It is very doubtful whether the idea of countermeasures is at all appropriate for the reality of international organisations. This is because of their limited mandate and their purpose to act towards the common interests of their members. Professor Alvarez raises a valid question – could this provision e.g. allow the US Congress to decide to withhold US contributions for a specific international organisation?

## Conclusions

So far, it seems that few comments had been received on the ILC's first reading of the Draft Articles. But, for example, the United Kingdom made some detailed comments in the General Assembly last year and the Articles faced extensive criticism at a conference hosted by the World Bank in Washington DC in late 2010, at which the international institutions expressed their concerns. The UN had promised extensive comments, which were likely to be critical. Giorgio Gaja, the Special Rapporteur, had worked very efficiently towards the final result, but has been hampered by the failure or tardiness of states and international organisations to submit their comments, which are critical for the future work of the ILC. If the Draft Articles are indeed causing serious concerns, as it appears, all those affected should put in written comments as a matter of urgency.



There are several changes that need to be made before the final adoption of the Draft Articles, and major surgery will be needed.

- Much clearer **recognition of the differences** between various international organisations. Paragraph 13 of the commentary to Article 2 specifies that in the application of the rules, the specific factual or legal circumstances pertaining to the international organisation concerned should be taken into account, where appropriate. This, however, needs to be acknowledged more clearly up front in an introductory note and in the Articles themselves.
- In order not to mislead the courts about their status, it should be **explicitly acknowledged that the Draft Articles do not necessarily reflect customary international law**, and are more in the nature of a guide, as they are not based on sufficient practice.
- **Ensure that the ILC gets the Articles right.** The draft at present could well have a chilling effect on international organisations, which would be afraid to proceed with many desirable actions. The ILC should not be under pressure to finish its work on the second reading in 2011, and if major changes cannot be worked out in time for that, the ILC should take more time to revisit the text.

## DISCUSSION

### *Accountability*

The primary rules may in fact lie at the heart of the problem and also require attention. There are instances of personal injuries tracing back to UN authority.

It was noted that the International Law Association had good reasons for deciding to look into accountability of international organisations, as opposed to legal liability. Firstly, international organisations are very different as amongst themselves. Secondly, the structural relationship between the international organisation and its members can be such that the organisation possesses a separate legal personality, but its organs are still composed of member states and decisions are taken by member states. It is therefore important to look through the ostensible structure of international organisations.

### *Immunities*

The main principles that govern immunities of international organisations are, firstly, that the United Nations and its specialized agencies are exempt from the jurisdiction of local

courts, according to the Convention on the Privileges and Immunities of the United Nations. Immunity ensures the independent functioning of these organisations, which would otherwise be seriously compromised. Secondly, immunity does not relieve international organisations from liability. In fact, they are obliged by the Convention to cooperate with the competent authorities in commercial as well as criminal matters to facilitate the proper administration of justice.

It was suggested that it is unrealistic to deal with responsibility of international organisations without addressing immunity, in particular in the context of war crimes or sexual offences committed by peacekeepers.

### *Compensation*

If an international organisation is responsible for a wrongful act, a secondary duty to compensate for the injury would arise. However, there are currently no funds for compensation established within international organisations. Furthermore, if states make a decision resulting in wrongful act, such as the failure of the Security Council to act in Rwanda, who bears the obligation to compensate? The United Nations, the Security Council, the Secretary-General or the states sitting on the Security Council? But it was pointed out that whilst the issue of inadequate financial resources is an important one, it cannot exempt international organisations from liability. In fact, Draft Article 39 stipulates that the members are required to take appropriate measures to provide the organisation with the means for effectively fulfilling its obligations of reparation. Similarly to how it is being done in the industry, international organisations should have insurance to cover injuries arising out of their actions. Currently, the victim is largely overlooked in the process of pointing fingers from the UN to states and back.

Summary by Monika Hlavkova