

Responsibility of International Organizations

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Essays in Memory of Sir Ian Brownlie

Edited by

Maurizio Ragazzi

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CHAPTER FOUR

INTERNATIONAL ORGANIZATIONS ARE DEFINITELY NOT STATES. CURSORY REMARKS ON THE ILC ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Alain Pellet¹

I. INTRODUCTION

Speaking during a debate of the International Law Commission on the responsibility of international organizations, the late Sir Ian Brownlie noted that, '[l]ooking at the topic against the background of the Commission's work on State responsibility, it was clear that, while one must guard against the use of facile analogues, past work on other topics should not be ignored.'² This is also the thesis of this contribution, written in the memory of the master who had been my mentor in the small world—he would have said the '*mafia*'—of the International Court of Justice.

Undoubtedly, Brownlie put his finger on the core issue of the whole topic: when considering the responsibility of international organizations, could the Commission take the Articles on State responsibility, adopted in 2001 by the General Assembly,³ as the starting point for its reflection?

The issue had already arisen in similar terms when the Commission had undertaken to study the topic of treaties concluded between States and international organizations or between two or more international organizations.⁴ Despite the efforts of the Special Rapporteur on that topic,⁵ the final draft adopted by the

¹ Deep thanks to Benjamin Samson (Centre de Droit international de Nanterre—CEDIN) for his most appreciated assistance in the preparation of this contribution.

² A/CN.4/SR.2803, at 88, para. 21.

³ Responsibility of States for Internationally Wrongful Acts (A/RES/56/83).

⁴ See, e.g., Report of the International Law Commission on the Work of its Twenty-seventh Session (A/10010/Rev.1), *YILC* (1975), vol. II, 47–187, at 169–70, paras. 124–5; Report of the International Law Commission on the Work of its Twenty-ninth Session (A/32/10), *YILC* (1977), vol. II, Part Two, 1–135, at 95–6, paras. 65–6.

⁵ P. Reuter, 'First report on the question of treaties concluded between States and international organizations or between two or more international organizations' (A/CN.4/258),

Commission, which led to the adoption of the 1986 Vienna Convention,⁶ only differs from the 1969 Convention on very limited matters.⁷ The same holds true of the 2001 and 2011 sets of Articles on the international responsibility, respectively, of States and international organizations. However, what is probably acceptable in respect of the law of treaties is less defensible for responsibility: international organizations are definitely not States, and this has—or should have—rather radical consequences on the regimes of responsibility applicable to the two types of entities.

2. INTERNATIONAL ORGANIZATIONS ARE NOT STATES

In its celebrated 1949 advisory opinion, the International Court recalled that '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'⁸ Having come to the conclusion that the United Nations is an international person, the Court added:

That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.⁹

These observations lead to two key remarks:

- (i) Inasmuch as responsibility is, in any legal system, the corollary of legal personality, a breach of an obligation entails a number of consequences which form the very content of responsibility.¹⁰ Precisely because they have legal

YILC (1972), vol. II, 171–99, at 178, para. 23; *Id.*, 'Third report on the question of treaties concluded between States and international organizations or between two or more international organizations' (A/CN.4/279), *ibid.* (1974), vol. II, Part One, 135–52, at 136, para. 3.

⁶ A/CONF.129/15.

⁷ See, e.g.: the capacity to conclude treaties (Article 6), the expression of consent (Articles 14 and 16), the settlement of disputes (Article 66), the diplomatic and consular relations (Article 63 of the 1969 Convention and article 75 of the 1986 Convention), and the miscellaneous provisions of both Conventions.

⁸ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, 174, at 178.

⁹ *Ibid.*, 179.

¹⁰ See R. Ago, 'Third report on State responsibility' (A/CN.4/246 and Add.1–3), *YILC* (1971), vol. II, Part One, 199–274, at 203, para. 19; more generally, see A. Pellet, 'The Definition

personality under international law, and are therefore subjects of that law, international organizations entail responsibility for their internationally wrongful acts.

- (ii) This in turn does not mean, though, that the rules applicable to State responsibility—whether ‘passive’ (the rules concerning the entailment of responsibility) or ‘active’ (those applying to the claims for responsibility)—are transposable ‘lock, stock and barrel’ to the responsibility of international organizations.¹¹ Yet, in large part, this was the assumption on which the Commission based its approach to the topic.

3. THE ‘GAJA METHOD’

In 2002, the Commission appointed its Italian member, Professor Giorgio Gaja, a highly qualified scholar, as the Special Rapporteur on the topic.¹² With some caution, he immediately chose to take the Articles on State responsibility as the baseline for his study. As early as his first report, he wrote:

It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text.¹³

In other words:

The need for coherency in the Commission’s work requires that a change, in respect of international organizations, in the approach and even the wording of what has been said with regard to States needs to find justification in differences concerning the relevant practice or objective distinctions in nature.¹⁴

of Responsibility in International Law’, J. Crawford *et al.* (eds.), *The Law of International Responsibility* (Oxford, 2010), 3–16.

¹¹ To my regret, the Special Rapporteur obstinately refused to fill the remaining gap between the two drafts, neither of which deals with the responsibility of States *vis-à-vis* international organizations. (See A/CN.4/SR.2962, at 3–5 (Pellet); A/CN.4/SR.2998, at 11–12 (Pellet); A/CN.4/SR.2999, at 7–8 (Gaja).)

¹² Report of the International Law Commission on the Work of its Fifty-fourth Session (A/57/10), *YILC* (2002), vol. II, Part Two, 1–104, at 11, para. 18.

¹³ G. Gaja, ‘First report on responsibility of international organizations’ (A/CN.4/532), 6–7, para. 11.

¹⁴ *Id.*, ‘Second report on responsibility of international organizations’ (A/CN.4/541), 3, para. 5.

The Special Rapporteur was reproached for aiming at producing a carbon copy of the Articles on State responsibility.¹⁵ However, then a Commission's member, I underlined that there was just one unequivocal notion of responsibility in international law and in law in general, and I took the position that it was not unreasonable to use those Articles as a starting point: the general system of responsibility was similar in both cases,¹⁶ and, as the Commission rightly pointed out in its general commentary to the Articles, it followed Roberto Ago's general approach to formulate only secondary rules: nothing in the Articles implies 'the existence or otherwise of any particular primary rule binding on international organizations.'¹⁷ However, there are also significant dissimilarities between the respective holders of responsibility, and this is where the question of methodology becomes one of substance, also because the great disparity between States and international organizations entails the issue of the principle of speciality.¹⁸

This was the dominant position among international organizations when requested to comment on the Commission's work. For example, the International Labour Organization noted:

The draft articles rely excessively on the articles on the responsibility of States for internationally wrongful acts. It is considered that a parallelism between States and international organizations regarding the question of responsibility is not justified in the light of important differences between the two subjects of international law.¹⁹

This view was widely shared by other organizations, which wrote in their joint submission on the final draft adopted by the Commission that the first of their 'main concerns' about the draft was 'the excessive alignment of the draft articles

¹⁵ See, e.g., A/CN.4/SR.2800, at 69, para. 17 (Matheson); A/CN.4/SR.2801, at 75, paras. 20–2 (Pambou-Tchivounda), and at 80, para. 64 (Escameia). See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session, prepared by the Secretariat (A/CN.4/537), 6–8, paras. 7 and 10–12; Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560), 18, para. 76. For criticism in the doctrine: C. Ahlborn, "The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations—An Appraisal of the "Copy-Paste Approach", 9 *JOLR* (2012), 53–65.

¹⁶ See A/CN.4/SR.3082, at 4 (Pellet); A/CN.4/SR.2999, at 5 (Pellet). For similar views, see A/CN.4/SR.3081, at 4 (McRae); Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/545), 8 (WHO); and A/CN.4/637, at 7 (Council of Europe).

¹⁷ 'Draft articles on the Responsibility of International Organizations, with commentaries 2011', Report of the International Law Commission on the Work of its Sixty-third Session, *Gen. Ass. Off. Recs., Sixty-sixth Session*, Supp. No. 10 (A/66/10), 69–172, at 69, para. (3).

¹⁸ See A/CN.4/SR.2801, at 75–6, paras. 22–3 (Pambou-Tchivounda); A/CN.4/SR.3081, at 11–12 (Wood).

¹⁹ A/CN.4/637, at 8, para. 1 (ILO).

with the articles on the responsibility of States for internationally wrongful acts'. These fourteen organizations added:

The methodology followed by the Commission is a source of concern mainly from two points of view: first, the draft articles are based on a very limited body of practice... second, they take limited account of the special situation of international organizations compared with that of States in regard to responsibility under international law in general and, more particularly, to reparation. These issues originate from the method followed by the Commission, which retained the articles on the responsibility of States for internationally wrongful acts as the point of departure for its draft articles on the responsibility of international organizations even though the two situations are extremely different and raise largely distinct legal issues. International organizations and States have very different legal personalities and the Commission's approach risks creating practical problems since the specific characteristics of international organizations are only taken into account in a limited manner.²⁰

This *caveat* was not really considered by the Special Rapporteur, whose methodology, approved by a majority of the Commission, is exposed in the general commentary to the Articles:

While the present draft articles are in many respects similar to the articles on State responsibility, they represent an autonomous text. Each issue has been considered from the specific perspective of the responsibility of international organizations. Some provisions address questions that are peculiar to international organizations. When in the study of the responsibility of international organizations the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to international organizations, this is based on appropriate reasons and not on a general presumption that the same principles apply.²¹

Indeed, that methodology had its own merits, not least the fact that the Commission thus avoided to have to start again from square one in drafting the Articles on the responsibility of international organizations.²² But it also had serious inconveniences, in particular since at no point did the Special Rapporteur endeavour to systematically analyze in depth the specific issues of the responsibility of international organizations, compared with those regarding States. As a result, the special rules said to apply to international organizations appear as exceptions to the 'general' rules embodied in the 2001 Articles.

This explains why the final draft adopted by the Commission does not grasp—or insufficiently grasps—crucial specific aspects of the mechanism of responsibility applicable to international organizations which, in the Commission's Articles,

²⁰ Ibid. 10–11, para. 2 (Joint submission). See also *ibid.*, 9–10 (IMF); A/CN.4/545, at 6–7 (IMF); A/CN.4/568, at 3 (WHO); A/CN.4/568/Add.1, at 4 (ILO) and 5 (UNESCO); A/CN.4/582, at 5 (IMF).

²¹ 'Draft articles on the Responsibility of International Organizations, with commentaries 2011', 69, para. (4).

²² A/CN.4/SR.2840, at 16–17 (Pellet).

remains largely undifferentiated from the rules applicable to the responsibility of States embodied in the 2001 Articles.

4. THE PRINCIPLE OF SPECIALITY IGNORED?

One of the recurrent criticisms levelled against the 2011 Articles is their lack of concern for the principle of speciality, which, combined with the doctrine of implied powers, is one of the main pillars of the global status of international organizations.

As the International Court of Justice explained, whereas States possesses all rights and obligations recognized by international law, ‘the rights and duties of an entity such as the Organization²³ must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.’²⁴ Therefore, ‘international organizations are subjects of international law which do not, unlike States, possess a general competence. International 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.’²⁵ However, this crucial element of differentiation between States and international organizations is only partially reflected in the 2011 Articles.

This shortcoming was denounced during the debates within the Commission,²⁶ and rather vehemently by the international organizations which were called upon to provide comments and observations on the draft. Thus, noting that ‘full recognition of the “principle of speciality” is fundamental to the treatment of the responsibility of international organizations’, the Secretariat of the United Nations observed:

It is, therefore, of the essence that in transposing the full range of principles set forth in the articles on the responsibility of States for internationally wrongful acts *mutatis mutandis* to international organizations, the International Law Commission should be guided by the specificities of the various international organizations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures—in brief, their special character.²⁷

²³ While the Court was referring to the UN, its reasoning is applicable to all other inter-governmental organizations.

²⁴ *ICJ Reports 1949*, 174, at 180.

²⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996*, 66, at 78–9, para. 25.

²⁶ See A/CN.4/SR.2801, at 75–6, paras. 22–4 (Pambou-Tchivounda); A/CN.4/SR.2962, at 6 (Pellet); A/CN.4/SR.3081, at 4 (McRae); A/CN.4/SR.3082, at 4 (Pellet).

²⁷ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1), 4, para. 1 (United Nations).

Similar concerns were voiced by many other organizations.²⁸ Indeed, the 2011 Articles may seem rather parsimonious in their reference to the principle of speciality:

- they do refer to the ‘rules of the organization’, but the expression often applies as an equivalent for the ‘internal law of the State’ in the 2001 Articles;²⁹
- when the rules of the organization do not correspond to the internal law of the State, they still do not illustrate the principle of speciality but rather the fact that the rules in question are part of international law;³⁰ and
- Article 64 of the 2011 Articles essentially corresponds to Article 55 of the 2001 Articles, as this comparative tables clearly shows:

<p>Article 64 (<i>Lex specialis</i>). These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.</p>	<p>Article 55 (<i>Lex specialis</i>). These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.</p>
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²⁸ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/545), 5 (EU), 6–7 (IMF) and 8 (International Seabed Authority); A/CN.4/556, at 26 (International Criminal Police Organization); A/CN.4/637, at 8 (ILO), 9–10 (IMF), 11 (Joint submission), and 13 (OECD). See also the remarks made during the debates in the Sixth Committee of the General Assembly: A/C.6/66/SR.20, at 14, para. 90, and 20, para. 22 (United States); A/C.6/66/SR.18, at 5, para. 24 (UN Legal Counsel).

²⁹ This is so in Article 6(2) (Conduct of organs or agents of an international organisation—see 2001 Art. 4(2) (Conduct of organs of a State)) and Article 32 (Relevance of the rules of the organization—see 2001 Art. 32 (Irrelevance of internal law)).

³⁰ See, e.g., Article 10(2) (Existence of a breach of an international obligation), Article 58(2) (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization), Article 59(2) (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization). In some respect, this is also the case of Article 40(2), which imposes on the members of a responsible organization the duty to ‘take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations’ concerning reparation.

Only Articles 22(2) and (3), and 52(1) and (2), relating to countermeasures, seem to take expressly into account the principle of speciality in that they limit the right to take countermeasures by international organizations or against them.

Globally, this has been criticized as an unsatisfactory response to the concerns expressed by organizations, which mainly bore upon the limitation of their responsibility in relation with the special character of their functions.

Now, while it is certainly true that (i) international organizations are not States, and (ii) one of the main distinctive characters is the principle of speciality, it is not obvious how one can figure out which consequences do or should follow. Interestingly, criticism did not include positive and practical suggestions on how this flaw could or should have been remedied. Moreover, as was amply underlined during the Commission's work on this project,³¹ the precedents are rare and poorly documented, and any rule adopted in this respect would emerge as a progressive development of international law.

It may have been possible to make speciality the principle, namely start with the idea that the (special) rules of the organization govern, although this would have raised difficult—but probably not insurmountable—questions of opposability of these rules to non-member States and other entities. This approach would have led the Commission to reflect more deeply on the different rules that apply, respectively, to member States and to non-member States.³² Yet, this distinction is not completely absent from the Articles. Article 32, paragraph 2 (on the relevance of the rules of the organization), considers the possibility that the rules of the organization could depart from the general principles applicable to the content of the international responsibility of an international organization in 'the relations between the organization and its member States and organizations', which implies that this is not so in respect to the relations of non-member States or organizations. Similarly, Article 52 accurately limits the right of an injured State or international organization to take countermeasures against a responsible organization of which it is a member, but does not impose such limits on

³¹ See 'Draft articles on the Responsibility of International Organizations, with commentaries 2011', 69–70, para. 5; G. Gaja, 'Third report on responsibility of international organizations' (A/CN.4/553), 2, para. 3; Id., 'Eighth report on responsibility of international organizations' (A/CN.4/640), 5–6, para. 6. See also Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/568), 3 (WHO); A/CN.4/609, at 4 (WHO); A/CN.4/637, at 10–11 (Joint submission) and 14 (World Bank); A/CN.4/637/Add.1, at 4–5 (United Nations).

³² As explained in the commentary on Article 5 (Characterization of an act of an international organization as internationally wrongful), 'while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members.' ('Draft articles on the Responsibility of International Organizations, with commentaries 2011', 82, para. (3).)

non-members.³³ Further, Articles 58 and 59 exonerate members of a responsible organization from responsibility when it has acted in accordance with the rules of the organization, a perfectly defensible rule as the responsibility would be entailed *vis-à-vis* the organization itself or its member States, but which is most debatable with respect to third parties.

It appears, then, that the 2011 Articles are certainly not perfect in respect to the consequences drawn from the principle of speciality. However, reflecting on this aspect and in view of the very general nature of the criticism advanced by a number of international organizations,³⁴ it would probably have been difficult for the Commission to draw much more concrete consequences from the principle of speciality than it actually did.

5. THE REAL FLAW IN THE 2011 ARTICLES: THEIR ABSTRACTION

‘[T]he limited attention paid [by the Articles] to the special situation of international organizations in relation to the obligation to compensate’³⁵ is less excusable.

States can be big or small, wealthy or poor, but they are supposedly equal and, whatever their actual situation, when their responsibility is entailed for an internationally wrongful act, they are ‘under an obligation to make full reparation for the injury caused by the internationally wrongful act’ (Article 31(1)). In this respect, it can be suggested that the law of international responsibility ignores the concrete situations and does not take into account whether or not the concerned States can make full reparation. Although this certainly is a serious problem, it must be put in perspective: statistically, a big, powerful and wealthy State is probably better able to cause huge damage than a small and poor country; the

³³ Regarding the circumvention of international obligations by a State which takes ‘advantage of the fact that the organization has competence in relation to the subject matter of one of the State’s international obligations’, with a view to circumventing that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation (Article 61), it goes without saying that the question only arises for member States of the organization (for the reciprocal case of an organization circumventing one of its international obligations through decisions and authorizations addressed to members, see Article 17). Similarly, it goes without saying that only a member State can be responsible, in certain circumstances, for an internationally wrongful act of an organisation (Article 62).

³⁴ As the Legal Adviser of the World Tourism Organization, a UN specialized agency, I had co-signed a collective letter prepared by the Legal Advisers of the UN system and criticizing rather severely the draft articles (referred to in A/CN.4/637, at 6, note 2). While I still have strong hesitation concerning several of the Articles, unlike others I have come to the conclusion that this particular aspect of the draft did not deserve strong criticism.

³⁵ A/CN.4/637, at 10, para. 1 (Joint submission).

former can make full reparation much more easily than the latter. In any case, States will usually be better equipped to face the consequences of their internationally wrongful acts than international organizations.

This empirical observation can hardly be transposed to international organizations: when fulfilling their special functions, they can cause enormous damage (for example, if the launching by an international organization of a nuclear propulsion rocket fails, or within the framework of a peace-keeping operation) and, in no case, could the organization be in a position, concretely, to make full reparation, out of its own resources, for any injury thus caused. In other words, if causing significant damage, international organizations often lack the means necessary to provide compensation.³⁶ Yet, exactly like a State, a responsible organization 'is under an obligation to make full reparation for the injury caused by the internationally wrongful act': Article 31 is merely copied from the equivalent provision found in the 2001 Articles (likewise numbered as Article 31 in that text too).

In itself, the principle is impeccable. As the Permanent Court of International Justice recalled in *Factory at Chorzów*: 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'³⁷ Consequently, the 'essential principle contained in the actual notion of an illegal act' is that 'reparation must, as far as possible, wipe out all the consequences of the illegal act'.³⁸ And this holds true for any subject of law in any legal system. There is no reason why it should not apply to international organizations.

However, the fact that full reparation—including full compensation—is due does not necessarily demand that the wrongdoer must in all cases be the payer. Here, for practical reasons, it seems indispensable to pierce through the 'organizational veil', if the principle of full reparation is to be respected. Otherwise, no claim concerning a somewhat serious injury would have any prospect of success: international organizations have no power to raise taxes or to issue coinage, and can only get the sums necessary to compensate through their membership. As the International Labour Organization wrote, international organizations have to rely on funds allocated to them. If they were to provide funds for contingent obligations such as a possible compensation, they would have reduced funds for fulfilling their original mandates. By imposing such a parallel obligation on international organizations, the Commission risks limiting effectively their future

³⁶ A/CN.4/SR.2894, at 17 (Pellet), and also at 5–6 (Yamada) and 16–17 (Economides); A/CN.4/SR.2932, at 11 (Pellet).

³⁷ *Factory at Chorzów, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17*, at 29.

³⁸ *Ibid.*, 47.

operations. The requirement of 'full reparation' may lead, in the case of compensation, to the disappearance of the international organization concerned.³⁹

In other words, it was indispensable to dissociate the problems of compensation from those of incurring responsibility, although, due to the legal personality of international organizations, the responsibility they incur can only be exclusively theirs, and there can be no question of asserting that States are responsible for an act of an international organization.⁴⁰ Nevertheless, it would have been reasonable, in the context of the progressive development of international law, to stipulate that, if the organization does not have the means to address the consequences of its responsibility, its member States should assist the organization by bearing the consequences of the responsibility themselves. One may logically suppose that, by joining the organization, member States bound themselves to give to the organization the means to fulfil its obligation; in this respect, they may be held as being 'liable' or 'accountable', rather than 'responsible'.⁴¹

Regrettably, the International Law Commission did not find a way of striking a satisfactory balance between the exclusive responsibility of the organization and the means of effectively implementing that responsibility in respect of the victims. As I had the occasion to explain, '[t]he road to take was clear: the Commission [should have established] principles according to which the organization's member States must allow the organization to discharge its obligation to make reparation'.⁴² Inspired by this conviction, I proposed, at the 2007 session, a supplementary draft article which read as follows:

The member States of the responsible international organization shall provide the organization with the means to effectively carry out its obligations arising under the present part.⁴³

Willing to add an express mention of the rules of the responsible organisation, the Special Rapporteur made a counter-proposal,⁴⁴ which eventually led to the current Article 40. This table shows the different stages of the progressive watering down of the provision I had proposed:

³⁹ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 30 (ILO). See also A/CN.4/SR.3084, at 7 (Pellet).

⁴⁰ 'International organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their international wrongful acts.' ('Draft articles on the Responsibility of International Organizations, with commentaries 2011', 132, para. (1).)

⁴¹ See A/CN.4/SR.2894, at 17 (Pellet).

⁴² A/CN.4/SR.2932, at 13 (Pellet); see also the statement made by the Russian Federation in the Sixth Committee on Nov. 17, 2006 (A/C.6/61/SR.18, para. 68).

⁴³ Report of the International Law Commission on the Work of its Fifty-ninth Session, *Gen. Ass. Off. Recs., Sixty-second Session*, Supp. No. 10 (A/62/10), 184, note 456.

⁴⁴ *Ibid.*, note 457.

Pellet's Proposal	2007	The member States of the responsible international organization shall provide the organization with the means to effectively carry out its obligations arising under the present part. ⁴⁵
Special Rapporteur's Proposal	2007	In accordance with the rules of the responsible international organization, its members are required to take all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter. ⁴⁶
Valencia-Ospina's Proposal	2007	The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter. ⁴⁷
Draft article 39	2009	The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter. ⁴⁸
New Proposal by the Special Rapporteur	2011	<ol style="list-style-type: none"> 1. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of organization in order to enable the organization to fulfil its obligations under this chapter. 2. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter.⁴⁹
Article 40	2011	<ol style="list-style-type: none"> 1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter. 2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.⁵⁰

⁴⁵ A/CN.4/SR.2935, at 21.

⁴⁶ A/CN.4/SR.2938, at 27.

⁴⁷ Responsibility of International Organizations. Titles and texts of draft articles 31 to 45 [44] adopted by the Drafting Committee on 18, 19, 20 and 25 July 2007 (A/CN.4/L.720), 5, note 1.

⁴⁸ Report of the International Law Commission on the Work of its Sixty-first Session, *Gen. Ass. Off. Recs., Sixty-fourth Session*, Supp. No. 10 (A/64/10), 30.

⁴⁹ A/CN.4/SR.3083, at 4.

⁵⁰ 'Draft articles on the Responsibility of International Organizations, with commentaries 2011', 132.

The end result is not entirely convincing. In spite of the use of 'shall' in both paragraphs of Article 40, the terminology used is rather soft, and the duty incumbent on both the organization and its members seems to be subordinated to the 'rules of the organization'. The commentary does not dispel the impression of softness: 'an obligation for members to finance the organization as part of the general duty to cooperate with the organization *may be implied under the relevant rules*'.⁵¹ In reality, that obligation is not implied by the rules of the organization, but is the logical and unavoidable consequence from the fact that member States, by conferring legal personality on an international organization, necessarily accept that it could incur responsibility and that it must bear its consequences.⁵²

6. CONCLUDING REMARKS

It might be the case that, due to the rather mixed reception they have received and their own weaknesses—one being the consequence of the other—, the Articles on the responsibility of international organizations are already 'dead at birth'. However, it is premature to make predictions and this worst-case scenario may well be avoided.

During the debates on the draft, Brownlie harshly noted that the expression 'activity analogous to that of Governments' was 'a beautiful phrase that was completely useless, but was exactly what was needed'.⁵³ This may well serve as a general comment on the whole draft: paradoxically, the main weaknesses of the Articles could also be seen as their strength.

In tying up their 2011 draft to the 2001 Articles—which have generally (and rightly) been praised—, the Commission and its Special Rapporteur have taken the easy way—and a debatable one. But, at the same time, they have probably facilitated a more consistent approach to the system of responsibility in international law and, in stressing the importance of the rules of the organization and the *lex specialis* principle, they have made room for such flexibility as may permit in practice full implementation of the principle of speciality.

Similarly, the vagueness of Article 40 on reconciling the international organizations' exclusive responsibility for their wrongful acts with the necessary involvement of member States when reparation—and more particularly compensation—is at stake could pave the way to a satisfactory balance between the full recognition of the legal personality of international organizations in the international sphere, on the one hand, and the necessity of full reparation in favor of the victims of an internationally wrongful act, on the other.

⁵¹ *Ibid.*, 133, para. (5) (emphasis added).

⁵² See A/CN.4/SR.3084, at 7–8 (Pellet).

⁵³ *YILC* (2003), vol. I, 6, para. 10.

Once adopted and, as the case may be, noted by the General Assembly, drafts prepared by the International Law Commission take a life of their own. The Articles on the responsibility of international organizations, in this respect, are no exception: they can be sanctioned (and developed) in practice as well as enter the kingdom of oblivion. Only the future practice of States and international organizations will tell.