THE LAW OF RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: GENERAL RULES, SPECIAL REGIMES OR ALTERNATIVE MECHANISMS OF ACCOUNTABILITY?

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ABSTRACT

The present article aims to analyze two different, albeit related, criticisms addressed to the general approach followed by the International Law Commission in its work of codification of the rules on the responsibility of international organizations. The first relies on the consideration of the great diversity among international organizations and of the ensuing difficulty of identifying a set of rules of responsibility which apply to every organization. The other criticism raises the question of whether a set of general rules of responsibility may be regarded as an adequate way of making international organizations more accountable. This article will show that these criticisms appear excessive. It is submitted that, to the extent that the Articles adopted on 2011 provide a first attempt to delineate a comprehensive legal framework for regulating the question of the responsibility of international organizations, they fill an important gap and may contribute to generate a greater awareness of the limitations incumbent on international organizations and of the consequences stemming from an overstepping of such limitations.

Keywords: International organizations. Responsibility. Accountability. International Law Commission.

RESUMO

O presente artigo tem por objetivo analisar duas diferentes, ainda que relacionadas, críticas dirigidas à abordagem geral seguida pela Comissão de Direito Internacional no seu trabalho de codificação das regras relativas à responsabilidade das organizações internacionais. A primeira crítica baseia-se na consideração da grande diversidade entre as organizações internacionais e da dificuldade que se seguiu de identificação de um conjunto de regras de responsabilidade que se aplicam a todas as organizações. A outra crítica levanta a questão de saber se um conjunto de regras gerais da responsabilidade pode ser considerado como uma forma adequada de tornar as organizações internacionais mais responsáveis.
Este artigo irá mostrar que estas críticas parecem excessivas. Alega-se que, na medida em que as disposições adotadas em 2011 fornecem uma primeira tentativa de delinear um quadro jurídico abrangente para regular a questão da responsabilidade

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das organizações internacionais, eles preenchem uma lacuna importante e podem contribuir para gerar uma maior consciência das limitações que incumbem às organizações internacionais e das consequências decorrentes de uma ultrapassagem de tais limitações.

Palavras-Chave: Organizações Internacionais. Responsabilidade. Comissão De Direito Internacional

INTRODUCTION

On 9 December 2011 the United Nations General Assembly adopted Resolution 66/100, by which it took note of the articles on the responsibility of international organizations, presented by the International Law Commission, and commended «them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action».[2] The 67 Articles on the responsibility of international organizations, to which Resolution 66/100 refers, were adopted on second reading by the International Law Commission at its sixty-three session in 2011.[3] If one considers that the first report of the Commission's special rapporteur, Giorgio Gaja, was submitted in 2003,[4] it can be said that the period of time spent by Commission on this work was a relatively short one. This can be also explained by the fact that, in addressing the issue of responsibility of international organizations, the Commission benefited from the previous codification of the rules on state responsibility. The general approach of the 2011 Articles, including the distinction between primary and secondary rules, as well as the content of several provisions are modeled on the Articles on state responsibility adopted in 2001.[5]

Much has already been written about the 2011 Articles on the responsibility of international organizations.[6] Some of the legal issues addressed in the Articles

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[2] UN Doc. A/RES/66/100, paragraph 3.

[3] Report of the International Law Commission on the Work of its Sixty-third Session, UN doc. A/66/10, p. 54.

[4] GAJA, G., **First report on the responsibility of international organizations**, UN doc. A/CN.4/532.

[5] However, the Commission took care to specify that the Articles are not based on any presumption that the Articles on state responsibility are also applicable to international organizations: «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». Report of the International Law Commission on the Work of its Sixty-third Session, cit., p. 69. On this issue, see AHLBORN, C., The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations. An Appraisal of the 'Copy-Paste' Approach, **International Organizations Law Review**, vol. 9, 2012, p. 53 ff.

[6] Among the many contributions, see RAGAZZI, M. (ed.), **Responsibility of international organizations: essays in memory of Sir Ian Brownlie**, Martinus Nijhoff, Leiden/Boston, 2013; the

have received extensive commentaries. One may refer, for instance, to the notion of «effective control» employed in Article 7 for the purposes of determining when the conduct of organs of a State placed at the disposal of an organization has to be attributed to that organization,[7] or to the question of whether and under what conditions member states can be held responsible for the conduct of the organization.[8] The present study does not aim to give a complete overview of the legal issues addressed in the 2011 Articles. Its heart will be formed by an analysis of two different, albeit related, criticisms which have been addressed over the time to the general approach followed by the Commission. The first relies on the consideration of the great diversity among international organizations and of the ensuing difficulty of identifying a set of rules of responsibility which, at least in principle, applies to every organization. The other criticism sometimes addressed to the work of the Commission is that the Articles, focused as they are on the relationship between international organizations *inter se* or between states and international organizations, do not have much impact on the conduct of international organizations. As we will see in the next paragraph, both views emphasize the need for alternative approaches to the question of responsibility of international organizations.

I. THE INTERNATIONAL LAW COMMISSION'S APPROACH TO THE CODIFICATION OF THE RULES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: WHAT'S WRONG WITH IT?

Since international organizations are a rather recent phenomenon, it does not come as a surprise that the rules on the responsibility of international organizations have come into existence only recently. Still a few decades ago some authors expressed doubts about the possibility that international organizations could commit

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special issue of the **International Organizations Law Review**, vol. 9, 2012, pp. 1-85; KLEIN, P., Les articles sur la responsabilité des organisations internationales: quel bilan tirer des travaux de la CDI?, **Annuaire français de droit international**, 2012, p. 15.

[7] DANNENBAUM, T., Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', **Harvard International Law Review**, vol. 51, 2010, p. 141 et seq.; SARI, A., UN Peacekeeping Operations and Article 7 ARIO: The Missing Link, **International Organizations Law Review**, vol. 9, 2012, p. 77 et seq.; MONTEJO, B. The notion of "effective control" under the Articles on the responsibility of international organizations, in RAGAZZI, M., (ed.), **Responsibility of international organizations. Essays in memory of Sir Ian Brownlie**, Martinus Nijhoff, Leiden/Boston, 2013, p. 404; MESSINEO, F., **Multiple Attribution of Conduct**, SHARES Research Paper No. 2012–11, pp. 1-52.

[8] D'ASPREMONT, J., Abuse of the Legal Personality of International Organizations and the Responsibility of Member States, **International Organizations Law Review**, vol. 3, 2006, p. 91 et seq.; PAASIVIRTA, E., Responsibility of a Member state of an International Organization: Where Will It End?, **International Organizations Law Review**, vol. 7, 2010, pp. 49-61; REINISCH, A., Aid or Assistance and Direction and Control between states and Inter- national Organizations in the Commission of Internationally Wrongful Acts, **International Organizations Law Review**, vol. 7, 2010, pp. 63-77.

internationally wrongful acts.[9] The prevailing view was that, while the organization does not have the capacity to commit wrongful acts, member states had to bear responsibility for its conduct.[10] Nowadays the general approach has changed considerably. As views expressed by states and international organizations during the recent work of codification conducted by the International Law Commission made clear, the principle that international organizations, like any other subjects of international law, have the capacity to commit internationally wrongful acts and have to bear responsibility for that acts appears to be generally accepted. Similarly, it is widely recognized that there is no general principle whereby states are, due solely to their membership, responsible for the wrongful acts of the organization of which they are members.[11]

Nowadays the debate appears to focus on other issues. As I have said, one the recurring comments addressed to the work of the International Law Commission related to the diversity among organizations and to the importance of the principle of speciality for the purposes of determining the rules of responsibility which are applicable to them. In particular, it has frequently been observed that, unlike states, international organizations are one different from the other in terms of functions, structure and composition and that this has necessarily important implications when it comes to the identification of the rules of responsibility. Such view was supported by many international organizations as well as by some states. Following such approach, the idea that there is a set of rules of responsibility which are applicable to

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[9] Significantly, in a statement made in 1963 during the work of the International Law Commission, Roberto Ago, at the time a member of the Commission, observed that «[i]t was even questionable whether [international] organizations had the capacity to commit international wrongful acts». Yearbook of the International Law Commission, vol. II, 1963, p. 229.

[10] See HARTWIG, M., International Organizations or Institutions, Responsibility and Liability, in WOLFRUM, R., (ed), **Max Planck Encyclopedia of Public International Law**, OUP, Oxford, 2011, para 7 («For a long time, it has not been clear if international organizations may bear international responsibility»). For one of the first studies entirely focused on the issue of the responsibility of international organizations, see EAGLETON, C., International Organizations and the Law of Responsibility, **Recueil des cours**, vol. 76, 1950, p. 319 et seq.

[11] While the Articles do not include a provision stating a residual rule on the non-responsibility of members for acts of the organization, as the commentary makes clear, «such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act». Report of the International Law Commission on the Work of its Sixty-third Session, cit., p. 164, para. 2. The resolution adopted in 1995 by the *Institut de droit international* on «Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations towards Third Parties», includes explicitly a provision stating a residual rule on the non-responsibility of members for acts of the organization. Article 6 (a) reads as follows: «Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members». **Annuaire de l'Institut de droit international**, vol. 66-II, 1996, p. 445. In legal literature, the principle of non-responsibility of members is generally acknowledged. For a different view see however BROWNLIE, I., The Responsibility of States for the Acts of International Organizations, RAGAZZI (ed.), M., **International Responsibility Today. Essays in Memory of Oscar Schachter**, Martinus Nijhoff, Leiden/Boston, 2005, p. 362, and more recently YEE, S., 'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations, RAGAZZI, M., (ed.), **Responsibility of international organizations**, cit. p. 325 et seq.

every international organization would be hardly conceivable.[12] Moreover, even when it is admitted that such rules may indeed exist, it is said that these rules, because of their residual nature, are scarcely significant: in most cases the general rules of responsibility will be replaced by special rules which apply to a specific organization or to a specific category of organizations.[13]

During the work of the Commission, states and international organizations submitted proposals which aimed to include in the draft articles a rule giving relevance to the diversity among international organizations. Thus, the European Union repeatedly asked to include a provision recognizing the special position of the so-called «regional economic integration organizations».[14] According to the United Kingdom, the set of articles should have included, in addition to the rule on *lex specialis*, a provision «requiring the special characteristics of a particular organization to be taken into account in applying the draft articles».[15] Some organizations went even further. They substantially denied the very existence of a general regime of responsibility which applies to every organization, claiming, as the International Monetary Fund did, that, apart from international rules having a peremptory character, the question of whether an organization has committed an internationally wrongful act or has incurred in international responsibility has to be assessed primarily on the basis of the rules of that organization.[16]

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[12] Within the International Law Commission such view had already emerged in the past. In the seventies, it led the Commission not to push forward the proposal of codifying the rules on the responsibility of international organizations. In particular, in the *Survey of International Law* submitted in 1971, the Secretariat had taken the following position: "there would appear to be considerable difficulties in arriving at a set of provisions on the matter which would be both specific enough in character to be useful and, at the same time, applicable to all or most international organizations". See Review of the Commission's Long-Term Programme of Work, Survey of International Law, in Yearbook of the International Law Commission, 1971, vol. II, p. 80, par. 354. For a survey of the obstacles encountered by the Commission when codifying rules applicable to international organizations, see KEITH, K., The Processes of Law-Making: The Law Relating to International Organizations as an Example, in RAGAZZI, M., (ed.), **Responsibility of international organizations**, cit., p. 15 ss.

[13] For a survey of the comments made by states and international organizations on this issue see BLOKKER, N., Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-Term Review, KLABBERS, J., and WALLENDAHL, A., (eds), **Research Handbook on the Law of International Organizations**, Edward Elgar, Cheltenham, 2011, pp. 318 et seq.. See also the critical remarks addressed to the work of the Commission by HAFNER, G., Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks, FASTENRATH, U., et al. (eds), **From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma**, OUP, Oxford, 2011, p. 695 et seq.

[14] A/CN.4/637, 14 February 2011, p. 38: «To the extent that the draft articles, even taking account of the commentaries, at present do not adequately reflect the situation of regional (economic) integration organizations such as the European Union, it would seem particularly important for the draft to explicitly allow for the hypothesis that not all of its provisions can be applied to regional (economic) integration organizations ('lex specialis')».

[15] A/C.6/64/SR.16, 27 October 2009, para. 27.

[16] A/CN.4/582, 2007, p. 8: «When an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a "peremptory norm" (jus cogens) or arises from a specific obligation that has been incurred by the organization in the course of its activities (e.g. by entering into a separate treaty with

These proposals did not find their way into the set of articles adopted by the Commission in 2011. The Commission did not deviate from its primary goal of codifying the general regime of responsibility of international organizations. Thus, in principle, the rules of responsibility codified by the Commission apply to all organizations, regardless of their competences, structure or composition.[17] Moreover, the scope of application of these rules is rather large: they apply not only to the relationship between the organization and third subjects but also to the relationship between the organization and its members. In other words, the Articles aim also to regulate the internal dimension of the organization. However, they do not exclude the possibility that the general rules of responsibility may be displaced by special rules which are applicable to a specific organization or to a specific category of organizations. This possibility is explicitly recognized by Article 64, which provides as follows: «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 an international organization, or 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». This provision is modeled on Article 55 of the Articles on the state responsibility.[18] However, unlike Article 55, Article 64 also concerns the relationship between the organization and its member. In that respect, it recognizes that such relationship may be governed by special rules contained in the rules of the organization.

The adoption of the Articles on the responsibility of international organizations did not put to an end the debate over the existence of a general regime of responsibility which is applicable to all organizations. The focus of the debate has only slightly changed. Those who, in the period between 2003 and 2011, criticized the Commission's approach aimed to determining the «general rules» of responsibility, appear now to accept the existence of such rules. At the same time, they found that in most cases these rules are displaced by the rules of the organization or by other special rules applicable to the organization. It is therefore not surprising that, after the adoption of the Articles, several authors, including some legal advisers of international organizations, held the view that Article 64 is the most

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another subject of international law). However, vis-à-vis all other norms of international law, both the charter and the internal rules of the organization would be lex specialis as far as the organization's responsibility is concerned and, accordingly, cannot be overridden by lex generalis, which would include the provisions of the draft articles».

[17] It must be noted, however, that according to Article 2 (a), international organization, for the purposes of the Articles, "means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities".

[18] Article 55 provides as follows: «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».

important provision among those contained in the set of articles.[19] Moreover, as it was recognized by the Commission itself, the rules set forth in the Articles are not supported by an extensive practice.[20] The lack of extensive and uniform practice is an element on which one could rely in order to deny the very existence of general rules of responsibility and to reaffirm the importance of special regimes of responsibility which apply to a specific organization or category of organizations.[21]
This opposition between an approach which relies on the existence of general rules of responsibility and an approach which emphasizes the importance of the special rules of responsibility raises a number of questions, which will be addressed in the following paragraphs. The first question is whether the existence of «internal rules» of the organization implies that the general rules of responsibility have no application in so far as the relationship between the organization and its members is concerned. Moreover it can be asked whether the special rules of responsibility applicable in the relationship between the organization and its members have any impact on the relationship between the organization and third subjects.

As I have said, the approach of the International Law Commission has also been criticized from a different perspective. The question was raised as to whether a set of general rules of responsibility may be regarded as an adequate way of making international organizations more accountable.[22] It has been argued that that the traditional principles of international responsibility – based as they are on a civil law paradigm, a paradigm involving responsibility between and among actors of equal standing – have little impact on the activity of international organizations and that, when it comes to the problem of controlling the conduct of organizations, other forms of control and alternative mechanisms of accountability are required.[23] Seen

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[19] See, for instance LECKOW, R., and PLITH, E., Codification, Progressive Development or Innovation? Some Reflections on the ILC Articles on the Responsibility of International Organizations, in RAGAZZI, M., (ed.), **Responsibility of international organizations**, cit., p. 228 («Article 64 on lex specialis, arguably the most important article»), e RAGAZZI, M., The World Bank and the ILC's Project on the Responsibility of International Organizations, ibid., p. 239 («the central role that the article on lex specialis should play in the scheme of the Commission's articles»).

[20] Report of the International Law Commission on the Work of its Sixty-third Session, cit., pp. 69-70, para. 5: «One of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice… The 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. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development».

[21] See FORTEAU, M., Régime général de responsabilité ou lex specialis?, **Revue belge de droit international**, 2013, p. 149.

[22] For a general overview of the different responses to the problem concerning the ways and means for controlling the conduct of international organizations, see KLABBERS, J., Controlling International Organizations: A Virtue Ethics Approach, **International Organizations Law Review**, vol. 8, 2011, p. 285 et seq.

[23] See ALVAREZ, J., International Organizations: Accountability or Responsibility?, intervention made in 2006 at the Canadian Council of International Law (www.asil.org/aboutasil/documents/CCILspeech061102.pdf), p. 28: «there is considerable evidence that those who created IOs did so sometimes to immunize those organizations from traditional notions of

from this perspective, the lack of extensive practice would simply confirm the limited impact of the rules of international responsibility. It is therefore suggested that the focus should be on alternative mechanisms for controlling the conduct of the organizations. These alternative approaches include the recourse to general principles of accountability,[24] whose application is not conditional upon the breach by the organization of an international obligation, or, as suggested by the global administrative law approach, the recourse to principles borrowed from administrative law, such as the principles of transparency or participation of the main stakeholders in the decision-making process of the organization.[25]

While, no doubt, more is needed in the quest for accountability of international organizations than simply devising a set of principles of international responsibility, it may be asked whether this circumstance is sufficient to justify the criticism addressed against the approach proposed by the International Law Commission. More broadly, it may be interesting to investigate what are the specific features of that approach in comparison to the other approaches. These issues will be addressed in paragraph five of this study.

II. THE APPLICABILITY OF THE GENERAL REGIME OF RESPONSIBILITY TO THE RELATIONS BETWEEN THE ORGANIZATION AND ITS MEMBERS

As it has already been said, the general rules of responsibility identified by the Commission are intended to apply also in the relations between the organization and its members. This is a direct consequence of the position retained by the Commission with regard to the legal nature of the rules of the organization, namely on the question of whether such rules are part of international law or not. While the Commission did not take a clear-cut view on such issue, it admitted the possibility that the obligations arising from the rules of the organization are to be considered as international obligations. Article 10 (2) provides that an internationally wrongful act may be the consequence of a breach «of an international obligation that may arise for

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responsibility, to create alternative mechanisms for making those IOs accountable distinct from those used for states, or, as with respect to organizations as different as the UN Security Council and the WTO Contracting Parties, to permit their collective bodies to do things that are denied to members individually». See also KLABBERS, J., **An Introduction to International Institutional Law**, 3° ed., CUP, Cambridge, p. 293: «organizations are supposed to control themselves, rather than be held accountable later on by others. As such, this may signify a move away from traditional legal thought about responsibility».

[24] See the principles identified by the Committee on Accountability of International Organizations of the International Law Association, **International Law Association, Report of the Seventy-First Conference**, Berlin, 2004, p. 200.

[25] See the critical remarks addressed to the work of the International Law Commission by KINGSBURY, B., En guise d'ouverture – Views on the Development of a Global Administrative Law, BORIES, C., (ed.), **Un droit admnistratif global?/A Global Administrative Law?**, Paris, 2012, pp. 16-17: «The traditional international law approach to international organization has been preoccupied with… an intense interest in their international legal responsibility that is out of all proportion to the number of situations in which such responsibility is ever seriously invoked. This legal repertoire simply does not reach much of what is important even in relation to formal inter-governmental institutions in global governance».

an international organization towards its members under the rules of the organization». Once it is admitted that an obligation arising from the rules of the organization is an international obligation, it ensues that, in the case of a breach of such obligation, the international responsibility of the organization or of its members is engaged, and such responsibility inevitably falls within the scope of application of the 2011 Articles.

The solution retained by the Commission on this issue was criticized by a number of authors who held that the internal law of the organization, once it has come into existence, is autonomous and distinct from international law.[26] In particular, - and surprisingly, if one considers that one of the most recurrent criticisms addressed to the Commission is that the Articles on the responsibility of international organizations are drafted along the same line as those on state responsibility and can therefore be regarded as a trivial exercise of copy-and-paste – these authors suggested that on this issue the Commission had to follow the approach retained in the 2001 Articles on state responsibility: As in the context of the rules of state responsibility the domestic legal order of a state is not regarded as being part of international law, similarly, in the context of the rules of responsibility of international organizations the Commission had to treat the internal rules of the organization as separate and distinct from international law.[27]

I do not intend to address here the question of the legal nature of the rules of the organization.[28] It seems, however, that the criticism addressed to the Commission is excessive. This criticism is premised on the idea that, when it comes to determining the rules of responsibility which are applicable in the relations between the organization and its members, the internal legal order of the international organization is invariably to be assimilated to that of a state. This view does not take account an important difference. While the legal order of states normally contains a complete and coherent set of rules governing the question of responsibility, only very few international organizations have developed a set of rules of responsibility which apply in the relations between the organization and its members. In the great majority of cases, such rules are lacking or cover only a limited number of issues. In the absence of rules of the organization, it seems reasonable to refer to the general rules of responsibility in order to regulate the question of responsibility. It is not clear what set of rules would be otherwise applicable. It has been suggested that, following the

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[26] Among the authors who defend this view, see in particular AHLBORN, C., The Rules of International Organizations and the Law of International Responsibility, **International Organizations Law Review**, vol. 8, 2011, p. 451. See also KLEIN, P., Les articles sur la responsabilité desorganisations internationals, cit., 2012, p. 15, who held that «le texte adopté par la Commission paraît donc bien entretenir une confusion entre ces dimensions 'contractuelle' et 'constitutionnelle' des règles de l'organisation, en prévoyant que leur violation peut, dans les cas où elles portent une règle internationale, donner lieu à l'application d'un régime de responsabilité internationale entre l'organisation et ses membres».

[27] AHLBORN, C., The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations. An Appraisal of the 'Copy-Paste' Approach, **International Organizations Law Review**, vol. 9, 2012, p. 53 et seq.

[28] On the different views emerged in legal literature, see GAJA, G., **Third report on the responsibility of international organizations**, UN doc. A/CN.4/553, p. 5 et seq.

solution which is envisaged in Article 340 of the Treaty on the Functioning of the European Union, such rules could be identified through a comparative analysis of the different municipal laws of states, particularly by taking into account national rules dealing with non-contractual liability.[29] This kind of solution would probably meet many difficulties. It is hard to identify specific rules which may be effectively used for the purposes of addressing question of responsibility if the comparative analysis is not restricted to a limited number of domestic legal orders. Moreover, principles which are inferred from national legal orders are not necessarily adequate to govern the relations between the organization and its members.

The criticism addressed to the approach followed by the Commission appears to be excessive also because the Articles do not exclude that, under certain circumstances, an organization may give rise to an internal legal order which is separate and distinct from the international legal order.[30] If this is the case, the general rules do not apply. While the Commentaries do not clarify what conditions are required for recognizing the existence of an autonomous legal order, it may be thought that a situation of kind presupposes that the organization has achieved a certain degree of integration.

While in the absence of rules of the organization dealing with the question of responsibility it is reasonable to have resort to the general rules of responsibility and to apply them to question of responsibility arising in the relations between the organization and its members, it is clear that these general rules can be derogated by any rule of the organization providing for a special rule of responsibility. As it has been said, Article 64 refers explicitly to such possibility by providing that «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».

It may not be easy to determine whether there exists a special rule of responsibility displacing the application of a general rule. The more so since only rarely treaties establishing an international organization contain rules dealing explicitly with the question of responsibility. It may be asked whether, in the absence of rules explicitly dealing with such question, one has invariably to apply the general rules. Article 64 does not say anything on this issue. It only provides that general rules do not apply «where and to the extent that» the question of responsibility is governed by special rules. The same terms are employed in Article 55 of the text on state responsibility. The commentary to Article 55 is rather restrictive in admitting the possibility of having recourse to special rules. It states that «for the *lex specialis*

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[29] For this view, see FORTEAU, M., cit., p. 159. Article 340 of the Treaty on the Functioning of the European Union provides as follows: «In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties».

[30] The Commentary to Article 10 specifies that this provision «does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not as such breaches of obligations under international law». Report of the International Law Commission on the Work of its Sixty-third Session, cit., p. 100, para. 7.

principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other"»[31] Thus «actual inconsistency» or a «discernible intention» are required in order to displace the application of general rules. While in the context of the rules of state responsibility these strict requirements may appear to be justified as there would be otherwise the risk that a state may invoke the existence of a special rule in order to evade the consequences of its wrongful conduct, it may be asked whether the same requirements apply with regard to questions of responsibility arising in the relations between the organization and its members. It may be suggested that, given the special relation linking together the organization and its members, resort to special rules may be subjected to more flexible requirements than in the context of state responsibility. This would be justified in the light of the institutional context in which the question of responsibility would arise. In this respect, it may be interesting to note that the commentary to Article 64 states that «[t]he rules of the organization may, expressly or implicitly, govern various aspects of the issues dealt with in Parts Two to Five».[32] The word «implicitly» may be taken as implying that a derogation from the general rules would be justified even in cases in which there is no actual inconsistency between the general and the special rule.

Reference must also be made to the fact that the Articles retain a wide definition of the notion of «rules of the organization». This circumstance has to be taken into account when considering whether there are special rules of the organization which can displace the application of general rules. Under Article 2 (b), the definition of rules of the organization includes rules which derive from the «established practice of the organization».[33] Under this definition, rules of the organization may also be established through the case law of a judicial body operating within the organization.[34] It is well known that judicial body can contribute significantly to identifying special rules which apply in the relations between the organization and its members. One may refer, for instance, to the judgment of the Court of Justice of the European Economic Communities (as it then was), by which, in the absence of any indication in the constitutive treaties, the Court affirmed the existence of a rule excluding the possibility of member states taking countermeasures

[31] Yearbook of the International Law Commission, vol. II, part II, 2001, p. 140, para. 4. On this statement see the observations made by GRADONI, L., ***Regime failure*** **nel diritto internazionale**, CEDAM, Padova, 2009, p. 30.
[32] Report of the International Law Commission on the Work of its Sixty-third Session, cit., p. 111, par. 8.
[33] According to Article 2 (b), rules of the organization «means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization».
[34] In its comments on the work of the International Law Commission, the European Union suggested that the notion of established practice «must be understood broadly as encompassing the case law of the courts of an organization». UN doc. A/CN.4/545, p. 15.

against the organization in response to a breach of an obligation under the rules of the organization.[35]

The retention of a wide definition of rules of the organization and the possibility of having recourse to special rules even in the absence of an actual normative conflict are two elements which must be taken into account when considering the impact of the *lex specialis* on questions of responsibility arising in the relations between an organization and its members.

III. SPECIAL REGIMES OF RESPONSIBILITY, RULES OF THE ORGANIZATION AND THIRD SUBJECTS

When it comes to the relationship between the organization and third subjects, the possibility that special rules of responsibility come into existence cannot be excluded. However, while in the relations between the organization and its members the institutional dimension may favour the emergence of special rules of responsibility, the same does not necessarily apply when the organization acts as a subject of international law and is bound by international obligations towards third subjects.

As it has been said, Article 64 of the Articles on the responsibility of international organizations recognizes the possibility that questions of responsibility arising in the relation between an organization and third subjects are governed by special rules. In the great majority of cases, such special rules will be contained in treaties that the organization concludes with third subjects. This may lead to a situation in which different special rules of responsibility apply to the same organization depending on the particular treaty framework within which that organization acts. This could explain the different responses which have been given in international practice to the question of the attribution to the European Union of the conduct of its member states implementing European Union acts. While in the practice of the panels established in the framework of the dispute settlement mechanism of the World Trade Organization there is the tendency to attribute to the European Union the conduct of its members states, the European Court of Human Rights has taken a different approach, finding that such conduct remains attributable to the member states even if they were implementing acts of the European Union.[36] It has been held that the diversity of approach to this particular question of attribution

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[35] Judgment of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, joined cases 90/63 and 91/63, European Court of Justice Reports, 1964, p. 1201.

[36] For an overview of the relevant case law, see the commentary to Article 64, in Report of the International Law Commission on the Work of its Sixty-third Session, cit., pp. 168-170, paras 32-6. The International Law Commission did not take a position on the issue relating to the existence of a special rule of attribution which would be applicable to the European Union. The existence of such a special rules was strongly advocated by HOFFMEISTER, F., Litigating against the European Union and its member States: who responds under the ILC's draft articles on international responsibility of international organizations?, **European Journal of International Law**, vol. 20, 2010, p. 723 ff.

could be explained, at least in part, by the differences between the two treaty regimes.[37]

A special rule of responsibility may also be contained in a rule of customary international law. Article 64 appears to cover the possibility of a special rule of responsibility having a customary nature which applies to a specific organization or to a specific category of organizations.[38] As it has been said, during the work of the International Law Commission, the European Union constantly advocated the inclusion in the Articles of a provision recognizing that special rules apply to regional economic integration organizations.[39] The existence of a customary international rule recognizing such a special category of organizations is doubtful. Practice is scarce. It mainly consists of treaty clauses establishing a special regime in respect to that category of organizations. Moreover, it is not clear what would be the content of the special regime of responsibility which would be applicable to that organizations. Be that as it may, it is here sufficient to observe that, if customary international rules establishing a special regime of responsibility for regional economic integration organizations will emerge in the future, such rules will fall within the scope of application of Article 64.

In principle, the possibility that special rules of responsibility applicable in the relation between the organization and third subjects are contained in the rules of the organization should be ruled out. In their commentary to the work of the International Law Commission, some organizations have defended such possibility. They claimed that the only rules of responsibility governing their activity were contained in the constitutive treaty and in acts of the organization.[40] This view can hardly be accepted. Third subjects are not bound by the rules of the organization. Such rules could be opposable to third subjects only if they accept these rules. To say otherwise is tantamount to recognize that international organizations have the power to unilaterally determine the rules of responsibility that apply in their relations with third subjects. It has been held that the Commission did not take a clear stance on this issue. In particular, it has been said that, since Article 64 recognizes the possibility that special rules of responsibility are contained in rules of the organization, there would be the risk that the organization or its members would invoke such rules in order to avoid their responsibility towards third subjects.[41] However, the commentary

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[37] KUIJPER, P.J., Attribution, Responsibility, Remedy: Some Comments on the EU in Different International Regimes, **Revue belge de droit international**, 2013, p. 57 ss.

[38] *Contra* M. FORTEAU, cit., p. 152.

[39] Such view is defended by PAASIVIRTA, E., and KUIJPER, P.J., Does One Size Fit All? The European Community and the "Codification" of the Responsibility of International Organizations, **Netherlands Yearbook of International Law**, 2005, p. 169 et seq.

[40] See the comments made by the International Monetary Fund, supra fn n. 15.

[41] For the view that, «if applied to the relations between international organizations and their member States, as suggested by Article 64 of the ARIO, the use of the lex specialis-legi generali principle … could, for instance, be taken to imply that member States can internally, i.e. by virtue of internal rules of the organization, contract out of the general regime of international responsibility vis-à-vis third parties and thus avoid compliance with other international obligations», AHLBORN, C., The Rules of International Organizations, cit., p. 480. For a similar view see KLEIN, P., cit., p. 14, and D'ASPREMONT, J., The

to Article 64 clarifies that the rules of the organization may have the effect of establishing special rules of responsibility only in the relations between the organization and its members.[42] This does mean that the rules of the organization cannot have external relevance. To the same extent to which the internal rules of a state may be relevant for the application of certain rules of responsibility, for instance for the purposes of determining when an individual or an entity has the status of organ of the state, the same is true for the rules of the organization.[43] However, it is one thing to say that the rules of the organization may be relevant for the purposes of determining the scope of application of the rules of responsibility. It is a totally different matter to say that special rules of responsibility may be unilaterally determined by the organization and imposed on third subjects.[44]

IV. CONTROLLING INTERNATIONAL ORGANIZATIONS: BETWEEN MECHANISMS OF ACCOUNTABILITY AND RULES OF INTERNATIONAL RESPONSIBILITY

As it has been said, some authors have argued for a more radical criticism of the approach proposed by the International Law Commission. According to these authors, instead of focusing on the applicability of the traditional principles of international responsibility to the organizations, a better approach, and one which would be more in line with the specific features of international organization and the way in which they exercise their functions, would be to devise alternative mechanisms for making organizations accountable. Such alternative mechanisms would include, in particular, those procedures by which the organization is required to justify its conduct when its activity could affect the interests of individuals or other stakeholders. Among the instances which are frequently referred to as models of this kind of procedures, one may mention the Inspection Panel of the World Bank or the Human Rights Advisory Panel established within the framework of the UN Mission

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Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility, **International Organizations Law Review**, vol. 9, 2012, p. 26.

[42] «Given the particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members, a specific reference to the rules of the organization has been added at the end of the present article»: Report of the International Law Commission on the Work of its Sixty-third Session, cit., p. 70 (emphasis added).

[43] Article 2 (c) of the 2011 Articles provides that «organ of an international organization means any person or entity which has that status in accordance with the rules of the organization».

[44] On this issue, see the following remarks by the Commission: «The rules of the organization do not per se bind non-members. However, some rules of the organization may be relevant also for non-members. For instance, in order to establish whether an international organization has expressed its consent to the commission of a given act (art. 20), it may be necessary to establish whether the organ or agent which gives its consent is competent to do so under the rules of the organization». Report of the International Law Commission on the Work of its Sixty-third Session, cit., p. 70, para. 8.

in Kosovo (UNMIK). It is said that these mechanisms offer the additional advantage of allowing for the participation of individuals.[45]

The Global Administrative Law approach represents an even more radical departure from the traditional approach proposed by the Commission. While the latter approach is based on the paradigm of international organizations as subjects of international law which are bound by international obligations and must bear responsibility in case of breaches of such obligations, the global administrative law approach is based on a public law paradigm: as entities which exercise public functions, international organization should be subjected to forms of control and accountability which are based on the extension of domestic administrative law to intergovernmental regulatory decisions and on the development of new mechanisms of administrative law at the global level.[46]

No doubt, the supporters of these alternative mechanisms raise an important point when they underline the fact that the application of the principles of international responsibility cannot be regarded as an effective instrument for controlling the activity of international organization, since the number of situations in which such responsibility can be effectively invoked is rather limited. I shall revert to this point later. At this stage, I would limit myself to observe that the views supporting the recourse to these alternative mechanisms appear to be based on the premise that international organizations can be controlled in an effective way only through the recourse to «internal» procedures or mechanisms. The idea is that, as an author put it, «organizations are supposed to control themselves, rather than be held accountable later on by others».[47] This becomes clear if one considers the way in which the «accountability» approach addresses the problem of restraining the exercise of powers by international organizations. The «principles of accountability» amounts to no more than norms of behaviour that an organization is free to introduce among the rules of the organization. In this respect, unlike the rules of responsibility, they belong to category of «primary rules».[48] However, the protection against the

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[45] On the Inspection panel and the Advisory panel see, respectively, BAIMU, E., and PANOU, A., Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?, **The World Bank Legal Review**, 2011, p. 147 et seq., and KLEIN, P., Le panel consultatif des droits de l'homme (Human Rights Advisory Panel) de la MINUK: une étape dans le processus de responsabilisation des Nations Unies?, **Perspectives du droit international au 21e siècle - Liber Amicorum Christian Dominicé**, Martinus Nijhoff, Leiden/Boston, 2012, p. 225 et seq. It is interesting to note that, when considering the possible impact of the 2011 Article on the activity of the World Bank, BAIMU, E., and PANOU, A., cit., p. 171, took the view that «the draft articles are inadequate for an institution like the World Bank».

[46] For a general presentation of the global administrative law approach see KINGSBURY, B., KRISCH, N., STEWART, R.B., The Emergence of Global Administrative Law, in **Law and Contemporary Problems**, 2005, p. 15 et seq..

[47] KLABBERS, J., **An Introduction to International Institutional Law**, 3° ed., CUP, Cambridge, p. 293.

[48] For the qualification of these accountability principles as primary rules, see BOISSON DE CHAZOURNES, L., Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies, **International Organizations Law Review**, vol. 6, 2009, p. 662, and KLEIN, P., Panels, Médiateurs et Mécanismes Informels de Controle des Activités des Organisations

wrongful conduct of an organization cannot depend on the initiative of the organization or of its members which. One cannot rely exclusively on those internal mechanisms that the organization has accepted to apply in order to control its own activity. At a time in which the scope of activities conducted by the organizations, together with the risk that such activity may affect the rights of other subjects, has greatly increased, it can hardly be accepted that the only mechanisms for holding the organizations accountable are those which are based on the free initiative of the organization or of its members. While it is true that it is still difficult to have recourse to the principles of international responsibility in order to sanction the wrongful conduct of an organization, the importance of this sanction mechanism should not be underestimated. The more so since, contrary to way in which some authors appear to frame the issue, there is no competition between those mechanisms which are based on principles of accountability or on principles borrowed from administrative law, on the one hand, and the mechanism based on the application to the organization of the principles of international responsibility. The relations between these instruments should be seen as complementary: while the rules of responsibility, by imposing obligation on the wrongdoing organization, provide a form of control "from the outside", the other mechanisms operate "from within", by imposing procedural limitations on the way in which the organization exercises its functions. For this reason, since these mechanisms present different features and operate in different ways, it is difficult to consider alternative mechanisms based on accountability principles as a form of *lex specialis* which could displace the application of the general rules of responsibility.[49]

CONCLUDING REMARKS

One of the main difficulties met by the International Law Commission in the codification of the rules of the responsibility of international organizations was constituted by the limited practice available on this issue. As we have seen, this circumstance has led some authors to doubt about the opportunity and usefulness of the entire exercise engaged in by the Commission. It is true that situations in which the responsibility of an international organization can be seriously invoked are still rather limited. The reasons should not be searched in a supposed inconsistency between the principles of international responsibility and the way in which international organizations exercise their powers.

Internationales: Entre Accountability et Responsibility, **Select Proceedings of the European Society of International Law**, vol. 3, Hart, Oxford, 2010, p. 227.

[49] See however BAIMU, E., and PANOU, A., cit., p. 171. Referring to the Inspection panel of the World Bank, these authors held that «one could argue that the panel's regime constitutes lex specialis that, according to draft Article 63, could preclude the application of the remainder of the draft articles' provisions». On the requirements for recognizing the existence of a *lex specialis* under Article 64, see BODEAU-LIVINEC, P., Les faux-semblants de la *lex specialis* : l'exemple de la résolution 52/247 de l'Assemblée générale des Nations unies sur les limitations temporelles et financières de la responsabilité de l'ONU, **Revue belge de droit international**, 2013, p. 117 et seq.

The reasons are to be found elsewhere. They have to do with specific features which still characterize the present stage of development of international organizations. In particular, it is a fact that organizations are subjected to a limited number of international obligations.[50] Even more restricted is the number of judicial or quasi-judicial mechanisms which provide for accession by or against international organizations. Finally, there is an almost complete absence of mechanisms accessible to individuals for bringing claims against international organizations. Nor domestic courts provide an alternative remedy as organizations enjoy immunity.

The fact that the practice is still relatively limited may help to explain why the adoption of the Articles on the responsibility of international organizations have met a skeptical response and why some authors have reacted against the work of the Commission by emphasizing the need to have recourse to alternative approaches to the question of the responsibility of international organizations. Be that as it may with regard to the possibility of effectively invoking the international responsibility of an organizations, it remains that, to the extent that the Articles provide a first attempt to delineate a comprehensive legal framework for regulating the question of the responsibility of international organizations, they fill an important gap.[51] By clarifying the relevant legal framework, the Articles may contribute to generate a greater awareness of the limitations incumbent on international organizations and of the consequences stemming from an overstepping of such limitations.[52] Significantly, the Articles have already been referred to by domestic and international courts in a number of cases.[53] Obviously, the adoption of the Articles is only one step, and probably not the most important, in the direction of making international organizations more accountable.

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[50] See on this point KLEIN, P., Les articles sur la responsabilité des organisations internationales, cit., p. 27.

[51] For the view that «the activities carried out by international organizations have become more numerous and encroach more deeply on social life, so as to make it more likely for responsibility issues to arise and more necessary to have a set of general rules in place», see BLOKKER, N., cit., p. 337. To the same vein, KLEIN, P., Les articles sur la responsabilità des organisations internationales, cit., p. 25.

[52] On the practical effects of the adoption of the Articles, see DAUGIRDAS, K., Reputation and the Responsibility of International Organizations, **European Journal of International Law**, vol. 25, 2014, p. 991 et seq.

[53] Admittedly, these cases mainly concerned only one issue, namely the attribution of conduct taken by national contingent in the course of a multinational peace support operation under the aegis of the United Nations. For some references see Report of the International Law Commission on the Work of its Sixty-third Session, cit., pp. 90-93.