CHAPTER FIVE

'WEIGHING' THE ARTICLES ON RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

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1. Introduction

It is with deep respect that the present writer offers this contribution to the memory of Ian Brownlie. Thrice elected to the International Law Commission by the United Nations General Assembly, Ian's work for the Commission was an important part of his professional career between 1997 and 2008. During those twelve years he took an active part in the Commission's work on many topics, including responsibility of international organizations. He served as Chairman of the Commission at its fifty-ninth session in 2007. The present writer, elected to the Commission following Ian's resignation in 2008, is most grateful to Ian and Christine for the care with which they introduced him to the life of the Commission and to the other activities—in particular restaurants and weekends—that make that life bearable. He was thus a teacher as well as a friend and colleague.

It is relevant to the theme of this contribution to note that, perhaps because of his early background as a barrister in the English courts,[1] Ian Brownlie always saw the need for a rigorous approach to the identification of international law, if it was worthy to be called law. Not for him easy recourse to values and interests, or casual and selective citation of writings. He would look for hard evidence of the state of the law.

In the words of Clive Parry, 'if attention be directed to the wrong sources, it is impossible to discover what international law is or, what is perhaps more important, what is not international law.'[2] The proper 'weighing' of the International

[1] Lowe has referred to 'the close attention to detail, to precise language and rigorous analysis, and to procedure, that Ian took with him from his practice in English courts into the world of international courts and tribunals': V. Lowe, 'Sir Ian Brownlie, Kt, CBE, QC (1932–2010)', 81 *BYIL* (2010), 9–12, at 11.

[2] C. Parry, *The Sources and Evidences of International Law* (Manchester, 1965), reproduced in A. Parry (ed.), *Collected Papers of Professor Clive Parry* (London, 2012), vol. II, 1–105,

Law Commission's final output on any topic is an important and delicate matter. By 'weighing' I mean not merely a proper understanding of the draft articles or other output, but also an assessment of the place of that output within the corpus of international law and, in particular, whether and to what extent the provisions already do, or may in the future, reflect customary international law. Such 'weighing' is particularly important where the Commission's draft articles have not been transformed into a convention. A prominent example concerns the Commission's 2001 articles on State responsibility; the debate over whether those articles should be transformed into a convention turns in good part on an assessment of their present standing.

The aim of the present contribution is to explore, through the example of the Commission's articles on responsibility of international organizations, the factors that need to be considered in order to determine the status of the Commission's final output on a topic, and in particular whether and how far it reflects rules of customary international law. It is important that this process be well understood since otherwise there is a risk that lawyers and judges, in particular national judges, may be misled as to the degree of authority that individual draft provisions enjoy.

Given 'the number of existing international organizations and their ever increasing functions', issues concerning the responsibility of international organizations are 'of particular importance'.[3] It is all the more important, therefore, to know whether the Commission's articles reflect existing law or are instead no more than the views of the Commission as to how the law might develop.

In the case of this particular Commission output, the following contextual factors are among those that need to be weighed: the negotiating history of the articles, both within the Commission and the Sixth Committee; the important general commentary which stands as a preface to the articles; and the commentaries to the individual provisions (which sometimes need to be read with the commentaries to the corresponding provisions of the articles on State responsibility).

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at 7; M. Wood, 'What Is Public International Law? The Need for Clarity about Sources', 1 *AsianJIL* (2011), 205–16.

[3] Paragraph (1) of the general commentary to the articles on responsibility of international organizations: 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. There is an extensive literature: see M. Hartwig, 'International Organizations and Institutions, Responsibility and Liability', R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford, 2012), vol. VI, 64–74 (with bibliography), and certain textbooks on the law of international organizations: C. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn., Cambridge, 2005), ch. 12; J. Klabbers, *An Introduction to International Institutional Law* (2nd edn., Cambridge, 2009), ch. 14; H. Schermers and N. Blokker, *International Institutional Law* (5th edn., Leiden and Boston, 2011), paras. 1582–90C.

Further, and as with any Commission output, the context includes the reactions to the articles of States and international organizations. Highly influential too may be the attitude of courts and tribunals, though—especially in the case of national tribunals—the significance of their decisions depends on the quality of their reasoning, including whether they have 'weighed' the articles properly.[4]

2. Elaboration of the Draft Articles

The Commission's work on the topic 'Responsibility of international organizations' extended over nine years, mostly concentrated in the years 2004 to 2009 and 2011.[5] The work was guided with great efficiency by the Special Rapporteur, Giorgio Gaja, and the process was relatively straightforward by comparison with other topics.

The topic was included in the Commission's long-term programme of work in 2000 on the basis of a syllabus prepared by Alain Pellet.[6] In 2002, it became part of the current programme of work, with Gaja appointed as Special Rapporteur. Between 2003 and 2011 he produced eight reports. Written comments and observations were received from Governments and international organizations

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[4] For a recent example of a domestic court giving undue weight to the work of the Commission, see the decision of the *Cour des plaintes* of the Swiss Federal Criminal Tribunal, dated 25 Jul. 2012, concerning a former Algerian Foreign Minister (No. BB.2011.140, electronically available at <http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/BB.2011.140.pdf>). At 5.4.3, the court seems to have come to its view of the state of international law on immunity *ratione materiae* in part on its reading of a brief and summary account, in the Commission's 2011 report, of what members of the Commission said during a general debate on the topic of the immunity of State officials from foreign criminal jurisdiction, in a context in which there were not even draft articles before the Commission, let alone articles that were ultimately adopted by the Commission. Further, there is no indication that the court looked at the records of the meetings themselves to see who actually said what. In any event, it is far from obvious how the views expressed by individual Commission members in such a context, on one side or the other, should have been accorded any decisive weight as evidence of the law.

[5] *The Work of the International Law Commission* (8th edn., New York, 2012), 244–7; N. Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously? A midterm review', J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham and Northampton, 2011), 313–41; D. McRae, 'The Work of the International Law Commission, 2007–2012: progress and prospects', 106 *AJIL* (2012), 322–40, at 329–31; A. Pronto, 'An introduction to the Articles on the Responsibility of International Organisations', 36 *SouthAfrYIL* (2011), 94–119; M. Möldner, 'Responsibility of International Organizations—Introducing the ILC's DARIO', 16 *MaxPlanckYUNL* (2012), 281–328.

[6] *YILC* (2000), vol. II, Part Two, 131 and 135–40.

at various stages,[7] and they commented each year in the Sixth Committee debate on the report of the Commission. A particular feature of the consideration of this topic was the active participation of international organizations in the debate.

In 2009 the International Law Commission adopted on first reading a set of 66 draft articles, with commentaries.[8] In 2011, taking into account the comments of Governments and international organizations on the first reading articles,[9] the Commission adopted a set of 67 final draft articles, with commentaries on the individual articles, together with a general commentary. The Commission recommended to the General Assembly to take note of the draft articles, to annex them to a resolution, and 'to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.'[10]

The relationship between the 2001 articles on State responsibility and the 2011 draft articles on responsibility of international organizations was a matter of some contention. The Special Rapporteur was criticized for hewing too closely to the 2001 articles, and then was criticized, sometimes from the same mouths, for departing from them. Gaja's view was clear from his first report:

> the Commission's work on State responsibility cannot fail to affect the new study. 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.[11]

It is worth highlighting the response of the Commission, at its 2011 session, to the many criticisms and questions to which the first reading draft articles of 2009 had given rise. The present writer had been among the strongest critics of the exercise over the years, especially in his former capacity as Legal Adviser

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[7] Most recently in A/CN.4/637 and Add.1.

[8] 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), 39–178.

[9] Surveyed in the Special Rapporteur's eighth report (A/CN.4/640). The Special Rapporteur introduced his eighth report on 26 Apr. 2011 (A/CN.4/SR.3080, 5–9) and 3 May 2011 (A/CN.4/SR.3083, 3–6). The debate on the report took place between 26 Apr. and 6 May 2011 (A/CN.4/SR.3080 to 3085). The draft articles were then referred to the Drafting Committee, whose Chairman reported to the Commission on 3 Jun. 2011 (A/CN.4/SR.3097, 3–35).

[10] 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), 53, para. 85.

[11] A/CN.4/532, 6–7, para. 11. For a similar view, see Pronto, 'An introduction', 111–13.

to the UK Foreign and Commonwealth Office. He was not alone. Various States and representatives of international organizations,[12] as well as academics,[13] had been highly critical. But to a considerable degree these criticisms had been addressed by the time the Commission came to adopt the final articles in 2011. Important substantive improvements were made to the text of the draft articles between first and second reading,[14] such as a definition of 'organ' and a tighter definition of 'agent' (article 2 (c) and (d));[15] a new provision on the characterization of an act of an international organization (article 5);[16] the omission of recommendations from the 'circumvention' provision (article 17);[17] and a restructuring of the basic provisions on countermeasures (articles 22 and 52).[18] In addition, the Commission had listened attentively to the more general concerns of States and international organizations, and addressed these in the general commentary.

3. The General Commentary

At its session in 2011, the Commission faced a dilemma. It had received, very late in the process, a quantity of critical comments from Governments, and especially from international organizations, including the United Nations. And there had been strong reactions from well-informed experts speaking in their private capacities, for example at seminars such as those organized in Washington by

[12] A/CN.4/637 and Add.1.

[13] J. Alvarez, 'Misadventures in Subjecthood', EJIL*Talk!*, Sep. 29, 2010: <http://www.ejiltalk.org/author/alvarezj> (with further references).

[14] For an account of the negotiating history and the substance of the articles, see Pronto, 'An introduction', 94–110.

[15] ILC's commentary to article 2, paras. (20) to (27); Gaja's eighth report (A/CN.4/640), paras. 20 to 24; A/CN.4/SR.3097, 19 (report of the Chairman of the Drafting Committee).

[16] Article 5, which is modelled on the first sentence of article 3 of the articles on State responsibility, provides that '[t]he characterization of an act of an international organization as internationally wrongful is governed by international law'. This may 'appear obvious', as the commentary indicates, but the omission of such an article might have been used by some to argue that an act could not be internationally wrongful if it was carried out in conformity with the organization's constituent instrument. See A/CN.4/SR.3097, 20 (report of the Chairman of the Drafting Committee).

[17] Gaja's eighth report (A/CN.4/640), paras. 53 to 58; A/CN.4/SR.3097, 23 (report of the Chairman of the Drafting Committee).

[18] These were developed by the Drafting Committee following suggestions in plenary: A/CN.4/SR.3097, 24 and 29 (report of the Chairman of the Drafting Committee).

the World Bank[19] and in London by Chatham House.[20] Writings on the subject had also raised many questions. Many of the criticisms were quite general in nature, even procedural, making a response difficult. They were also hardly new. In the words of the Special Rapporteur, they were 'recurrent themes of a general nature'.[21] But they deserved to be taken seriously. The implications of having an unsatisfactory draft, one that did not meet the needs of States and international organizations, were considerable. Some spoke of a possible 'chilling effect' on the activities of international organizations. The topic was seen to have potentially far-reaching implications for the future of international cooperation and a multilateral approach to common problems.

At the same time, at the end of the quinquennium and with the Special Rapporteur leaving, the Commission was under considerable pressure to complete the second reading, and its work on this topic, within a few weeks. This was where the idea of a general commentary seemed attractive. The idea that certain concerns of a general nature might be answered in a kind of an introduction to the draft articles appears to have its origin in the comments of the United Nations,[22] was taken up by members of the Commission,[23] and endorsed by the Special Rapporteur.[24]

The general commentary should be seen as an integral part of the articles. It is placed at the beginning of the articles, as a kind of preface, a health warning to the reader. It covers central issues of methodology. It acknowledges the concerns of States and international organizations. And it seeks to explain the status of the articles (not—yet—the same as the articles on State responsibility).

The general commentary includes, among others, the following points:

– '*Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.*'[25]
The corpus of international law that is binding on international organizations is not the same as that which binds States. International organizations are, for the

[19] 'Special Session on Responsibility of International Organizations', World Bank Law, Justice, and Development Week, 11 Nov. 2010 (<http://siteresources.worldbank.org/INTLAWJUSTICE/News%20and%20Events/22757091/LJDWeek2010_Final.pdf>). The videotape of the session is available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:22980348~menuPK:8096148~pagePK:210058~piPK:210062~theSitePK:445634,00.html>.

[20] 'Legal Responsibility of International Organisations in International Law', International Law Discussion Group meeting held at Chatham House on Thursday, 10 Feb. 2011 (<http://www.chathamhouse.org/publications/papers/view/109605>).

[21] Gaja's eighth report (A/CN.4/640), para. 4.

[22] A/CN.637/Add.1, para. 2.

[23] A/CN.4/SR.3081, 7 (McRae); 11 (Wood).

[24] Ibid., 16 (Gaja).

[25] General commentary, para. (3).

most part, party to rather few international conventions. The extent to which the rules of customary international law that are binding on States are also, or can also be, binding upon international organizations is a largely unexplored field. It was important to make clear that the adoption of the articles did not carry implications for the substantive application of the rules of international law to international organizations in general or individually.

– *'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.'*[26]
Notwithstanding this general comment, the basis for the international responsibility of international organizations and States is the same. As Arnold Pronto explains, 'the ILC drew upon the rules elaborated for the responsibility of states, by way of analogy. This was done on the basic assumption that such rules are largely axiomatic, reflecting legal propositions applicable not only to states, but also to other subjects of international law.'[27]
– *'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. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the articles on State responsibility, their authority will depend upon their reception by those to whom they are addressed.'*[28]
This is the most important point made in the general commentary. It will be recalled that, by 2011, ten years had passed since the adoption of the articles on State responsibility and their generally favourable reception by States and international courts and tribunals over that time. But, as McRae points out, what the Commission has said here about the articles on the responsibility of international organizations 'may become a relevant consideration in deciding upon the authority of one of those articles. One can surely anticipate that international organizations themselves will invoke this part of the General Commentary in defending against a claim of responsibility.'[29]
– *'International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions (''principle of speciality''). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound. Because of this diversity and its implications, the draft articles where appropriate give weight to the specific character of the organization, especially to its functions, as for instance article 8 on excess of authority or contravention of instructions. The provision on* lex specialis *(art. 64) has particular importance in this context. Moreover, the diversity of international organizations may affect the application*

[26] Ibid., para. (4); Gaja's eighth report (A/CN.4/640), para. 5.
[27] Pronto, 'An introduction', 95.
[28] General commentary, para. (5); Gaja's eighth report (A/CN.4/640), para. 6.
[29] McRae, 'The Work', 330–1.

> *of certain articles, some of which may not apply to certain international organizations in the light of their powers and functions.*'[30]
> The present writer elaborated on this point in the debate within the Commission:
> 'The differences go much wider than the respective functions of States and various organizations. International organizations differ from States in many respects. They have no territory; even when they engage in what is sometimes referred to as 'international territorial administration', their relationship to the territory in question is different in nature from that of a State, and is moreover specific to each case. International organizations have no nationals. International organizations have no legal system in the sense we know it within a State . . . The structure and facilities available to international organizations are quite different from those of a State. Their relations with other international legal persons, not least their Member States, impact in crucial ways on the applicable law.'[31]
> It has to be acknowledged, however, that most of these differences are more relevant to the applicable primary obligations than to the secondary rules on responsibility.[32]

4. The Commentaries on Specific Articles

As with any Commission draft articles, the commentaries can be as important as the articles themselves. The articles are often not self-explanatory, and the commentaries include points regarded as important by Commission members as part of the overall compromise. Yet they rarely receive the same detailed attention as the articles themselves. On this occasion, the Commission seems to have had neither the time nor the inclination to adopt comprehensive and self-contained commentaries to the various articles. The adoption of the commentaries took place at a single meeting towards the end of the session.[33] As the general commentary makes clear, the articles on the responsibility of international organizations often have to be read together with the commentaries to the articles on State responsibility,[34] which is not entirely satisfactory for a text that is claimed to be 'autonomous'.[35] Nevertheless, especially when read with the commentaries on State responsibility (to which they make frequent reference), the commentaries to the present articles cover many important points. A good example is the

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[30] General commentary, para. (7); Gaja's eighth report (A/CN.4/640), para. 4.
[31] A/CN.4/SR.3081, 11–12 (the text given above is the verbatim original).
[32] Pronto, 'An introduction', 113–16.
[33] A/CN.4/SR.3118, 3–20.
[34] 'When the wording of one of the present draft articles is similar or identical to an article on State responsibility, the commentary of the former will give the reasons for its adoption and the essential explanations. In so far as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles.' (General commentary, para. (6).)
[35] General commentary, para. (4).

commentary to article 14 ('Aid or assistance in the commission of an internationally wrongful act'). Apart from a final paragraph quoting internal legal advice concerning support by the United Nations Mission in Congo (MONUC) to the Armed Forces of Congo (FARDC), the commentary to this crucial article consists of five short paragraphs, chiefly referring the reader to the commentaries to the corresponding article on State responsibility (article 16), but by doing so it covers the essential points.

5. Reception of the Draft Articles by States and International Organizations

The most important element for 'weighing' any product of the Commission is its reception by States (and in the present case also by international organizations). After only a year or so, it is still too early for a considered assessment of how the articles on responsibility of international organizations will be received by States and international organizations. The draft articles were discussed in the Sixth Committee as part of the annual debate on the Commission's report, in which reactions were somewhat mixed.[36] The Secretariat's summary of the debate includes the following:

> Several delegations were of the view that the draft articles on the responsibility of international organizations represented a useful attempt at describing practice and the applicable rules in the area. It was stated that in many respects the draft articles reflected current customary law and that despite the diversity of international organizations, in general terms, the draft articles would provide appropriate responses to the legal issues concerned. At the same time, it was noted by several other delegations that, in some areas, the available practice was relatively sparse and not always consistent. Several delegations welcomed the general commentary to the draft articles and, in particular, the acknowledgment that several of the draft articles tended towards progressive development. It was noted that the general commentary rightly acknowledged that special rules could play a significant role, especially in the relations between an international organization and its members.[37]

Following the debate, on 9 December 2011 the General Assembly adopted, without a vote, resolution 66/100, in which the Assembly:

> 3. *Takes note* of the articles on the responsibility of international organizations, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments and

[36] In addition to the Summary Records of the Sixth Committee (A/C.6/66/SR.18, 19, 20, 21, 23, 24 and 25), see the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat (A/CN.4/650/Add.1), paras. 10–26.

[37] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat (A/CN.4/650/Add.1), para. 10.

> international organizations without prejudice to the question of their future adoption or other appropriate action . . .

By the same resolution, the Assembly decided to include an item entitled 'Responsibility of international organizations' in the provisional agenda of its session in 2014 'with a view to examining, inter alia, the question of the form that might be given to the articles.'[38]

6. Procedures for Dispute Settlement Involving International Organizations

One related matter may be worth mentioning. It will be recalled that the first reading of the 2001 articles on State responsibility had included dispute settlement provisions. They were dropped during the second reading because their inclusion was thought unrealistic given the present state of development of the law: in the nature of the 2001 articles, they would relate to all legal disputes. Accordingly, a dispute settlement requirement would have been tantamount to an across-the-board mandatory dispute settlement, which would not have been acceptable to States. No doubt for the same reason there are no dispute settlement provisions in the current articles.

At the same time, the general commentary notes that one reason for 'the limited availability of pertinent practice' is 'the limited use of procedures for third-party settlement of disputes to which international organizations are parties'.[39] There is indeed, in many cases, a lack of third-party dispute settlement mechanisms through which allegations of internationally wrongful acts by international organizations may be tested.[40] This matter was raised in a debate on the peaceful settlement of disputes that took place within the Commission in 2010 and 2011,

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[38] Responsibility of International Organizations (A/RES/66/100). This is similar to the action taken by the Assembly in 2001 in respect of the articles on State responsibility (Responsibility of States for Internationally Wrongful Acts (A/RES/56/83)), and has become a common initial reaction of the Assembly to the Commission's work product: see M. Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?', I. Buffard *et al.* (eds.), *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Leiden and Boston, 2008), 373–88.

[39] General commentary, para. (5).

[40] A quite separate matter, on which there is rather more practice, is dispute settlement in the case of private law claims against international organizations, and the associated question of immunity from domestic courts: for a recent case upholding the immunity of the United Nations, see the judgment of 13 Apr. 2012 by the Supreme Court of the Netherlands (Hoge Raad) in the *Mothers of Srebrenica Association* case: <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Ruling-Dutch-Supreme-Court-Mothers-of-Srebrenica.aspx>.

under the agenda item 'Other business'.[41] Amongst the possible topics in the field of dispute settlement that were suggested in 2011, and the one in which there was most interest, was 'improving procedures for dispute settlement involving international organizations.'[42] It was indicated in plenary that a paper on the settlement of disputes to which international organizations are parties would be prepared for consideration by the Working Group on the Long-term Programme of Work.[43] The Working Group has not yet taken any decision on the matter. It may be better to wait a little until international organizations have become more familiar with the articles on responsibility of international organizations.

7. Conclusion

It may be thought that the International Law Commission is a potentially dangerous place. It is not dangerous in itself; it is the attitude of others, including courts and tribunals, that makes it so, in the sense that undue homage is sometimes paid to its work, whether that work is good, bad or indifferent, and whatever stage it has reached. It should be recalled that under the UN Charter the role of the General Assembly is to 'initiate *studies* and make *recommendations* for the purpose of . . . *encouraging* the progressive development of international law and its codification',[44] wording which is picked up in the Statute of the International Law Commission.[45]

It is entirely understandable that the Commission should heed the International Court of Justice; it is perhaps less understandable that the International Court should heed the Commission. The Court's decisions are authoritative. The Commission's output is normally less so. It is worth what it is worth, sometimes a great deal, sometime less, depending in large measure on its reception by States and other relevant actors. Members of the Commission are fully conscious of

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41 A/CN.4/SR.3070, SR.3095 and SR.3096. See Settlement of disputes clauses. Note by the Secretariat (A/CN.4/623); Peaceful settlement of disputes: Working paper by Sir Michael Wood (A/CN.4/641). The debate on 29 Jul. 2010 was the last occasion on which Paula Escarameia addressed the Commission (A/CN.4/SR.3070, 9–10).

42 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), paras. 416–17; A/CN.4/SR.3070, 7 (Gaja); A/CN.4/SR.3096, 3–4 (Gaja); A/CN.4/641, paras. 16(b) and 19(b); A/CN.4/SR.3095, 3–5 (Wood).

43 A/CN.4/SR.3096, 8 (Wood).

44 Charter of the United Nations, article 13 (*a*) (emphasis added).

45 Statute of the International Law Commission, article 1, reflecting article 13, paragraph 1 (a), of the Charter, provides that the object of the Commission is 'the promotion of the progressive development of international law and its codification': A/RES/174(II), 21 Nov. 1947 (*U.N. Off. Recs., Second Session of the General Assembly, Resolutions, 16 September–29 November 1947*).

their responsibilities, given the potential weight that the Commission's drafts may have.

It follows that courts and others should approach the articles on the responsibility of international organizations with a degree of circumspection. They should, as Ian Brownlie would have insisted, weigh the evidence when determining the status of particular provisions within the draft. The articles on the responsibility of international organizations should not simply be assumed to have a status equivalent of that of the articles on State responsibility, which in many respects are now viewed as reflecting customary international law. As is explicitly stated in the general commentary, 'the provisions of the present draft articles do not necessarily *yet* have the same authority as the corresponding provisions on State responsibility.'[46] If courts and others pay proper regard to the elements mentioned in the present contribution, the concerns of international organizations and their member States about the Commission's articles on the responsibility of international organizations should prove unfounded.

[46] General commentary, para. (5) (emphasis added); A/CN.4/640, para. 6.