



New Directions in Responsibility: Assessing the International Law Commission’s Draft Articles on the Responsibility of International Organizations

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I. INTRODUCTION

The International Law Commission’s (ILC) Draft Articles on the Responsibility of International Organizations (Draft Articles) are a critical new development in the law regulating international organizations (IOs).¹ If adopted, these Articles will create a legal framework—although not a forum—to sue IOs that commit internationally wrongful acts.² The Draft Articles create a law of “consequences”: they lay out rules of attribution, excuses precluding wrongfulness, effects of a breach, and principles of reparations. The 2011 military intervention in Libya highlights the practical application of these principles.

Following Momar Qadhafi’s repression of the civilian population in Libya, the United Nations Security Council approved the use of “all necessary measures” to protect civilians and civilian populated areas in Resolution 1973.³ NATO took over the implementation of the Security Council’s resolution under

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¹ See Rep. of the Int’l Law Comm’n, *Draft Articles on Responsibility of International Organizations*, 61st sess, May 4–June 5, July 6–Aug. 7, U.N. Doc. A/64/10; U.N. GAOR 64th Sess., Supp. No. 10, art. 2, (2009), available at <http://untreaty.un.org/ilc/reports/2009/2009report.htm> [hereinafter *Draft Articles on IO Responsibility*]. As of writing, the ILC has just begun its second reading of these articles. It is expected to complete this reading in 2011.

² An internationally wrongful act is defined as an “action or omission” that is (i) attributable to the state or IO under international law and that (ii) constitutes a breach of an international obligation (whether by treaty or by another source of law) of that IO. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, art. 2, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int’l L. Comm’n 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Articles on State Responsibility*]; *Draft Articles on IO Responsibility*, *supra* note 1, art. 4.

³ S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

Operation Unified Protector.⁴ Several reports have emerged indicating that pilots have mistakenly bombed civilian targets and caused extensive damage.⁵ The law of responsibility would apply to any actions by NATO or its Member States that violate the laws of war or that exceed the Security Council's authorization for the use of force in Resolution 1973.

The Draft Articles' rules of attribution would determine which entity is responsible for the internationally wrongful act: the United Nations, NATO, or the armed forces of the countries carrying out the air strikes.⁶ Because the United Nations is not in command and control,⁷ responsibility would likely be attributed to NATO or to Member States. The Draft Articles anticipate that responsibility can be held jointly and singly, meaning that NATO could be held responsible in its own right, or it could be responsible along with one or more Member States that were involved in a given incident.⁸ Next, the law of responsibility would be applied to determine whether NATO or a Member State can invoke any excuses, such as self-defense, to avoid liability.⁹ Finally, both the Draft Articles and the State Responsibility Articles require full reparations, which suggests that if

⁴ *Operation Unified Protector Factsheet*, NORTH ATLANTIC TREATY ORGANIZATION (May 16, 2011 9:00 AM), http://www.nato.int/cps/en/SID-872ABE23EBC48005/natolive/news_71773.htm.

⁵ See, e.g., Kareem Fahim, *Allies Defending Actions in Libya After Airstrike*, N.Y. TIMES, May 1, 2011, at A4; Michael Georgy, *Libyans Blame Deadly Strike on NATO Mistake*, REUTERS (Apr. 7, 2011, 11:35 PM BST), <http://uk.reuters.com/article/2011/04/07/uk-libya-idUKLDE71Q0MP20110407?pageNumber=2;http://www.nytimes.com/2011/05/02/world/africa/02libya.html>.

⁶ The Draft Articles propose an "effective control" test in Article 6. *Draft Articles on IO Responsibility*, *supra* note 1, art. 6.

⁷ For the command structure of the NATO Operation, see *Operation UNIFIED PROTECTOR: Command and Control*, NORTH ATLANTIC TREATY ORGANIZATION, www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-command-control.pdf (last visited May 9, 2011). The UN's comments on the Draft Articles clarify that the UN assumes responsibility when it is in command and control, but not when it authorizes operations, as it did in Security Council Resolution 1973. See Rep. of the Int'l Law Comm'n, 63d sess, Apr. 26-June 3, July 4-Aug. 12, U.N. Doc. A/CN.4/637/Add.1 (2011) [hereinafter UN Comments]; Press Release, Prime Minister's Office, NATO to Control Libya Operation (Mar. 27, 2011), available at <http://www.number10.gov.uk/news/latest-news/2011/03/nato-to-control-libya-operation-62528>.

⁸ See Preliminary Objections of The French Republic, *Legality of Use of Force (Serb. and Montenegro v. Fr.)* 2004 I.C.J. 575, at 33 (July 5, 2000) (asserting that responsibility lies primarily with NATO, and to a lesser extent with the United Nations, but not with Member States); see also Andrew Stumer, Note, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT'L L. J. 553, 557-8 (2007) (analyzing Canada's oral argument that "joint and several liability for the acts of an international organization, or for the acts of other States acting within such an organization, cannot be established unless the relevant treaty provides such liability."); see generally Pierre Klein, *The Attribution of Acts to International Organizations*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 297 (James Crawford et al. eds., 2010).

⁹ See *Draft Articles on IO Responsibility*, *supra* note 1, art. 20 ("The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defense under international law.").

NATO or its Member States were responsible, they would have a financial obligation to the victims.¹⁰

There are pros and cons to extending legal responsibility to IOs like NATO. On the one hand, the Draft Articles highlight that power should be exercised responsibly by all international actors, including IOs. The extension of this basic principle to IOs is a testament to the important role that non-state actors now play in the international system. Moreover, if NATO and its Member States do commit internationally wrongful acts, the law of responsibility provides a basis for reparations, which is a fundamental principle of international law.¹¹ On the other hand, NATO is a product of its Member States. As NATO explained in its comments to the ILC, it operates on the basis of consensus decision-making.¹² To sanction NATO separately from the countries carrying out the military strikes is to participate in an act of legal fiction. Indeed, NATO would have to levy the funds through assessments paid by Member States, which may affect its willingness to engage in such endeavors in the future.

In this essay, I explore the consequences of extending legal responsibility to IOs. I distinguish between the concepts of accountability and responsibility, highlight some salient aspects of the structure and substance of the Draft Articles, and finally suggest that the law of responsibility and Chapter VII Security Council Resolutions have a long and complicated future ahead of them. I also comment on how the privileges and immunities of IOs will affect the application of the law of responsibility and conclude that the Draft Articles' main forum of application will be within the IOs themselves.

II. ACCOUNTABILITY AND RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

An IO is "an organization established by treaty or other instrument governed by international law and possessing its own international legal

¹⁰ See *Draft Articles on IO Responsibility*, *supra* note 1, art. 33 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."); see also Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. 8, June 19, 1951, 4 U.S.T. 1792 (detailing compensation procedure for claims arising from NATO operations).

¹¹ *Factory at Chorzow (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J., (ser. A) No. 17 (Sept. 3); *Factory at Chorzow (Ger. v. Pol.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9 (July 26).

¹² In its 2011 comments to the ILC, NATO emphasized that there is little difference between member states and NATO. See Rep. of the Int'l Law Comm'n, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 63d sess, 12, U.N. Doc. A/CN.4/637 (2011) [hereinafter *2011 IO Report*] ("NATO decisions are taken on the basis of consensus, after discussion and consultation among the representatives of member States. There is no voting or majority decision. All member nations of the Alliance have an equal right to express their views at the Council, and decisions are not made until all nations are prepared to join consensus in their support. Decisions are thus the expression of the collective will of the sovereign member States, arrived at by common consent and supported by all. Each member State retains full responsibility for its decisions, and is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted.").

personality.”¹³ Today, there are approximately 1700 IOs.¹⁴ This number is unprecedented, demonstrating both the importance of non-state actors in international affairs and the demand for institutional management of global issues.

IOs fulfill a variety of functions. Institutionally, they provide a forum for coordination and discussion. Substantively, they address issues ranging from collective security to trade, fisheries to public health, and international criminal law to the global economy. An IO’s function is determined by its articles of association or constitution and subsequent practice. Some IOs have consequently grown into important new roles that were not foreseen by their founders.¹⁵ It is therefore unsurprising that there has been a growing call for IOs to ‘answer up’ for their activities.¹⁶ Interest in the available forms of recourse has increased as the potential effects of their activities have become apparent. For example, would the FAO, through the course of technical assistance, be responsible if it releases a dangerous chemical into the environment? Could the IAEA be found liable if it causes a nuclear accident? Would the WHO owe compensation if it releases a vaccine that has unexpected side effects on public health?¹⁷ Demands for accountability are partly a function of IOs’ expanding authority and power; the call for accountability has been strongest where IOs exercise governance functions or affect individual rights.¹⁸

Accountability, however, has two narratives. The first narrative is political; most efforts to open up the activities of IOs fall within this category. The International Law Association’s 2002 report on accountability, for example, focuses on improving institutional mechanisms such as transparency, independent reporting and evaluation mechanisms, financial review, and broader rights of participation.¹⁹ New policies on access to information at the International Financial Institutions respond to demands for political accountability.²⁰

¹³ *Draft Articles on IO Responsibility*, *supra* note 1, art. 2(a).

¹⁴ See DE GRUTER SAUR, YEARBOOK OF INTERNATIONAL ORGANIZATIONS at app. 3, tbl. 1a (Union of Int’l Ass’n ed., 47th ed. 2010).

¹⁵ For example, the UN’s practice of “peacekeeping” was not envisioned by the UN Charter. See U.N. DEP’T OF PUB. INFO., THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING 5 (2d ed. 1996) (describing the evolution of the U.N.’s peacekeeping authority). Similarly, the IMF and World Bank’s extensive current involvement in post-conflict situations was not foreseen. See Kristen E. Boon, “Open for Business”: *International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT’L L. & POL. 513 (2007).

¹⁶ See, e.g., Surakiart Sathirathai, *Renewing our Global Values: A Multilateralism for Peace, Prosperity, and Freedom*, 19 HARV. HUM. RTS. J. 1, 21 (2006); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT’L AFF. 83, 84 (2001).

¹⁷ These hypotheticals were raised in the Final Report of the International Law Association’s Committee on the Accountability of International Organizations. INT’L LAW ASS’N, COMM. ON THE ACCOUNTABILITY OF INT’L ORGS., FINAL REPORT ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS, pt. II, § 2 (2004) [hereinafter ILA REPORT].

¹⁸ See, e.g., Clemens A. Feinaugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?*, 9 GER. L.J. 1513, 1539 (2008) (concluding that “restraining principles would be meaningless if the Security Council could not be held accountable in cases of human rights violations”).

¹⁹ ILA REPORT, *supra* note 17, pt. I, § 1.

²⁰ For example, a number of IOs have improved their transparency policies. See, e.g., *The Fund’s Transparency Policies*, INT’L MONETARY FUND,

The second narrative of accountability is legal and revolves around the law of responsibility.²¹ This approach predates the political accountability movement; it is rooted in the International Law Commission's efforts to codify general principles of responsibility.²² The ILC's study of the law of responsibility began in the 1950s and culminated in the widely respected Articles on State Responsibility, which the General Assembly took note of and commended to the attention of Member States in 2002.²³ IO Responsibility subsequently emerged as a separate topic in its own right.²⁴

The ILC's effort to develop general principles of responsibility for IOs akin to those applicable to states has been controversial. It is generally accepted that IOs can incur responsibility. Indeed, the International Court of Justice recognized that separate legal personality brings responsibility in the 1949 *Reparation for Injuries* case, when it determined that the United Nations, as an international legal person, is capable of possessing international rights and duties, including the capacity to bring international claims to defend its rights.²⁵ Nonetheless, the attempt to develop a generally applicable set of articles of responsibility for IOs has been fraught with complications.

III. SUBSTANCE OF THE LAW OF IO RESPONSIBILITY

The debate over the responsibility of IOs is currently framed by a draft set of sixty-six articles released by the ILC in 2010. These articles apply and adapt the principles of state responsibility to IOs, sometimes word for word. Like the Articles on State Responsibility, the Draft Articles do not purport to address primary rules of international law.²⁶ Thus, the substantive obligations on the use

<http://www.imf.org/external/np/pp/eng/2009/102809.pdf> (last visited May 9, 2011); Press Release, World Bank, World Bank Broadens Public Access to Information (July 1, 2010), available at <http://go.worldbank.org/L3HF51WOX0>.

²¹ See Jutta Brunnee, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETH. Y.B. OF INT'L L. 21 (2005).

²² Special Rapporteur on the Responsibility of International Organizations, *First Rep. on the Responsibility of Int'l Orgs.*, Int'l Law Comm'n, ¶ 3, U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (by Giorgio Gaja) [hereinafter *First Report of Special Rapporteur Gaja*].

²³ G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

²⁴ The link between the responsibility of states and IOs was recognized as early as 1963. *First Report of Special Rapporteur Gaja*, *supra* note 22, ¶ 3. The topic of the Responsibility of International Organizations was placed on the ILC's agenda in 2002. See G.A. Res. 57/21, U.N. Doc. A/RES/57/21 (Nov. 19, 2002); G.A. Res. 56/82, U.N. Doc. A/RES/56/82 (Dec. 12, 2001).

²⁵ The UN's independent personality was recognized by the ICJ. See *Reparations Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11); see also *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 167-68 (July 20) (recognizing in general terms that *ultra vires* acts can be attributed to an IO, and affirming that all members of an organization may have to contribute to the unforeseen expenses of that IO).

²⁶ Primary rules refer to the law relating to the content and duration of substantive state obligations. In contrast, secondary rules refer to the legal consequences of failing to fulfill obligations established by primary rules. See THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 14-16 (James Crawford ed., 2002). The Draft Articles are not devoid of primary rules, however. Article 16, on decisions, authorizations, and recommendations addressed to member States

of force or human rights, for example, are found in other instruments. The Draft Articles provide secondary rules that would come into play after an internationally wrongful act occurs.

The Draft Articles will have concrete implications for IOs. The proposed rules on attribution, and the definitions of organs and agents in particular, could greatly expand IO liability.²⁷ Indeed, the UN's comments suggest that its widespread use of independent contractors and implementing agencies may be caught in this net.²⁸ Moreover, IOs may also be directly liable if organs or agents engage in *ultra vires* acts.²⁹ A series of other articles would create indirect liability for IOs that have operational control of state agents, such as peacekeepers, who commit internationally wrongful acts.³⁰

The Draft Articles envision significant forms of recourse to accompany the expanded liability: IOs that are held responsible for an internationally wrongful act are obligated to make full reparation or provide other remedies, such as satisfaction. IOs rely on Member States for their funding. Thus, large reparation awards could impact an IO's purse and its ability to operate. As the NATO example illustrates, large compensation awards may affect the ability and willingness of IOs to undertake risky operations.

Three underreported implications of the Draft Articles are also worthy of comment. First, the Draft Articles create responsibility for a failure to act, confirming that IOs could be responsible for harms resulting from omissions.³¹ Indeed, it was precisely this scenario that arose in the *Behrami* case before the European Court of Human Rights, in which France and Norway were accused of failing to demine an area under their control.³² The exact limits of this cause of action are unclear. If the Security Council fails to act to prevent a genocide, for example, or if it imposes an embargo on a country at war that has genocidal effects, would it owe the victims compensation?

Second, since most IOs depend on states,³³ the Draft Articles create a new dimension of exposure for states—particularly those that work actively through IOs. An internationally wrongful act may create direct liability, in the form of joint or parallel responsibility, between an IO and its Member States. In addition, acts by states that assist an IO that commits an internationally wrongful act may trigger indirect liability. Even failing to conduct due diligence could expose a state to liability.³⁴ The Draft Articles thus prevent states from using IOs to avoid

and IOs, Article 33, which requires “full” reparation, and the aggravated responsibility regime of Articles 40-48, all arguably create primary obligations. *See Draft Articles on IO Responsibility*, *supra* note 1, arts. 16, 33, 40-48.

²⁷ *See Draft Articles on IO Responsibility*, *supra* note 1, arts. 5, 6.

²⁸ UN Comments, *supra* note 7, at 9; *see also 2011 IO Report*, *supra* note 12, at 17-18 (Comments of the International Labour Organization).

²⁹ *Draft Articles on IO Responsibility*, *supra* note 1, art. 8.

³⁰ *See id.* arts. 13-17.

³¹ *See Articles on State Responsibility*, *supra* note 3, art. 2 (defining an internationally wrongful act as an action or omission).

³² *Behrami v. France*, *Saramati v. France*, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. SE10 (2007).

³³ Either during the creation of IOs or for ongoing funding and operational assistance.

³⁴ *See Klein*, *supra* note 8, at 310.

their own responsibility, introducing a way to ‘pierce the corporate veil’.³⁵ Article 16 consequently prohibits states from creating an IO to circumvent the rules of State Responsibility, holding an IO internationally responsible for authorizing or recommending a Member State or IO “to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization,” provided the Member State or IO actually commits the act because of the authorization or recommendation.³⁶

Finally, both the Articles on State Responsibility and the Draft Articles contain a clause stating that the Articles are “without prejudice to the Charter of the United Nations.”³⁷ This provision carves out the law of collective security from the purview of the law of State or IO Responsibility. The ILC’s vision is that the law of responsibility will operate in parallel to and consistently with the UN Charter.³⁸ Despite the attempt to isolate the law of collective security from the law of responsibility, it is clear there will be considerable interplay in practice.³⁹ The UN Charter is not a self-contained regime. The Security Council has made decisions that implicate the law of state responsibility on several occasions.⁴⁰ Conversely, states may invoke the law of responsibility in United Nations fora to plead necessity or justify countermeasures.⁴¹ Of particular significance for the Security Council, the Draft Articles create an “aggravated responsibility” regime, which provides that where there is a violation of a *jus cogens* norm (non-derogable norm), or when it is necessary to defend an *erga omnes* obligation (an obligation owed to the international community as a whole), not just the injured state or IO, but any state or IO can invoke the law of responsibility in order to demand cessation of an act.⁴² Because *jus cogens* norms and *erga omnes* obligations include acts of aggression, crimes of genocide, and other situations often within the purview of the Security Council, the law of responsibility could be invoked in precisely the same situations as those where the Security Council is entitled to act.⁴³

³⁵ See *Draft Articles on IO Responsibility*, *supra* note 1, art. 16.

³⁶ *Id.* art. 16(2).

³⁷ See *Articles on State Responsibility*, *supra* note 2, art. 59; *Draft Articles on IO Responsibility*, *supra* note 2, art. 66.

³⁸ This intent is consistent with Article 103 of the U.N. Charter, which is a rule of precedence providing that the UN Charter trumps conflicting instruments. U.N. Charter art. 103.

³⁹ See Kristen E. Boon, *Applying the Law of Responsibility in Collective Security Situations*, 42 GEO. WASH. INT’L L. REV. (forthcoming 2011).

⁴⁰ For example, in Resolution 687, it determined that Iraq committed an internationally wrongful act when it invaded Kuwait, and stated that Iraq owed compensation. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) (finding “Iraq . . . liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait”).

⁴¹ Vera Gowlland-Debbas, *Responsibility and the United Nations Charter*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 8, at 116.

⁴² See *Articles on State Responsibility*, *supra* note 2, art. 48; *Draft Articles on IO Responsibility*, *supra* note 1, art. 48.

⁴³ The effects may include greater scrutiny of Security Council acts and omissions, more “self help” by states, and increased attempts to attribute acts of aggression or genocide to IOs. The commentary on the Articles on State Responsibility thus provides acts of aggression,

IV. CRITICISMS OF THE DRAFT ARTICLES

There are two prevalent criticisms of the Draft Articles. First, a number of IOs have emphasized that unlike states, which are juridically equal, IOs range greatly in size, function, and mandate.⁴⁴ Because IOs are different, they contend, it will be difficult, if not impossible, to come up with a set of principles that can apply across the board. Similarly, the European Commission has noted that there is no “one size fits all” approach to IOs, given the significant differences between traditional IOs and regional economic integration organizations.⁴⁵

A second criticism is that the ILC is developing these rules without an extensive body of practice. Whereas the Articles on State Responsibility were usually the product of existing rules, and in many cases codified customary law, the ILC had no compendium of general IO practice from which to work. Because IOs are protected by privileges and immunities, there are few instances where principles of responsibility have been invoked before courts. Indeed, the Council of Europe’s comment that it “has had so far no specific practice regarding wrongful acts under international law involving the organization’s responsibility” is a common observation.⁴⁶

This lack of jurisprudence or analysis of IO practice prompted the ILC to “cut and paste” many of the Articles on State Responsibility to create a template for its study of IO responsibility.⁴⁷ IOs may thus be justified in worrying that the Draft Articles will have unintended consequences. For example, the effect of the application of the rules on countermeasures, force majeure, and necessity to IOs is

genocide, and protection from slavery as examples. *See 2011 IO Report, supra* note 12, at 332. Note also that after the NATO bombing campaign of 1999, states attempted to shift responsibility to NATO, although the ICJ dismissed the case for lack of jurisdiction. *See Preliminary Objections of Canada, Legality of Use of Force (Serb. and Montenegro v. Can.)*, 2004 I.C.J. 429, ¶ 165 (July 2000); *Preliminary Objections of The French Republic, Legality of Use of Force (Serb. and Montenegro v. Fr.)* 2004 I.C.J. 575, at 33 (July 5, 2000); *Preliminary Objections of the Kingdom of the Netherlands, Legality of Use of Force (Serb. And Montenegro v. Neth.)* 2004 I.C.J. 1011, ¶¶ 7.2.5 – 7.2.12 (July 5, 2000); *Preliminary Objections of the Portuguese Republic, Legality of Use of Force (Serb. and Montenegro v. Port.)* 2004 I.C.J. 1160, ¶¶ 130-141 (July 5, 2000); *Preliminary Objections of The Italian Republic, Legality of Use of Force (Serb. and Montenegro v. Ital.)* 2004 I.C.J. 865, at 19 (July 3, 2000).

⁴⁴ This is demonstrated by the “principle of speciality,” which was recognized by the ICJ in the Nuclear Weapons Case, where the Court stated that “international organizations . . . do not, unlike States, possess a general competence, but are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.” *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Nuclear Weapons Case)*, Advisory Opinion, 1996 I.C.J. 78 (July 8).

⁴⁵ *2011 IO Report, supra* note 12, at 7 (Comments of the European Commission).

⁴⁶ *Id.*

⁴⁷ Jose Alvarez, Luncheon Address to the Canadian Council of International Law: International Organizations: Accountability and Responsibility? 2 (Oct. 27, 2006), *available at* <http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf> (“[T]his nearly six year effort has turned into a ‘find and replace’ exercise in which some of the world’s leading lawyers sit around in Geneva, presumably drinking good wine, while replacing ‘international organization’ wherever the word ‘state’ originally appeared in the ASR.”).

unknown. Some IOs are therefore questioning the ILC's mandate and whether the ILC has been too aggressive in developing the Draft Articles.

Much of the concern about the Draft Articles focuses on how the ILC developed the Draft Articles—an issue of political accountability. IOs have no official standing before the ILC, and although they have been invited to submit comments at various stages of the drafting process, they have no control over the ILC's final proposals.⁴⁸ In this sense, the Draft Articles do not represent a shift in the international system; the law-making process is still run largely by states. Moreover, the Draft Articles are intended to operate in the field of state and IO relations, not to be invoked directly by individuals.⁴⁹ Although the final form of the Draft Articles has not been determined, the ILC will likely recommend that they be commended to states by the General Assembly, as were the Articles on State Responsibility before them. This could further limit IO influence.

V. CONCLUSION

In their current iteration, the Draft Articles will codify some principles of responsibility that are considered customary international law, while proposing many more novel principles. Although the final form of the Draft Articles will likely be non-binding, this should not be taken to suggest that they will disappear into the interstices of the international legal order. Already, courts are invoking the Draft Articles, sometimes quite controversially.⁵⁰ In at least one instance, the invocation of the Draft Articles by the European Court of Human Rights has the European Commission suggesting that the ILC is already out of date.⁵¹ Moreover, many IOs are using the comments process to create a record of dissatisfaction with the ILC's proposals. These may provide fodder to challenge the Draft Articles' application in future controversial situations.

Nonetheless, the Draft Articles are unlikely to affect IOs in judicial fora in the near future. Given their extensive privileges and immunities, IOs cannot be sued in domestic courts for most matters.⁵² Nonetheless, it is important to

⁴⁸ See, e.g., *2011 IO Report*, *supra* note 12, at 15 (Comments of the International Labour Organization) (“[I]nternational organizations should be at least permitted to fully participate in the process of elaborating such a treaty, and their comments should carry greater weight in the deliberations of the International Law Commission.”).

⁴⁹ See Draft Articles on IO Responsibility, *supra* note 2, art. 42 (invocation of responsibility by an injured State or international organization).

⁵⁰ See, e.g., *Behrami*, 45 Eur. H.R. Rep. SE10, ¶ 134 (finding the UN in “ultimate control”).

⁵¹ The European Commission, for example, has questioned whether, in light of the *Behrami* decision, international practice is clear enough for the ILC to codify the “effective control” standard. *2011 IO Report*, *supra* note 12, at 22 (Comments of the European Commission).

⁵² See, e.g., Convention on the Privileges and Immunities of the United Nations, art. 2(2), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, (“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”); see also August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285, 294 (2008) (on absolute or functional immunity from suit). In addition, most courts, including the ICJ, have contentious jurisdiction over states, not IOs. See, e.g., Statute of the International Court of Justice, arts. 34, 36(1), June 26, 1945, 33 U.N.T.S. 993. Nonetheless, as the ICJ's Reparations decision

recognize that privileges and immunities are separate from questions of responsibility because they constitute an affirmative defense to jurisdiction. The existence of privileges and immunities does not, therefore, affect the primary question of whether an IO is responsible. Instead, the privileges and immunities issue may limit where claims under the law of responsibility can be pursued.

In the longer term, courts may use the developing principles of responsibility to chip away at the edifices protecting IOs, as has been the case with state immunity.⁵³ Because the immunities that IOs enjoy are not yet fully crystallized in international law, courts may face the question of whether IOs are entitled to immunity under customary law—when there is no relevant treaty—and whether immunities should be limited to functional necessities.⁵⁴ In either case, courts could limit the scope of privileges and immunities not delineated in treaties, opening the floodgates to responsibility claims against IOs.⁵⁵

Practically speaking, the near-term effects of the Draft Articles are likely to be greatest in three areas. First, they will affect IO's internal behavior. IOs may, for example, change how they define "agents," and whom they contract with. Second, the Draft Articles may lead IOs not to act when they lack a proper mandate or funding. Especially in light of their potential legal exposure for omissions, IOs may avoid engaging when they cannot meet a certain standard of care or level of due diligence. Finally, the new Draft Articles may prompt IOs to take advantage of Article 63 on *lex specialis*, which permits IOs to contract around the default rules of responsibility, and to come up with their own secondary rules specific to the practices of that regime.⁵⁶ Although this permits specialization, it will stymie the creation of a unified and coherent set of principles on the responsibility of IOs and states alike. Whether that is a desirable goal is another question.

indicates some questions of IO responsibility can be addressed indirectly. *See supra* note 25 and accompanying text.

⁵³ Consider, for example, the Pinochet decisions and their limitations on the immunity of sitting heads of state. *See R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, (1999), 2 W.L.R. 827 (Eng.); Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 345 (2008).

⁵⁴ Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 INT'L ORG. L. REV. 121, 123-29 (2010).

⁵⁵ Because of the potential for joint attribution, the Draft Articles may incent states to shift responsibility to IOs. In an important string of cases before the European Court of Human Rights, the United Nations, which is outside of the Court's jurisdiction, has been found to be in "ultimate control," not its member states. *See, e.g., Behrami*, 45 Eur. H.R. Rep. SE10 (finding the application inadmissible due to the attribution of conduct to the United Nations). The European Court of Human Rights has decided the question of attribution in similar cases. *See Beric v. Bosnia and Herzegovina*, App. No. 36357/04, 46 Eur. H.R. Rep SE6 (2008); *Gajic v. Germany*, App. No. 31446/02 (Eur. Ct. H.R., August 28, 2008), available at <http://echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink, then search for "Gajic" then follow link to case title); *Kasumaj v. Greece*, App. No. 6974/05 (Eur. Ct. H.R. July 5, 2007), available at <http://echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink, then search for "Kasumaj" then follow link to case title).

⁵⁶ The limitation to this approach is that, due to the principle of consent, it would not bind states or entities that are non-members of the organization. As Article 34 of the Vienna Convention on the Law of Treaties confirms, "A treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).