2018 AIIB Law Lecture: International Organizations in the Recent Work of the International Law Commission

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Abstract

The United Nations International Law Commission occasionally deals with the law relating to international organizations. A well-known example is its work in preparation of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. It is less well-known, but perhaps more important for the practice of international organizations, that the Commission has in recent years also addressed other relevant issues in this field. Those include the responsibility of international organizations (2011), the role which the practice of international organizations may play in the interpretation of their constituent instruments (2018) and in the formation of customary international law (2018), as well as considerations on whether the topic 'Settlement of disputes to which international organizations are parties' (2016) should be put on its agenda. This chapter reflects the 2018 AIIB Law Lecture, summarizing the work of the Commission on these aspects of the law of international organizations and engages in some general reflections.

1 The Work of the ILC on International Organizations during the Twentieth Century

The International Law Commission (ILC) has the mandate, under its Statute of 1947, to promote 'the progressive development and the codification of international law'.¹ This mandate is rather broad, and the Commission is aware that

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1 United Nations General Assembly (UNGA), Statute of the International Law Commission 1947 (amended in 1950, 1955, 1981), art 1.

it shares its mandate with many more specialized bodies. But the Commission is still the main body for the progressive development and the codification of the 'general' rules of international law. This means that the Commission tends to look for common features in different treaties, and of practice in different fields, with a view of distilling general rules from them. And the Commission has done the same with respect to 'the' law of international organizations.

A closer look at the history of how the Commission has dealt with rules relating to international organizations, however, reveals that the Commission has for a long time not been very successful in its efforts to develop and to identify general rules relating to international organizations. In the late 1950s, when it started its work on the law of treaties, the Commission intended to include the law of treaties concluded by international organizations in that work. But when it finalized its draft articles on the law of treaties in the 1960s, it concentrated, with one exception, on the law of treaties between States, leaving the law of treaties in relation to international organizations to be dealt with later and separately.² The one exception concerned the constituent instruments of international organizations, which are addressed in article 5 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).³ Later, when the Commission addressed the law of treaties relating to international organizations in the late 1970s and early 1980s, the outcome of its work, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO),⁴ was largely a copy-and-paste exercise. This Convention has still not entered into force due to an insufficient number of ratifications.⁵

Even worse still, the work of the Commission on 'Relations between States and intergovernmental organizations', which the Commission started in the late 1950s, ended inconclusively. The first part of this topic resulted, in 1971, in draft articles for what is now the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975.⁶ This treaty has still not entered into force. Work on the

2 ILC, 'Report on the Work of the First Part of its Seventeenth Session' 1965, para 19.

3 Vienna Convention on the Law of Treaties (VCLT); it is true that constituent instruments of international organizations in the sense of the Vienna Convention of 1969 are also treaties concluded between States, but they can nevertheless be said to belong to the law of treaties relating to international organizations.

4 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO).

5 The topic 'Succession of States' with its subtopic 'Succession in respect of membership of international organizations' suffered a similar fate, see ILC, 'Report on the Work of its Nineteenth Session' 1967, para 41.

6 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

second part of the topic started in 1979, on 'the relations between States and international organizations concerning privileges and immunities of international organizations and their officials', but the Commission discontinued this work in 1992, considering 'it wise to put aside for the moment the consideration of a topic which does not seem to respond to a pressing need of States or of international organizations'.⁷ This reasoning sounds odd today, and it is clear that practitioners in international organizations are interested in questions relating to immunities, yet the reasoning given may not have provided the full explanation.

In short, during the twentieth century the work of the ILC on the law of international organizations rested on the basic assumption that this law consisted of many general rules which should be developed and identified, but this work was ultimately not very successful. Perhaps something was wrong with the basic assumption?

2 The Recent Work of the ILC on International Organizations

The more recent work of the ILC is different. During its work on other topics the Commission has addressed various aspects of the law of international organizations. In contrast to earlier attempts, the Commission has not discontinued any relevant project. And the Commission has not proposed to conclude a convention. Instead, the Commission has made a few contributions which may be more significant than most of its earlier work.

2.1 *Responsibility of International Organizations*

The first such contribution is the work on 'Responsibility of international organizations'. This work started in 2002, immediately after the adoption of the articles on State responsibility in 2001, and it was finalized in 2011.⁸ At first sight, this work seems to be a repetition of the approach used for the law of treaties. This approach consisted in, firstly undertaking a project on rules for States, and only in a second step pursuing a project on the rules for international organizations which then largely copies the rules for States. But this first impression is misleading. It is true that a significant number of the articles on the responsibility of international organizations are formulated in parallel with corresponding articles on the responsibility of States, but

⁷ ILC, 'Report on the Work of its Forty-Forth Session' 1992, para 362.

⁸ ILC, 'Responsibility of International Organizations' 2011 (ARIO), paras 87–8.

... 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.⁹

The Commission thus also tried to identify and propose rules which are specific to international organizations. In doing that, the Commission was aware that,

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 specialty'). 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... The provision on *lex specialis* (article 64) has particular importance in this context.¹⁰

The main problem for the identification of rules which are specific to international organizations, but which at the same time applied to all international organizations was, however,

... the limited availability of pertinent practice. The main reason for this is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy

9 ARIQ, general commentary, para (4).

10 ARIQ, general commentary para (7).

to locate, nor are international organizations or States often willing to disclose it.¹¹

On this methodological basis the Commission proposed several rules which are specific to international organizations, or which have a specific relevance to them. The rules on the attribution of acts to an international organization are relatively narrow: according to article 8, 'the conduct of an organ or agent of an international organization shall' only 'be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'.¹² And, according to article 7, 'the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall' only 'be considered under international law an act of the latter organization if the organization exercises effective control over that conduct', as opposed to some kind of 'ultimate authority and control'.¹³

Articles 7 and 8 on attribution are thus somewhat protective of international organizations. In contrast, the articles on the 'Responsibility of an international organization in connection with the act of a State or another international organization'¹⁴ formulate rather broad forms of joint, or supplementary, responsibility of international organizations when they act in conjunction with States or other international organizations. Article 14 on responsibility for aid or assistance is more or less copied from the corresponding article 16 of the articles on State responsibility¹⁵—but it is likely that this form of responsibility is more relevant in practice to international organizations, since they are typically 'aiding and assisting' States in the fulfillment of various tasks. Similarly, article 15 on 'Direction and control exercised over the commission of an internationally wrongful act' applies a general rule of State responsibility to international organizations.¹⁶ This rule is also typically more relevant to international organizations since situations of 'direction and control' would appear to happen less in the inter-State context but are often found in arrangements between international organizations and States.

11 ARIO, general commentary para (5).

12 ARIO, art 8.

13 ARIO, art 7, commentary para (10).

14 ARIO, arts 14–9.

15 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' 2001 (ASR), paras 76 and 77.

16 ASR, art 17.

The most specific, and perhaps also the most interesting rule is article 17 on the circumvention by an international organization of one of its international obligations through decisions and authorizations addressed to members. According to paragraph 1 of this provision:

An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.¹⁷

Paragraph 2 extends this responsibility to cases in which an international organization 'authorizes' a member to commit an internationally wrongful act and thereby circumvents one of its own obligations.¹⁸

The situations that are envisaged in articles 14, 15 and 17 of the articles on responsibility of international organizations are not only important for international organizations which have the power to take binding decisions, such as the United Nations or the European Union, and whose practice is the basis for these articles. These articles also seem to be relevant to a multilateral development bank like the Asian Infrastructure Investment Bank (AIIB). This is because, it is assumed, the AIIB often exercises a considerable amount of influence on the conduct of those States with which it cooperates. It is possible that such influence amounts, in certain situations, to giving 'aid or assistance' to an internationally wrongful act of the State in question, or it may give rise to a responsibility of the organization of its own, either because the influence amounts to a 'direction or control', or because the organization does not sufficiently consider that its influence on conduct of a State amounts to a circumvention of its own obligations.

Admittedly, there is only limited practice regarding the international responsibility of international organizations in the context of international development finance.¹⁹ Since their adoption, however, the Articles on Responsibility of International Organizations have been increasingly brought up—in academic debates and beyond—to substantiate the responsibility of

17 ARIO, art 17.

18 Ibid.

19 Gaja, 'Third Report' 2005, para 28; but see, for example, 'the World Bank's operational policies' concerning the '[...] West African Gas Pipeline Project and its effects on the individuals who were subjected to involuntary resettlement', in Gaja, 'Eighth Report' 2011, para 46; further Reinisch, 'Aid or Assistance and Direction or Control between States and International Organizations' 2010, 66.

international financial institutions.²⁰ Therefore, it would not be surprising if more cases would come up.²¹ If they could be brought before a proper dispute settlement system, it would have to be determined whether the ILC rules already reflect customary international law. The Commission itself has indicated that it is conscious that this cannot be taken for granted. In its general commentary it has stated:

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.²²

2.2 *Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*

The law of treaties is another area in which the Commission has recently addressed the role of international organizations. Between 2012 and 2018 the Commission has worked on the topic 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties'. This topic is not about specific rules of international law, but rather about the methodology of treaty interpretation, with a focus on how subsequent conduct needs or should be taken into account in the interpretation of treaties. The increasing

20 Daugirdas 2014, 1000; See also Radavoi 2018, 1–22, with specific references to the AIIB at 9, 16 ff and 21; Reinisch, 'Aid or Assistance and Direction on Control between States and International Organizations' 2010, 67.

21 Gaja, 'Third Report' 2005, para 28; for a different view Shihata 1992, 35; Gaja, 'Eighth Report' 2011, para 46: 'One could state that an international organization contributing financially to a project undertaken by a State would normally not be responsible for the way the project is run. However, the organization could be aware of the implications that the execution of a certain project would have for the human rights, including the right to life, of the affected individuals. That issue has arisen, for instance, in relation to compliance with the World Bank's operational policies'.

22 ARIO, general commentary para (5).

need to properly interpret treaties over time has led the Commission to work on this topic.²³ Articles 31 (3) (a) and (b) of the Vienna Convention of 1969 provide that treaties shall be interpreted by taking into account subsequent agreements and subsequent practice of the parties which establish the agreement of the parties regarding the interpretation of a treaty. Article 32 provides implicitly that subsequent agreements and subsequent practice which do not establish the agreement of the parties regarding its interpretation may be taken into account.²⁴ Subsequent agreements and subsequent practice are means of interpretation which contribute to an interpretation of treaties that is in conformity with the shared expectations of the parties, as well as with the development a treaty, and its context, over time.

In this context international organizations are sometimes confronted with the problem that their constituent instruments do not explicitly provide for certain activities or solutions to challenges which have arisen during the life of the organization. The classical case concerns the establishment of peace-keeping troops by the United Nations, a practice that was challenged by some member States, but which the International Court of Justice, in its *Certain Expenses* Advisory Opinion, declared to be permissible under the organization's Charter.²⁵

One of the questions which arises here is whether, in addition to the practice of States, the practice of international organizations themselves, as independent legal persons, also contributes to the interpretation of treaties. For many international lawyers this may be an obvious statement, particularly to those who are familiar with European treaties. But it is not that obvious if one looks at the rules on interpretation of the 1969 Vienna Convention. Article 31, paragraph 3, only speaks about the practice of the 'parties', which, in this context, are by definition States. The only provision of the 1969 Vienna Convention which specifically deals with international organizations is article 5, which declares that the Convention also applies to constituent instruments of international organizations and to treaties adopted within an international organization. But international organizations are usually not parties to such treaties. It therefore cannot be taken for granted that their practice contributes to the interpretation even of such a treaty. Relying on judicial and academic sources, the Commission has nevertheless found in conclusion 12, paragraph 3,

23 The original proposal is from 2008: Nolte, 'Treaties over time' 2008, annex A.

24 UNGA Res A/RES/73/202, 3 January 2019; ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' 2018 (SASP), paras 51 and 52, draft conclusion 2, para 4 and commentary thereto, paras (8) and (9).

25 ICJ, *Certain Expenses* 1962.

that 'Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32'.²⁶

This conclusion was, however, the maximum for what could be achieved by consensus among Commission members. The Commission also stated that '[s]ubsequent agreements and subsequent practice of the parties [...] may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument'.²⁷ But this acknowledgement does not include a role for the organization itself and thus does not go beyond conclusion 12, paragraph 3.

It should be stated quite clearly that the Commission was reluctant to acknowledge that the practice of other actors than States play a recognized role in the interpretation of treaties. This can be seen in conclusion 5 according to which,

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.
2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.²⁸

Conclusion 5 leaves open the possibility that an international organization which is a party to a treaty engages in subsequent practice which is relevant as a means of interpretation under articles 31 and 32. But paragraph 2 also says that other conduct does not constitute relevant subsequent practice. This statement does not, however, necessarily apply to international organizations because the commentary states that 'one aspect not dealt with generally [in the conclusions] is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations',²⁹ and thus the treaties which are covered by the 1986 Vienna Convention.

2.3 *Identification of Customary International Law*

The reluctant attitude with which the Commission has treated the role of international organizations in the context of treaty interpretation cannot simply be explained by the complicated interrelationship between the two Vienna

²⁶ SASP, conclusion 12(3).

²⁷ SASP, conclusion 12(2).

²⁸ SASP, conclusion 5.

²⁹ SASP, commentary to draft conclusion 1, para (3).

Conventions on the law of treaties. The reserved treatment was rather a symptom of more profound considerations. This became clear when the Commission dealt with the question of how to determine the existence and content of other rules of customary international law. The project 'Identification of customary international law', like the one on treaty interpretation by subsequent practice, did not concern international organizations specifically, but rather the way in which rules of customary international law are to be identified. But it turned out, during the work on this topic, that the role of international organizations was, again, a crucial question.

As is well known, a rule of customary international law comes into existence if there is, firstly, a 'general practice' that is, second, accepted as law.³⁰ Article 38, paragraph 1 (b) of the Statute of the International Court of Justice and the Court itself³¹ authoritatively require the presence of those two elements, in short: practice and *opinio juris*, despite some academic criticism to the contrary.³² But this two-element approach does not answer the question: whose practice are we talking about—only the practice of States, or also the practice of international organizations and of other actors? The Special Rapporteur on the topic, Sir Michael Wood, addressed this question in his draft conclusion 4, entitled 'Requirement of Practice'. This draft conclusion was one of the most debated and controversial draft conclusions for this topic. It concerns the question whose practice counts.

This question has become important since more and more actors other than States have during the past thirty years become relevant in international affairs. Such actors do not only include intergovernmental organizations, but also non-governmental organizations. Indeed, customary international law is relevant for an organization like AIIB whose General Conditions for Sovereign-backed Loans recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, *inter alia*, '... forms of international custom, including the practice of states and international financial institutions of such generality, consistency and duration as to create legal obligations'.³³

30 UNGA Res A/RES/73/203, 11 January 2019; ILC, 'Identification of Customary International Law' 2018, paras 65 and 66 (CIL), conclusion 2.

31 See, for example, ICJ, *North Sea Continental Shelf* 1969, para 77.

32 See, for example, Committee on Formation of Customary (General) International Law 2000, 16 and 32; Roberts 2001.

33 AIIB, 'General Conditions for Sovereign-backed Loans' 2016, Sect 7.04(vii)(c); see also European Bank for Reconstruction and Development, 'Standard Terms and Conditions' (1 December 2012), s 8.04(b)(vi)(C); CIL, commentary to draft conclusion 4, para (6); emphasis added.

In 2014, when he first addressed the question, the Special Rapporteur proposed the following draft conclusion: 'The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law'.³⁴

By making this proposal, he emphasized the central role of States in the formation and identification of customary international law, despite the increased involvement of other actors in international relations. By using the word 'primarily', however, he did acknowledge that it is not exclusively the practice of States that contributes to the formation of customary international law. This approach was somewhere in between those who advocate an exclusive position for States and those who have a very open understanding regarding whose activities should count as practice.³⁵ It was only in a separate provision that the Special Rapporteur proposed that 'The acts (including inaction) of international organizations may also serve as practice'.³⁶ Some Commission members criticized this proposal, preferring not to acknowledge such a role for international organizations at all.³⁷ Other members, however, did not consider it to be enough that the 'secondary' role of actors other than States would be hidden away under a conclusion that was meant to provide details on forms of practice.³⁸ The Drafting Committee therefore decided to provisionally add the following paragraph 2 to the draft conclusion: 'In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'.³⁹

The Drafting Committee also agreed to ask the Special Rapporteur to provide a fuller assessment of the role of international organizations in the formation of customary international law in his next report.⁴⁰ This was done by the

34 As draft conclusion 5, see Wood, 'Second Report' 2014, 73.

35 See, on the one hand, critical comments by several States in the Sixth Committee, summarized by Wood, 'Fifth Report' 2018, paras 38–9; and, on the other hand, e.g. Boisson de Chazournes 2013, 60–2.

36 Wood, 'Second Report' 2014, 73.

37 See, for example, statements in plenary by Mr. Murphy, ILC, 'Provisional Summary Record of the 3224th Meeting' 2014, 8–9; ILC, 'Provisional Summary Record of the 3251st Meeting' 2015, 3–4; and Mr. Hmoud, ILC, 'Provisional Summary Record of the 3226th Meeting' 2014, 5; ILC, 'Provisional Summary Record of the 3251st Meeting' 2015, 11.

38 See, for example, statement in plenary by Ms. Escobar Hernández, ILC, 'Provisional Summary Record of the 3226th Meeting' 2014, 7–8.

39 Wood, 'Third Report' 2015, para 68; see also ILC, 'Provisional Summary Record of the 3242nd Meeting' 2014, 12.

40 ILC, 'Statement of the Chairman (Identification of Customary International Law)' 2014, 4, 8, 9, 13 and 18.

Special Rapporteur in his third report, in 2015, in which he offered an elaborate explanation for the provisionally adopted paragraph 2 and explained that 'the contribution of [practice of] international organizations as such to the formation and identification of rules of customary international law is most clear-cut in instances where States have assigned State competences to them', most certain in the case of exclusive competences.⁴¹

The role of international organizations nevertheless remained the most contentious issue until the end. After the Commission had adopted paragraph 2 of draft conclusion 4 on first reading in 2016, a number of States criticized this provision sharply as going too far in recognizing a role of international organizations in the formation of customary international law which was independent of that of States.⁴² The Special Rapporteur, in his last report to the Commission in 2018, tried to accommodate the views of those States by proposing to limit the role of international organizations to 'certain cases' in which their practice 'may also' contribute to the formation of customary international law.⁴³

When the Commission discussed this proposal in May 2018, it was aware that, among the reactions of States, those States which are more fully integrated in different international organizations, particularly regional organizations, tended to support the text as adopted on first reading, whereas States which are less integrated in such organizations tended to play down the role of such organizations in the formation of customary international law. The difference between the two approaches probably resulted from the following concerns.⁴⁴ On the one hand, those States which are less integrated in international organizations are concerned that States which are so integrated could increase their relative influence on the formation of customary international law simply by establishing international organizations. On the other hand, those States which are more integrated in international organizations are concerned that they could lose influence on the formation of customary international law if international organizations are not recognized as playing a role in this context, because, after all, such States often do not continue to play an independent, or uncoordinated, role in the areas where the international organization acts on

41 Wood, 'Third Report' 2015, para 77.

42 ILC, 'Comments and Observations (Identification of Customary International Law)' 2018; Wood, 'Fifth Report' 2018, paras 38–9.

43 Wood, 'Fifth Report' 2018, para 47: 'In certain cases, the practice of international organizations may also contribute to the expression, or creation, of a rule of customary international law'.

44 Statement in plenary by Georg Nolte, ILC, 'Provisional Summary Record of the 3400th Meeting' 2018, 9.

their behalf. Both underlying concerns of the two groups of States needed to be met by the Commission.

Ultimately, the Commission concluded that the text, as it had been adopted at first reading, had succeeded in finding an acceptable balance by recognizing and by emphasizing, in conclusion 4, paragraph 1, that is ‘primarily’ the practice of States that contributes to the formation of customary international law.⁴⁵ The insertion of the word ‘may’ in paragraph 2 of the same conclusion would have unnecessarily raised the threshold for the practice of international organizations to be relevant. Indeed, if international organizations act in areas in which their members would otherwise have acted, the practice of the organization needs to count because its member States would otherwise have given up their role in the formation of customary international law by establishing an international organization and letting it act on their behalf. The Commission decided to address the concerns of those States which had demanded a change in the commentary of the set of conclusions.⁴⁶

The role of international organizations was not the only important issue in connection with the ‘Requirement of practice’. The role of non-governmental organizations was also raised. The Special Rapporteur proposed, simply ‘in order to clarify the position in regard to non-State actors, as reflected in the 2014 debate ...to omit “primarily” ... and include a new paragraph 3’, which reads: ‘Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law’.⁴⁷

By making this proposal, he expressed the view of a great majority of members who wished to make it clear that non-governmental organizations are *not* to be recognized as contributing directly to the formation of customary international law. Fortunately, the rather strict way in which the relevance of non-governmental organizations was denied in this proposal was later somewhat nuanced when the Commission followed an example which it had set in the context on its work on the topic, ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’, where the Commission had added a second sentence according to which, ‘Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty’.⁴⁸

The Commission has thereby given some room, for example, to have the practice of the International Committee of the Red Cross and certain other non-State actors be taken into account in the process of identifying customary

45 CIL, conclusion 4(1).

46 CIL, commentary to conclusion 4, paras (4)–(7).

47 Wood, ‘Third Report’ 2015, para 79.

48 SASP, conclusion 5(2).

international law, without, however, putting them on the same level as the practice of States and of international organizations.⁴⁹

2.4 *Possible Future Work: The Settlement of International Disputes to Which International Organizations are Parties*

Questions regarding the relevance of the practice of international organizations for the interpretation of treaties and for the identification of customary international law may arise in very different kinds of disputes. International organizations do not even need to be a party to such disputes. This is different when it comes to the determination of the responsibility of international organizations for internationally wrongful acts. Here, we are confronted with a substantial gap in the international legal system. International organizations do not have standing to initiate contentious proceedings before the International Court of Justice.⁵⁰ The capacity of certain United Nations organs to request an Advisory Opinion from that court is of limited help and does not extend to those who feel aggrieved by acts of the organization. There are agreements which contain arbitral clauses for disputes involving international organizations. Such proceedings are, however, rare and, so far, only four such proceedings have become public knowledge.⁵¹ There are certain internal procedures by which the staff of international organizations can claim certain rights, but all in all, the legal possibilities to involve international organizations in legal proceedings at the international level are quite limited. This has led national courts in some countries to step in,⁵² which in turn risks unequal legal protection which is also detrimental to the unity of the international organization. This concern has led the Commission, in 2016, to put the topic 'The settlement of international disputes to which international organizations are parties' onto its long-term program of work.⁵³ This does not mean, however, that it is certain that the Commission will start to work on the topic in 2019. That depends on whether this or other topics will be given priority.

Another potential topic which specifically relates to international organizations is 'Jurisdictional immunities of international organizations'. After the Commission had discontinued its work on this topic in 1992,⁵⁴ it was

49 SASP, commentary to conclusion 5, paras (9) and (10).

50 ICJ Statute, art 34 (1).

51 Wood, 'Settlement of International Disputes to Which International Organizations Are Parties' 2016, annex A, para 20.

52 For examples from a number of jurisdictions see Reinisch, *Privileges and Immunities in Domestic Courts* 2013.

53 ILC Report 2016 (n 51), para 308; see August Reinisch, 'International Organizations and Dispute Settlement' 2018.

54 See ILC, 'Report on the Work of its Forty-Forth Session' 1992, para. 360.

considered again in a 2006 syllabus prepared for the Commission by its then member, Professor, now Judge, Giorgio Gaja⁵⁵ According to him, the 'very general' character of existing provisions, the 'not infrequent[...]' consideration of this issue before courts of States which are not bound by an agreement, the 'ever-increasing activities of many international organizations', and several domestic court decisions suggested that a 'thorough inquiry into State practice' should be undertaken 'with a view to reaching appropriate conclusions, whether on the basis of codification or progressive development'.⁵⁶ The Commission subsequently included the topic in its long-term programme of work,⁵⁷ meeting with mixed reactions by States.⁵⁸ States which supported the topic pointed to the need of domestic courts for 'greater legal certainty when ruling on the immunity of international organizations' and argued that it 'would supplement the Commission's work with regard to both immunity and international organizations'.⁵⁹ Other States, however, questioned the necessity for the Commission to consider the topic.⁶⁰

At the core of this topic lies the question of the scope and the possible legal bases of jurisdictional immunity of international organizations, in particular whether there is an obligation under general international law to grant immunity to international organizations in the absence of a treaty provision. The debate on this question has so far been inconclusive.⁶¹ The same is true regarding the modalities of giving effect to immunity, possible procedural safeguards, as well as the role of alternative means of dispute settlement.⁶²

3 Conclusion

The early work of the ILC regarding international organizations was ambitious, but not very successful. The recent work has been more modest, but also more relevant. The Commission still strives to derive general rules or criteria from a large variety of international organizations and their practice. But it does not

⁵⁵ Gaja, 'Jurisdictional Immunity', para 3.

⁵⁶ *Ibid.*, para 3–6.

⁵⁷ ILC, 'Report on the Work of its Fifty-Eighth Session' 2006, para. 257f.

⁵⁸ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat, see UNGA Sixth Committee, 'Report on the Work of ILC's Fifty-Eighth Session' 2007, para 126 (c).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Reinisch, 'Privileges and Immunities' 1053; Wood, 'Do International Organizations Enjoy Immunity under Customary International Law' 2014, 287–318.

⁶² See also Gaja, 'Jurisdictional Immunity', para 8.

attempt to push States to conclude conventions. It rather tries to identify general patterns, and to offer appropriate solutions which need to be received and validated in practice. The Commission is aware that the role of international organizations in the international legal system is not always clear and sometimes contested. By adopting this more modest approach the Commission hopefully contributes to an appropriate reflection of the role of international organizations in international law. In that sense, the work of the Commission has, hopefully, become more mature.

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