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

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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.

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’. 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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