The Notion of International Responsibility: A 'Classic' in Times of Change?

María Fernanda Pérez Solla

1. Introduction: The Role of Non-state Actors

The notion of international responsibility requires, as to be put into motion, the discussion of issues such as the respect for international law by international actors and the need for adequate mechanisms to settle disputes.[1] If after the Second War World the international community worried, amongst other things, about human rights, and later, in the seventies, about the environment, then today issues such as terrorism, weapons of mass destruction [2] reveal new and significant urgencies, requiring new solutions.

International law has followed with excessive slowness and lack of reaction the changing environment of international relations. The current system deals almost exclusively with inter-State questions. The impact of non-State actors is still inadequately reflected.[3] They include international organizations, multinational corporations, indigenous peoples, minorities, movements of national liberation,[4] self-proclaimed governmental entities, and private (sometimes one-member) NGOs in the field of human rights, environment and development. They have a very limited status under international law.[5] That leads to their *de facto* impunity.

2. The Problem of the Definition of International Responsibility

The lengthy and careful work of the International Law Commission reveals that the notion of international responsibility is one of the most difficult issues under international law. Another current project of the ILC concerns liability of States for injurious consequences of acts non-prohibited under international law.[6] Moreover, a Project of Code of Crimes against Peace and Mankind failed and served as a starting point for the elaboration of the Statute of the International Criminal Court.

Concerning State responsibility, the ILC concluded that two elements are required: an illicit act under international law and that the act is attributable to the State. The project appears to exclude fault as prerequisite of international responsibility.[7]

---

[1] VADAPALAS, Vilenas, 'Aspects de processus de la responsabilité internationale', 21 *Polish Yearbook of International Law* (1994) 87.

[2] See RUBENSTEIN, Paul, 'State responsibility for Failure to control the export of weapons of mass destruction', 23 *California Western International law Journal* (1993) 319-372.

[3] FRANSSEN, Edith 'Overview of Literature on the Actual Role of non-State actors in the international community', *SIM Special 19* (1991) 183.

[4] ATLAM H., 'International Liberation Movements and international Responsibility', in Simma & Spinedi (eds), *United Nations Codification of State Responsibility* (1987) 35-56.

[5] FLINTERMAN, C., 'Concluding Observations', SIM Special 19 (1991), 187.

[6] ASSANJANI, Mahnoush H. & REISMAN, W. Michael, 'The Quest for an International Liability Regime for the Protection of Global Commons', in Wellens (ed.), *International Law: Theory and Practice* (1998), 469-492.

[7] ARANGIO-RUIZ, Gaetano, 'State Fault and the Forms and Degrees of International responsibility: Questions of Attribution and Relevance', in *Le droit international au service de la paix, de la justice et du développement – Mélanges Michel Virally* (1991), 25-41.

Can we apply the same principles to other subjects of international law? The schema is simple enough as to be applied analogically to other situations. Some important differences should be, however, underlined. In cases of individual criminal responsibility, a particular intentionality of the actor is normally required. Some crimes, such as torture and genocide, include, in addition, specific intent issues.

Damage should be an additional element to be included in case of responsibility argued by non-State actors against States. The damage can be a threshold from which they may originate their responsibility, in order to avoid abuses by these actors.[8]

Concerning the injurious consequences of licit acts under international law,[9] adequate protection should be provided to human and natural life. Any solution that widens the 'responsiveness' under international law should be welcomed.

3. Lack of Adequacy of Primary Rules in International Law

The classification of rules of international law in primary and secondary rules will be followed in this work.[10] The discussion concerning self-contained regimes is also relevant.[11]

Under customary international law, a State may incur an international responsibility for the failure to prevent damage by private parties, if there was fault, for instance, of State organs.[12] But who is responsible in a case where the non-State actor commits an illicit act and, though the corresponding State acted with due diligence, the rules of international law were breached and damage was caused. The current methodology is not adequate to deal with such cases.[13]

---

[8] PRZETACZNICK, Franciszek, 'La responsabilité internationale de l´état à raison des préjudices de caractère moral et politique causés à un autre état' 78 *RGDIP* (1974) 917-974.

[9] BARBOZA; Julio, 'La responsabilité « causal » à la Commission du Droit International', 34 *A.F.D.I* (1988) 513-522; and A/CN.4/540, *International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities) Second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities by Pemmaraju Sreenivasa Rao, Special Rapporteur,* 15 March 2004; BOYLE, Alan E., 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International law: A necessary distinction?', 39 *International and Comparative Law Quarterly* (1990), 1-26.

[10] BLECKMANN; 'General Theory of Obligations under Public International Law', 38*German Yearbook of International Law* (1995), 26-40.

[11] KUYPER, P.J.,'The Law of GATT as a Special Field of International Law: Ignorance, further refinement or self-contained regime of international law', 25 *Netherlands Journal of International Law* (1995), 227-257. See an interesting discussion in WEIL, Prosper, 'Vers une normativité relative en droit international', 86 *Revue générale de droit internationale public* (1982), 5-47. WILLISCH, J., *State responsibility for Technological Damage in International Law* (1987).

[12] FRANCIONI, Francesco 'Exporting Environmental Hazard through multinational enterprises: can the State of Origin be held Responsible?, in F. FRANCIONI and T. SCOVAZZI, *International Responsibility for Environmental Harm* (1991) 275, at 279-80.

[13] JÄGERS Nicola, '*Colloquium on the Liability of Multinational Corporations under International Law', 29 and 30 April 1999, Rotterdam, The Netherlands'* I *International Forum du droit international* 181-183, 183.

Consequently, some actors enjoy impunity (euphemistically called 'immunity') because of the lack of primary rules concerning them.

For instance, international organizations such as the ILO can criticize labour practices of Member States; consequently, the same rules should apply to the organization. International organizations execute projects that can cause environmental damage, but they can hardly be considered responsible for damage caused by their advice.[14] The logic of the Project of the ILC finally adopted by the General Assembly is that the responsibility for the acts of international organization falls on the State in which the international organization committed the illicit act.[15] The project does not mean that other actors in the international arena cannot be held internationally responsible. For that reason, the work of the ILC on international responsibility and not liability of international organizations is to be welcomed.[16]

If we turn back to the work developed concerning international organizations, the ILA has preferred the notion of accountability concerning international organizations, that includes three components: the daily monitoring of the fulfilment by international organizations of their responsibilities, tort liability, and responsibility for breaching a rule of the applicable law.[17] As we have discussed above, the ILC has preferred to refer to responsibility.

Moreover, multinational corporations profit from the 'liberalization' of international relations, consequently, a core of basic standards of international law should be respected by them: international human rights law, international humanitarian law, international environmental law, international labour law. The case of the maquiladoras,[18] causes concerns in the field of human rights.[19] The same happens concerning oil companies in Nigeria.[20]

A clear example addressing this problem of multinational corporations is Art. 35 of the Charter of the Organization of American States, as amended by the Protocol of Cartagena de Indias of 5 December 1985:

'Transnational enterprises and foreign private investments shall be subject to the legislation of the host country and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries'

This rule assumes that the host country, in abstract, is able and willing to regulate the activities of transnational enterprises and foreign private investments. The lack of investment and the fear of pushing down the economy impede efficient domestic regulation. International law should not ignore the problem and include specific solutions.

---

[14] The New York Times, *A misguided World Bank Project*, Editorial, 05.07.2000.

[15] MENG, Werner ,Internationale Organisationen im völkerrechtlichen Deliktsrecht', 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht'* (1985), 329

[16] A/CN.4/541, *Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur,* 2 April 2004.

[17] WELLENS; Karel 'ILA Committee on Accountability of International Organizations', *International Law Forum du droit international*, 107-109, 108.

[18] Human Rights Watch, 9 *Corporations and Human Rights. Freedom of Association in a maquila in Guatemala*, (1997) 3..

[19] COATS, Stephen, 'Made in Guatemala Union Busting in the Maquiladoras', *Multinational Monito*r (1991) 23.

[20] The New York Times, *Shell Game in Nigeria*, December 3, 1995; The New York Times, *Blood and Oi*l, February 13, 1996

Multinational corporations were the object of attention of some international efforts. The OECD Council on 27 November 1985 to the OECD Guidelines for multinational enterprises provides that MNCs should in particular assess and take into account in decision–making the foreseeable consequences of their activities which could significantly affect the environment, cooperate with competent authorities *inter alia*, by providing adequate and timely information regarding the potential impacts on the environment and on environmentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole, and take appropriate measures in their operations to minimize the risk of accidents and damage to the environment, and to cooperate in mitigating adverse environmental effects. Consequently, the actor is liable towards the State, and there is no international responsibility.

The Commission on Transitional Corporations of the ECOSOC considers that the existing law and praxis do not yet offer any clear rules for the allocation of legal responsibilities of States for transboundary environmental harm.

However, multinational corporations could implement and promote human rights due to their capacity to introduce and impose values in the organization of the work, in the professional relations and in the juridical instruments as to execute their activities.[21]

In a recent example, the 1998 Declaration on fundamental principles and rights at work of the ILO goes beyond inter-State action, towards the privatization of the international norms of work through codes of conduct and private labels, as well as investment conditions.[22] In 1977 the UN had drafted in the United Nations Code of Conduct on Transnational Companies. Later this work stalled. Also in 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The only enforcement mechanism is persuasion by officials and embarrassment caused by the media. Codes of conduct prove to be insufficient. Amnesty International has proposed to include the responsibility of multinational corporations concerning personnel practices and policies, security arrangements, etc.[23]

Weissbrodt prepares, in the framework of the Sub-Commission on the Promotion and Protection of Human Rights, a Draft Code of Conduct, that includes war crimes, crimes against humanity and other crimes, non-discrimination and harassment, respect for national sovereignty and self determination, healthy and safe working environment, fair and equal remuneration, hours of work, freedom of association, collective bargaining, consumer protection, environment.[24]

Another good example is the 1977 Declaration of tripartite principles about multinational corporations and social policy of the ILO, paragraph 8, that asserts that all the parties should respect the Bill of Human Rights, as well as the Constitution of the ILO. The OECD has adopted Principles relative to the government of the business, presented to the Council of Ministers of the OECD, May 1999.

The most important existing exception to the above-mentioned efforts without success is the case of international criminal responsibility of the individual,[25] an exceptional system.

---

[21] PICARD, Lois, 'Les acteurs de la société civile et le respect des droits de l´homme', *Institut international des droits de l´homme*, Strasbourg, 30e Session, Juillet 1999.

[22] MAUPAIN, F. 'The International Labour Organization, Social Justice and Globalisation', *Recueil des Cours de l´Académie de Droit Internationa*l, 1999

[23] Amnesty International Report ACT 70/01/98, *Outreach Work General Human Rights Principles for Companies*, January 1998.

[24] E/CN.4/Sub.2/2000/WG.2/WP.1/Add. 1, 25 May 2000.

[25] GOWLLAND-DEBBAS, Vera, 'Security Council Enforcement Action and Issues of State responsibility', 43 *International and Comparative Law Quarterly* (1994), 55-98.

Probably one of the reasons of this failure is that the discussion concerning non-State actors has been wrongly termed: subjectivity under international law. The problem is how to include all the relevant actors in the framework of legality.

Another initiative that we should mention are labels and conditioning to investment.[26] In addition, some non-State actors have also been tried before national courts of another State, in particular, in the United States of America,[27] including Unocal, Texaco, Degussa, Ford, Daimler-Chrysler, Volkswagen and different European banks.

The Global Compact, signed in July 2000 by 50 multinationals, 12 labour associations and NGOs, commits them to support human rights, eliminate child labour, allow free trade unions and refrain from contaminating the environment.[28] Nine principles were agreed. The type of relation is a partnership.[29] The Security Council has also addressed in many different resolutions non-State parties.[30]

We shall include some proposals in order to address these issues:

- To permit international organizations in general, movements of national liberation, minorities, multinational corporations and international non-governmental organizations to assume the obligations included in treaties protecting human and natural life: international humanitarian law instruments, international human rights instruments, international environmental law and international labour law, for instance, via a protocol to the pertinent instruments. Reservations should not be permitted.
- To develop in the monitoring bodies chambers dealing exclusively with non-State actors.
- Individual communications against international organizations could only be presented before monitoring bodies, when they exist, if a previous complaint had been submitted to the international organization without a favourable reply.

---

[26] For instance, Phillips – Van Heusen, *'A shared commitment- Requirements for Suppliers, Contractors, Business Partners'. The CERES Principles, the Keidanren Charter for Good Corporate Behaviour, the FIFA Labour Code, the Code of Labour Practices for the Apparel Industry Including Sportswear (*October 1997*)., IFBWW – IKEA agreement on rights of workers., Code of Vendor Conduct of GAP, NIKE Code of Conduct*

[27] BOYD, Kathryn L. 'Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level', *Birgham Young University Law Review* (1999) 1139; ANDERSON, M.R. 'State obligations in a Transnational Dispute: the Bhopal Case', in Budler (ed.),*Control over Compliance with International law* (1991)

[28] KAHN, J., 'Multinationals sign UN Pact on Rights and Environment', *The New York Times,* 27.07.2000.

[29] PAUL, James A., ,Der Weg zum Global Compact- Zur Annäherung vom UNO und multinationalen Unternehmen', in BÖHL, Tajia (ed.), *Die Privatisierung der Weltpolitik* (2001), 118.

[30] See for instance SC Res. 794, 3 December 1992; SC Res. 883, 16 November 1993; SC Res. 886, 18 November 1993, all concerning Somalia; SC Res. 812, 12 March 1993; SC Res.912, 21 April 1994, Resolution 918, 17 May 1994 concerning Rwanda; and the following resolution concerning international organizations of regional character, SC Res. 1366, 30 August 2001. *See* also GA Resolution 54/200, Unilateral economic measures as a means of political and economic coercion against developing countries, 25 August 1999, §2, referring to the international community.

- If the non-State actor acts independently and without obeying orders from another non-State actor in a particular State and the State where the non-State actor is has an adequate legal system including due process of law, the non-State actor cannot be brought to the international arena. The issue should be solved in the internal arena and, if it is the case, the State could be brought before international monitoring bodies.

6. Conclusions

International law should be an effective problem-solving legal system as regards, in particular, problems concerning human life and the environment. If international law cannot prevent the interaction among international actors from negatively affecting human and natural life, international law misses important aspects and problems of current concern. International law cannot be reduced to a system of dealing only with inter-State issues. Times have changed and problems reveal a higher degree of complexity, requiring a more complex system of solutions.

International relations have qualitatively changed. We are no longer dealing with sovereigns who are defending quasi-patrimonial rights, privileges and immunities over a territory. The international community is composed of almost 200 States of very different size and power. This should be taken into account when re-thinking the system of international responsibility.

How to develop such a system? If many States try to avoid being engaged by international law rules, this is easier for non-State actors. However, if there are no mechanisms to try to encompass these non-State actors, there is no starting point.

As we have underlined above, the important issue consists of widening fundamental primary rules to non-State actors. We have also agreed with the position that permits liability under international law in cases where damages have taken place. Finally, the actors in the international arena should abide by mechanisms guaranteeing the compliance with the obligations assumed.