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Introduction: First Views at the Articles on The Responsibility of International Organizations

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In 2011 the International Law Commission (ILC) adopted the Articles on Responsibility of International Organizations (ARIO).[1] Subsequently, on 9 December 2011, the UN General Assembly adopted by consensus Resolution 66/100 in which it "takes note" of these articles.[2] This is therefore an appropriate moment for stocktaking, as the text of the ARIO has now been finalized, after a decade of discussions within the ILC, in the Sixth Committee of the UN General Assembly, in academic conferences and doctrine. In previous issues, IOLR has already paid attention to a number of specific topics relating to the ARIO.[3] In addition, an earlier

1) UN Doc. A/66/10. The text of these articles is available online at http://doi.org/10.1163/15723747-00901010; http://booksandjournals.brillonline.com/content/15723747/9/1 as a supplement to this Forum.

2) For a summary of the discussion held in the Sixth Committee in 2011 in relation to ARIO, see UN Doc. A/CN.4/650/Add.1.

3) *See, e.g.*, Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', 2011, No. 2, pp. 391-476; Eleni Micha, 'The Fight Against Corruption Within Peace Support Operations: In Search of the Responsibility of International Organizations', 2008, pp. 85-118; Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 2007, pp. 91-119; Pieter Jan Kuijper and Esa Paasivirtaa, 'Further Exploring International

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Forum has examined in particular provisions of the ARIO relating to the relationship between the responsibility of international organizations and membership responsibility.[4] For this Forum, we have collected a wide variety of short opinions on the outcome of the ILC work on this topic. Authors were given pretty much carte blanche to discuss key questions such as the points of criticism that have been put forward in relation to the ARIO, as discussed in various reports by ILC Special Rapporteur Gaja and in the 2011 ILC report: is there sufficient practice for these draft articles, or is this too much progressive development of law? Is this not too much a copy of the articles on state responsibility? Is it appropriate to have one set of draft articles in view of the existing wide variety of IOs? But authors could also write on other general or specific issues they deemed important to note and that perhaps had received less attention so far. There is no doubt that in the next few years long articles will be written on the ARIO. Our objective for the current Forum was however to collect short first views.

The seven contributions to this Forum express diverging views on the ARIO. Some question the need for these articles, others see some merit in them as (small) contributions to increased accountability of international organizations. Considerable attention is paid to the criticism that the ARIO is too much the product of a 'copy paste' exercise, in which the articles on state responsibility have been taken too much as a starting point, neglecting the differences between states and international organizations, and also between international organizations. According to Amerasinghe, "the parallelism established between the provisions of the DARIO and the ILC Draft Articles on the International Responsibility of a State is acceptable and correct". Wouters and Odermatt are of the view that the criticism that the ILC "has 'slavishly' copied from the ASR might be overstated; they rather criticize the ILC for giving "little justification for basing its work on rules developed in the context of state responsibility.

Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations', 2004, pp. 111-138.

4) *See* Volume 7, No. 1, 2010 with the following contributions: Pieter Jan Kuijper, 'Introduction to the symposium on Responsibility of International Organizations and of (Member) states: Attributed or Direct Responsibility or Both?', pp. 9-33; Niels Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations', pp. 35-48; Esa Paasivirta, 'Responsibility of a Member state of an International Organization: Where Will It End?', pp. 49-61; and August Reinisch, 'Aid or Assistance and Direction and Control between states and International Organizations in the Commission of Internationally Wrongful Acts', pp. 63-77.

This approach assumes that IOs and states can be treated in a similar manner since they are both international legal persons". d'Aspremont takes the view that the ILC is "- to a large extent unfairly – criticized for what was then seen as a cut-and-paste exercise" (footnote 3), but also demonstrates that the ARIO, by using the state responsibility articles as a starting point, has inherited the latter's conceptual deficiencies: "the minor and almost invisible defects at the level of the ASR have swollen on the occasion of their transposition to the responsibility of international organizations". Nedeski and Nollkaemper also do not share the criticism that the ARIO have been a "copy and paste exercise". Ahlborn shows that the ARIO "do actually not follow the example of the ASR in many key provisions" and is of the view that "instead of overemphasizing the differences between States and international organizations by departing from the ASR, … the ILC should have identified the common ground between States and international organizations as a precondition for the use of analogies".

The question may emerge what *should* have been used as a basis for the ILC work on the ARIO, if this should not be the articles on state responsibility, in the absence of rich practice of international organizations in the responsibility area. If the ILC would not have developed the ARIO on the basis of the state responsibility articles, it would certainly be criticized even more for creating the ARIO rules out of the blue. At the same time, with the benefit of hindsight, the ILC could at the start of its work on the ARIO have devoted more attention to the fundamental question of the differences between states and international organizations, even though they are both international legal persons, and the implications of using the state responsibility articles as a starting point.

Yet, it is obvious that the ARIO had to deal with questions that simply do not occur if only states are involved. It is in particular the complex relationship between the international organization and its Member States that proved to be difficult to grasp. In his contribution Sari points to the choice in the ARIO to focus on the 'effective control' test to decide on the division of responsibilities in the case of peace-keeping missions. As he argues, the Commentary to the ARIO distinguishes between state organs that are fully seconded to an international organization and state organs which to a certain extent still continue to act as organs of their home state during their secondment. He questions whether the conduct of national contingents serving in peace operations must be attributed with reference to factual criteria alone.

The relevance of more clarity regarding the different roles an international organization and its Member States play at the global scene was underlined in 2011, when the Court of Appeals in The Hague ruled that The Netherlands was responsible for some actions of its military personnel as part of the UN military mission during the Srebrenica crisis in 1995.[5] Indeed, as Von Bogdandy and Steinbrück argue in their contribution: "The Draft Articles on Responsibility of International Organizations […] leave the victims of human rights violations largely overlooked." In their view the ARIO should have taken the potential role of domestic courts into account.

Over the years, similar questions have been raised in relation to the position of the European Union, in which the relationship between the organization and its Member States is perhaps even more complex. Insight in this division has become more important in view of the increasing role of the EU in global security governance.[6] Due to its complex and to some extent *sui generis* nature, the question to which extent the EU would in general be covered by the rules on international legal responsibility has led to some debate. Most contributions focused exclusively on the European Community,[7] but questions returned in relation to the European Union, whose international legal status was clarified by the Lisbon Treaty. It has been observed that the ARIO make no mention of the notion of 'regional economic integration organization' (REIO).[8] This notion was invented to permit an organization like the EU to participate in multilateral treaties

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5) Court of Appeals The Hague, *Mustafic* and *Nuhanovic* [2011] LJN BR0132.

6) See more extensively R.A. Wessel and L. den Hertogh, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?', in M. Evans and P. Koutrakos (eds.), *International Responsibility: EU and International Perspectives*, Oxford: Hart Publishing, 2013 (forthcoming).

7) *See* E Paasivirta and PJ Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organisations', (2007) 36 *Netherlands Yearbook of International Law 2005*, p. 169; S Talmon, 'Responsibility of International Organizations: Does The European Community Require Special Treatment?', in M Ragazzi (ed), *International Responsibility Today* (Leiden/Boston, Martinus Nijhoff Publishers, 2005), p. 405; F Hoffmeister, 'Litigating Against the European Union and its Member States', (2010) *European Journal of International Law* p. 723.

8) The 2004 Energy Charter Treaty (Art. 3) defines a REIO as "an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters".

and conventions as a contracting party alongside states.[9] In the absence of special rules for the EU, even this organization's responsibility will have to be assessed on the basis of the general ARIO.

Indeed, by now is has become widely accepted that the EU as such may bear international responsibility for an internationally wrongful act.[10] It seems to fit the definition of an international organization used in the ARIO: "For the purposes of the present draft articles, the term 'international organization' refers to an organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to States, other entities." This suggest as a point of departure that the EU is responsible for its own internationally wrongful acts. Yet, the EU is a rather special international organization and the division of external competences is not only complex but also dynamic: due to an increasing activity of the EU, competences may shift from the Member State to the organization level. One of the key questions is therefore how to divide the responsibility between the EU and its Member States. The responsibility of international organizations in relation to the role of their Member States is dealt with in Article 17 of the ARIO.[11] What, for instance, happens if the Union adopts a decision which would force (or authorize) the Member States to commit an internationally wrongful act? The rules suggest that the European Union *itself* could incur international responsibility both in the case of binding decisions addressed to the Member States and when the latter act because of an authorization by the Union. It is important to realise that this Article applies to 'circumvention' *by the Union* and that hence the conduct of the 'implementing' Member State itself need not necessarily be unlawful; it is the binding or 'authorising act' of the Union that, if it were to implement that itself, should qualify as unlawful.[12] At the same time, Member States may be responsible once they hide behind an international organization (Article 61).

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9) Paasivirtaa and Kuijper, *supra* note 4, p. 205.

10) Cf. Hoffmeister, *supra* note 8, p. 724.

11) *See* N.M. Blokker, 'Abuse of the Members: Questions concerning Draft Art. 16 of the Draft Arts. on Responsibility of International Organizations', (2010) *International Organizations Law Review*, p. 35; J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', (2007) *International Organizations Law Review*, p. 91.

12) Draft Arts. with commentaries, above, pp. 40-42.

This Forum presents a number of first views of the ARIO. We have no doubt that further discussion will follow. The proof of the pudding is now in the eating: these articles will now lead their own life, and practice will demonstrate how useful they are. According to General Assembly Resolution 66/100, the ARIO will be put on the agenda of the 2014 regular session of the Assembly. It would be useful if, on that occasion, not only states could give their comments, but also international organizations themselves. After all, this exercise is also about their responsibility.