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The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the 'Copy-Paste Approach' –

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THE USE OF ANALOGIES IN DRAFTING THE ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

– AN APPRAISAL OF THE 'COPY-PASTE APPROACH' –

Christiane Ahlborn[*]

Introduction

Ten years after the International Law Commission (ILC) concluded its work on the topic of State responsibility in 2001, the ILC successfully adopted the Articles on the Responsibility of International Organizations (ARIO). While it took the ILC fifty years and five Special Rapporteurs to complete the Articles on State Responsibility (ASR), Special Rapporteur Giorgio Gaja and the ILC have to be congratulated for finalizing a comprehensive set of Articles within less than a decade. And, yet, it has to be recognized that the speedy completion of the ARIO was facilitated by the fact that the ILC could rely on its previous work on State responsibility. When it began to draft the ARIO, the ILC noted that the ASR would serve as "a source of inspiration, whether or not analogous solutions are justified with regard to international organizations."[1] The ILC thus modeled its ARIO on the different provisions of the ASR, with the necessary terminological modifications, just as it had previously drawn on the 1969 Vienna Convention on the Law of Treaties between States for the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[2]

Although the reliance on the ASR allowed for the expeditious completion of the ARIO, it has nonetheless also resulted in substantial criticism by international organizations, States, and scholars regarding the 'copy-paste approach' employed by the ILC.[3] In particular, the ILC has been criticized for

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[1] *ILC Report, Fifty-fourth Session,* UN Doc. A/57/10 (2002), p. 232 (para. 475).

[2] *See extensively* C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007).

[3] *See* the Eighth Report on Responsibility of International Organizations by the Special Rapporteur, Giorgio Gaja, UN Doc. A/CN.4/640 (2011), p. 5 (para. 5). See also J. Alvarez, "International Organizations: Accountability or Responsibility?" Address delivered at the Canadian Council of International Law, 27 October 2006, p. 2, <www.asil.org/aboutasil/documents/CCILspeech061102.pdf>, last visited 15 October 2012, characterizing the drafting of the ARIO as "a 'find and replace' exercise in which some of the

not taking sufficient account of the differences between States and international organizations, and of the diversity among different international organizations. Commenting in the UN's Sixth Committee on the ARIO on second reading, States and international organizations thus unsurprisingly emphasized the importance of *lex specialis*,[4] and some international organizations even requested that the ARIO be sent back to the ILC for further refinement.[5] While international organizations are not entitled to vote in the UN General Assembly, the ARIO could risk failing in the long term if they are not perceived to be authoritative by the actors most concerned with them.

In view of the adoption and future reception of the ARIO on second reading, this contribution seeks to offer some reflections on the 'copy-paste narrative' that has characterized the process of drafting the ARIO. On the basis of a brief introduction to the concept of analogies in international law (Section 1), it is explained that the use of analogies is not to be equated with a mechanical exercise of copy-pasting legal rules; rather, it constitutes a method of legal reasoning based on a principled assessment of relevant similarities and differences. By comparing both sets of Articles drafted by the ILC, it will be demonstrated that the ARIO actually do not follow the example of the ASR in many key provisions. Interestingly, much of the critique of the ARIO has been directed against these dissimilar provisions, especially when they concern the relations between an international organization and its member States (Section 2). Since this critique is mainly driven by considerable uncertainty as to the determination of the responsible actor(s), it will be suggested that the ILC should have used closer analogies with the ASR in order to enhance the overall coherence of the law of international responsibility (Section 3). This is because, as argued in conclusion, the corporate complexity of international organizations and States may necessitate a unified set of Articles on International Responsibility (Section 4).

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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".

[4] *See* UN Doc. A/C.6/66SR.20 (2011), p. 14 (para. 90) [World Bank on behalf of many other international organizations] and p. 20 (para. 22) [United States]; and UN Doc. A/C.6/66SR.18 (2011), p. 5 (para. 24) [UN Legal Counsel].

[5] *See* the comments by the United Nations Educational, Scientific and Cultural Organization on behalf of a considerable number of other international organizations, UN Doc. A/C.6/66SR.20 (2011), p. 15 (para. 93).

1. The Use of Analogies in International Law

The use of analogical reasoning generally involves the application of a legal rule covering a specific case to a different case that has similar characteristics but is not dealt with by the law.[6] Accordingly, the existence of a 'gap' in the law, which cannot be filled by other interpretational means, is a central precondition for reasoning *per analogiam*. As such, analogies are mostly utilized by courts to fill the gaps left by the lawmaker. Since the decentralized international legal order continues to be rudimentary in many respects,[7] it is not surprising that international courts and tribunals have made use of analogies with domestic law or other rules of international law in their case law.[8] However, as Lauterpacht showed in his well-known 1927 analysis, "Private Law Sources and Analogies of International Law", analogies are used not only by judicial bodies, but have also influenced the development of international law on a broader scale, including the law of international responsibility.[9]

The question of whether scholars or courts acknowledge the use analogies is closely linked with diverging views on the sources of a particular legal system.[10] While adhering to State will as the ultimate source of international law, positivists frequently reject the use of analogies with domestic law in the absence of State practice, emphasizing the autonomy of the sources of international law. In contrast, naturalist scholars claim the existence of certain meta-principles or rules to emphasize the completeness of the international

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[6] *See generally* S. Vöneky, 'Analogy in International Law', in *Max Planck Encyclopaedia of Public International Law* (2009), <www.mpepil.com>, 1 February 2012, and G. Lamond, 'Precedent and Analogy in Legal Reasoning' in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), <http://plato.stanford.edu/archives/fall2008/entries/legal-reas-prec/>, 1 February 2012.

[7] Yet, the problem of fragmented materials and decision-making instances is not specific to the international legal order *see* Lamond, *supra* note 6.

[8] *See*, for instance, *Military and Paramilitary Activities in and against Nicaragua* case *(Nicaragua v. United States of America)*, 26 November 1984, International Court of Justice, ICJ Reports 1984, p. 420 (para. 63); or *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, 15 November 1994 [unadopted].

[9] *See* H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Co., London, 1927). For a different view *see* H. Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 *Recueil des cours* pp. 265-405, but *see also* J. Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL pp. 949-971.

[10] Due to the limited scope of this article, the following juxtaposition of different views is necessarily simplified. For a more detailed discussion *see* Lauterpacht, *supra* note 9, pp. 3-42 and also the discussion by M. Koskenniemi, *From Apology to Utopia. From Structure of International Legal Argument. Reissue with a new Epilogue* (CUP, Cambridge, 2005), p. 52 *et seq*.

legal order.[11] In this context, the use of analogies is seen as a means of achieving coherence and consistency with overarching principles or values, and not as an end in itself.[12] Some scholars have even contended that no clear line can be drawn between an argument from analogy and from principle, because principles are necessary to justify the similar treatment of different cases.[13]

For present purposes, it can be noted that the use of analogies presupposes at least generally accepted reasons or a common rationale that can be applied to both cases in question.[14] In fact, this justificatory reference to general principles or reasons lays bare that the use of analogies in law is more a method of reasoning rather than a simple exercise of 'copy-pasting'.[15] If an argument from analogy is broken down into separate steps, the identification of the similarities between the case covered by the law and the case at hand first requires a comparison between these two cases. Following this comparison, the common underlying rationale or principle serves to justify why certain differences are irrelevant, and why the similarities give rise to legally relevant analogies.[16] In this sense, repeated reference to general principles or common underlying reasons in different cases enhances the predictability and replicability of particular legal decisions, and also the coherence between different rules and the legal order as a whole.[17]

2. The Lack of Analogies between the ARIO and the ASR

While this contribution does not discuss the controversial issue of domestic law analogies in relation to the sources of international law, the arguments advanced in the general debate on the use of analogies are evidently also

[11] As Lauterpacht argued in a work subsequent to his study of private law analogies, law "is originally and ultimately not so much a body of legal rules as a body of legal principles." H. Lauterpacht, *The Function of Law in the International Community* (OUP, Oxford, 2011 [first published in 1933]), p. 110.

[12] On the attributes of coherence and consistency with general principles or values as important justifications for analogical reasoning *see* Vöneky, *supra* note 6, para. 6; Lamond, *supra* note 6; N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Law Series, Oxford, 1978), p. 152ff; C. Sunstein, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* pp. 741-791, at pp. 778-9, also arguing that the requirement social consensus or homogeneity for reasoning by analogy is overstated (pp. 769-73).

[13] *See* MacCormick, *supra* note 12, p. 161 and also R. Dworkin, 'In Praise of Theory' (1997) 29 *Arizona State Law Journal* pp. 353-376, p. 371, stating that "analogy without theory is blind".

[14] On this debate *see generally* Lamond, *supra* note 6; and Vöneky, *supra* note 6, para. 23.

[15] On the methodogical dimension of the use of analogies in law *see* in particular Sunstein, *supra* note 12.

[16] *See* MacCormick, *supra* note 12, pp. 120 and 163.

[17] On the importance of repetition by a steady line of authorities giving weight to a particular principle *see* MacCormick, *supra* note 12, pp. 160-161.

reflected within specific fields of international law, such as the law of international responsibility.[18] When the ILC began its work on the responsibility of international organizations, it stressed "the need for keeping some coherence in the Commission's output".[19] However, the new general commentary to the ARIO on second reading states that the ARIO "represent an autonomous text".[20] In addition, the ILC underlines that the transposition of rules from the ASR has not taken place on the basis of a general presumption that the same principles apply to international organizations.[21] Indeed, although the ARIO may follow the general model of international responsibility as designed by the ILC in its work on State responsibility, a more detailed examination reveals that a number of key provisions in the ARIO do not actually replicate the ASR.

For instance, a significant departure from the ASR lies in the ILC's concept of "rules of the organization", to which the ARIO refer in numerous provisions.[22] Article 2(b) of the ARIO defines these rules of the organization as "in particular, the constituent instruments, decisions and resolutions and other acts of the international organization adopted in accordance with those instruments, and practice of the organization". Although the term "rules of the organization" replaces the term "internal law of the State" in the corresponding provisions of the ASR, the ILC explains that the rules of the organization do not only have an internal legal nature. Referring to the treaty nature of the constituent instruments, the ILC decided not to take "a clear-cut view" on the nature on the rules of the organization.[23] This indecisive position on the legal nature of the rules of the organization is epitomized in the new Article 5 of the ARIO on the characterization of the internationally wrongful act. Although Article 5 seems to replicate Article 3 of the ASR, it omits the crucial second sentence on the irrelevance of the internal law for the characterization of an act as wrongful under international law.[24]

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[18] In fact, this is the classical way in which analogies are used in domestic legal reasoning.
[19] *ILC Report, Fifty-fourth Session,* UN Doc. A/57/10 (2002), p. 232 (para. 475).
[20] *ILC Report, Sixty-third Session*, UN Doc. A/66/10 (2011), p. 67 (para. 4).
[21] *ILC Report, Sixty-third Session*, UN Doc. A/66/10 (2011), p. 67 (para. 4).
[22] The 'rules of the organization' are mentioned in the following provisions of the ARIO: Article 2(b) on the use of terms; Article 6(2) on attribution of conduct; Article 10(2) on the existence of the breach of an international obligation; Article 22(2) and (3) on countermeasures; Article 32 on the relevance of the rules of the organization; Article 40 on ensuring the fulfilment of the obligation to make reparation; Article 52 on conditions for taking countermeasures by members of an international organization; and Article 64 on *lex specialis*.
[23] *ILC Report, Sixty-third Session*, UN Doc. A/66/10 (2011), p. 98 (para. 7).
[24] On the discussion regarding this point during the second reading of the ARIO, *see* the ILC, Statement of the Chairman of the Drafting Committee, *Sixty-third Session* (2011), <http://www.un.org/law/ilc/>, 1 February 2012, p. 8.

The importance that the ILC assigns to the rules of the organization in the determination of responsibility is further underlined by Articles 17 and 61 of the ARIO. The provisions do not exactly mirror each other, but pursue similar objectives in addressing the situation in which an international organization or a member State circumvents its international obligations. More precisely, Article 17 of the ARIO provides that an international organization incurs responsibility if it circumvents one of its international obligations by adopting a decision or authorization binding its members to commit an act that would be internationally wrongful if committed by that international organization.[25] It is noteworthy that the ILC thereby departed from its usual approach of abstaining from characterizing the internal acts of the responsible subject, whether as decisions, authorizations, or recommendations.[26] Conversely, Article 61 of the ARIO stipulates that a State member of an international organization incurs international responsibility "if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation". Since Articles 17 and 61 of the ARIO do not have corresponding provisions in the ASR, it seems that the ILC did not find the situation of circumvention to be covered by any of the existing provisions on the responsibility of one actor in connection with the act of another, i.e. aid and assistance, direction and control, or coercion.

Another important area in which the ARIO diverge from the ASR is that of the rules on the attribution of conduct. At first sight, the rules on the attribution of conduct in the ARIO appear to be similar to those in the ASR. In particular, Article 6 of the ARIO, which lays down the general rule on attribution of conduct, resembles Article 4 of the ASR. However, a second look shows that the ARIO do not distinguish between situations of normative (organic) control and effective (factual) control in the same way as the ASR. The ASR differentiate between the conduct of organs or other actors that exercise governmental authority, covered by Articles 4 to 7, and the conduct of agents or private persons under the effective control of the State, which is

[25] In the case of an authorization, paragraph 2 adds the additional condition that the act committed must have been committed because of that authorization.

[26] This approach is evidently based on the prevailing assumption that the internal law of the State is a fact under international law, in light of the ruling of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)*, 25 May 1926, Permanent Court of International Justice, *PCIJ Series A (vol. 7),* p. 19.

addressed in Article 8.[27] Accordingly Article 7 of the ASR, concerning *ultra vires* conduct, only extends to the conduct of organs but not to that of agents, i.e. private persons. In contrast, the ARIO do not make this distinction. After having added a new definition of "organ" in Article 2(c) of the ARIO on second reading, the rules on attribution of conduct in Articles 6 to 8 of the ARIO now continuously – albeit consistently – refer to the conduct of "agents or organs".

The ARIO may thus appear to be a copy of the ASR, but a closer inspection reveals that a number of important provisions in the ARIO differ from the ASR. It seems that the ILC has answered the disapproving voices that have stressed that international organizations are too different from States to transplant the rules of the ASR into the ARIO. It is interesting to note, however, that the more specific criticism regarding the ARIO has been mostly geared towards provisions that diverge from the ASR.[28] In commenting on the ARIO on first reading, international organizations in particular criticized the unclear legal nature of the rules of the organization, which leaves the ARIO with a fluctuating scope of application.[29] Furthermore, the question has been raised as to how Articles 17 and 61 of the ARIO in their various versions can be delineated from the existing provisions on aid and assistance, direction and control, and coercion.[30] And, lastly, the rules on the attribution of conduct, and especially the test of effective control, have led to controversial court decisions, most notably in the case of *Behrami and Saramati* and subsequent jurisprudence of the European Court of Human Rights.[31]

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[27] For a discussion *see* C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', (2011) 8 IOLR pp. 397-482.

[28] I have already made this observation elsewhere. *See* J. d'Aspremont and C. Ahlborn, 'The International Law Commission Embarks on the Second Reading of the Draft Articles on the Responsibility of International Organizations', EJIL:Talk!, 30 April 2011, <http://www.ejiltalk.org/the-international-law-commission-embarks-on-the-second-reading-of-draft-articles-on-the-responsibility-of-international-organizations/>.

[29] *See* the critical comments on the ARIO on first reading by international organizations, UN Doc. A/CN.4/637 (2011), pp. 17 and 39; in particular the United Nations, UN Doc. A/CN.4/637/Add.1 (2011), pp. 6-7 (paras. 2-7), but also by governments, UN Doc. A/CN.4/636 (2011), p. 15 (Portugal).

[30] On second reading, the ILC arguably deleted the most controversial part of Article 17 whose paragraph 2 on first reading allowed for the possibility that an international organization incurs responsibility as result of a recommendation if its member acts upon that recommendation. For discussion of Article 17 of the ARIO on second reading *see* the contribution by N. Nedeski and A. Nollkaemper in this issue of the IOLR. On Article 61 on first reading *see* in particular J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 IOLR p. 99; and E. Paasivirta, 'Responsibility of a Member state of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations', (2010) 7 IOLR pp. 49-61.

[31] *See Behrami and Behrami v. France* (application no. 71412/01) and *Saramati v. France, Germany and Norway* (no. 78166/01), 2 May 2007, European Court of Human Rights (Grand

3. The Need for Analogies between the ARIO and the ASR

Although all of these provisions have been critiqued for different reasons, it can be observed that this criticism has generally been driven by substantial uncertainty as to the determination of the responsible actor, especially in situations where international organizations interact with their member States. Despite the laudable objectives to draft provisions specific to the responsibility of international organizations, the ILC may therefore have fared better by applying closer analogies with the ASR when drafting the ARIO. As observed above, one of the advantages of reasoning by analogy lies in the systematic attributes of coherence in connection with a sense of predictability and certainty.

As a preliminary caveat, it should be noted that the law of international responsibility – more so than other areas of international law – is not exactly a paragon of certainty and stability. In fact, when the ILC began its work on State responsibility, Special Rapporteur Garcia Amador observed that "the subject of responsibility has always been one of the most vast and complex of international law; it would be difficult to find a topic beset with greater confusion and uncertainty". [32] However, he acknowledged that these inconsistencies and incongruities had not prevented traditional doctrine and practice from formulating a number of fundamental concepts and principles that have so far constituted the generally accepted law on the subject.[33] Many of these principles found their way into the final set of the ASR, and can be considered as "permissive ground[s] for further development of the law"[34] in a systematic and coherent manner, as confirmed by the practice of numerous courts and tribunals.

Chamber), <http://www.echr.coe.int/echr/>, 10 October 2011, paras. 132 *et seq*. Among the many critical voices *see*, for instance, P. Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt Behrami et Saramati' (2008) 53 *Annuaire français de droit international* pp. 43-64; F. Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 *Netherlands International Law Review* pp. 35-62.

[32] Report of the Special Rapporteur, F.V. García-Amador, U.N. Doc. A/CN.4/96 (1956), p. 175 (para. 6). As Roberto Ago later observed, "in fact, the parties are far more interested in attaining their objectives than in invoking strict and coherent principles." Fourth Report of the Special Rapporteur, Mr. Roberto Ago, U.N. Doc. A/CN.4/264 and Add.1 (1972), p. 73 (para. 4).

[33] Report of the Special Rapporteur, F.V. García-Amador, U.N. Doc. A/CN.4/96 (1956), p. 175 (para. 7).

[34] MacCormick, *supra* note 12, pp. 160-161.

Instead of overemphasizing the differences between States and international organizations by departing from the ASR, it is submitted here that the ILC should have identified the common ground between States and international organizations as a precondition for the use of analogies. Interestingly, some States have recently underlined the need for coherence and harmony between the provisions on the responsibility of States and international organizations in their comments on the ARIO on second reading.[35] Even though the ILC surely engaged in some considerations of the nature of international organizations, it remains unclear in the ARIO how international organizations compare to States in matters of international responsibility, or how the ARIO relate to the ASR more generally. Considering the prevailing controversies regarding the legal personality of international organizations, the ILC's reluctance to engage in this comparative assessment is understandable, but remains behind expectations.

Obvious differences exist between States and international organizations, especially since the latter do not have a territory or a permanent population. At the same time, however, States and international organizations also share common characteristics, most notably the exercise of different degrees of powers or competences.[36] It is increasingly recognized that international organizations are created by conferrals of powers by their future member States, which form the basis of their distinct will and thus the core of their legal personality. In contrast, States disappear behind the corporate veil of the organization to the extent that they have conferred their powers to it. By virtue of their own powers, States and international organizations act autonomously and may commit internationally wrongful acts for which they incur independent or shared responsibility. On the basis of the rationale that power breeds responsibility,[37] it can thus be explained why the ILC replicated Article 1 of the ASR in the form of Article 3 of the ARIO as the foundation of the system of international responsibility.[38] The ILC could have applied this kind of explicit analogical reasoning to all provisions of the ASR, including cases

[35] See for instance the comments by El Salvador (para. 45) and Italy (para. 48) in UN Doc. A/C.6/66/SR.18 (2011), p. 9.
[36] This point is most clearly made by D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP, Oxford, 2005), but extends to the general literature on international institutional law.
[37] The fact that "[p]ower breeds responsibility" was already stated in 1928 by C. Eagleton, *The Responsibility of States in International Law* (New York University Press, New York, 1928), p. 206.
[38] For an introduction to the systemic nature of the law of international responsibility see J. Crawford, 'The System of International Responsibility' in J. Crawford *et al.*, *The Law of International Responsibility* (OUP, Oxford, 2010), pp. 17-25.

in which the resort to analogies may not be warranted. As such a review is beyond the scope of this contribution, it will suffice to make a few remarks about the above-mentioned provisions of the ARIO.[39]

First, the international nature of the constituent instruments should not have kept the ILC from drawing analogies between the so-called "rules of the organization" and the internal law of the State. Although the founding instruments of an international organization are indeed a treaty between the States that established the organization, the international organization is not a contracting party to its own constituent instruments. The constituent instruments of an international organization have an exclusively constitutional dimension and are not international *lex specialis*, as suggested by Article 64 of the ARIO. As such, the internal rules of the organization – whether in the form of a decision, authorization, or other exercise of competence, broadly speaking – may, secondly, not be abused by international organizations or States to circumvent their international obligations. By recognizing that the rules are internal law, the ILC could therefore have extended the rationale of Article 3 of the ASR to the situation of international organizations, which may have illustrated the limited added value of the controversial Articles 17 and 61 of the ARIO. Finally, the recognition of the constitutional nature of the constituent instruments of international organizations is also of relevance for the basic distinction between normative and effective control in the rules on the attribution of conduct. As several scholars and even courts have argued, international organizations exercise normative control over the organs of their members to the extent that they have competence.[40] Particularly in situations of shared competences in which both the organization and its member State exercise normative control over an organ, the criterion of effective control may be decisive in determining which actor has acted wrongfully.[41] The fact that States may thereby incur responsibility while acting in the framework of an international organization underpins the necessity to consider the ASR and the ARIO as a coherent system of rules and principles.

[39] For a comprehensive discussion of these different points see Ahlborn, *supra* note 27.
[40] For an unconvincing rejection of these positions see Seventh Report of the Special Rapporteur on the Responsibility of International Organizations, Giorgio Gaja, UN Doc. A CN.4/610 (2009), at 12-13 (para. 33), as discussed by Ahlborn, *supra* note 27.
[41] On this particular argument see B. Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanovic* and *Mustafic*: the Continuous Quest for a Tangible Meaning of 'Effective Control' in the Context of Peacekeeping', (2012) 25 LJIL pp. 521-535.

4. Towards a Unified Set of Articles for States and International Organizations

Although the ARIO seem to be a copy of the ASR, this contribution has illustrated that the ILC departed from the ASR in a substantial number of provisions to accommodate the specific situation of international organizations and their member States. Instead of inflating the differences between States and international organizations, it has been argued that the ILC should have focused on their similarities. Indeed, given the lack of practice in the field of the responsibility of international organizations, the ILC would have had a strong interest in relying on closer and justified analogical reasoning so as to attenuate or even avoid the criticism that it crossed the fine line into the realm of law-making. This is because analogies have not only an enabling but also a limiting effect on progressive development if they are incoherent with regard to established principles or underlying reasons that are accepted in a given legal order.[42]

The unveiling of these underlying principles of the law of international responsibility may also have given the ILC an opportunity to revisit its model of responsibility in light of a more diversified landscape of actors, including States, international organizations, and individuals. The above-discussed principles regarding the internal law of the responsible subject or the rules on attribution of conduct have proven their usefulness in international practice. Nonetheless, the difficulties in drafting the ARIO highlight that the ILC model of international responsibility suffers from deeper structural deficiencies.[43] This model of responsibility, as codified in the ASR, originated when States were the only subjects of international law. Accordingly, the ASR are based on the fiction of the State as a unitary and mostly independently responsible actor. In contrast, international organizations frequently interact with States, which may lead to complex situations of shared responsibility. The ILC tried to look behind the corporate veil of international organizations – as illustrated by its indecisive position on the rules of the organization, but also Articles 17 and 61 of the ARIO. However, this contribution has shown that it is insufficient to make slight modifications to the established rules of responsibility without broader conceptual justifications.

In order to take into account the complex structure of corporate actors such as States and international organizations, it is therefore suggested that the existing model of international responsibility should be re-considered in a

[42] See, for instance, MacCormick, *supra* note 12, p. 155.
[43] As succinctly discussed by J. d'Aspremont in this issue of the IOLR.

principled discussion. Such discussion would inevitably have to tackle long-banished or at least neglected concepts such as fault, causation, and injury.[44] These notions, which the ILC deliberately deferred to the realm of primary rules, are essential to most domestic law accounts of responsibility, especially in cases involving multiple responsible actors. A reconsideration of the law of international responsibility may thus shake the edifice carefully built by the ILC, which explains but does not excuse the lack of any such attempts in drafting the ARIO. In view of the policy considerations at play in the law of international responsibility, it will take time and historical necessity before the ILC or another codification body will assume the task of reflecting upon the responsibility of States, international organizations, and individuals in a unified set of Articles on International Responsibility. Until then, it will be for courts and scholars to make sense of the law of international responsibility by means of interpretation, including analogical reasoning.

[44] *See* the contribution by N. Nedeski and A. Nollkaemper in this issue of the IOLR.