the frustration of people who watch as the international community fails to respond to human rights abuses. If you are puzzled or outraged by the often-feeble attempts of international bodies to protect human rights, then Freedman's book uncovers some answers.

*Ruth Houghton**

Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Leiden and Boston, Martinus Nijhoff Publishers, 2013, xlvi + 470 pp., ISBN 9789004256071, €166 (hardback)
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This volume of 34 essays is a welcome addition to the growing literature on the responsibility of international organizations. The choice of topic is timely, in light of the completion of the International Law Commission's (ILC) Articles on the Responsibility of International Organizations (ARIO) in 2011.[1] Most of the contributions in this volume directly engage with aspects of the Commission's project, and offer insightful commentary on the development, content, or application of the ARIO.

The main strength of the volume is its impressive range of contributors, including current judges of the International Court of Justice, current and former members of the International Law Commission (ILC) who were present during the development of the ARIO, and numerous in-house legal advisers or former legal advisers to international organizations, including the World Health Organization (WHO), the International Fund for Agricultural Development (IFAD), the International Monetary Fund (IMF), the World Bank, and the UN Office of Legal Affairs.

The contributors were free to choose the topic of their essay, being constrained only by a 5,000 word limit. The editor accepted the implicit consequence that contributors may write on the same topic, but took the view that multiple perspectives on the same or similar topics usefully served to highlight the areas of greatest interest and debate (p. xii). This editorial approach has, invariably, resulted in some repetition and overlap between the contributions, but less than one might have anticipated. Each essay stands on its own, and together they present a rich commentary on the current concerns and controversies in the law of organizational responsibility.

The Articles on the Responsibility of International Organizations have, in their relatively short existence, already attracted their fair share of criticism. One scathing review claimed that 'the ARIO fell short, in the view of – almost all – observers, of meeting the conceptual consistency which legal scholars expect from such a set of

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1 ILC Draft Articles on the Responsibility of International Organizations with commentaries, in Report of the International Law Commission on the work of its Sixty-third Session, UN Doc. A/66/10, at 54–172, paras. 87–88 ('ARIO').

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secondary rules'.[2] Much of the criticism has been directed at the ILC's decision to utilize its 2001 Articles on State Responsibility (ASR) as the blueprint in developing the ARIO.[3] Explaining this decision, the Special Rapporteur argued that '[i]t would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so'.[4] As the project developed, and the extent of the structural and textual parallelism with the ASR became apparent, the ILC was criticised for 'basically replacing the term "State" with "international organization" in the articles on State responsibility'.[5] Whereas the ASR were built up from a careful study of voluminous state practice, arbitral awards, and judgments, the practice of international organizations in matters of international responsibility is severely limited. Without relevant practice, the Commission had difficulty asserting that organizational responsibility had, in every case, been 'examined on its merits'.[6] More often, the Commission has assumed a parallelism as a matter of principle, absent any evidence of actual practice.

That organizations were dissatisfied with the result of the ILC's approach was made plain in their comments in response to the first reading draft in January 2011. Of the 23 organizations who provided comments, all but one registered their dissatisfaction with the ARIO, citing the lack of organizational practice, the lack of regard for the 'principle of speciality' which governs international organizations,[7] and excessive reliance on the ASR.[8] Many organizations called for the ILC to make explicit that the ARIO represented a progressive development of the law, rather than a codification of existing rules.[9]

The ILC's response to these criticisms was the adoption of a 'general commentary' at the beginning of the ARIO, in which the Commission noted its methodology and the intellectual debt owed by the ARIO to the ASR. The general commentary

2 J. d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', (2012) 9 *International Organizations Law Review* 15, at 16–17.

3 Thus, d'Aspremont: 'fundamentally, the design of the ARIO was hindered by the vocabulary and framework inherited from the ASR'. Ibid., at 17.

4 G. Gaja, Special Rapporteur, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532 (2003), at 6–7.

5 G. Gaja, Special Rapporteur, Sixth Report on Responsibility of International Organizations, UN Doc. A/CN.4/597 (2008), at 2–3.

6 Ibid., at 3.

7 As explained by the International Court of Justice (ICJ) in its *Nuclear Weapons (WHO Request)* advisory opinion: 'International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.' *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, [1996] ICJ Rep. 66, at 78, para. 25.

8 See, e.g., the joint statement of 13 organizations (Comprehensive Nuclear-Test-Ban Treaty Organization; International Civil Aviation Organization, IFAD, International Labour Organization, International Maritime Organization, International Organization for Migration, International Telecommunication Union, UNESCO, World Tourism Organization, WHO, World Intellectual Property Organization, World Meteorological Organization, and the World Trade Organization) in Comments and Observations Received from International Organizations, UN Doc. A/CN.4/637 (2011), at 10. See also G. Gaja, Special Rapporteur, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), at 5–6.

9 Comments and Observations Received from International Organizations, *supra* note 8, at 10 (IMF), at 13 (Organization for Economic Co-operation and Development), at 14 (World Bank).

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emphasized the principle of speciality of international organizations and the rule on *lex specialis*, and explained the limited availability of relevant practice which, in turn, 'moved the border between codification and progressive development in the direction of the latter'.[10]

Despite the inclusion of the general commentary, the criticisms continue to haunt the ARIO, as evidenced by the contributions to this volume. Thus, Vincent-Joël Proulx argues that the ILC failed to take the principle of speciality seriously (p. 115). Ross Leckow and Erik Plith, writing from their perspective as lawyers at the IMF, argue that, in light of the diversity of functions of international organizations, it is 'not appropriate to develop principles of responsibility that would apply to organizations engaged in financial activities primarily based on the practice of organizations engaged in peacekeeping' (p. 230). Similarly, a number of contributions analyse the perils of having relied so heavily on the ASR when drafting the ARIO, such as Arnold Pronto's analysis of the 'transposition' of the ASR as a working method (pp. 147–50) and Tullio Scovazzi's essay on the ILC's 'mutatis mutandis' drafting technique (Chapter 11).

Alain Pellet, as a member of the Commission present during the drafting of the ARIO, admits that he initially supported the use of the ASR as the basis for the ARIO (what Pellet terms the 'Gaja method', p. 43). While the approach had its merits, 'not least the fact that the Commission thus avoided to have to start again from square one', Pellet assesses that this method ultimately treated the special rules applicable to international organizations as exceptions to the 'general' rules in the ASR, rather than systematically analysing in depth the specific issues of the responsibility of international organizations (p. 45). While maintaining that the ARIO are 'certainly not perfect' in terms of reflecting the principle of speciality, Pellet concedes that, in light of the very general nature of criticisms advanced by international organizations (absent positive or practical suggestions) 'it would probably have been difficult for the Commission to draw much more concrete consequences from the principle of speciality than it actually did' (p. 49).

Pellet's ambivalent assessment of the Articles appears to constrain his prognosis of their likely impact. Eschewing both endorsement and censure, his closing assessment strikes an equivocal tone:

> Once adopted and, as the case may be, noted by the General Assembly, drafts prepared by the International Law Commission take a life of their own ... [the ARIO] can be sanctioned (and developed) in practice as well as enter the kingdom of oblivion. Only the future practice of States and international organizations will tell (p. 54).

Conversely, Michael Wood's essay belies an anxiety that the ARIO will, indeed, take on a life of their own, inviting 'undue homage' (p. 65) from 'lawyers and judges, in particular national judges [who] may be misled as to the degree of authority that individual draft provisions [of the ARIO] enjoy' (p. 56). Wood is at pains to stress that the ARIO, while based on the ASR, share little of their authority. For Wood, the 'most important point' (p. 61) made in the general commentary is the statement that the

10 ARIO, *supra* note 1, General Commentary, at para. (5).

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ARIO present more progressive development than codification, due to the limited practice on which several of the draft articles are based, such that the ARIO 'do not necessarily yet have the same authority as the corresponding provisions on State responsibility'.[11] Wood counsels that 'courts and others should approach the [ARIO] with a degree of circumspection' and the status of an individual provision will need to be weighed on the evidence, and not lightly assumed to share the same customary status as its counterpart in the ASR (p. 66).

And yet, the same paragraph of the general commentary, which is so important to Wood, is 'alarming' to Chusei Yamada (p. 92). Wary of the ILC's practice of distinguishing progressive development from codification when reporting to the UN General Assembly (UNGA), Yamada interprets the statement as 'warning States that some of the draft articles are not yet established customary international law and inviting them to stay away from them', and that, with little hope of the UNGA taking up the Articles as a convention, the ARIO are 'doomed to be shelved' (p. 93).

Yamada's perspective highlights the link between the form or 'packaging' of an ILC project and its influence, which itself is the subject of Sean Murphy's essay, in which Murphy provides a typology of the ILC's output. Murphy is concerned that the practice, first utilized with the 2001 ASR and repeated for the ARIO in 2011, of submitting draft articles to the UNGA merely for 'noting' – and not for the adoption of a convention, either by the UNGA or via the convocation of a diplomatic conference – could present a challenge to the ILC's legitimacy. As Murphy argues,

> [a]n approach where the Commission blends codification with progressive development is defensible if the ultimate outcome is the adoption by States of a convention, but such blending in a situation where no further State action is envisaged, and with the expectation that the draft articles will simply be seen as 'the law', potentially casts the Commission in the role of legislator (p. 35).

Murphy sees the inclusion of the general commentary, with its emphasis on progressive development and limited authority of the ARIO, as an attempt by the Commission to pre-empt any criticism as to the legitimacy of its approach.

The numerous contributions written by current or former legal counsel to international organizations demonstrate that the rules of most interest to – and often most resisted by – organizations are the rules on attribution of conduct (ARIO Articles 6 to 9) and attribution of responsibility (ARIO Articles 14 to 17), especially in terms of the attribution to the organization of conduct of its member states, or the responsibility of the organization for conduct carried out by members. Thus, Gian Luca Burci and Clemens Feinäugle tease out some of the difficulties with applying the 'effective control' standard for attribution of the conduct of the organ of one organization placed at the disposal of another organization in the context of the WHO, using the case studies of the Joint United Nations Program on HIV/AIDS (UNAIDS) and the Pan American Health Organization. Similar analyses of attribution rules and their utility in the context of particular organizations, are conducted from the perspective of the EU (José Manuel Cortés Martín), the UN (Daphna Shraga) and

11 Ibid.

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for partnerships between international financial institutions (Laurence Boisson de Chazournes).

The application of the ARIO in the context of UN peacekeeping missions or UN-authorized missions – one of the few areas where there is a body of practice and (evolving) case law – is addressed in three contributions by Blanca Montejo, P. S. Rao, and Francesco Salerno. The topic of attribution of wrongful conduct of UN missions has generated a considerable literature and has been addressed by various courts and tribunals, often inconsistently. Much of the debate has centred on Article 7 ARIO, which provides that, where the organ of a state is placed at the disposal of an organization, the acts of the organ will be attributable to the organization if it exercises effective control over its conduct. The ILC based this novel test of 'effective control' on the practice of UN peacekeeping and UN-authorized missions.[12] However, as highlighted by Montejo, the 'United Nations was clear in that the test is contrary to its practice' (p. 404). Following a careful study of the drafting history of the provision, including the comments by states and international organizations, Montejo – a lawyer at the UN Office of Legal Affairs – concludes that Article 7 represents a progressive development of the law, and the test of effective control is 'controversial' and 'largely unsettled' (ibid.).

In light of this assessment, it is interesting to consider the 2013 decisions of the Supreme Court of the Netherlands in the *Mustafić* and *Nuhanović* cases, concerning the responsibility of the Netherlands for the conduct of Dutch troops operating as part of the UN peacekeeping mission, UNPROFOR, in Srebrenica. In seeking to determine whether the conduct of the Dutch contingent was attributable to the UN or the Netherlands, the Supreme Court applied Article 7 ARIO. Utilizing reasoning that Michael Wood would likely find disconcerting, the Supreme Court treated the content of Article 7 and the Commentary thereto 'apparently as the current state of the law'.[13] As one commentator has noted, '[i]t is certainly remarkable that the Supreme Court accepted the customary international law character of the [ARIO] at face value, in spite of the formally non-binding character of ILC codifications'.[14] Already the ARIO are taking on a 'life of their own' beyond the Commission.

It is fitting in a volume dedicated to the memory of Ian Brownlie that there are four contributions on the issue of the responsibility of member states for the acts of an international organization, since this was the topic chosen by Brownlie for his contribution to an earlier volume edited by Ragazzi, *International Responsibility Today*, in 2005.[15] In a characteristically lucid essay, Brownlie argued that 'there is surely a presumption, based upon public interest and ordinary logic, that, if the organization is not empowered to make reparation to third States, the member States are under

12 Though the UN noted that its own use of the term of 'effective control' differs from the application to which that term has been put by the Commission in Art. 7 ARIO. See Comments and Observations Received from International Organizations, UN Doc. A/CN.4/637/Add.1 (2011), at 13–14.

13 C. Ryngaert, 'Supreme Court (Hoge Raad), *State of the Netherlands v. Mustafić et al.*, *State of the Netherlands v. Nuhanović*, Judgments of 6 September 2013', (2013) 60 *Netherlands International Law Review* 441, at 443.

14 Ibid.

15 I. Brownlie, 'The Responsibility of States for the Acts of International Organizations', in M. Ragazzi (ed.) *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 355–62. Ragazzi describes the 2013 volume (under review) as a 'companion volume' to the earlier collection of essays from 2005 (at xiii).

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such a duty'.[16] To hold otherwise would lead to the 'illogical' supposition that a group of states could 'manufacture an immunity from responsibility toward third States by the creation of an international legal personality'.[17]

The ILC debated whether to include a rule or statement in the ARIO that member states do not incur responsibility, concurrently or subsidiarily with an organization, merely by virtue of their membership therein. In the Commission, Brownlie argued strongly against the adoption of a 'general principle of the non-responsibility of States members' as such a rule would be 'contrary to existing general international law and to all the principles of the law of treaties and the law of State responsibility because its application could allow States to circumvent their obligations by concluding a multilateral treaty establishing an international organization'.[18] However, Brownlie's view failed to gain majority support in the Commission, which ultimately adopted a statement in its commentary to Article 62 ARIO that 'membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act' and 'there is clearly no presumption that a third party should be able to rely on the responsibility of member states'.[19]

Unlike in the Commission, Brownlie's position on member state responsibility enjoys unanimous support among the contributors to this volume. Thus, for example, Sienho Yee opposes a conception of 'limited liability' of the member states of an international organization because it is 'unfair' to injured third parties (p. 326) – an argument which Yee originally espoused in Ragazzi's 2005 volume, alongside Brownlie, and to which he continues to adhere.[20] Pavel Šturma's analysis of the EU's differing approaches to the allocation of responsibility between itself and its member states before various tribunals, concludes with the observation that 'in no legal order is it up to the wrongdoer to determine freely its own status. Why should a claimant or a tribunal have to respect any arrangement reached by way of the internal rules of the organization?' (p. 324). Paolo Palchetti analyses whether the underlying rationale of member state responsibility – to ensure reparation for victims – has been addressed through an alternative route in the ARIO: Article 40 on 'ensuring the fulfilment of the obligation to make reparation'. In light of the commentary thereto, Palchetti interprets Article 40 as enunciating a 'general presumption that members are under a duty to provide the organization with the appropriate means to fulfil its obligation to make reparation' (p. 311).[21] Similarly, Kazuhiro Nakatani argues for a presumption of member state responsibility if the organization has

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16 Ibid., at 359.

17 Ibid., at 362.

18 ILC, 58th Session, Provisional Summary Record of the 2892nd Meeting of 12 July 2006, UN Doc. A/CN.4/SR.2892, at 9 (Brownlie).

19 ARIO, *supra* note 1, Art. 62, commentary paras. (2), (10).

20 S. Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership', in M. Ragazzi (ed.) *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 435–54.

21 Yee similarly reads the commentary to Art. 40 as a 'rule of interpretation', which favours an implied obligation on member states to enable remedies when the rules of the organization are silent or unclear (pp. 331, 335–6). See also Pellet's illuminating discussion of the drafting history of Art. 40 (pp. 50–53).

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limited resources or a small membership, in order to prevent abuses by a few ill intending states and protect innocent third parties (p. 300).

While topics such as the ILC's methodology, member state responsibility, attribution, and UN peacekeeping garner the most attention, Ragazzi's editorial policy has also invited contributions on topics not often canvassed in the literature, and the relatively short length of the essays favours the concentrated treatment of discrete issues. Among the highlights is Maurizio Arcari's study of Article 67, the provision which ensures that the ARIO are 'without prejudice' to the UN Charter. Arcari identifies the difficulty in justifying the priority of the Charter in the case of international organizations, as opposed to states, since organizations are neither UN members nor party to the Charter, and therefore cannot be bound by Article 103 of the Charter (p. 102). In Hugh Thirlway's excellent piece on international organizations before the International Court of Justice (ICJ), he examines whether and how the *Monetary Gold* principle might affect the admissibility of a case before the Court in which the responsibility of a state was entwined with that of an international organization. Rutsel Silvestre Martha analyses the interplay between legal personality and attribution in the ICJ's reasoning in the *Global Mechanism* advisory opinion[22] (a case also discussed by Antônio Augusto Cançado Trindade, pp. 8–12). Taking a longer historical view, Kenneth Keith describes 'the unhappy fate of the [Commission's] earlier attempts at codifying the law of international organizations' (p. 26), which resulted in two treaties, neither of which have attracted sufficient ratifications to enter into force, and an abandoned project on the privileges and immunities of international organizations (pp. 23–25). This prompts Keith to ask whether the responsibility of international organizations is 'another case of an ill conceived project for codification?' (p. 27).

The essays in *Responsibility of International Organizations* implicitly seek to answer Keith's question. Taken as a whole, the volume is an important reflection on, and criticism of, the ILC's Articles – as a project, as a balance between codification and progressive development, as a workable or coherent set of rules, and even in respect of the correctness of individual provisions. As the powers, mandates, and activities of international organizations continue to expand, the likelihood of organizations contravening international law similarly increases. For this reason, rules on the responsibility on international organizations are important, and it is important to get them right. *Responsibility of International Organizations* serves as a timely contribution to the debate on the legitimacy and utility of the ARIO, and to the ultimate legacy of the ILC's project.

*Odette Murray**

22 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development,* Advisory Opinion, [2012] ICJ Rep. 10.

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