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The Articles on the Responsibility of International Organizations:

Magnifying the Fissures in the Law of International Responsibility

Jean d'Aspremont[*]

The adoption of the Articles on the Responsibility of International Organizations (ARIO) should certainly be celebrated with enthusiasm by our professional community. Although the debates concerning some of the provisions of the ARIO have proved dry at times, their adoption constitutes a welcome *denouement* after almost a decade of controversies which have riveted many of us. The completion of the second reading of the ARIO simultaneously generates an inevitable feeling of satisfaction that another important fragment of secondary rules of the international legal system – which was for too long left in limbo – has now made its way into a formal instrument, i.e. a written set of articles. All-in-all, tribute must be paid to Professor Giorgio Gaja for using his renowned and unrivalled expertise in international law and wielding his authority with talent and diplomacy, which allowed him to steer the Commission towards a successful codification. However, with the hindsight of the few months that have passed since the adoption of the final set of Articles, this contentment also gives way to some bitter-sweet emotions – exactly like on the occasion of the adoption of the Articles on the Responsibility of States (ASR) in 2001. Indeed, our elation is gradually taken over by the bemoaning of the haste with which the ILC sought to complete its work, and especially the second reading. It is difficult to not to feel that the devilish details which are traditionally

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left for the second reading required more than the cosmetic and hasty changes carried out in the second reading.[1]

The following brief observations are certainly not the place to express any regret about what could have been done better. Indeed, lamenting some substantive aspects of the ILC codification of the responsibility of international organizations would be utterly in vain and futile. That the ARIO fall short, in the view of – almost all – observers, of meeting the conceptual consistency which legal scholars expect from such a set of secondary rules was a foregone conclusion. Had the ILC devoted another decade to the matter, it would probably have not designed anything fundamentally better. Such fatalism can be explained as follows. First, the subject matter on the table of the ILC was probably too intricate and controversial to ever secure a consensus among experts. Second, it seems fair to say that there are structural limits to the conceptual virtue of the ILC public codification process, especially given the internal dynamics and composition of that body. Third, and more fundamentally, the design of the ARIO was hindered by the vocabulary and framework inherited from the ASR. It is argued here that this kinship that was established between the ARIO and the ASR condemned the ARIO to share the same conceptual deficiencies as the ASR without the ILC being in a position to fix them.

It is against the backdrop of the conceptual impairment inherited from the ASR that this note, rather than zeroing in on what could have been better devised at the micro-level of the ARIO, adopts a holistic view on the approaches to the law of international responsibility. In so doing, the ARIO are not approached in isolation but together with the ASR. This paper argues that, envisaged together with the ASR, the ARIO magnify the structural straits of the law of international responsibility. It more particularly argues that the ARIO reveal that the minor and

[1] This is also what I have expressed elsewhere. See J. d'Aspremont and C. Ahlborn, "The International Law Commission Embarks on the Second Reading of Draft Articles on the Responsibility of International Organizations", EJIL:Talk, 30 April 2011, available at http://www.ejiltalk.org/the-international-law-commission-embarks-on-the-second-reading-of-draft-articles-on-the-responsibility-of-international-organizations/. On the limited changes included in the second reading, see generally the Eighth Report of the Special Rapporteur, U.N. Doc. A/CN.4/640.

almost invisible defects at the level of the ASR have enlarged on the occasion of their transposition to the responsibility of international organizations, unveiling the conceptual fissures of the whole law of international responsibility (Section 1). It then formulates a few epistemological considerations on how a normative instrument that so openly lays bare the limits of the current law of international responsibility could nonetheless be usefully received by our professional community (Section 2).

1. The ARIO as a pointer of the fissures in the law of international responsibility

Very early in the codification process, the ILC – despite the organic differences between States and international organizations[2] – decided that the ARIO would generally be patterned on the ASR.[3] Especially as regards the determination of responsibility – i.e. the ascertainment of wrongfulness – the position was taken that the regime of the responsibility of international organizations and the regime of the responsibility of States for conduct in connection with international organizations would follow the same standardizing and uniformizing "Anzelottian"[4] scheme based on non-conformity adopted in the ASR.[5]

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[2] See gen. C. Brölmann, "A Flat Earth? International Organizations in the System of International Law", in *International Organizations, Series: Library of Essays in International Law* (Ashgate, 2006), pp. 183-206. See also C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishers, 2007).

[3] See the First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, 26 March 2003, A/CN.4/532, pp. 6-7 ("It 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. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text"). This decision led the ILC to be – to a large extent unfairly – criticized for what was then seen as a cut-and-paste exercise. On this criticism, see A/CN.4/640, Eighth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, 14 March 2011, p. 5. See also the comments by Christiane Ahlborn in this forum.

[4] On the extent to which Ago based himself on the conceptualization by Anzilotti, see Ago, Second report on State Responsibility, A/CN.4/233, *Yearbook of the International Law Commission*, 1970, vol. II, pp. 179-180 and 187-195; on the influence of Anzilotti, see gen. P.-M.

According to that model, wrongfulness was built on to an interface between the origin of responsibility and its consequences,[6] and all subjective elements, like *dolus*, fault, (un)due diligence, are – somewhat artificially and temporarily[7] – left out to allow for an allegedly uniform standard of determination of responsibility.[8]

It is well-known that this foundational "Anzelottian" layout of what constitutes a conduct engaging responsibility had been the object of severe distortions in the ASR. Most can be traced back to Roberto Ago and his followers[9] who resorted to private law concepts – like injury[10] – to make the law of international responsibility perform public law functions [11] and give responsibility a communitarian content (and

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Dupuy, "Dioniso Anzilotti and the Law of International Responsibility of States", 3 EJIL (1992), p. 139.

[5] See article 2 of the ASR and article 4 of the ARIO. See gen. the First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, 26 March 2003, A/CN.4/532.

[6] P. Weil, "Le droit international en quête de son identité: Cours général de droit international public", 237 Recueil des cours (1992), p. 334.

[7] The argument can be made that psychological elements have not been completely obliterated from the system and still pervade many aspects of the regime. It suffices to mention all the hypotheses of attribution of responsibility – already mentioned above – which presuppose that participation is accompanied by the knowledge of the circumstances of the wrongful act. See articles 14-19 and 58-63 ARIO. On the oscillation between intention and knowledge of the facts in the concept of complicity, see O. Corten and P. Klein, "The limits of complicity as a ground for responsibility", in K. Bannelier, T. Christakis and S. Heathcote (eds.), *The ICJ and the Evolution of International Law – The Enduring Impact of the Corfu Channel Case* (London, Routledge, 2012), pp. 315-334.

[8] R. Ago, Second report on State Responsibility, A/CN.4/233, *Yearbook of the International Law Commission*, 1970, vol. II, p. 185; J. Crawford and S. Olleson, "The Nature and Forms of International Responsibility', in M. Evans (ed.), *International Law* (OUP, 2003) p. 451. On the conceptual "revolution" that such an objectivation may have constituted, see See Alain Pellet, "The ILC's Articles on State Responsibility", in James Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP 2010), pp. 75-94, at pp. 76-77.

[9] See G. Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations", 13 EJIL (2002), pp. 1083-1098.

[10] On the declaratory function of injury, see J. Crawford, "Overview of Part Three of the Articles on State Responsibility", in J. Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP 2010), pp. 931-940, at p. 931.

[11] See gen. B. Stern, "The Elements of an Internationally Wrongful Act", in J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility* (OUP, 2010), pp. 193-220, at p. 194. A good illustration is the introduction of sanction-regulation in the regime of responsibility aimed at the restoration of legality, but conditioned upon injury. See article 42 and article 50 of the ASR. On the introduction of provisions regulating counter-measures, see R. Ago, First Report on State responsibility, A/CN.4/217, *Yearbook of the International Law Commission*, 1969, vol. II, p. 139,

consequences) not envisaged by its creator.[12] Such a distortion came as one of the main sources of the conceptual flaws found in the ASR. Some of these flaws have been extensively discussed in the literature[13] and it is not necessary to recall them here. It only matters to point out that, until the adoption of the ARIO, the conceptual insufficiencies of the ASR were never found to be overly alarming or threatening for the stability of the regime as a whole.[14] However, as a result of the decision to establish a kinship in the determination of responsibility between the ASR and the ARIO, these flaws made their way to the ARIO. Once transposed to the ARIO, they manifest the limits of the whole law of international responsibility as codified by the ILC. Needless to say that the ILC was entirely aware of such flaws and never purported to correct them. Indeed, the ARIO were not seen as the platform to fix the conceptual drawbacks of the ASR.[15] However, what was probably less anticipated is that the perpetuation of the defects of the ASR would make them snowball and fill out to an extent that cracks in the whole law of international responsibility would begin to surface.

It is the aim of the following paragraphs to mention a few of the structural cracks in the law of international responsibility that are revealed by the ARIO. Attention is paid particularly to the problems arising in connection with the multi-dimensional notion of (a) causality, (b) situations of shared responsibility, (c) the possibility of attributing responsibility short of any conduct, and (d) the fluctuating nature of the internal rules of legal subjects whose responsibility is invoked.

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para. 91. On the idea that the inclusion of the faculty to take countermeasures led to a distortion of the notion of injury, see A. Nollkaemper, "Constitutionalization and the Unity of the Law of International Responsibility", 16 Indiana Journal of Global Legal Studies (2009), p. 14.

[12] G. Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations", 13 EJIL (2002), pp. 1083-1098.

[13] B. Stern, "Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I sur la responsabilité des États", 47 *Annuaire français de droit international* (2001), pp. 3-44; see A. Nollkaemper, "Constitutionalization and the Unity of the Law of International Responsibility", 16 Indiana Journal of Global Legal Studies (2009).

[14] See nonetheless A. Nollkaemper, who talks about the "breaking point" through which such distortion for the sake of public law functions have pushed the system of responsibility. A. Nollkaemper, "Constitutionalization and the Unity of the Law of International Responsibility", 16 Indiana Journal of Global Legal Studies (2009), p. 28.

[15] See the First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, 26 March 2003, A/CN.4/532, pp. 6-7.

a) a multi-dimensional causality

In both the ASR and the ARIO, the concept of causation is the measure of the primary remedial function of responsibility, i.e. reparation. Indeed, the causal link between the violation and the damage calibrates the *restitutio in integrum* since the wrongdoer is obliged to make full reparation for any damage caused by the wrongful act.[16] However, by virtue of the above-mentioned Anzilottian concept of wrongfulness, this type of causation was made alien to the determination of responsibility, in contrast to classical modes of determination of responsibility under domestic law. This is because the ILC and its various Special Rapporteurs deemed it an impossible task to generalize and formalize the ascertainment of the origin of every wrongful act[17] and accordingly decided that the determination of responsibility could not be made dependent on such a tangible concept.

Albeit to some extent unconsciously, the ILC and its Special Rapporteurs nonetheless integrated another type of causality at the level of the determination of responsibility. Indeed, a specific form of causality made its way into the Articles, i.e. the causal link between the conduct and the violation. This second type of causality manifests itself in a construction that was made a constitutive element of responsibility: attribution of conduct. In this sense, attribution of conduct can be seen as another expression of – factual as well as normative – causality in the law of international responsibility, for it connects a human conduct with a violation of an international standard.[18] If this is true, causation plays a

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[16] Article 31 para. 2. See also Commentary ASR (2001), pp. 93-94. The idea that the causal link is the measure of the *restitutio in integrum* was expressly confirmed by the International Court of Justice in the *Bosnian Genocide* case, para. 462. See also the Seabed disputes chambers of the ITLOS in its Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, No. 17, ITLOS, 1 February 2011, paras. 181-182.

[17] See the commentary of article 31 ASR, J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (CUP, 2002), p. 93.

[18] In the same sense, see Dionisio Anzilotti, 'La Responsabilité internationale des états à raison des dommages soufferts par des étrangers', 13 *Revue générale de droit international public* (1906), p. 287.

role both at the level of the determination of responsibility and with respect to the consequences of the international wrongful act. Indeed, the causal link between the conduct and the violation is very instrumental in the determination of responsibility, while the causal link between the violation and the damage operates as determinative of the scope of one of the main consequences of responsibility, namely reparation.

The ARIO, no more than the ASR, define causality other than in the form of attribution. Indeed, they do not formalize causality at the level of reparation. As a result, both the ASR and the ARIO leave it to the law-applying authority to determine such a causal link which in turn enjoys a wide leeway to construe that form of causality. It is important to realize, however, that the absence of formalization of the standard of causation at the level of reparation was something of less importance in the ASR, for the availability of law-applying authorities to perform such a task is much greater in comparison to those which can potentially be seized of questions of the responsibility of international organizations. When it comes to issues of the responsibility of international organizations as well as the responsibility of member States for conduct in connection with international organizations, there are organically and structurally very few law-applying authorities which could give some flesh to that notion.[19] That means that in the absence of judges or any sort of law-applying authority, this second form of causal link will probably be totally left in limbo with respect to the ARIO. Actors, who are already confronted with the lack of indicators in the ARIO, will thus not find guidance from law-applying authorities as to the ambit of this central consequence of responsibility. The lack of formalization of the causal link between the violation and the damage, which is tolerable under the regime of state responsibility because of the greater availability of law-applying authorities, dangerously puts the law of international responsibility under great strain. It is noteworthy that such

[19] It is the same unavailability of law-applying authorities which explains that absence of adjudicative practice in connection to the ARIO and which has been one of the greatest challenges faced by the ILC, a difficulty often highlighted by the Special Rapporteur. See e.g. the Third report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, A/CN.4/553, 13 May 2005, p. 2.

systemic stress even goes unabated in a situation of shared responsibility, about which a few words must now be formulated.

b) situations of shared responsibility

As the ASR and the ARIO do not provide any indicators as to the causal link between the violation and the damage, it becomes extremely difficult to identify situations of shared responsibility and, hence, it is even more complicated to address them. Indeed, in the view of the author, it is when causation, either in attribution or in reparation, has not been able to apportion responsibility between the multiple participants in the wrongdoing that a situation of shared responsibility *stricto sensu* arises. More specifically, situations of shared responsibility, *stricto sensu*, originate in the cumulative presence of the indivisibility of the wrong and the indivisibility of the damage. In other words, a situation of shared responsibility, *stricto sensu*, arises when attribution of conduct and attribution of responsibility do not allow apportionment among responsible actors, while causal analysis has not allowed the sharing of the burden of reparation among those involved in the commission of the wrong. In that sense, shared responsibility presupposes the failure of the two types of causality around which the law of international responsibility is currently articulated, i.e. the causal link between the conduct and the violation, and the causal link between the violation and the damage.

Failing to provide any pointer as to the second form of causality, the ASR and the ARIO become of limited use to ascertain, unravel, and address situations involving a plurality of wrongdoers.[20] It is true that they leave intact the possibility to further elaborate rules for *implementation* of responsibility in situations of multiple responsible actors. Indeed, Article 47 of the ASR and Article 48 of the ARIO, despite their nebulous formulation, seem to allow for each State or international organization to be separately responsible in respect of the same wrongful act; that is, conduct that is attributable to several States

[20] See A. Nollkaemper and D. Jacobs, "Shared Responsibility in International Law: A Concept Paper: ACIL Research Paper No 2011-07" (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl).

or organizations and is internationally wrongful for each of them. These provisions thus acknowledge situations of failure of causality at the level of attribution of conduct for responsibility-apportioning purposes and indicate that in such situations, responsibility is not precluded by the impossibility of apportioning it by virtue of attribution. However, even if such principles could someday be elaborated[21] – mainly in the form of joint and several responsibility which prescribes that reparation in its entirety is due to the victims by any of the wrongdoers[22] – the regime of responsibility fails to define when and how this would operate. When it comes to situations involving international organizations, such failure proves to be extremely problematic. As a great many questions of responsibility (or in connection with the activities) of international organizations boil down to questions of shared responsibility, the need to resort to alternative modes of responsibility or to design a specific regime to address such situations becomes compelling, thereby potentially demoting the residual regime of responsibility provided by the ASR and the ARIO to a cosmetic instrument.

c) attributing responsibility short of conduct

In designing the ASR and the ARIO, the ILC was very much aware that the above-mentioned "objectivized" concept of responsibility falls short of capturing complex situations of non-conformity, and that the creation of additional sources of responsibility was needed.[23] This is how the ILC came to design a conceptual hotchpotch for all those situations that did not fit with the binary concept of wrongfulness but which were still deemed sufficiently problematic to be included into the law of international responsibility.[24] This residual subterfuge took the

[21] This is one of the ambitions of the SHARES project. See http://www.sharesproject.nl.
[22] See gen. R. W. Wright, "The Logic of Joint and Several Liability", 23 Memphis State University Law Review (1992) p. 45; J. E. Noyes and B. D. Smith, "State Responsibility and the Principle of Joint and Several Liability", 13 Yale Journal of International Law (1988), p. 225, at pp. 251-258; Separate Opinion of B. Simma, Oil Platforms, paras. 66-72.
[23] See Ago, Second report on State Responsibility, A/CN.4/233, *Yearbook of the International Law Commission*, 1970, vol. II, p. 186, para. 29.
[24] For a use of that distinction in connection with specific issues of responsibility, see J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States",

form of attribution of responsibility (also sometimes called, albeit unconvincingly, indirect responsibility, to differentiate it from attribution of conduct).[25] As is well known, the concept of attribution of responsibility was given a much more limited role under the ASR[26] than under the ARIO.[27] This is hardly surprising. Complex situations of non-conformity are much more current when the violation has been committed by (or in connection with the activities of) international organizations. Certainly this conceptual subterfuge allowed the ILC to be highly creative. For instance, it allowed the ILC to tackle situations of "circumvention of obligations" which would otherwise have necessitated the explicit design of a primary obligation, at odds with its traditional focus on secondary rules.[28]

Such a category of convenience, although extremely handy, has however come with severe problems. Whilst these problems remained minor in the ASR because of the limited resort to attribution of responsibility, they grew into a source of vexing issues in the ARIO, thereby creating a dominant feeling of unease. First, the attribution of responsibility generalizes the re-introduction of a subjective element in the determination of responsibility which the concept of wrongfulness had attempted to eradicate. Indeed, there is not a single rule on attribution of responsibility whose application does not require the fulfillment of a psychological element, usually in the form of knowledge of the circumstances of the internationally wrongful act. Second, the various rules pertaining to attribution of responsibility differ greatly in scope, effect, and conditions of application, resulting in a highly heterogeneous and disparate concept. Third, some of these rules have remained too strictly defined to apprehend the situations which they purport to address. As I have explained in this journal a few years ago,

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4 International Organizations Law Review (2007), pp. 91-119 or J. d'Aspremont, "Rebellion and State Responsibility", 58 International and Comparative Law Quarterly (2009), pp. 427-442.

[25] Rather surprisingly, the commentary on the ASR provisions on attribution of responsibility indicates that "the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II". See J. Crawford, *The International Law Commission's Articles o State Responsibility – Introduction, Text and Commentaries* (CUP, 2002), p. 147.

[26] Articles 16-19 ASR.

[27] Articles 14-19 and 58-63 ARIO.

[28] Articles 17 and 61 ARIO.

this is the case of situations of abuse of legal personality of the organization by member States which the rules on attribution of responsibility found in the ARIO do not allow to fully capture.[29] Finally, and most fundamentally, the rules on the attribution of responsibility prescribed by the ARIO generate an odd feeling of deceitfulness. Indeed, these rules convey the impression that, behind many of them, lurks a primary obligation of States and international organizations. They seem to indicate that the ILC, while claiming that its overture to primary norms was limited to complicity,[30] disguised other primary obligations behind makeshift secondary rules of attribution of responsibility. Despite the distinction between primary and secondary rules proving absolutely fundamental in achieving unity of the law of international responsibility[31] and allowing a realistic delineation of the work of the ILC, such dichotomy seems to have received an extremely light treatment in the ARIO, thereby shedding some doubt on the architectural consistency (and trustworthiness) of the whole responsibility regime.

d) the internal law of the international legal subject whose responsibility is invoked

The failure to correctly grasp the varying nature of the internal law of the subject whose responsibility is invoked constitutes another alarming and debilitating factor in the law of international responsibility found in the ASR and the ARIO. Under the ASR, the role and effect of the domestic law of States – equated to a mere fact – was considered to be of limited importance. It drew the attention to connection with

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[29] This is what I have argued in J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", 4 International Organizations Law Review (2007), pp. 91-119.

[30] See article 16 ASR and articles 14 and 58 ARIO. For a criticism of the usefulness of the model of complicity favored by the ILC, see O. Corten and P. Klein, "The limits of complicity as a ground for responsibility", in K. Bannelier, T. Christakis and S. Heathcote (eds), *The ICJ and the Evolution of International Law – The Enduring Impact of the Corfu Channel Case* (London, Routledge, 2012), pp. 315-334.

[31] Second report of the Special Rapporteur, Mr. Roberto Ago (22nd session of the ILC (1970)), A/CN.4/233. See also the First report of the Special Rapporteur, Mr. James Crawford (50th session of the ILC (1998)), A/CN.4/490. See also the remarks by A. Gourgourinis, "General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System", 22 European Journal of International Law (2011), pp. 993-1026.

attribution of conduct or with exhaustion of local remedies. Its status, however, remained ambiguous, as Article 4, paragraph 2 seemed to reserve a determinative role for domestic law when it comes to ascribe a conduct under international law.[32] Whilst such ambiguity was short of major consequences under the ASR, the similar lack of rigor and precision in the ARIO could potentially corrupt the whole sub-regime of responsibility of international organizations. Although Article 2(b) of the ARIO provides that the term "rules of the organization means in particular, the constituent instruments, decisions and resolutions, as well as established practice of the organization", the ILC decided not to take a "clear-cut" position on the nature of these rules as either international law or the internal law of the organization, which leaves the scope of application of the ARIO severely indeterminate. As a result, some provisions of the ARIO could be construed as endowing the rules of the organizations with an international character – in contradiction with their intrinsically internal nature – paving the way for the exact opposite effects from those envisaged by the Commission. Such a lack of qualification could, accordingly, impinge upon the operability of the whole system. The argument has been formulated with insight in this journal[33] and there is no need to expand on it here.

2. Epistemic acceptance of the product of public codification processes: working with the ARIO in the future

If we accept that the transposition of the conceptual flaws found in the ASR to the ARIO sheds light on some – until recently underestimated – of the structural limitations of the whole law of international responsibility, a few concluding epistemological and sociological remarks can be formulated about how legal scholars ought to confront such fissures of the law of international responsibility, as well as the specific instrument that magnifies them. Indeed, if we take for granted that the ARIO will not be amended and that nothing better can be

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[32] Article 4.2 ASR. See the commentary by J. Crawford, *The International Law Commission's Articles o State Responsibility – Introduction, Text and Commentaries* (CUP, 2002), pp. 98-99.

[33] C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", ACIL Research Paper No 2011-03 (SHARES Series), published in *IOLR* (2012).

expected from any possible subsequent step in the codification process, one may wonder which fate our professional community should reserve for a tool of such systemic importance. Once we accept the irreversibility of the ARIO-making process, two possible attitudes in our professional community can be envisaged. On the one hand, scholars and professionals could decide to hide their head in the sand and turn a blind eye to the conceptual flaws of the law of international responsibility. They could act as though (or pretend that) the law of international responsibility is working decently and that its insufficiencies do not hinder its operations, both in terms of the determination and content of responsibility. It can be surmised that this is an approach that judges and legal advisers of States and international organizations will espouse. Interestingly, this is also the reaction that had mostly prevailed in international academia as regards the law of treaties, which was itself not exempt from similarly fundamental conceptual weaknesses.[34] On the other hand, scholars and experts, while coming to terms with the immutability of the ARIO, could decide to engage head-on with the space left unregulated by the rules elaborated so far. That would mean a cathartic use by scholars of that space to allay the above-mentioned conceptual flaws of the system. This is probably the attitude that has dominated scholarship with respect to the ASR since their adoption in 2001.[35]

The choice between these two attitudes – *i.e.* resignation or active and systemic gap-filling – will inevitably be informed by how one construes the public codification process established under the auspices of the ILC. If one were to understand such process as one of the most legitimate public processes by which rules of international law can be codified and progressively developed, there would be a lot of sense in simply using the vocabulary and categories of the ARIO, like those of the ASR, without much critical attention for the above-mentioned conceptual fissures of the law of international responsibility. On the

[34] See J. d'Aspremont, *Formalism and the Sources of International Law* (OUP, 2011).

[35] Among other examples, this can be illustrated by the debate on counter-measures in the general interest which constituted one of the most obvious spaces left unfilled by the ILC. See e.g. C. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, 2005); see also J. d'Aspremont, *L'Etat non démocratique en droit international* (Pedone, 2008), esp. pp. 294-303.

contrary, one can construe the ILC codification process of secondary rules of international law as a dialectic and mutually reinforcing exchange between private scholarly reflection and public deliberative institutional dynamics geared towards legitimacy and acceptance.[36] According to such an understanding of the ILC codification process, the completion of a set of articles like the ARIO does not terminate the codification process, but only marks the conferral upon the codified rules of public law-making the certification necessary to endow the secondary rules concerned with authority and legitimacy, which is indispensable for their global acceptance by law-applying authorities. If one embraces that narrative, it is a feeling of unfinished business that follows from the adoption of the ARIO and, with it, a sense of responsibility to pursue the continuous dialectic norm-forming process between private and public actors by engaging in active systemic gap-filling. One way or another, the reception which our epistemic community will reserve to the ARIO inevitably constitutes an act of faith (or the manifestation of the absence thereof) in the current public codification processes of international society.

[36] The argument could be made that given that the ILC has codified the most important fragment of the systemic rules of the international legal order, this public process of the production of secondary rules through the ILC is coming to an end. I have already made that argument in J. d'Aspremont, "Les travaux de la Commission du droit international relatifs aux actes unilatéraux des États", 109 R.G.D.I.P. (2005), p. 163.