
The Allocation of International Responsibility between International Organizations and Their Member States: A Case of Indirect Responsibility?

Christiane Ahlborn*

Nikolaos Voulgaris. **Allocating International Responsibility between Member States and International Organizations**. Oxford: Hart Publishing, 2019. Pp. 755. £70.00. ISBN: 9781509925728.

Abstract

While the responsibility of international organizations and their member states has been on the agenda of courts and scholars for decades, the adoption of the Articles on the Responsibility of International Organizations (ARIO) by the International Law Commission in 2011 has given new impetus to the debate. Nikolaos Voulgaris' *Allocating International Responsibility between Member States and International Organizations* is one of the few general books on the topic that post-dates the adoption of the ARIO. Despite its broad title, however, the focus of the book is rather narrow: it concentrates on the responsibility of an international organization or a state in connection with the act of a/another state or international organization, which Voulgaris describes as 'indirect responsibility'. Considering the book's extensive discussion of the function and nature of international responsibility, this review essay first submits that the book's actual aim is a rethinking of indirect responsibility. Second, it examines Voulgaris' reconceptualization of the pertinent provisions on indirect responsibility in terms of what he calls the 'complicity' and 'derivative responsibility' models. This review essay concludes that the reader who expects detailed guidance on the allocation of responsibility between international organizations and their member states will be

* Legal Officer, United Nations Office of Legal Affairs, New York, USA. Email: christiane.ahlborn@gmail.com. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

left wanting. Instead, the interaction between international organizations and their member states serves as an illustration for the book's insightful analysis of the under-theorized provisions on international responsibility in connection with the act of another.

1 Introduction: The Accountability Gap

Since the *Westland Helicopters* and *International Tin Council (ITC)* cases,¹ the responsibility of international organizations and their member states has been a popular topic in international law. Several codification projects have attempted to clarify the applicable rules – in particular, the Institut de Droit international (IDI), the International Law Association (ILA) and the International Law Commission (ILC). These codification efforts culminated in the ILC's 2011 Articles on Responsibility of International Organizations (ARIO),² which are largely a reflection of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).³ However, the ARIO do not necessarily have the same authority as its predecessor.⁴ States, international organizations and scholars have criticized the ARIO for not adequately addressing the responsibility of international organizations and their member states.⁵ Conceptually, international organizations are said to be too specialized to be subjected to a general regime of international responsibility. In any case, the direct transposition of the rules on state responsibility to international organizations is inappropriate as international organizations are fundamentally different from states. At a practical level, international organizations are seldom held responsible for their internationally wrongful conduct because they have far-reaching immunities before domestic courts,⁶ and they are generally not subject to the jurisdiction of international courts and tribunals. Moreover, international organizations often do not have effective internal

¹ Swiss Federal Supreme Court (First Civil Court), *Arab Organization for Industrialization and Others v. Westland Helicopters Ltd*, 19 July 1988, 80 ILR 652; House of Lords, *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, [1989] 3 WLR 969 (HL).

² International Law Commission (ILC), Articles on the Responsibility of International Organizations, with Commentaries (ARIO), UN Doc. A/66/10 (2011), at 46–105.

³ ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (ARSIWA), UN Doc. A/56/83 (2001), at 31–114.

⁴ As acknowledged by the ILC in the ARIO commentaries. See ILC, *supra* note 2, at 45, para. 5.

⁵ For the views of states and international organizations on the ARIO on first reading, see Responsibility of international organizations: Comments and observations received from Governments, UN Doc. A/CN.4/636 and Add. 1–2, 14 February, 13 April and 8 August 2011; and Responsibility of international organizations: Comments and observations received from international organizations, UN Doc. A/CN.4/637 and Add.1, 14 and 17 February 2011. For the various positions in scholarship, see, e.g., M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013).

⁶ This is so because the immunity of international organizations, unlike state immunity, is driven by functional necessity considerations. See, e.g., M. Singer, 'Jurisdictional Immunity and International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virginia Journal of International Law* (1995) 53.

mechanisms that could make up for the lack of external accountability. The resulting accountability gap raises the question of whether member states could be held responsible with or for the acts of an international organization.

2 Do Not Judge a Book by Its Title

Nikolaos Voulgaris' book on *Allocating International Responsibility between Member States and International Organizations* makes an interesting and distinctive contribution to the scholarship on the responsibility of international organizations. At first sight, and going by the title, the book appears to fit into the category of the few general monographs on the topic that post-date the adoption of the ARIIO in 2011.⁷ The author underpins this impression when explaining on the first pages that he will discuss 'how ... international law regulate[s] (if at all) the international responsibility of both the members [sic] States and the International Organization of which they are members when these two subjects interact' (at 1–2). His aim is not only to identify the existing law but also to provide guidance on how the law should develop and how its content should be determined. As the later chapters reveal, this guidance includes proposals for textual reformulations of some of the provisions of the ARSIWA and the ARIIO. Although the author notes that he does 'not propose a redrafting of the provisions under scrutiny' (at 204), his reformulations partly diverge considerably from the work of the ILC.

Turning a few pages forward, it becomes clear that the focus of the book is much narrower than the title suggests. It does not offer a comprehensive treatment of the different aspects of the law of international responsibility. As Voulgaris explains at the outset, his book does not examine the implementation of international responsibility even though some consider this to be the 'main obstacle' in holding international organizations responsible (at 4). It may be added that the book also does not treat aspects such as circumstances precluding wrongfulness and the content of international responsibility. The book only discusses a limited set of provisions in the ARIIO – namely, those in Chapter IV of Part Two and Part Five (at 4) – and their relevant counterparts in Chapter IV of Part One of the ARSIWA. The pertinent provisions concern the responsibility of an international organization or state in connection with the act of a/another state or international organization. Those provisions have been dubbed in different ways such as 'responsibility for the act of another' or 'derived responsibility'. Voulgaris chooses the term 'indirect responsibility' with remarkably little treatment of the alternative options (at 6).

⁷ See, e.g., C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (2017); see also the more specialized monographs by A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011); M.P. Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (2017); A.S. Barros, *Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions* (2019).

The reader accustomed to the pertinent case law of domestic and international courts and tribunals might stumble across the book's conceptual focus on the rules on indirect responsibility. As cases such as *Al-Jedda*⁸ or *Nuhanović* illustrate,⁹ responsibility is usually allocated on the basis of attribution of conduct. When conduct is attributable to an actor that is bound by a relevant obligation, that actor is internationally responsible pursuant to the elements of the internationally wrongful act stipulated in the ARSIWA and the ARIO. As Voulgaris acknowledges, the rules on the responsibility of a state or international organization in connection with the act of another are considered 'anomalies' and are hardly ever applied in practice (at 7). He argues that the controversial nature of these provisions is due to the lack of a 'principled argumentative basis' for the development of rules on indirect responsibility (at 8). Therefore, he intends to provide a 'principled and logical framework upon which practice can be based' and under which the provisions on indirect responsibility may be assessed (at 9). It is here then that the author hints at the true purpose of his book, which is not so much the allocation of responsibility between international organizations and their member states. In line with the author's previous scholarship, the book is more about 'rethinking indirect responsibility' generally (at 10).¹⁰

3 The Function and Nature of International Responsibility

To develop the framework for assessment used in the book, Chapter 2 engages with 'The Function and Nature of International Responsibility'. After coming to the rather trite conclusion that responsibility is necessary for law to exist ('[n]o responsibility, no law' at 22), Voulgaris observes that the law of international responsibility functions as 'the legal accountability mechanism in international law insofar as States and International Organisations are concerned' (at 23). This characterization may be accurate, but it is over-simplistic for several reasons. First, Chapter 2 does not discuss the function of international responsibility in terms of the well-established distinction between sanctions and reparation.¹¹ The remedial function of international responsibility is the provision of reparation for damage, whereas its restorative function focuses on the violation of the rule of international law. Second, the distinction between these different functions is closely related to the omission of damage as one of the conditions of international responsibility.¹² The author accepts the ILC's conceptual choice to eliminate damage from the conditions of international responsibility (at 36), but he does not integrate it into his conceptual framework. In fact, he (maybe unconsciously) carries the ILC's choice to a new level by treating the two elements of

⁸ *R. (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58; *Al-Jedda v. United Kingdom* (GC), Appl. no. 27021/08, Judgment of 7 July 2011.

⁹ Supreme Court of the Netherlands, *The State of the Netherlands v. Hasan Nuhanović*, Case no. 12/03324, 6 September 2013.

¹⁰ See Voulgaris, 'Rethinking Indirect Responsibility', 11 *International Organizations Law Review (IOLR)* (2014) 5.

¹¹ See Ago, 'Le Délit International', 68 *Recueil des Cours* (1939) 415, at 530–531.

¹² See Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?', 11 *Michigan Journal of International Law* (1989) 105, at 122.

the internationally wrongful act as the ‘the content of international responsibility’ (at 31–32). This term is usually reserved for the secondary obligations resulting from an internationally wrongful act in the form of cessation, assurances and guarantees of non-repetition and reparation. Lastly, the phrase ‘legal accountability mechanism’ is not well chosen because there are hardly any institutional ‘mechanisms’ to hold international organizations ‘accountable’. As the book does not deal with the implementation of responsibility, however, such pragmatic considerations escape its attention.

The narrow focus of the book also extends to its description of the nature of international responsibility, which is characterized by three ‘general principles’ contained in Articles 1, 2 and 3 of the ARSIWA and Articles 3, 4 and 5 of the ARIO (at 26). While the provisions on indirect responsibility analysed in subsequent chapters constitute the progressive development of international law (at 3), those general principles are codified ‘valid statements of existing law’ (at 30). By jointly analysing the ARSIWA and the ARIO as part of one common framework, the book allows for a more coherent reading of the law of international responsibility, which does not exaggerate the differences between states and international organizations.¹³ As international legal persons, both states and international organizations are subject to the law of international responsibility. Nonetheless, one wonders which other principles in the law of international responsibility apply to both states and international organizations. The obligation to make full reparation in Articles 31 of the ARSIWA and the ARIO comes to mind, but this obligation is not mentioned. Instead of looking at those other provisions, Voulgaris makes the broader point that the general principles he identified should underlie the law of responsibility as a whole and do not allow for any exceptions (at 26). The determination of international responsibility requires an internationally wrongful act committed by the responsible person. This claim is far from a truism as the provisions on indirect responsibility in the ARSIWA and the ARIO are often considered to dispense with this requirement, and the book rightly takes issue with this view in the subsequent chapters.

With commendable methodological rigour, the book then sets out to examine the different provisions on indirect responsibility using the framework developed in Chapter 2. The analysis is structured based on the different roles of states in relation to international organizations: they can either act as members of an international organization or interact with the international organization as independent subjects of international law.

4 The ‘Exclusive International Organisation’ / ‘No Member Responsibility’ Rule and Its Complexities

Chapter 3 on ‘Reassessing the Particular Member State-International Organisation Relationship’ focuses on those situations in which states act as members of an international organization. The consensus among international lawyers is that states are

¹³ For a nuanced study on the similarities and differences between international organizations and states based on the work of the ILC, see F. Lusa Bordin, *The Analogy between States and International Organizations* (2018).

not responsible by virtue of their membership alone. This ‘exclusive International Organisation responsibility’/ ‘no member responsibility’ rule dates back to the work of the IDI on the topics of the ‘Legal Consequences for Member States of the Non-fulfilment by International Organizations of Their Obligations toward Third Parties’, in which the IDI concluded that member states could not be held liable for the act of an international organization. As the IDI emphasized in Article 8 of its 1995 resolution, ‘[i]mportant considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations’ speak against the development of a rule on member state responsibility for the obligations of an international organization.¹⁴ The ILC and also the ILA followed the IDI’s approach.

The book accepts the ‘no member responsibility’ rule but supplements the commonly invoked policy considerations with legal arguments. Voulgaris correctly explains that the responsibility of member states by virtue of their membership alone cannot be reconciled with the autonomy of the organization, which makes the organization a separate legal person. While legal subjects can be autonomous in relation to certain competences, they may not have autonomy with regard to others, which is an observation that can be applied to states and international organizations alike (at 62–63). As members, states disappear behind the ‘institutional veil’ of the organization¹⁵ and therefore do not incur international responsibility for the acts of the organization based on their membership alone. The book offers a welcome addition to the ‘unprincipled theorising’ on the ‘no member responsibility’ rule (at 63), but it does not really engage with the significant literature arguing that member states should incur responsibility for the acts of the organization. Voulgaris notes that ‘[a]ttribution of conduct, as a normative operation, ensues from some sort of control or organic link between a subject and certain conduct. And in the present scenario of mere membership, neither of the two is in play’ (at 58). As ‘Masters of the Treaty’, however, member states ultimately control the international organization, which could be relevant when the organization is unwilling or unable to provide a remedy corresponding to the remedial function of international responsibility.¹⁶ But Voulgaris does not discuss such legal arguments that would support the countervailing policy consideration of closing the accountability gap through member state responsibility.

A more balanced consideration of the legal arguments for and against a ‘no member responsibility’ rule might have led to a different assessment of the two exceptions to this rule carved out by the ILC in the ARIO: acceptance of responsibility by member states (Article 62(a) of the ARIO) and third-party reliance on the responsibility of member states (Article 62(b) of the ARIO). The book is highly critical of Article 62 because it ‘transposed the debate on member State liability to the international

¹⁴ Institut de droit international, *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties* (1995).

¹⁵ See C. Brölmann, *The Institutional Veil in Public International Law International Organisations and the Law of Treaties* (2007).

¹⁶ See J. Klabbers, *An Introduction to International Organizations Law* (2015), at 309.

responsibility framework' (at 64). The ILC had worked on the topic 'International liability for injurious consequences arising out of acts not prohibited by international law' from 1974 to 1997.¹⁷ Unlike international responsibility, international liability does not depend on wrongfulness but is based on a primary obligation to repair damage caused by certain transboundary activities. In Voulgaris' view, the case law in the above-mentioned *ITC* and *Westland Helicopters* cases concerned liability and not responsibility because the member states in those cases had not acted wrongfully (at 65, 79). Since the ILC relied on both cases to draft Article 62 of the ARIO, he concludes that the ILC mixed the two accountability mechanisms of responsibility and liability (at 64). His conclusion seems to be based on the assumption that the relevant international organization had separate legal personality. However, a more thorough analysis of the relevant case law could have revealed that the *ITC* and *Westland Helicopters* cases at least partly dealt with the question of whether the respective international organization had autonomy from its member states.¹⁸ If this question had been answered negatively, the obligations of the organization would have been those of its members, which therefore could have been responsible for the acts of the organization.

The author makes a valid point that Article 62 of the ARIO does not fit squarely into the law of international responsibility, which allocates responsibility based on attribution of conduct and the breach of an international obligation. Still, Voulgaris' claim that the ILC had ventured into the field of state liability when drafting Article 62 remains doubtful. Assuming that the ILC remained within the responsibility framework, it could be argued that Article 62 is intended to protect third parties from the effects of the complex internal relations between an international organization and its member states. Indeed, the ILC commentary to Article 62 of the ARIO puts considerable emphasis on third parties.¹⁹ From the perspective of a third party, it may not be possible to 'objectively determin[e]' (at 69) who committed the internationally wrongful act – that is, the organization, its member states or both. But this does not mean that member states are liable without having acted wrongfully. Therefore, Article 62 stipulates that member states may assume responsibility for the act of the organization, or they may be considered responsible based on reliance by the third party.

To salvage Article 62 of the ARIO to a certain extent, the book suggests reformulating it in a way that omits subparagraph (b) and refocuses the remaining part on the consent of member states accepting international responsibility. Once again, it must be underlined that a remedial perspective would have likely led to a different outcome that also considers the interests of the injured party to receive reparation. While consent is the basis for member states to accept responsibility, there might be situations

¹⁷ The topic was subdivided into the two topics: '[p]revention of transboundary damage from hazardous activities' and '[i]nternational liability in case of loss from transboundary harm arising out of hazardous activities'. See ILC, 'Report of the International Law Commission on the Work of Its Forty-Ninth Session (12 May–18 July 1997)', 2(2) *ILC Yearbook* (1997) 1, at 9.

¹⁸ See, e.g., Palchetti, 'Maclaine Watson & Co. Ltd v International Tin Council, 26 October 1989, United Kingdom House of Lords, 81 ILR 670', in C. Ryngaert *et al.* (eds), *Judicial Decisions on the Law of International Organizations* (2016) 28.

¹⁹ ARIO, *supra* note 2, at 101, paras 7–11.

in which third parties validly relied on the responsibility of the member states as provided for in subparagraph (b). Voulgaris rightly notes that the common denominator of both responsibility and liability is ‘that the victim must be redressed and without such a legal duty, the establishment of international responsibility or liability would fall down to an academic exercise’ (at 69). By drafting Article 62, the ILC likely intended to strengthen the position of the injured parties and their right to a remedy as one of the main functions of international responsibility. Within the confines of the ‘no member responsibility’ rule, the ILC tried to contribute to closing the accountability gap, which Voulgaris’ reinterpretation of the provision might arguably widen. At the end of Part 1 of the book, the reader is thus left with the sombre impression that there are very few (if any) options of holding member states responsible for the acts, or in conjunction with the acts, of an international organization.

5 Rethinking Indirect Responsibility: The Complicity and Derivative Responsibility Models

In Part 2 of the book on ‘Member State-International Organisation Interaction as Independent Subjects of International Law’, this impression is at least partly reversed. In fact, it almost seems as if for Voulgaris, Part 1 was a necessary prelude to the book’s actual focus on indirect responsibility. Chapter 4 first develops the ‘Applicable Responsibility Models’, considering the provisions on aid or assistance, direction and control and coercion that were transposed from the ARSIWA to the ARIO. The two applicable responsibility models are the ‘complicity model’, based on aid or assistance, and the ‘derivative responsibility model’, which may result from direction and control or coercion. While this basic distinction was already drawn by the ILC in the ARSIWA on first reading,²⁰ it was blurred on second reading by splitting the two ‘models’ into three distinct provisions, dealing separately with aid or assistance (Article 16 of the ARSIWA), direction and control (Article 17 of the ARSIWA) and coercion (Article 18 of the ARSIWA). Voulgaris helpfully recalls Special Rapporteur Roberto Ago’s motivation in drafting the two provisions on ‘aid or assistance by a State to another State for the commission of an internationally wrongful act’ (Article 27) and ‘[r]esponsibility of a State for the internationally wrongful act of another State’ (Article 28) in the Draft Articles on State Responsibility on first reading (at 109). Unlike aid or assistance, direction and control and coercion concern the impairment of the freedom of the directed and controlled or coerced state (or international organization). Voulgaris’ discussion thus contributes to clarifying the legal nature of the provisions on the responsibility of one state or international organization in connection with the act of another.

²⁰ See draft Arts 27 and 28 of the Draft Articles on State Responsibility contained in ILC, ‘Report of the International Law Commission on the Work of Its Thirty-First Session (14 May–3 August 1979)’, 2(2) *ILC Yearbook* (1979) 87, at 93.

Building on the early theory on international responsibility, the book also moves the discourse on indirect responsibility forward. The pertinent provisions are often described in terms of ‘attribution of responsibility’ (at 117–118), which seems to suggest that the responsibility of the aiding or assisting, directing and controlling or coercing state or international organization is not based on the attribution of its own conduct. Relying on his conceptual framework, Voulgaris argues that all three provisions on indirect responsibility should meet the two general requirements for an internationally wrongful act – that is, amounting to a breach of an international obligation through conduct that is attributable to the state whose responsibility is asserted. This argument is well accepted regarding aid or assistance,²¹ but its application to derivative responsibility in the case of direction and control and coercion is novel. As the author explains, ‘[t]he restriction of freedom of action functions as a carrier that transfers the conduct of one actor to another, thus attributing P’s conduct to R’ (at 115).²² Based on such a ‘transfer’, when a state or international organization directs and controls or coerces another actor, the conduct of that latter actor becomes attributable to the directing and controlling or coercing state or international organization.

As for the other requirement of the internationally wrongful act – that the conduct in question must have breached an international obligation – Article 17 of the ARSIWA (and the corresponding provisions in the ARIO) stipulates that the directing and controlling state should be bound by the same obligation as the directed and controlled state. The directing and controlling state would thus breach its own obligation. The same condition is not stipulated in Article 18 of the ARSIWA (and the corresponding provisions in the ARIO) on coercion, which makes it challenging to argue that the requirements of the international wrongful act are met when one state coerces another. In reformulating the two provisions on direction and control and coercion in one single provision, Voulgaris therefore distinguishes between the responsibility of an actor restricting the freedom of another for its own wrongful conduct (paragraph 1) and responsibility for the restriction of the freedom itself (paragraph 2). He thus seems to characterize coercion as a primary obligation, which is necessary because the coercing state is not bound by the same obligation as the coerced state. A breach of the obligation not to coerce would thus fulfil the requirement of the breach of an obligation under Article 2 of the ARSIWA. It is problematic, however, that, for Voulgaris, the ‘intensity of the restriction of freedom exercised’ (at 120) is not relevant for distinguishing coercion from direction and control. Unlike the restriction of freedom by means of direction and control, the concept of coercion implies a lack of consent on the part of the coerced state,²³ which gets lost in Voulgaris’ reformulation.

Although the discussion in Chapter 4 makes a real contribution to the scholarship on indirect responsibility, Voulgaris relies heavily on state practice, while the practice

²¹ See ARSIWA, *supra* note 3, at 66, para. 1.

²² ‘P’ stands for ‘perpetrator of wrongful conduct’ and ‘R’ is the ‘responsibility bearer’ (at 88).

²³ See ARSIWA, *supra* note 3, at 69, para. 2, also noting that as coercion ‘has the same essential character as *force majeure* under article 23’, the responsibility of the coerced state will be precluded in most cases (para. 4).

of international organizations is only examined peripherally. This again betrays the actual aim of his book, which is not so much focused on the allocation of responsibility between international organizations and their member states but, rather, invites a rethinking of indirect responsibility. The reliance on state practice might be justified by the author's categorization of the pertinent provisions as progressive development in relation to international organizations, which Voulgaris seeks to subject to a 'reality check' in Part 3. And, yet, given the title of the book and its corresponding research question set out in Chapter 1, one could have hoped for a fuller analysis of the provisions on aid or assistance, direction and control and coercion with regard to the relevant practice of international organizations. To put it in simple terms, how would these provisions be used to allocate responsibility between international organizations and their member states?

6 The Problem of Circumventing Obligations and How to Deal with It

Instead of giving these more established provisions a closer look, the book applies the two responsibility models developed in Chapter 4 to the new and controversial ARIО provisions on the circumvention of obligations by international organizations (Article 17 of the ARIО) and by member states (Article 61 of the ARIО). These two articles are part of the provisions that the ILC added to the ARIО to deal with the member state–international organization relationship, which the ARSIWA had not covered.²⁴ Article 17 addresses the situation in which an international organization 'uses' its member states to circumvent its own obligations, and Article 61 addresses the scenario in which member states circumvent their obligations by means of an international organization. While Article 17 and 61 of the ARIО could have been discussed in Part 1 of the book on the specific member states–international organization relationship, Voulgaris argues that they concern the allocation of responsibility between international organizations and states as independent subjects of international law (at 125). Based on this argument, he then applies his own responsibility models to the two provisions on circumvention to clarify their legal nature.

Chapter 5 on 'Circumvention of Obligations through Member States' uses the pertinent case law on United Nations Security Council sanctions resolutions in cases such as *Kadi*,²⁵ *Nada*²⁶ and *Al-Dulimi*²⁷ to illustrate that binding decisions of an international organization pursuant to Article 17(1) of the ARIО restrict the freedom of member states, which reflects the derivative responsibility model. Member states are

²⁴ As Art. 57 of the ARSIWA on 'Responsibility of an international organization' provides: 'These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.'

²⁵ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (EU:C:2008:461).

²⁶ ECtHR, *Nada v. Switzerland*, Appl. no. 10593/08, Judgment of 12 September 2012.

²⁷ ECtHR, *Al-Dulimi v. Switzerland*, Appl. no. 5809/08, Judgment of 26 November 2013.

then ‘exculpated’ from responsibility when implementing the act of an international organization (at 137). Article 17(2) of the ARIIO addresses situations in which international organizations participate in the internationally wrongful act of another (that is, the member states) and thus represents the complicity model. While the ILC has been criticized for mostly transposing the ARSIWA to the ARIIO, Article 17 of the ARIIO illustrates that the new provisions in the ARIIO were often more controversial than those that have an equivalent in the law of state responsibility.²⁸ The book’s interpretation of the provision in terms of the derivative and complicity models of responsibility helps situate its position within the law of international responsibility. Nonetheless, Article 17 requires that the organization that circumvents its international obligations has the intention to do so,²⁹ which sets a very high threshold of application. Considering the problematic nature of Article 17, one wonders why the author does not question its overall necessity or suggest a reformulation.

The only real added value of Article 17 of the ARIIO compared with other provisions on ‘indirect’ responsibility seems to be that the international organization will incur responsibility whether or not the member states ‘used’ for the circumvention were bound by the relevant obligation, as expressly stated in Article 17(3). This requirement is relevant to the extent that responsibility resulting from the act in question could be shared between the organization and its member states, which the book only discusses superficially (at 120–122). But this does not constitute a sufficient reason why the pertinent case law in Chapter 6 could not be discussed in terms of both the ‘complicity’ and ‘derivative’ models of responsibility without resorting to the notion of circumvention. Under the provisions on direction and control and coercion, the conduct of member states would be attributable to the international organization based on its binding decision. Member states would not necessarily be ‘exculpated’ from responsibility, unless they were coerced to act on behalf of the organization. In relation to authorizations, the international organization could incur responsibility for knowingly aiding or assisting in the wrongful conduct of its member states, provided that the latter acted wrongfully. Given his intention of ‘rethinking’ indirect responsibility, it is curious that Voulgaris does not examine these provisions in greater detail.

7 In Particular: Circumvention of Obligations and Equivalent Protection

Chapter 6 on ‘Circumvention of Obligations through the International Organisation’ considers the reverse scenario to Article 17 of the ARIIO. As Article 61(1) of the ARIIO stipulates, member states incur responsibility for breaching their own obligations by causing an international organization to act, and paragraph 2 adds that member

²⁸ See Pronto, ‘Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations’, in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 147, at 148–149.

²⁹ ARIIO, *supra* note 2, at 68, para. 4.

states incur responsibility whether or not the organization is bound by the relevant obligation. While Article 61 is thus structured differently from Article 17, Voulgaris makes the same argument that he advanced in Chapter 5. In his view, Article 61 operates according to both indirect responsibility models – namely, member state responsibility for conduct of the international organization (derivative responsibility) and for participation in the internationally wrongful act of the international organization (complicity). Considering that Article 61 of the ARIO provides that member states only incur responsibility for circumvention when ‘causing’ the organization to act, the level of causation in each particular case is pertinent in deciding which responsibility model is applicable (at 154). When the member state restricts the freedom of an international organization, it would incur derivative responsibility, whereas the facilitation of wrongful conduct by the organization would result in member state responsibility based on the complicity model (at 157–158). While Article 61, like Article 17, requires intention on the part of member states, Voulgaris rightly identifies causation as the more problematic element to establish because it is under-theorized (at 157). However, the book does not add much to the theory of causation in international law, which it describes as an ‘objective’ standard. It thereby neglects that causation may not only be objective: at least at the stage of delineating the scope of responsibility, legal judgments are often informed by subjective (policy) considerations such as foreseeability, proximity or remoteness of the damage.³⁰

The most striking feature of the discussion in Chapter 6 is that it discounts the relationship between Article 61 of the ARIO and the case law of the European Court of Human Rights (ECtHR) regarding the so-called ‘equivalent protection’ doctrine. In a nutshell, the ECtHR’s equivalent protection doctrine, as developed in cases such as *Waite and Kennedy* or *Bosphorus*,³¹ provides that the parties to the European Convention on Human Rights (ECHR) may confer powers to an international organization ‘as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides’.³² The doctrine implies a rebuttable presumption that the human rights protection provided by the international organization is equivalent to that under the ECHR.³³ In drafting Article 61, the ILC sought guidance from the pertinent case law of the ECtHR.³⁴ Although Article 61 has been criticized for its formulation, the ILC’s reliance on the equivalent protection doctrine finds support in scholarship and practice.³⁵

³⁰ See Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’, 26 *European Journal of International Law* (2015) 471, at 478.

³¹ ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999; *Bosphorus v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005.

³² *Bosphorus*, *supra* note 31, para. 155.

³³ *Ibid.*, para. 156.

³⁴ ARIO, *supra* note 2, at 99, paras 3–5.

³⁵ For a discussion, see, e.g., Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’, 8 *IOLR* (2011) 291.

Based on his own understanding of Article 61 of the ARIO, Voulgaris characterizes the relationship between the provision and the equivalent protection case law as being ‘lost in causation’ (at 159). In particular, he argues that the pertinent case law does not concern the indirect responsibility of member states for causing the initial wrongful act by the international organization in the sense of Article 61 of the ARIO. Instead, the case law focuses on the direct responsibility of those member states for transferring powers to an international organization (at 170). It is of course true that the equivalent protection doctrine does not necessarily focus on the initial wrongful act by the organization but, rather, on the failure to ensure effective substantive and procedural human rights protection equivalent to that provided by the ECHR – in short, the lack of a remedy for ECHR violations.³⁶ However, while Voulgaris rightly notes that the member states might not have caused the initial wrongful act, he does not consider that they might have caused the lack of remedies for injured parties. This violation of the organization’s secondary obligation to make reparation might indeed lead to a situation in which member states circumvent their own obligations. As noted above with regard to the ‘no member responsibility’ rule, if the organization is unable or unwilling to provide a remedy for its wrongful conduct, its member states may arguably incur subsidiary responsibility. In this context, a court might have to assess whether the lack of equivalent human rights protection was foreseeable for the member states or proximate to the damage caused. From a remedial point of view, the equivalent protection doctrine of the ECtHR might thus certainly be relevant for the interpretation of Article 61 of the ARIO.

Voulgaris’ decision to view the equivalent protection doctrine as an instance of direct responsibility reveals a more general problem in his rethinking of rules on the responsibility of a state or international organization in connection with the act of another in Part 2. While this rethinking offers a refreshing new perspective on a difficult aspect of the law of international responsibility, one wonders why the author portrays the relevant provisions as ‘indirect responsibility’ in the first place. As the convoluted titles of the relevant chapters in the ARSIWA and the ARIO illustrate, it is not easy to bring those provisions under one umbrella.³⁷ Still, to choose the term ‘indirect responsibility’ somewhat counteracts the author’s main argument that those provisions should comply with the ‘general principles’ of the law of international responsibility that he had identified in Chapter 2. When the two elements of the internationally wrongful act exist, the state or international organization incurs direct responsibility. On that basis, complicity maybe never quite belonged to the category of ‘indirect’ responsibility for acts of another. More generally, an

³⁶ For a detailed analysis, see E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (2017).

³⁷ In the Draft Articles on State Responsibility on first reading, the ILC had still used the concept of ‘[i]mplication of a State in the internationally wrongful act of another State’. See ILC, ‘Report of the International Law Commission on the Work of Its Thirtieth Session, 8 May–28 July 1978’, 2(2) *ILC Yearbook* (1978) 74, at 98–99.

argument could be made – or should at least be refuted – that member states incur direct responsibility when they cause an international organization to act wrongfully, including by not enabling it to provide a remedy.

8 ‘Interactions Intertwined’ in Practice

Part 3 of the book on ‘Interactions Intertwined’ then applies the theoretical insights gained in the previous chapters to ‘real-life scenarios’ using the example of ‘Responsibility at the Decision-making Level’ (at 177). Applying first the derivative responsibility model to decision-making, the book analyses paragraph 2 of Article 59 of the ARIIO, which provides that a member state will not incur responsibility for an act done in accordance with the rules of the organization. While agreeing that states are not responsible in their capacity as member states, Voulgaris argues that voting in an international organization is ‘the example *par excellence* of States exercising two different functions through the same act’ (at 186). Member states do not incur responsibility to the extent that the exercise of their vote is an expression of the will of the organization, but they may incur international responsibility to the extent that the vote reflects the separate will of the state. Member states thus may incur responsibility for decision-making under the derivative responsibility model, but they are ‘off the hook’ as far as complicity is concerned (at 196). As the provisions on aid or assistance in the ARSIWA and the ARIIO require that the internationally wrongful act is committed by another subject of international law, member states cannot be complicit in the decision of the international organization that they have made possible by acting on behalf of the organization (at 198).

The problem with using responsibility at the decision-making level as a real-life example is that such responsibility is mainly of scholarly interest. Domestic and international courts and tribunals have shied away from holding member states responsible for participating in the decision-making of an international organization. In fact, the *Chixoy Dam* case, which is discussed in Chapter 7, was decided on the basis of state responsibility only, whereas the petition regarding the responsibility of the relevant organizations and their members was dismissed (at 198–199).³⁸ The case of the *Application of the Interim Accord* before the International Court of Justice is ultimately an instance where the Court seemed to have ‘looked underneath’ the institutional veil with a view to establishing state responsibility (at 180–181).³⁹ The book’s argument that member states remain responsible, to a certain extent, for their voting is difficult to reconcile with the legal personality of the international organization, which depends on the merging of the individual

³⁸ IACtHR, *Case of the Rio Negro Massacres v. Guatemala*, Judgment, 4 September 2012.

³⁹ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Reports (2011) 644; see Barros and Ryngaert, ‘The Position of Member States in (Autonomous) Institutional Decision-Making: Implications for the Establishment of Responsibility’, 11 *IOLR* (2014) 53, at 79.

wills of the member states into the separate will (or *volonté distincte*) of the organization. It is telling that the book leaves open the question of whether a member state should be seen to have acted on behalf of the organization or in its own interest. Similarly, it remains unclear which standard political influence over the decision-making process would lead to exclusive member state responsibility under the derivative responsibility model (at 193). The rules of the organization might be an indicator, but the attribution of conduct is ultimately a normative operation under international law pursuant to the 'general principles' set out in Article 3 of the ARSIWA and Article 5 of the ARIIO.

9 Concluding Thoughts

Responsibility, as defined by the ILC, comprises the legal consequences flowing from an internationally wrongful act in the form of obligations of cessation, guarantees and assurances of non-repetition and reparation owed towards a third party. 'Responsibility' is a broad notion, but notwithstanding the choice of a broad title for his book, Voulgaris covers only a fraction of the law of international responsibility – namely, the provisions on 'indirect responsibility'. In doing so, the book oscillates between discussing the responsibility of international organizations and their member states, and the more general, underlying aim of rethinking indirect responsibility. As a result, the book does not really achieve either of its two objectives. On the one hand, the reader who expects detailed guidance on the allocation of responsibility between international organizations and their member states will be left wanting. Voulgaris' often far-reaching reinterpretations of the pertinent provisions in the ARSIWA and the ARIIO do not really take a remedial perspective, which is very much at the centre of concerns regarding the accountability of international organizations and their member states. On the other hand, his arguments on indirect responsibility – or, rather, responsibility in connection with the act of another – would have been stronger if this had been the outright focus of the book.

Considering the book's discussion on indirect responsibility, its contribution to the law of international responsibility is still unique and timely. The book offers a significant and insightful addition to the general theory on the law of international responsibility by analysing all of the provisions on responsibility in connection with the act of another and applying them to both states and international organizations. The provisions on direction and control, coercion and circumvention are usually only discussed in conjunction with aid or assistance, which has received much attention in recent scholarship.⁴⁰ While the book's conclusions are of general application and do not only relate to international organizations, international organizations often rely on their member states to operate. They are therefore an ideal object of study regarding

⁴⁰ See H.P. Aust, *Complicity and the Law of State Responsibility* (2011); M. Jackson, *Complicity in International Law* (2015); V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016).

questions of ‘indirect’ or ‘derivative’ responsibility. Vulgaris makes important points on the attribution of conduct between different subjects of international law. His approach of rethinking, and thereby giving more prominence to, the provisions on the responsibility of a state or international organization in connection with the act of another is innovative. His book will certainly stimulate further research and thinking on the pertinent rules, which will hopefully at some point materialize in the practice of those courts and tribunals that have to decide on the responsibility of international organizations and their member states.