Responsibility of International Organizations 'in connection with acts of States'

Nedeski, N.; Nollkaemper, A.

DOI
10.1163/15723747-00901012
Publication date
2012
Document Version
Final published version
Published in
International Organizations Law Review

MARTINUS NIJHOFF PUBLISHERS

International Organizations Law Review 9 (2012) 33–52

International Organizations Law Review

brill.com/iolr

Responsibility of International Organizations 'in connection with acts of States'

Nataša Nedeski[a] and André Nollkaemper[b]

a) PhD Researcher, Amsterdam Center for International Law
E-mail: n.nedeski@uva.nl
b) Professor of Public International Law, Amsterdam Center for International Law, University of Amsterdam
E-mail: p.a.nollkaemper@uva.nl

Abstract
This article offers some reflections on the way in which the ILC Articles on the Responsibility of International Organizations (ARIO) have addressed the responsibility of international organizations for conduct of member States implementing their normative acts. The ILC has chosen to deal with this issue through the concept of responsibility 'in connection with' acts of States, which it had already included in its Articles on State Responsibility (ASR), and more in particular through article 17 on 'circumvention'. Focusing primarily on this provision, we argue that the attempt to address this particular type of responsibility forced the ILC to relax the conceptual straightjackets it had opted for in the ASR, thereby exposing certain ambiguities in the foundations of the law of international responsibility.

Keywords
international organizations; international responsibility; responsibility of international organizations; International Law Commission; articles on the responsibility of international organizations; attribution of responsibility; responsibility in connection with acts of others

* The research leading to this article has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

DOI: 10.1163/15723747-00901012

I. Introduction

One of the complex questions that the International Law Commission (ILC) had to answer in its Articles on the Responsibility of International Organizations (ARIO)[1] was whether and how it should provide for responsibility of international organizations (IOs) that, through their decisions or other normative acts, induce member State conduct that contravenes international obligations of either the organization or the member State(s).

This question can be of practical relevance. It is prompted by the combination of the ever increasing role of IOs in international governance, on the one hand, and the fact that organizations rely on States for the implementation of their policies, on the other. When State conduct implementing IO's normative acts is not attributable to the organization,[2] the question may arise whether the IO nonetheless should incur responsibility towards third States and, if so, on what basis.

The development of principles on such IO responsibility in the ARIO presented profound conceptual difficulties. While the Articles on State Responsibility (ASR)[3] provided some guidance, in particular its provision on direction and control,[4] the ILC could not limit itself to copying from the ASR on this point, simply because in the relations between States there is no equivalent of the more hierarchical normative relationship between an IO and its member States. The attempt to address this type of IO responsibility forced the ILC to relax the conceptual straightjackets it had opted for in the ASR. However, this has exposed certain ambiguities in the very foundations of the law of international responsibility as construed by the ILC.

In this brief article we offer some reflections on the way in which the ARIO has addressed IO responsibility for conduct of member States implementing normative acts of IOs, and on the larger foundational issues that such responsibility raises. In section 2 we introduce by way of background the concept of responsibility 'in connection with acts of others'. In section 3 we explain how this type of responsibility has with difficulty

---

1) International Law Commission, *Draft Articles on the Responsibility of International Organizations*, 2011 (A/66/10) (ARIO).

2) Under the principles in articles 6-9 of the ARIO such attribution will only be possible in rather exceptional circumstances. *See generally* Pierre Klein, 'Attribution of Acts to International Organizations', in James Crawford *et al* (eds.), *The Law of International Responsibility* (Oxford, OUP, 2010), pp. 297-315.

3) International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (A/56/10) (ASR).

4) Article 17 ASR.

been molded into the conceptual model developed by the ILC and offer some thoughts on the tensions that have been exposed by the introduction of this form of responsibility.

II. The Concept of 'Responsibility in Connection with the Acts of Others'

In developing principles for IO responsibility in connection with conduct of member States that was normatively guided by the IO, the ILC was not in entirely uncharted territory. It could take inspiration from domestic law (section A) and from the ASR (section B) in its approach to the ARIO (section C).

A. Domestic Law

Many if not all legal systems provide for liability of person A, who stands in some relationship to person B, if B causes injury towards C.[5] Such domestic principles are not immediately transposable to international law, and Special Rapporteur Gaja did not rely much on domestic law analogies. Nonetheless, they are based on experience and intellectual effort that surpasses the relatively short history of international responsibility, and present useful frames of reference for thinking about possible bases for the responsibility of IOs who stand in a normative relationship to member States.

European efforts to codify tort law and contract law show two possible bases for a responsibility of A who induces B to cause injury to C. The first basis is that A is made responsible for its own acts towards B, which result in B causing injury to C. This 'personal responsibility' of A is based on the idea that A has breached an obligation towards C, for instance by entrusting a task to B or by acting wrongfully towards C on other grounds, with B only being an intermediary variable in the causal process.

The second basis for responsibility in this triangular relationship is that A is made responsible not for its own conduct, but for the conduct of (and injury caused by) B. This construction is commonly referred to as 'liability for the acts of others' or, in common law, 'vicarious liability'.[6] A is not liable for something that it did or did not do, but merely on the basis of

---

[5] We use the terms responsibility and liability interchangeably.

[6] W. V. Horton Rogers 'Liability for Damages Caused by Others under English Law', in J. Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others* (The Hague/London/New York, Kluwer Law International, 2003), p. 63.

the fact that it stands in some special relationship to B.[7] That relationship is often defined in terms of control ('superiority', or 'master-servant') – as we will see below, not without relevance for approaching the responsibility of IOs. One justification for this construction is that A can be better placed to provide reparation. In particular (and relevant for our topic) A may be in a better position to remove the underlying cause of B´s conduct, and to ensure termination of the wrong and prevention of its recurrence.

Contract law provides similar constructions for addressing injury arising out of a triangular relationship. The Principles of European Contract Law provide that "[a] party who entrusts performance of the contract to another person remains responsible for performance."[8] The resulting liability may, depending on the circumstances, resemble either personal liability (based on the act of instructing or entrusting)[9] or vicarious responsibility (based on the relationship between A and B that results from the entrusting of such performance).

B. State Responsibility

In its work on State responsibility, the ILC had to consider similar 'triangular' questions. State practice had shown examples of States incurring responsibility in connection with injurious acts by others to third parties. Roberto Ago made some sense of the variety in State practice by explaining that responsibility for the acts of others could only arise between subjects of the same juridical order.[10] He thus excluded, for instance, the possibility that States would be responsible for the acts of individuals.

---

7) Horton Rogers, *supra* note 6, p. 63. *See, e.g.*, article 6: 102 of the Principles of European Tort Law in: European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Vienna/New York, Springer, 2005) ("A person is liable for damage caused by his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct.").

8) Commission on European Contract Law, *Principles of European Contract Law, Volumes 1-2* (Kluwer Law International, 2000), p. 378, Article 8:107. This principle may overlap with the principle of liability for the acts of others; *see* Principles of European Tort Law, *supra* note 7, p. 117.

9) The Commentary adds that the person who carries out the contract may be subject to instructions of the (responsible) party. *See* Principles of European Contract Law, *supra* note 8.

10) Roberto Ago, Special Rapporteur, *Seventh Report on State Responsibility*, 1978 (A/CN.4/307 and Add.1 & 2 and Corr.1 & 2), para. 72. *See also* Hans Kelsen, *Principles of International Law* (New York, Rinehart, 1952), pp. 119 *et seq*.

Ago argued that the construction of 'responsibility for the act of another', which he also referred to as 'attribution of responsibility' or 'indirect responsibility',[11] would primarily be applicable in the relations between States.[12] He advocated that international responsibility could be attributed to a State for an internationally wrongful act committed by another State if the former State directed, controlled, or coerced the latter State; a construction that found its way into article 28 of the 1996 Draft ASR.[13] Some authors had founded this construction on the so-called control theory.[14] Ago based it not (only) on control as such, but on its effect on the freedom of the affected State:

> "International responsibility arising out of an internationally wrongful act can be attributed to a State only if that State, in committing it, was operating in a sphere of action for which it had complete freedom of decision. Contrariwise, in so far as that State was subject to the control of another State and its freedom of decision was thereby restricted for the benefit of another State, it is that other State which should be held responsible."[15]

It is important to emphasize that the responsibility of the State restricting the freedom of decision of another State was explicitly distinguished from situations in which a State would be responsible for its *own* wrongful acts.

---

[11] Roberto Ago, Special Rapporteur, *Eighth Report on State responsibility*, 1979 (A/CN.4/318 and Add.1 to 4), paras. 2-3.

[12] *Ibid.*, para. 3. He also thought it "intellectually conceivable" that a State would incur international responsibility for the act of a subject of international law other than a State (*e.g.* an international organization or an insurrectional movement), but did not discuss this possibility because there were "no known cases in which this has actually happened and such cases are unlikely to occur in the future".

[13] *Report of the International Law Commission on the work of its forty-eight session*, 1996 (A/51/10), p. 61.

[14] Ago, *Eighth Report, supra* note 11, para. 17. He refers to *e.g.* C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 43; M. Scerni, 'Responsabilita degli Stati', (1939) XI *Nuovo Digesto Italiano*, pp. 474-475, at 474; G. Barile, 'Note a teorie sulla responsabilita indiretta degli Stati', (1948) XXII *Annuario di diritto comparative di studi legislative*, pp. 443 *et seq.*; H. Rolin, 'Les principes de droit international public', (1950) 77 *Recueil des cours de l'Acadimie de droit international de la Haye*, p. 446. *See* for a comparable more recent argument, Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State, in James Crawford et al (eds.), The Law of International Responsibility (Oxford, OUP, 2010), pp. 281-289, at 287.

[15] Ago, *Eighth Report*, *supra* note 11, para. 17 and para 45.

The act of controlling, directing or coercing was thus not necessarily seen as a wrongful act in itself.

Eventually these situations were included in article 17 and 18 of the 2001 Articles, which placed direction and control and coercion (together with aid or assistance) under the heading of 'responsibility of a State in connection with the act of another State' in Chapter IV of Part 1 ASR. That the title of the chapter refers to 'in connection with' rather than to 'for' seems primarily related to the fact that the chapter also includes aid or assistance – a form of responsibility that cannot properly be construed as responsibility *for* the acts of another state.

In this later stage of the ILC's work the conceptual basis for such a category did not become much clearer. Rather than focusing on the relationship between responsibility and freedom, Crawford's main reason for including these three scenarios in Chapter IV was that they were not adequately covered by the general principle in article 1 and thus did not constitute responsibility for own wrongful acts.[16]

C. The ARIO

In its work on the ARIO, the ILC copied, without much debate, the three provisions on 'State responsibility in connection with the act of another State' that it had included in the ASR.[17] The question was whether this was enough to address the specific nature of the relationship between IOs and member States. In considering this question, a difficulty is the wide variety of legal relationships between IOs and member states. In some cases (but the EU may be the only example), the mere fact of transfer of powers may be sufficient to make an IO responsible for acts of member states.[18] But in other IOs, this was hardly conceivable, and it would seem that for such

---

16) James Crawford, Special Rapporteur, *Second Report on State Responsibility*, 1999 (A/CN.4/498/Add.1), para. 162. We will further discuss this general principle below.

17) Gaja saw "no reason for distinguishing, for the purposes of international responsibility, between the case, for instance, of a State aiding another State and that of an organization aiding another organization or a State in the commission of an internationally wrongful act. The same generally goes for the instance of direction and control and for the case of coercion." Giorgio Gaja, Special Rapporteur, *Third Report on the Responsibility of International Organizations*, 2005 (A/CN.4/553), para. 27. *See also Draft articles on the responsibility of international organizations, with commentaries*, 2011 (A/66/10), p. 35, para. 1.

18) However, this eventual responsibility may also be explained on the basis of traditional conditions of breach and attribution. *See* S. Talmon, 'Responsibility of international

IOs, the only basis for responsibility that would be specific for IOs was the fact that IOs could adopt normative acts that would oblige, recommend or authorize member States. The question then was whether the ARIO should provide for IO responsibility for State conduct that was induced by a normative act of the IO?

In turn, this question triggered two preliminary questions. The first one was whether principles of international responsibility could, or should, attach legal consequences to normative acts of organizations.[19] Such normative acts are part of the internal legal order of IOs, and arguably the law of international responsibility should not qualify, or attach legal consequences to them, any more than it should in regard to internal (domestic) acts of States. However, while the internal dimension of rules of the IO in several aspects precludes international law from recognizing their legal status, it is submitted that the internal dimension of such rules does not as such preclude the law of responsibility to attach legal consequences to external effects that they may produce vis-à-vis third States. Such normative acts then have a dual nature: in the relationship to member States they obviously have a legal nature,[20] whereas in the external relations to third States they acquire a factual nature. It follows that international law can certainly attach relevance to the relationship between the organization and member States and the effects of that relationship on third parties, whatever the legal status of internal rules. Moreover, the policy considerations that in domestic law underlie liability of A for acts of B that cause injury to C to some extent are equally applicable here, notably the argument that if A exercises normative control, only A will be able to remove the basis of the conduct of B.

---

organizations: does the European Community require special treatment?' in: M. Ragazzi (eds), *International Responsibility Today: Essays in memory of Oscar Schachter*, (Martinus Nijhoff, Leiden, 2005), p. 419; P.J. Kuijper, Mixed Agreements Revisited, The EU and its Member States in the World, in C. Hillion & P. Koutrakos (eds.), International Responsibility for EU Mixed Agreements (2010), pp. 208-227 (Oxford-Oregon: Hart Publishing).

19) But note that the ILC intentionally, though not uncontroversially, did not copy the corresponding article of the ASR into the ARIO; *see* Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations - An Appraisal of the "Copy-Paste Approach"' (2012) 9 *International Organizations Law Review* pp. 53-66; SHARES Research Paper 13 (2012), ACIL 2012-14.

20) We can leave aside here the question whether this legal nature is limited to the internal order of the IO or whether general international law can recognize it as an international obligation, as the ILC suggested in article 10(2) of the ARIO.

Once it was accepted that there was a need to address the possible responsibility of an IO for conduct of a member State resulting from normative acts of the IO, the second question was whether the provisions that the ARIO had copied from the ASR adequately covered this particular problem. Since the provisions on aid or assistance and coercion could generally not cover responsibility arising out of normative acts of IOs, the key question was whether the concept of 'direction and control' could do so.[21] The ILC answered the question in the negative. One reason was that it had opted for a construction of direction and control which required factual control.[22] As the external effects of an IO's normative acts are indeed of a factual nature, it could be argued that the provision on direction and control is sufficient to cover situations of responsibility arising out of normative acts of IOs.[23] However, the ILC was of the opinion that, while normative acts of IOs could in some cases fulfill the requirements for direction and control, this provision would not necessarily cover all possible cases of IO responsibility for normative acts by IOs vis-à-vis member States. One essential element that was considered in this respect is the fact that responsibility resulting from direction and control rested on actual wrongful acts by the target State – a requirement that was not deemed decisive for IO responsibility in relation to its normative acts.[24] We may add as an additional consideration that the threshold for direction and control has been framed at a rather high level, and that it was not obvious that decisions, and certainly authorizations and recommendations, could be covered by these terms. Since such acts certainly can have constraining effects on member States, there were good grounds for including a separate provision.

Based on these considerations, the ILC included article 17, stipulating that an IO can be held internationally responsible if it circumvents one of its international obligations; either by adopting a decision binding

---

21) *See* on this point Niels Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations', (2010) 7 *International Organizations Law Review* pp. 35-48, at 39.

22) Responsibility under this article will only be incurred in the case of the exercise of factual control by the IO over the State conduct, *see* Gaja, *Third Report*, *supra* note 17, para. 35.

23) The ILC recognized that what was to became art. 17 indeed could overlap with art. 15. *See Draft articles on the responsibility of international organizations, with commentaries*, 2011 (A/66/10), pp. 42-43, para. 15. *See also* Gaja, Third Report, *supra* note 17, para. 35.

24) *Ibid*., para. 36.

member States to commit an act that would be wrongful if it had committed the act itself;[25] or by authorizing member States to commit an act that would be internationally wrongful it if had committed the act itself, but in the latter case only if the act in question is committed because of that authorization.[26] We note that the ILC could provide only limited practice that supports the proposed rule in article 17, and to some extent it seems therefore more a proposed ('progressive') development that would respond to an envisaged increase in the situations where IOs would induce member States to act in contravention of international obligations, than a codification of customary law.

III. Exposing the Tensions

Although at first sight the inclusion of article 17 may seem a technical fix, a small fine-tuning of 'direction and control' so as to allow for the specific problem of normative acts of IOs, it exposed fundamental tensions in the law of international responsibility. We list five of such tensions.

A. A Dual Foundation of Responsibility

First, this seemingly small addition that was brought by introducing article 17 forced a change in the very foundation of the entire set of principles. It should be recalled that the ASR are firmly based on the responsibility of a State arising out of its *own* wrongful conduct. The basic principle embodied in article 1 ASR ("every internationally wrongful act of a State entails the international responsibility of that State") underlies the ASR as a whole.[27] In view of the possibility that a State would be responsible not only for its own act but also for the act of others, Ago had suggested to opt for a broader opening article, providing that "every international wrongful act by a State gives rise to international responsibility", without specifying that this responsibility would necessarily attach to the State that had committed the wrongful act in question.[28] However, the ILC was of the opinion that the cases in which responsibility was attributed to a State other

---

[25] Article 17(1) ARIO.

[26] Article 17(2) ARIO.

[27] *See* ARIO with commentaries, *supra* note 23, p. 31 para, 1; p. 32 para. 1; p. 64 para. 1.

[28] Roberto Ago, Special Rapporteur, *Second Report on State Responsibility*, 1970 (A/CN.4/233), paras. 29-30.

than the State that committed the internationally wrongful act were so exceptional that they should not influence the basic principle in article 1.[29] It believed that following Ago would have detracted from the principle's basic force,[30] and thus State responsibility for the State's *own* wrongful conduct came to be the basic rule underlying the ASR.[31]

If Article 17 could have been pushed in this model of responsibility for a State's own wrongful acts, the basis of the ASR could have been retained. Indeed, if article 17 would embody a form of responsibility for own acts (rather than for that of others), it would even strengthen this foundation. While it may be argued that article 17 simply establishes responsibility for own wrongful conduct (see section III(B) below), the ILC seems to be of the opinion that article 17, together with the other forms of responsibility included in Chapter IV, establishes a form of IO responsibility for acts *other* than their own.[32] It was therefore included under the heading of 'responsibility in connection with' the acts of others, which the ILC believes to enumerate situations of IO responsibility for acts other than its own.[33]

In view of the relative significance attached by the ILC to this particular form of responsibility (even though it could not provide a long list of relevant practice), the foundation of article 1 ASR proved untenable. The exception had to be upgraded to a rule. Resembling Ago's original suggestion, the very first article of the ARIO therefore stipulates that the Articles apply not only to the responsibility of an international organization for its

---

29) Roberto Ago, Special Rapporteur, *Third Report on State Responsibility*, 1971 (A/CN.4/246 and Add.1-3), para. 47.

30) *Report of the International Law Commission on the work of its twenty-fifth session*, 1973 (A/9010/Rev.1), p. 176, para. 11.

31) Chapter IV is treated as an exception to this basic rule. *See* International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001 (A/56/10), p. 32, p. 64.

32) *See* ARIO with commentaries, *supra* note 23, p. 4, para. 4; p. 16, para. 2 with fn. 77. *See also* Giorgio Gaja, Special Rapporteur, *Eighth Report on the Responsibility of International Organizations*, 2011 (A/CN.4/640), para. 27 (where Gaja provides "clarification of the statement in the commentary that 'the responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization'. This may happen not only (…) when 'an international organization has expressly (for example via a treaty clause) assumed such responsibility'; it may also occur when an international organization is responsible, according to chapter IV of part two, in connection with the act of a State or another international organization.").

33) *See ibid.*

own wrongful conduct, but rather to "the international responsibility of an international organization for *an* internationally wrongful act".[34] This provision thus covers both cases of responsibility arising out of the organization's own wrongful conduct and situations in which an international organization incurs international responsibility for conduct other than its own.[35] While this brought a range of new problems, we submit that this presents a conceptual improvement over the ASR that better reflects the plurality of bases of responsibility.

B. Responsibility in the Absence of a Wrongful Act?

While a conceptual improvement over the ASR, the inclusion of article 1(1) does reveal a new problem. Even though this article presumes that responsibility is in all cases based on a wrongful act, article 17 seems to introduce situations in which responsibility can exist without wrongfulness.

We note that this problem would not present itself if we were to accept that article 17 deals with IO responsibility for its own wrongful acts. Indeed, in some cases an IO can be responsible on the basis of normative acts, because such acts themselves would be in breach of an international obligation of that IO. This would entail IO responsibility for its own acts; and whether or not this is the case would depend on that (primary) obligation.[36] For instance, if we accept that the UN is bound by international human rights obligations, a decision that requires its member States to block exports, resulting in starvation may well be wrongful as such, irrespective of conduct of member States. However, responsibility of IOs in such situations simply would be the operation of a primary norm outside of article 17, and there would be no need for this provision.[37] Another possible construction is that article 17 itself would be a primary norm,

---

34) Article 1(1) ARIO; emphasis added. Note that the internationally wrongful act is still a basis for responsibility – which may be questionable in connection to coercion and circumvention. We will come back to this below.

35) ARIO with commentaries, *supra* note 23, p. 4, para. 4.

36) *See* Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford, OUP, 2011), p. 48; Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review* pp. 397-482; SHARES Research Paper 02 (2011), ACIL 2011-03.

37) The same may in some cases be said for the other provisions dealing with responsibility 'in connection with' the acts of others. In this respect, during the drafting of the ASR some of the members of the ILC expressed the view that "the matters dealt with in these articles should be left to primary rules and the rules on attribution" in: *Report of the International*

specifying that it is wrongful for an IO to issue a decision or authorization in order to circumvent its international obligations. This indeed may be argued for all four of the provisions on IO responsibility in connection with the acts of States, casting doubt on the soundness of the way the primary-secondary rules distinction should shape the law of international responsibility.[38]

However, it seems that the ILC itself did not construe it in this way. It included article 17 in Chapter IV on responsibility 'in connection with' the acts of others and, as mentioned above, it is of the opinion that this Chapter deals with IO responsibility for acts other than their own.[39] Thus, if we follow the ILC's apparent conviction that article 17 deals with responsibility for the acts of others, this provision indeed provides for a construction of responsibility in the absence of a wrongful act.

The problem of responsibility in the absence of a wrongful act had already been identified with regard to the provision on coercion in the ASR, in those cases where the wrongfulness of the act of the coerced

---

Law Commission on the work of its fifty-first session, 1999 (A/54/10), para. 250. Moreover, it can be argued that all or some provisions dealing with 'responsibility in connection with the acts of States' cover situations that in fact could be solved with reference to the primary rule of due diligence, Corten and Klein make a similar argument with regard to the notion of aid or assistance also included in Chapter IV in: Olivier Corten & Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel case', in Karine Bannelier *et al* (eds.) *The ICJ and the Evolution of International Law* (Routledge, 2012) and with regard to the responsibility of States in connection with the acts of IOs in Klein, *supra* note 2, p. 310.

[38] *See* Jean 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* pp. 15-28; SHARES Research Paper 12 (2012), ACIL 2012-13. *See also supra* note 16, para. 164 (where Crawford states that "[o]ne obvious feature of article 27, and perhaps also of article 28, is that they specify that certain conduct is internationally wrongful"); International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001 (A/56/10), p. 65, para. 7 ("A feature of this chapter is that it specifies certain conduct as internationally wrongful."). Dominicé suggests that the provisions on direction and control and coercion in the ASR constitute primary rules, *see supra* note 15 at 289. From a different perspective, Reinisch suggests that article 15 ARIO on direction and control in fact provides for the attribution of conduct, s*ee* August Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 *International Organizations Law Review* pp. 63-77, at 76.

[39] According to the ILC, IO responsibility for their own wrongful acts will occur when the elements of breach and attribution of conduct are satisfied; when speaking of IO responsibility *without* attribution of conduct (thus for acts other than their own), the ILC refers to

State is precluded on the basis of *force majeure*.[40] As the ILC has constructed the provision on coercion as establishing responsibility for acts other than own acts, this results in responsibility of the coercing State in the absence of a wrongful act towards the injured state. We may now add the situation of circumvention as another case in which such responsibility may arise.

Article 17 does not require the member State that is acting on the basis of the IO's decision or authorization to be bound to the international obligation that is being circumvented.[41] This entails that in an article 17 situation it is possible that by implementing the IO's normative act the member State is not committing a wrongful act itself. Article 17(1) even provides for responsibility of the IO issuing a decision directed to its member States, without the States actually having to commit *any* act.[42] If this is then construed as IO responsibility for acts other than their own, and it is not the member State that commits a wrongful act, then where do we find the internationally wrongful act that according to the ILC is required in order to establish international responsibility?

Accepting the ILC's reasoning in this respect would make us encounter a fundamental problem. The scope of acts of IOs (and States) that can cause some form of injury (notably economic injury) to other actors is so large and heterogeneous that without a requirement that responsibility is limited to those cases where the acts in question contravene legal requirements, or alternatively without a clear definition of protected interests,[43] such responsibility will significantly undermine stability and legal certainty. Without any conceptual or theoretical basis for such responsibility in the absence of a wrongful act, article 17 (and indeed 16) uneasily undermine the coherence of a system of responsibility that is said to be based on wrongfulness.

Chapter IV. *See* ARIO with commentaries, *supra* note 23, p. 2, para. 3; p. 4, para. 4; p. 16, para. 2 with fn. 77.

40) *See* on this point James D. Fry, 'Coercion, Causation and the Fictional Elements of Indirect State Responsibility' (2007) 40 *Vanderbilt Journal of Transnational Law* pp. 611-641, at 630-631.

41) Article 17(3) ARIO determines that "[p]aragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed."

42) ARIO with commentaries, *supra* note 23, p. 41, para. 5.

43) This is the approach in the Principles of European Tort Law, *supra* note 7, art. 2:102.

C. The Role of Causation

A third tension that is highlighted by the introduction of IO responsibility in connection with the conduct of States concerns the role of causation. All situations covered by the heading 'responsibility in connection with the acts of States' are firmly based on a requirement of causation. The ILC seems to suggest that in Chapter IV situations the IO is held responsible "not for having actually committed the wrongful act but for its causal contribution to the commission of the act".[44] The ILC made this point expressly for authorizations, which result in IO responsibility if the act of the member State in question is committed '*because of* that authorization';[45] and rather implicitly in the case of decisions, where it suggested that the responsibility of an IO for issuing a decision that may result in circumvention should be assumed "[s]ince compliance by members with a binding decision is to be expected" and thus "the likelihood of a third party being injured would then be high".[46]

This treatment of causation causes two problems. First, article 17 is inconsistent in its requirement of causation. The proper justification of article 17 would seem to be that an IO can cause, by means of a normative act, conduct of States that would be wrongful if committed by the organization itself. However, if causation is indeed the decisive factor, it is unclear why article 17 (in contrast to the first reading) does not provide for the possibility of IO responsibility in cases of recommendation. Several members of the ILC rightly recognized that recommendations may be relevant causal factors.[47] In their support, it can be noted that it is a bit odd that so much of modern international legal scholarship emphasizes that the distinction between binding and non-binding rules is relative, and that non-binding effects can have a variety of effects, and to then deny them any causal effect in the context of the law of responsibility.[48] Surely there

---

44) ARIO with commentaries, *supra* note 23, p. 35 para. 2. Though the commentaries refer explicitly only to those situations of responsibility 'in connection with' acts of others already covered by the ASR, this reference to causation in the general commentaries seem to imply that this goes for all provisions in Chapter IV.

45) Article 17(2) ARIO (emphasis added).

46) ARIO with commentaries, *supra* note 23, p. 23, para. 5.

47) International Law Commission, *Provisional Summary Record of the 3000th Meeting*, 2009 (A/CN.4/SR.3000) p. 4; International Law Commission, *Provisional Summary Record of the 3001st meeting*, 2009 (A/CN.4/SR.3001), p. 17.

48) *See, e.g.*, Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law*, pp. 23-57; Ramses Wessel, 'Informal

can be differences between the impact of decisions, authorizations and recommendations, but it is difficult to see what the point is in making these distinctions when, first, it is not for general international law to qualify internal acts of IOs,[49] second, the terminology will differ between organizations,[50] and third, in the end all will depend on a contextual analysis of the role of causation that will have to include the degree of discretion left by the normative act.[51]

In addition, there is some ambiguity as to the question whether causation concerns the relationship between the normative act of the IO and the conduct of the member State, or between the normative act of the IO and the eventual injury. The text of article 17(2) suggests the former, but the commentaries to article 17(1) suggest the latter ("[s]ince compliance by members with a binding decision is to be expected, the likelihood of a third party *being injured* would then be high"[52]). More fundamentally, the question remains what exactly is the basis for the responsibility of the IO against the injured State if it is not contribution to injury (whether legal or material) of the injured party.

The main problem here appears to be that the improvement that seems to be brought in article 1(1) (responsibility cannot only be based on the own wrongful acts of an IO but also on a connection with wrongful acts by others) is not developed in the corresponding role of causation (and injury). While the ILC could construe responsibility for own wrongful acts without relying on causation and injury (and even this was not without problems),[53] this was much more problematic for the category dealing with responsibility in connection with acts of others. The treatment of causation in article 17 (and the other provisions included in Chapter IV)

International Law-Making as a New Form of World Legislation?' (2011) 8 *International Organizations Law Review*, pp. 253-265. *See also* Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' in: Joseph Weiler and Alan T. Nissel, *International Law Vol. 2* (Routledge, 2011) pp. 210-225.

49) *See supra* note 19.

50) This is a point also made by Blokker. *See supra* note 21.

51) Gaja, *Third Report*, *supra* note 17, para. 30, refers to the role of discretion: "Should the member States be given discretion so that they may comply with the decision without breaching an international obligation, the organization could not be held responsible."

52) ARIO with commentaries, *supra* note 23, p. 41, para. 5 (emphasis added).

53) Brigitte Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', in Maurizio Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005), pp. 93-106.

exposes a more fundamental tension in the law of responsibility; its reliance on causation sits uneasily in a system of responsibility in which causation to injury has been relegated from being constitutive of responsibility in the first place to being either a component of primary rules or just a determinant of modes of compensation.

D. The Role of Intent

The same holds, to some extent, for the role of intent and fault. Whereas the ILC had banned the subjective element from the ASR and the general part of the ARIO, this subjective element is decisive in the chapter on responsibility of IOs in connection with the acts of States.[54]

While good grounds may be offered for introducing such a subjective element in this particular chapter, requiring intent can impose an insurmountable challenge to injured parties. The commentaries note that the term 'circumvention' "implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation."[55] It will not be easy for an injured party to prove such intention.

Intent appears to function as an on-off switch that to a greater or lesser extent can protect the responsible party or the injured party and, certainly in the absence of much practice, reflects of policy choice. The commentaries do not address any of the policy considerations that determine the use of that switch. If we approach the issue from the perspective of the injured party, it may have been necessary to distinguish between situations in which the State who is actually carrying out the conduct in question *is* or *is not* internationally responsible. Requiring intent makes more sense if the State implementing the IO's normative acts is responsible and if reparation can be obtained from that State (see section III(E)). If it is not responsible, from the perspective of the injured party, the requirement of intent arguably should be dropped. In view of the limited practice, these are more questions for legal policy than for codification, but requiring intent across the board is also a policy choice – the ILC simply could not duck the issue. The unfortunate use of the term 'circumvention' (can one ever prove a 'circumvention'?) reminds one of Allott´s powerful argument to the effect that the concept of responsibility (in this case responsibility in connection

---

54) *See supra* note 38.

55) ARIO with commentaries, *supra* note 23, p. 41, para. 4.

with the acts of others) serves as a shield to protect against liability, rather than as a basis for ensuring proper remedies.[56]

E. Joint Responsibility?

This leads us to the fifth and final point. Recognition of the possibility that an IO is responsible in connection with conduct of member States may lead to joint responsibility. In his work on State responsibility, Ago argued that the responsibility of a State for the acts of another State excluded the possibility of responsibility of the latter State, based on his conception of limitation of freedom.[57] Corresponding to the dominant approach in domestic law,[58] the ILC rejected that proposition and left open the option of responsibility of both States and, in the ARIO, of the IO and the State(s).[59] This seems the better choice, but it does lead us onto rather foggy terrain, haunted by the indeterminate role of injury and causation that we alluded to earlier.

The ILC recognized that in a situation of circumvention the responsibility of both the IO and member States could be invoked, stipulating that these situations are covered by article 48 ARIO (which provides for, in the ILC's terms, 'joint responsibility').[60]

However, one may wonder what is the basis of such joint responsibility (a term that the ILC did not define),[61] as article 48 suggests that joint responsibility follows only from the "same internationally wrongful act". Should we consider the act of circumvention to give rise to an internationally wrongful act of the IO itself there clearly would not be a

---

[56] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal*, pp. 1-26.

[57] Ago, *Eighth Report, supra* note 11, para. 45. *See also* Dominicé, *supra* note 14 at 288.

[58] Compare article 9:101 of the Principles of European Tort Law, *supra* note 7 ("Liability is solidary where: a) a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim.").

[59] *Report of the International Law Commission on the work of its thirty-first session*, 1979 (A/34/10). *See* article 19 ASR and article 19 ARIO.

[60] ARIO with commentaries, *supra* note 23 p. 76, para. 1.

[61] *See for further discussion* André Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations Under Multilateral Environmental Agreements (December 1, 2011)', in Elisa Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge, CUP, 2012); SHARES Research Paper 05 (2011), ACIL 2011-14.

question of the same wrongful act, as the issuing of the normative act and the implementing conduct of the member State would then constitute two separate wrongful acts.[62] But even if we were to accept that article 17 deals with IO responsibility for the implementing act of the member State, it is not obvious at all that we are speaking here of a single wrongful act. Indeed, as noted above, the ILC's current construction gives rise to the possibility that the IO could be responsible without any wrongful act.[63] Arguably, a true case of joint responsibility for the same internationally wrongful act would in this construction occur only if an IO issues a decision or authorization circumventing its international obligations and the member State acts in reliance on this normative act while it is at the same time bound by the international obligation that is being circumvented.

However, the implications of such a joint responsibility are not immediately obvious. Joint responsibility may be interpreted as implying that each actor is responsible for the whole injury and should provide full reparation. But this is not easily applicable in IO-member State relations, as States surely are not (always) able to remove the underlying cause of their wrongful conduct – the remedy that has to be provided by the IO (removing the normative act) can only be provided by the IO, not by the member State.

Different constructions would have been possible. For instance, it may be possible to base responsibility more expressly on contribution to injury, which would allow us to base joint responsibility on contribution to a single, undivided injury (rather than the same wrongful act).[64] This also would allow us to define the responsibility of each of the responsible actors in terms of their contribution to the injury, and thereby to differentiate between remedies. However, this avenue was closed once the ILC downplayed the role of injury and causation as elements of responsibility.

---

62) Note that the fact that the commentaries to article 48 refer to article 17 illustrates that the ILC did not consider the latter provision to constitute deal with responsibility for a separate wrongful act; and thus did not consider article 17 to deal with a primary norm. However, it may also have been an oversight. The commentaries also refers to article 14; it is somewhat of a stretch to construe these separate wrongs as the 'same wrongful act', as the aiding State/organization is strictly speaking not responsible for the same wrongful act as the State that committed the principal wrong. *Ibid*; *see* Dominicé, *supra* note 14 at 289 (who believes that in such situations there are separate wrongful acts).

63) *See* section III(B).

64) *See* for further discussion Nollkaemper, *supra* note 61.

Also in this respect, what appears to be a provision of modest practical relevance in fact raises questions touching the very foundations of the law of international responsibility.

IV. Conclusions

The ILC should be praised for addressing, as part of what some incorrectly saw as a copy and paste exercise, such a conceptually complicated topic as the responsibility of international organizations when they, through their decisions or other normative acts, induce State conduct that violates international obligations of either the organization or the member State(s). By introducing article 1(1), the ARIO reflect more appropriately the plurality of bases of responsibility. When in all legal systems models of personal liability exist side by side with models of liability for acts of others, it was unpersuasive to base the entire body of international responsibility on responsibility for one's own acts. Moreover, IO responsibility under article 17 potentially could be of great practical relevance, as it is often not the member State but the IO that is capable of providing the necessary remedy (removing the normative act) in case of a breach of an international obligation.

The operation was not entirely successful in its technical aspects, however. The ILC left it unclear whether article 17 truly provides for responsibility for the acts of others or simply reflects IO responsibility for its own acts. The fact that article 17 appears to provide for responsibility in the absence of wrongful acts is not persuasive and unnecessarily undermines the entire foundation of the law of international responsibility. The differentiation between forms of internal normative acts likewise is an unnecessary complication that may neglect the autonomy of the internal legal order of IOs.

But our main argument is that by including this seemingly modest article, the ILC has exposed fundamental tensions present in the law of international responsibility and thereby has raised many more questions. The inclusion of responsibility for acts other than own acts in the basic rule in article 1(1) ARIO has brought with it a role for causation and intent, that the ILC thought it had successfully discarded for situations of responsibility for own wrongful conduct. This raises fundamental questions on the coherence of the structure of the ARIO (and for that matter the ASR) as a whole. Is responsibility based on wrongfulness, contribution to injury, or something else? On what basis is an IO responsible towards a third State

if it is not on the basis of contribution to injury? And what is the basis for dividing remedies between IOs and States in case of what the ILC called a case of joint responsibility? Perhaps the ILC cannot be faulted for not conceptually developing these issues given the scarcity of practice and the nature of its working methods – though our comments on intent demonstrate that choices were inevitable, and that it was hard if not impossible to formulate the principles in a neutral manner.

If it proves true that the role of international institutions and their normative practice vis-à-vis member States further increases, practice may as yet bring us more answers to the above questions. However imperfect, the ILC has at least handed us normative lenses through which we can assess such practice and, in turn, which we can modify in the light of that practice.