

# Allocating International Responsibility Between Member States and International Organisations

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# 1

## *Introduction*

### I. INTRODUCTION

**I**NTERNATIONAL ORGANISATIONS HAVE emerged in the United Nations era as prominent actors in the international arena. Within a very limited time-span, they have grown considerably in number but also in size and scope. But as their competences augment, so do their obligations. The transformation of International Organisations is so evident that the remark of the United Nations International Law Commission (ILC) that ‘it must not be forgotten that, by their very nature, international organizations normally behave in such a manner as not to commit internationally wrongful acts’ hardly reflects the present state of affairs.<sup>1</sup> Nevertheless, International Organisations coexist and interact with other subjects of international law and mainly with States who are (to a great extent) their members.

International Organisations are all the more frequently accused of behaving in a manner inconsistent with their international obligations and such behaviour more often than not impacts their member States. Recent international practice abounds with relevant examples. UN Nepalese peacekeepers admittedly were the source of a cholera outbreak in Haiti in 2010 that afflicted nearly a tenth of the country’s population and may have caused over 9,000 deaths.<sup>2</sup> The International Monetary Fund (IMF)’s engagement with the euro area, focusing on its surveillance and crisis management in Greece, Ireland and Portugal, had a major impact on human rights standards in those States. The list grows to cover illegal conduct during military operations where NATO participates, and recommendations by the World Health Organization (WHO) proven to be harmful and without significant clinical effect that are followed by its member States. Given the gravity of such situations, it is only pertinent to ask whether international law possesses the necessary normative toolkit to address such scenarios.

To pose in other words the research question I will endeavour to answer in this book: how does international law regulate (if at all) the international

<sup>1</sup>ILC, *Report of the International Law Commission on the Work of Its 27th Session (5 May–25 July 1975)*, UN doc A/10010/Rev.1 (1975), reproduced in (1975) 2(1) YBILC 47, 87, [3].

<sup>2</sup>Secretary-General, *A New Approach to Cholera in Haiti*, UN doc A/71/620 (25 November 2016).

## 2 Introduction

responsibility of both the members States and the International Organisation of which they are members when these two subjects interact? And in case international law leaves the matter unsettled or unregulated, how is this potential gap in international law to be filled? So, this book is essentially a law-identification exercise. Overall, I do not aim just to identify international law, but also to suggest, where the law is not yet formed, how it should be developed, how its content should be determined.

The ILC purported to answer these questions in its Articles on the Responsibility of International Organisations (ARIO).<sup>3</sup> Within its mandate to codify and progressively develop international law,<sup>4</sup> the Commission produced this set of Articles that contains two Chapters directly relevant for present purposes: namely, Chapter IV of Part Two entitled ‘Responsibility of an international organization in connection with the act of a State or another international organization’ and Part Five entitled ‘Responsibility of a State in connection with the conduct of an international organization’. Since the ARIO constitute the most authoritative text to date on the matter but also lay the essential background for integrated answers, it is only pertinent to ask how the ILC should have drafted the provisions that regulate the international responsibility of both the member States and the International Organisation of which they are members in scenarios when these two subjects interact.

When drafting the ARIO, the ILC faced a considerable challenge: the paucity of relevant international practice, be it judicial or institutional.<sup>5</sup> The precedents are rare and poorly documented (eg unreported institutional documentation or unpublished case law) and this was underlined by the ILC itself,<sup>6</sup> the Special Rapporteur<sup>7</sup> and several International Organisations which commented during the drafting process.<sup>8</sup> Consequently, the Commission concluded that

<sup>3</sup> See ILC’s ARIO in ILC, *Report of the International Law Commission in the Work of Its 63rd session (26 April–3 June and 4 July–12 August 2011)*, UN doc A/66/10 52 (2011). See commentaries to the ARIO in *ibid* 67.

<sup>4</sup> UN Charter, Art 13(a) Charter of the United Nations (adopted 26 June 1945; entered into force 24 October 1945) 1 UNTS XVI; Statute of the International Law Commission, Art 1(1), UNGA, Resolution 174(II) (21 November 1947), UN doc A/RES/174(II).

<sup>5</sup> See eg G Hafner, ‘Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks’ in U Fastenrath, R Geiger, DE Khan, A Paulus, S von Schorlemer and C Vedder (eds), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (OUP, 2011) 695, 700–4; VJ Proulx, ‘An Uneasy Transition? Linkages Between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations’ in M Ragazzi (ed), *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, 2013) 109, 114.

<sup>6</sup> ARIO Comment, 67–68, [5]: ‘relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it’. For examples of unpublished case law, see *ibid* notes 109, 143, 146 and 189.

<sup>7</sup> G Gaja, *Third Report on Responsibility of International Organizations*, UN doc A/CN.4/553 (2005), reproduced in (2005) 2(1) YBILC 7, 9, [3] (‘Gaja Third Report’); G Gaja, *Eighth Report on Responsibility of International Organizations*, UN doc A/CN.4/640 (2011) 5–6, [6] (‘Gaja Eighth Report’): ‘only a few instances of unpublished practice have been contributed by States and international organizations in order to facilitate the Commission’s study’.

<sup>8</sup> ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organisations*, UN doc A/CN.4/568 (2006) and Add 1 reproduced in (2006)

most provisions incorporated in the ARIO constitute progressive development of the law, rather than its codification.<sup>9</sup> This lack of relevant State and International Organisation practice is a prominent feature of all provisions that will be examined throughout this book, and address the issue of interaction between member States and International Organisations.<sup>10</sup> I hold the view that the provisions under examination do not form part of customary international law and the intention of the Commission when drafting them was to reflect the progressive development of the law. Having proven this, I intend to assess whether the relevant ARIO provisions, in the way they are drafted, indeed provide for the progressive development of the law. If this is not the case, I will examine how the law has developed and therefore to what extent the provisions deviate from the development of the law.

As a caveat, I should stress that I intend to confine my study to the level of establishment of international responsibility, irrespective of its implementation, since this is what the ILC had in mind when drafting the relevant ARIO provisions. And by implementation it is not necessarily meant enforcement through the courts or through the settlement of claims (while this will most often be the case), but any type of enforcement of international responsibility against the responsibility bearer.<sup>11</sup> While the two have been mixed up by some theorists,<sup>12</sup> the former is completely independent of the latter. This is so, because these two aspects of international responsibility operate at different levels.<sup>13</sup>

2(1) YBILC 125, 128 (WHO); ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organisations* UN doc A/CN.4/609 (2009), reproduced in (2009) 2(1) YBILC 97, 98 (WHO); ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN doc A/CN.4/637 (2011) 10–11 (Joint submission) and 14 (World Bank); ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN doc A/CN.4/637/Add 1 (2011) 4–5 (United Nations).

<sup>9</sup> ARIO Comment, 68, [5]. According to Wood this assertion by the ILC is ‘the most important point made in the general commentary’ of the ARIO, as it seeks to explain the legal status of the Arts, M Wood, “‘Weighing’ the Articles on Responsibility of International Organizations’ in M Ragazzi (ed), *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, 2013) 55, 60.

<sup>10</sup> On the significance of International Organisations’ practice with respect to the identification of international customary law, see M Wood, *Second Report on the Identification of Customary International Law*, UN doc A/CN.4/672 (2014) [43]–[44]; M Wood, *Third Report on the Identification of Customary International Law*, UN doc A/CN.4/682 (2015) [68]–[79]; M Wood, ‘International Organizations and Customary International Law’ (2015) 48 *Vanderbilt Journal of Transnational Law* 609.

<sup>11</sup> A Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP, 2011) 6.

<sup>12</sup> S Chesterman, *Who Needs Rules? The Prospects of a Rules-Based International System* (2005), available at [www.iilj.org/research/documents/panel\\_2\\_report.pdf](http://www.iilj.org/research/documents/panel_2_report.pdf) 7; TM Franck, ‘The United Nations as Guarantor of International Peace and Security’ in C Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer, 1995) 25, 37.

<sup>13</sup> ILC, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries’ (2001) 2(2) YBILC 31, 67, [11]: ‘Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility ...’.

## 4 Introduction

For many decades, for example, no means were put in place to enforce within the international legal system a violation of the prohibition of genocide. This does not *ipso facto* mean that international responsibility for such violations was not established before a competent tribunal could render a relevant finding.<sup>14</sup> While they remain distinct, the two aspects are undoubtedly related, for a robust implementation of international responsibility can only depend upon clear and coherent rules regulating its establishment. The lack of enforcement through the courts is, it has been suggested, the main obstacle preventing accountability of International Organisations in general.<sup>15</sup> I agree that this is a problem that merits deep reflection, but it exceeds the remit of the present study.

### II. INTERACTION BETWEEN INTERNATIONAL ORGANISATION AND MEMBER STATES

Interaction between member States and the International Organisation of which they are members is addressed by Chapter IV of Part Two and Part Five of the ARIO. For present purposes, interaction involves the establishment of international responsibility by virtue of a particular relationship between two subjects of international law. Given that the victim is by definition not involved in the establishment of international responsibility, interaction in these provisions is reflected in the relationship between the perpetrator of wrongful conduct and the responsibility bearer. This is evident from the titles of both ARIO Chapters; Chapter IV regulates the responsibility of an International Organisation ‘in connection with the act of a State or another international organisation’, while Part V the corresponding responsibility of a State ‘in connection with the conduct of an international organization’.

Throughout the book, I distinguish between two types of such interaction. The criterion that separates one from the other is the basis on which this interaction occurs. In the first type, interaction occurs on the basis of the particular member State-International Organisation relationship (or on the basis of membership), while in the second it occurs outside this relationship. In the latter case, the two subjects interact as independent subjects of international law.

<sup>14</sup>R McCorquodale, ‘International Organizations and International Human Rights Law: One Giant Leap for Humankind’ in KH Kaikobad and M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice, Essays in Honour of Colin Warbrick* (Nijhoff, 2009) 141, 151; D van Zyl Smit, ‘Punishment and Human Rights in International Criminal Law’ (2002) 2 *Human Rights Law Review* 1. See also S Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’ in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008) 185, 219: ‘The fact that no judicial machinery exists to hold the United Nations responsible should not be allowed to obscure the fact that the United Nations remains responsible for its internationally wrongful acts’.

<sup>15</sup>J Wouters, E Brems, S Smis and P Schmitt, ‘Introductory Remarks’ in J Wouters, E Brems, S Smis and P Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 1, 11.

First, member States interact with International Organisations on the basis of membership. This mode of interaction is in place when two conditions are present: first, member States exercise competence that lies with the International Organisation; and second, member States do so in accordance with the rules of the International Organisation. This is the case, for example, when a State exercises its right to vote within decision-making procedures of an International Organisation. ARIO, Articles 58(2), 59(2) and 62 capture this type of interaction. Unsurprisingly, they have no corresponding provision within the United Nations' Articles on State Responsibility (ASR).<sup>16</sup> Only when both these conditions are present, member States will *act as members* of the International Organisation. The main feature of this mode of interaction is that member States disappear behind the international personality of the International Organisation – or 'under the organisational veil' – and, as a result, do not bear international responsibility for internationally wrongful acts even when they contributed to their causation.

On the other hand, member States interact with the International Organisation of which they are members as independent subjects of international law in every case that does not fulfil both the aforementioned conditions. Throughout this book, I examine instances where one of the two conditions is present, ie when member States exercise competences that originate from the International Organisation but lie with member States in a particular instance (eg the request by a domestic court to the Court of Justice of the European Union for a preliminary ruling), and instances where member States operate within procedures of the International Organisation but not in accordance with its rules (eg exercise of political influence over decision-making procedures). In none of these scenarios do member States and International Organisations interact on the basis of their particular relationship.

On these occasions, *member States act as States*, do not disappear 'under the organisational veil' and thus their international responsibility can be established. The three provisions on 'aid or assistance', 'direction and control' and 'coercion' incorporated in ARIO, Articles 14, 15, 16, 58(1), 59(1) and 60, address this type of interaction. These provisions were transposed into the ARIO 'lock, stock and barrel' from the corresponding Chapter IV of the ASR and they capture all the possible ways in which two independent subjects may interact. Further, an analysis of the scope of application of ARIO, Articles 17 and 61 that have no corresponding ASR provision clearly demonstrates that they fall under the second type of interaction too.

It is the use of competence on a particular instance that points to the type of interaction in play, and the criterion that separates one from the other is

<sup>16</sup>UNGA, Resolution 56/83 (12 December 2001) 'Articles on the Responsibility of States for their Internationally Wrongful Acts', UN doc A/RES/56/83, Annex, and corrected by UNGA, Resolutions and decisions adopted by the General Assembly during its fifty-sixth session, UN doc A/56/49 (Vol.I)/Corr.4.

## 6 Introduction

purely functional. In this sense, the two bases of interaction are mutually exclusive. At the same time, the second type is broad enough to encompass all instances of interaction that do not fall under the first type and hence these two cover all possible interaction scenarios.

### III. A DESCRIPTION OF THE PROBLEM

The provisions of ARIO, Chapter IV and Part Five, and the ASR, Chapter IV provisions which they replicate, possess certain characteristics that set them apart from other ILC provisions dealing with international responsibility (in both the ASR and the ARIO). They differ in their scope of application but also in the way international responsibility is established in these cases.

First, they are applicable to scenarios involving three legal actors. Generally, responsibility concerns only the relationship between a wrongdoer and a victim.<sup>17</sup> Such cases will be referred to as involving ‘direct responsibility’. ARIO, Chapter IV and Part Five provisions, however, deal with situations in which, between the wrongdoer and the victim, a third intermediate legal subject is placed who is in some way linked to the wrongdoer.<sup>18</sup> While the ILC refers to such triangular relationships as involving ‘derived responsibility’,<sup>19</sup> I will use the term ‘indirect responsibility’ instead, not only because of the presence of the intermediate subject, but also as an antithesis to the situation of ‘direct responsibility’.<sup>20</sup>

Second, the establishment of international responsibility in cases covered by indirect responsibility is considered to arise in an exceptional way. The establishment of international responsibility in direct responsibility is dependent upon the objectively determined conditions of breach and attribution.<sup>21</sup> Under ARIO, Chapter IV and Part Five, the establishment of responsibility depends on the presence of subjective requirements such as knowledge or intent.<sup>22</sup>

<sup>17</sup> ASR, Art 2 and ARIO, Art 4.

<sup>18</sup> J Fry, ‘Coercion, Causation and the Fictional Elements of Indirect State Responsibility’ (2007) 40 *Vanderbilt Journal of Transnational Law* 611, 615.

<sup>19</sup> ASR Comment, 65, [8].

<sup>20</sup> Inconsistent terminology is a source of confusion surrounding indirect responsibility norms and clarification of the terminology is undoubtedly a necessary prerequisite of a robust analysis. The ILC refers to indirect responsibility rules as ‘derived responsibility’ provisions (ASR Comment, 65) while Tzanakopoulos refers to them as ‘derivative responsibility’ rules (Tzanakopoulos, *Disobeying the Security Council* (n 11) 47). The term ‘indirect responsibility’ which I use throughout the book has been used in contrast with direct responsibility since C de Visser, *La Responsabilité des Etats, Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium* (Brill, Lugduni Batavorum, 1924) vol 2, 91. For a thorough examination of the terms ‘direct’ and ‘indirect’ responsibility in international law, see H Fox, ‘The International Court of Justice’s Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to the State’ in N Ando, E McWhinney and R Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) 147ff.

<sup>21</sup> ASR, Art 2 and ARIO, Art 4, with commentaries.

<sup>22</sup> eg ASR, Art 16(a).



The introduction of such notions is *prima facie* in contrast with the ILC's two projects, which intend to confine the establishment of international responsibility to objectively determined prerequisites.<sup>23</sup> What is more, there is general consensus that indirect responsibility norms, in contrast to the rest of the international responsibility provisions, provide directly for the attribution of responsibility<sup>24</sup> without the prior attribution of conduct.

Due to the aforementioned features, indirect responsibility provisions have been perceived to be 'anomalies' or exceptions within the law of international responsibility.<sup>25</sup> The absence of a solid doctrinal background in the ASR for those provisions has been perpetuated in the ARIO, with Special Rapporteur Gaja opting to follow the indirect responsibility approach of the ASR and thus failing to bridge this doctrinal gap.<sup>26</sup> Since the problematic features of the indirect responsibility provisions have not been adequately explained, they appear to cause incoherence within the law of international responsibility. It has been argued that this incoherence, in turn, is detrimental to the validity and prestige of the international responsibility edifice as a whole.<sup>27</sup> Thus, it is questioned whether international responsibility as an accountability mechanism possesses the necessary doctrinal rigour to address complex scenarios such as those resulting from the interaction between member States and International Organisations.

Further, the confusion around the nature of the indirect responsibility provisions has practical ramifications. It impairs their application, and impedes their effective functioning as regulatory formulas for triangular scenarios. For example, it remains unclear whether the provisions provide for shared, joint, joint and several, or parallel responsibilities for the legal subjects involved in such triangular situations.<sup>28</sup> Thus, international courts and tribunals experience a certain unease when applying such provisions and need more guidance as to their proper interpretation and application.

<sup>23</sup> On the ramifications of the adoption of such an objective model of international responsibility, see J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in M Evans (ed), *International Law* (OUP, 2003) 443, 451.

<sup>24</sup> ASR Comment, 64, [5]; R Ago, *Eighth Report on State Responsibility* UN doc A/CN.4/318 (1979) and Add 1 to 4 reproduced in (1979) 2(1) *YBILC* 4, 22–24, [38]–[42] ('Ago Eighth Report'); Fry, 'Coercion, Causation and the Fictional Elements' (n 18) 631; Tzanakopoulos, *Disobeying the Security Council* (n 11) 45–46. Referring to these norms, the ILC suggested that 'responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization', ARIO Comment, 83, [2].

<sup>25</sup> Ago Eighth Report (n 24) 5–6, [4]: 'the abnormal phenomenon of indirect responsibility'; ASR Comment, 64, [5]: 'Chapter IV of Part One defines these exceptional cases where ...'.

<sup>26</sup> Gaja Third Report (n 7) 11.

<sup>27</sup> J d'Aspremont, 'The Articles on the Responsibility of International Organisations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *IOLR* 15, 17, 24–25: 'the concept of responsibility falls short of capturing complex situations of non-conformity'; N Nedeski and A Nollkaemper, 'Responsibility of International Organisations in Connection with Acts of States' (2012) 9 *IOLR* 33, 43–48.

<sup>28</sup> See the commentaries to the provision on direction and control, ASR Comment, 69.

Because understanding indirect responsibility provisions as *sui generis* norms has always been the ‘orthodoxy’ among international lawyers and the ILC,<sup>29</sup> so far no commentator has managed to adopt a holistic perspective on indirect responsibility. On the contrary, the ILC has relied heavily on the exceptional character of these norms in order to avoid offering a normative explanation of the way they operate;<sup>30</sup> and in so doing, it has precluded the systematic incorporation of those norms into the law of international responsibility. In fact, the ILC has relied upon considerations external to the law on international responsibility, such as policy arguments, or arguments that pertain to liability, in order to justify these provisions.

Overall, the ILC lacks a principled argumentative basis for the elaboration of such rules. This is why it was uneasy about drafting provisions that were not backed by the adequate *opinio juris* and State or institutional practice. Likewise, the literature has evoked divergent grounds to assess whether the Commission has effectively delivered its function and drafted provisions that indeed reflect the progressive development of the law. For example, commentators have suggested that the ILC should have elaborated these norms on the basis of their accordance with (admittedly scarce) State, institutional and judicial practice, by way of analogy with the concomitant provisions on the ASR, or on the basis of other pragmatic or policy considerations such as usability.<sup>31</sup> This lack of a guiding drafting framework, along with the heterogeneity of the provisions under examination, have confused both the ILC and the academic discussion that sparked after the provisions were finalised in 2011; the provisions were drafted by the ILC on an unprincipled and ad hoc basis and commentators have failed to articulate a comprehensive criticism since they lack the necessary framework to do so. As otherwise put by Rao, a member of the Commission:

Recalling the opinion of Oliver Wendell Holmes, Jr., that the life of the law was not logic but experience, [Mr Rao] personally believed that, in the absence of practice, logic could help to move the debate forward and might even lead to the creation of practice. Yet while much of the Commission’s work in the area of the responsibility of international organizations was premised on logic, many of the real problems did not fit neatly into a logical framework.<sup>32</sup> (footnote omitted)

<sup>29</sup> Both bibliography and ILC documentation consider indirect responsibility norms as exceptional and incoherent with the overall responsibility framework, see n 25 above. Commentators who have dealt with the issue of EU international responsibility also share this view, eg E Paasivirta and PJ Kuijper, ‘Does One Size Fit All? The European Community and the Responsibility of International Organisations’ (2005) 36 *Netherlands Yearbook of International Law* 169, 214ff. I am not aware of any commentator that does not share this view.

<sup>30</sup> An explanation of normativity as used throughout this book is provided in Chapter 2, n 8ff and accompanying text.

<sup>31</sup> For a discussion of the analogy argument, see FL Bordin, *The Analogy Between States and International Organizations* (CUP, 2018).

<sup>32</sup> ILC, *Provisional Summary Record of the 2891st Meeting*, UN doc A/CN.4/SR.2891 (2006) reproduced in (2006) 1 *YBILC* 145, 153–54, [59] (Rao).

## IV. ADDRESSING THE PROBLEM

## A. Aim of the Book

My aim is to assess whether international responsibility is an accountability mechanism that can effectively address scenarios of interaction between member States and International Organisations. In order to do so, I first offer a principled and logical framework upon which practice can be based, and subsequently I assess whether the indirect responsibility provisions under scrutiny are aligned with it. I reject the *sui generis* approach described above, and I endeavour to offer an integrated analysis of all ARIO, Chapter IV and Part Five provisions by putting forward a new understanding of the ILC international responsibility edifice. The principled analysis I attempt throughout the book is, I believe, the key to understanding the operation of indirect responsibility provisions and hence to legally addressing concomitant judicial or extra-judicial cases.

My main argument is that international responsibility is the expression of certain basic legal rules. And I characterise as ‘legal’ those rules that possess binding force according to the sources of international law.<sup>33</sup> In the second chapter, I define the particular features of those rules that constitute the foundations of international responsibility. These rules take the form of normative principles: what the Permanent Court of International Justice (PCIJ) has termed ‘principles of international law’ in the *Lotus* case,<sup>34</sup> or what the Study Group of the ILC and the International Court of Justice (ICJ) have named ‘general international law’.<sup>35</sup> These terms capture both the ‘general principles of law’ according to ICJ Statute, Article 38(1)(c) and the ‘principles of international law’ that have the status of customary international law according to ICJ Statute, Article 38(1)(b). The ICJ evokes a common method of identification for both categories and that is why for practical reasons it is pertinent to group them in one. My aim is not

<sup>33</sup>On the relationship between normativity and the legal character of a rule, see Chapter 2 nn 12–16 and accompanying text.

<sup>34</sup>*Case of the SS Lotus (France v Turkey)* [1927] PCIJ Ser A, no 10, 3, 16: ‘Now the Court considers that the words “principles of international law”, as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States’. For an analysis of the reference to legal principles in the PCIJ and the ICJ case law, see G Gaja, ‘General Principles of Law’ in *Max Planck Encyclopedia of Public International Law* (OUP online ed, 2013) [20] and G Schwarzenberger, ‘The Fundamental Principles of International Law’ (1955) 92 *RCADI* 195, 204.

<sup>35</sup>ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law [Report of the Study Group]*, UN doc A/CN.4/L.682 (13 April 2006) 254. This term has been used by the ICJ, eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 197, [150]. Gourgourinis, who conducted a survey in the use of the term in international practice, concludes that ‘general international law’ refers to norms which are ‘binding on and, in principle, applicable to all the subjects of the international legal system’, A Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System’ (2011) 22 *EJIL* 993, 1011.

to ground the law of international responsibility *in toto* upon ‘general principles of law’ as B Cheng tried to do.<sup>36</sup> It is far more modest than that.

I argue that those ‘principles of international law’/‘general international law’ determine the nature of international responsibility, the basic premise of the whole ILC international responsibility edifice. Since these legal principles underlie the law of international responsibility as a whole, the latter cannot progressively develop against these binding rules. And arguably all ARIO provisions, due to lack of relevant practice, have been drafted as reflections of the progressive development of the law and not of existing law. Therefore, my analysis rests upon those ‘principles of international law’ I identify in Chapter 2 as the legal basis of international responsibility. The elaboration of any provision that regulates international responsibility can only be based on, and respect, these rules. By contrast, a provision that runs counter to them does not reflect the progressive development of the law. Overall then, I aim to justify the development of the law on the basis of its accordance with its normative premises.

Theorising indirect responsibility provisions as exceptions to such principles affects the normative status of such provisions. This is so, because they are conceptualised as running counter to the essential legal basis upon which the whole international responsibility edifice is constructed. And unless they are proven to exist as *lex lata*, exceptions to existing law cannot constitute the progressive development of the law, all the more when, as is the case with the ARIO, no relevant practice exists.

It is not only the content of the provision drafted but also the argumentative basis upon which the ILC infers the ‘progressive development’ that should be congruent with the legal premises of international responsibility. And in the case of both the ASR and the ARIO, this argumentative basis is provided mainly by the commentaries and by the drafting history of the respective provisions. Thus, the book argues for a rethinking of indirect responsibility provisions on the basis of the legal rules underpinning every provision that deals with international responsibility so that the latter forms a coherent and principled whole.

I believe that if the ILC had elaborated the indirect responsibility provisions on such normative grounds it would have achieved a double goal. Most importantly, it would have got the law’s development right and consequently it would have forestalled the breadth of criticism and the ensuing distrust that targeted these provisions after the final reading of the ARIO. The novel understanding of international responsibility on the basis of legal principles put forward here explains the operation of these provisions and clarifies their relationship with other responsibility provisions. The analysis demonstrates that scenarios

<sup>36</sup> B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 2006) 163–256.

of interaction between member States and International Organisations are not necessarily regulated by exceptional or anomalous responsibility provisions, but rather by norms consistent with the whole responsibility framework.

Finally, the *raison d'être* of these provisions is their use by interested actors, be they courts and tribunals in relevant cases, or International Organisations and member States when justifying their conduct and addressing reparation claims. But as formulated at present, some of these provisions do not represent the progressive development of the law and are thus of limited practical usefulness for those actors. So, by proposing new interpretations of existing rules or alternative formulations of them, I intend to offer rules that can help courts, International Organisations or States address cases of indirect responsibility. I do not propose that the ILC reconsiders the wording of the ARIO, because the latter are now finalised and in the hands of the General Assembly. Hence, the rules I propose throughout the book as reflections of the progressive development of the law are intended to function primarily as interpretative guidelines of the existing ARIO provisions. Only to the extent that harmonisation through interpretation is impossible, the rules proposed here will serve as substitutes of the ARIO provisions. Instead of putting forward an overhaul of the whole system of responsibility, I examine what can be done within the corners of the existing legal framework.

While most of the discussion in the book revolves around the ARIO, it is not exclusively confined to the analysis of the provisions drafted by the ILC. The book aims to answer any legal question pertinent to the allocation of responsibility between International Organisations and member States. The issues that arise by virtue of the research question are guiding the analysis and not the ILC's treatment of the matter. The Commission has not tackled every issue (eg no member responsibility rule)<sup>37</sup> or has got the law wrong with respect to others (eg Article 61).<sup>38</sup> Thus, in dealing with scenarios where the ILC's approach has proven defective, the analysis will move beyond the ARIO.

## B. Progressive Development of International Law in the ARIO

The ILC in its Statute is mandated not only to identify or codify existing law (*lex lata*), but also to record international law's progressive development (*lex ferenda*) in matters when no identifiable legal rules exist. Article 15 of the ILC Statute defines 'progressive development' as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States', while 'codification' entails 'the more precise formulation and

<sup>37</sup> See Chapter 3.

<sup>38</sup> See Chapter 6.

systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.<sup>39</sup> The separation between the two exercises, reflected in Chapter II of the Commission's Statute 'has proved impractical'<sup>40</sup> or 'unworkable'<sup>41</sup> and the Commission's modern practice has de facto pushed the distinction to one side.<sup>42</sup> With this in mind, the ILC reluctantly shied away from expressing an overall opinion on the legal status of every ARIO provision. On the other hand, it was satisfied with a generic statement that 'the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility'.<sup>43</sup> This oracular statement suggests that, absent any characterisation from the ILC or collectively from States, the normative standing of the Articles remains uncertain, just like Schrodinger's cat.<sup>44</sup> So, it falls upon the consumers of the ILC's work to determine their legal validity.

Despite the aforementioned statement, not every single provision in the ARIO exists, in the absence of an observer, in a state of 'quantum superposition'. As will be explained in the next chapter, the ILC has implicitly, albeit clearly, suggested that ARIO, Articles 3 to 5 constitute rules of general applicability that exist as *lex lata*. And my argument is that these rules, in turn, affect the normative status of the remaining ARIO provisions that have been drafted as reflections of international law's progressive development.

The elaboration of the progressive development of international law has not been extensively analysed by legal scholarship. And this may be so because it is believed to be a political and not a legal exercise since it 'involves controversial policy choices'.<sup>45</sup> However, this *ipso facto* does not mean that existing law has no say in it. To the extent that progressive development of the law constitutes *lex ferenda*, a separation between *lex lata* and *lex ferenda* is in order. As Thirlway explains, the establishment of *lex lata* is dependent upon objective determination, while *lex ferenda* is a subjective assertion that some rule should

<sup>39</sup> ILC Statute, Art 15.

<sup>40</sup> H Lauterpacht, 'Codification and Development of International Law' (1955) 49 *AJIL* 16, 30.

<sup>41</sup> A Watts, 'Codification and Progressive Development of International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, 2007) [20].

<sup>42</sup> Crawford characterised the modern approach as 'a functional hybrid between codification and progressive development', J Crawford, 'The Progressive Development of International Law: History, Theory and Practice' in D Alland, V Chetail, O de Frouville and JE Vinuales (eds), *Unity and Diversity of International Law, Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff, 2014) 1, 19.

<sup>43</sup> ARIO Comment, 67–68, [5].

<sup>44</sup> By presenting a cat that may be simultaneously both alive and dead, Schrodinger intended to explain a state known as 'quantum superposition'. According to the latter, a quantum system can exist as a combination of multiple states corresponding to different possible outcomes until it interacts with, or is observed by, the external world, E Schrodinger, 'Die gegenwartige Situation in der Quantenmechanik' (1935) 23 *Naturwissenschaften* 807.

<sup>45</sup> K Daugirdas, 'The International Law Commission Reinvents Itself?' (2014) 108 *AJIL Unbound* 79, 80.

be part of positive law.<sup>46</sup> So, the ILC in the ARIO records the rules on responsibility of International Organisations *which the ILC thinks* ought to be law.

The question that arises is whether the ILC remains completely unrestrained to propose any provision it sees fit as the progressive development of the law, or whether this is qualified in some way. To put this differently, can the content of a proposed rule affect its standing as progressive development of the law? When discussing *lex ferenda* in general, Thirlway suggests that there are ‘numerous possible ideas and rules’ that do not qualify for *lex ferenda* ‘inasmuch as they would not be desirable as law’.<sup>47</sup> Targeting solely the ILC, Pellet has argued that the Commission’s ‘duty is to try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic’.<sup>48</sup> If existing law forms part of the framework (or the underlying logic) for developing rules, then it is conceivable that it imposes restraints on law’s progressive development.

With respect to the indirect responsibility ARIO provisions examined in this book, the Commission has no relevant practice it can ‘build on’ but it rather has to construe provisions seemingly *ex nihilo*. As stated above, Article 15 of the ILC Statute suggests that progressive development can occur in two instances: with respect to ‘subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States’.<sup>49</sup> ARIO, Chapter IV and Part V provisions clearly fall under the first category. Since no indications of practice direct the future development of the law, the Commission has to start *almost* from a ‘blank sheet’. Nevertheless, the sheet is not entirely blank, for certain fundamental legal rules of general applicability impose some limitations to the ILC’s work.<sup>50</sup>

The thrust of my argument is that with respect to the law on international responsibility, the ILC is not unrestricted when delivering its function of progressive development. The ILC cannot use its mandate of progressive development to draft *lex ferenda* provisions that run counter to foundational legal rules underpinning the ILC’s project as a whole.<sup>51</sup> By setting the legal foundations

<sup>46</sup>H Thirlway, ‘Reflections on Lex Ferenda’ (2001) 32 *Netherlands Yearbook of International Law* 3, 4.

<sup>47</sup>*ibid.*

<sup>48</sup>A Pellet, ‘Between Codification and Progressive Development of the Law: Some Reflections from the ILC’ (2004) 6 *International Law FORUM du Droit International* 15, 16–17.

<sup>49</sup>ILC Statute, Art 15.

<sup>50</sup>Similar proposition from Boyle and Chinkin: ‘even in those topics where the element of progressive development of new law is necessarily larger ... there are usually some indications of state practice and general principles, however fragmentary, on which to build ... Rarely, if ever, is the Commission starting from a blank sheet’, A Boyle and C Chinkin, *The Making of International Law* (OUP, 2007) 174–75.

<sup>51</sup>See the similar argument by Ahlborn, who suggests that: ‘analogies have ... a limiting effect on progressive development if they are incoherent with established principles or underlying reasons accepted in a given legal order’, C Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the “Copy-Paste Approach”’ (2012) 9 *IOLR* 53, 65.

for the ARIO edifice, in the form of *lex lata* Articles 3 to 5, the Commission has self-imposed certain limitations on what it can identify as *lex ferenda* in the rest of the ARIO. It should respect those legal rules applicable to the law of international responsibility in its entirety. If it does not, it does not record the progressive development of the law, for *lex ferenda* does not gradually develop in defiance of *lex lata*.

In a similar vein, Guideline 9(2) of the recent ILC Guidelines on the Protection of the Atmosphere reads:

States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

While this provision is addressed to States in their capacity as international legislators and not to the ILC, and pertains to the relationships between rules emanating from different legislative texts, it confirms the applicability of the principle of systemic integration when progressively developing the law.<sup>52</sup> According to this principle, legal reasoning ‘builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose’.<sup>53</sup> The so-called presumption against normative conflict that emanates from this principle dictates that rules do not conflict and ‘when creating new obligations, States are assumed not to derogate from their obligations’.<sup>54</sup> Since no single legislative will can be discerned in international law, this principle promotes harmonisation, coherence and uniformity in the application, interpretation and development of international law.

As a matter of logic, this principle applies more forcefully in the case of ARIO provisions. If relationships are built between two or more rules that emanate from different texts, shouldn’t this be the case between rules that emanate from the same text? The Commission clearly intends to draft rules that form a coherent whole and can coexist harmoniously. Also, if rules with the same normative value are presumably in accordance with each other, shouldn’t a developing *lex ferenda* rule presumably accord with a *lex lata* rule? Especially when this *lex ferenda* rule comes as an assertion based on extra-legal considerations and not as the reflection of a developing practice or a concomitant *opinio juris*. This means that in the absence of a legal indication to this direction, the ILC cannot infer that exceptions to existing law constitute the law’s progressive development. It would be self-contradictory and against any systemic conceptualisation of the law, if the latter were to undermine itself in such a way. So, the presumption against conflict applies not only to a *lex lata–lex lata* conflict but also to a *lex ferenda–lex lata* conflict, when the former constitutes

<sup>52</sup> ILC, *Report of the International Law Commission on the Work of Its 69th Session* (1 May–2 June and 3 July–4 August 2017), UN doc A/72/10 (2017) ch VI, 147, 161, [14].

<sup>53</sup> ILC, *Fragmentation of International Law* (n 35) 24–26, [35]–[38].

<sup>54</sup> *ibid* [38].



the progressive development of the latter and no *legal* indication (ie existing practice or *opinio juris*) points to the opposite direction.

If the qualification to the progressive development of ARIO rules stands, then the ILC is not entitled to ignore ARIO, Articles 3 to 5 when recording international law's progressive development in the field of responsibility of International Organisations. If it does, the Commission is stepping beyond its mandate, is recording provisions that do not reflect the development of international law, and abuses the confidence placed in it by the General Assembly.<sup>55</sup> However, it must be reminded that the Commission is not a law-maker but rather a law-identifier.<sup>56</sup> The hardening of *lex ferenda* into *lex lata* falls upon the legislators of the international legal order, be they States or International Organisations.<sup>57</sup> So, what are the consequences that follow from a determination that certain ILC provisions do not reflect the progressive development of international law and hence the Commission is acting *hors mandat*?

Arguably, the normative status of such provisions is affected. They constitute legislative proposals but with no claim to normativity. They no longer ought to transform into existing law and in this sense they are dispossessed of their 'deontic' characteristic.<sup>58</sup> This change of status may be utterly insignificant should law-makers decide to act upon those rules and transform them into customary *lex lata*. Nevertheless, it is of the outmost significance when such rules are to be applied from international courts and tribunals. And the ARIO, for lack of a more authoritative alternative, already play an important role in judicial practice (ie the *Nuhanovic* judgments before Dutch courts and the European Court of Human Rights (ECtHR) *Behrami* decision).<sup>59</sup> It is essential, then, for courts to have a guiding light in cases where the law is in a state of formation, and arguably the ILC Articles fulfil this role.<sup>60</sup> Judicial bodies should not resort to provisions that cannot constitute the progressive development of the law in order to fill gaps in existing law.

Being a law-identification exercise, this book purports to serve as a point of reference for courts and tribunals that must determine legal issues related

<sup>55</sup>UN Charter, Art 13(1)(a).

<sup>56</sup>Pellet, 'Between Codification and Progressive Development' (n 48) 16.

<sup>57</sup>On the role of International Organisations in international law-making, see N Voulgaris, 'International Organizations as Autonomous Actors in the Formation of Customary International Law' in S Droubi and J d'Aspremont (eds), *Perspectives on International Organisations and Formation of Customary International Law* (Manchester University Press, forthcoming).

<sup>58</sup>'Deontic' originates from the ancient Greek word 'δέον', present participle of the verb 'δέει', which means 'being necessary to', HG Liddell and R Scott, *An Intermediate Greek-English Lexicon* (Clarendon Press, 1889).

<sup>59</sup>For an analysis of those cases, see Chapters 4 and 6, respectively.

<sup>60</sup>The tendency of international courts to uncritically rely on the ILC's work has been argued by Boyle and Chinkin: 'This has also enabled the ICJ and other tribunals to rely on ILC conventions without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law', *The Making of International Law* (n 50) 200. For an analysis of the use of ILC Articles by international courts and chiefly the ICJ, see G Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 *BYBIL* 10.

to the allocation of international responsibility between International Organisations and member States. From a practical perspective, this constitutes this book's contribution. The ILC rules that presumably constitute the progressive development of the law in such cases will be used as a starting point of the analysis. In order to test whether they indeed reflect *lex ferenda*, the book will analyse whether they can be interpreted to align with *lex lata*. If harmonisation through interpretation is impossible,<sup>61</sup> alternative formulations that accord with existing law will be proposed as accurate reflections of international law's progressive development.

### C. Structure of the Argument

This book is divided into six substantive chapters and my argument is structured around the afore-mentioned types of interaction.

In Chapter 2, I set the scene for the analysis that follows. Since indirect responsibility provisions will be scrutinised against the basic premises of the law of international responsibility, my objective is to identify these premises. In this way, I aim to fill a doctrinal gap that has been haunting the ILC's work since it embarked upon its 50-year quest to draft the ASR.<sup>62</sup> The Commission has done very little to set out the common foundations of its two projects. Had it pondered over them, the ILC would have formulated a legal accountability mechanism with unitary nature in both the ASR and ARIO. In this way, the Commission would have provided solid foundations to its international responsibility edifice.

It is of fundamental importance to determine why these common foundations should exist in the first place. The function of international responsibility provides guidance in this respect. According to the ILC, international responsibility for internationally wrongful acts is the legal accountability mechanism of the international legal order with respect to States and International Organisations. This will be the case, however, if this mechanism can be attached to both subjects of international law. Respectively, international responsibility's nature, comprised of its content and its applicability *ratione personae* and *ratione materiae*, should possess a unitary character in order to be compatible with this function. Since it is the content of international responsibility that determines its applicability, I test whether the former possesses such conceptual unity in both the ASR and ARIO.

<sup>61</sup> '[I]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it', *Case concerning Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142.

<sup>62</sup> The Commission began the study of State responsibility at its seventh session in 1955 and concluded it in 2001, ILC, 'Analytical Guide to the Work of the International Law Commission' available at [legal.un.org/ilc/guide/9\\_6.shtml](http://legal.un.org/ilc/guide/9_6.shtml).

This will be the case only if this content is constructed upon rules that are sufficiently generic to attach to both entities. As constructed by the ILC, the content of international responsibility is indeed based on such rules. According to the Commission, the content of responsibility is inherently linked with the notion of an internationally wrongful act. I argue that the latter is the expression of generally applicable legal principles that admit of no exceptions. It follows that international responsibility possesses the necessary conceptual unity to attach to both States and International Organisations and fulfil its function. This understanding of international responsibility's nature I put forward, determined by legal principles and applicable to both subjects of international law, constitutes the foundation of the ILC's responsibility edifice.

Part 1 of the book, comprised of Chapter 3, focuses on member State-International Organisation interaction on the basis of their particular relationship. For every relationship, I will examine it from each side, discussing both the position of the member States and that of the International Organisation. Interaction occurs on this basis when member States exercise competence that lies with the International Organisation in accordance with the latter's rules. This type of State conduct puts the organisational veil in operation and shields member States under it by virtue of a personality merging.

The starting point for the analysis of this subject-matter is Article 62, although the ILC's ARIO Articles deal with it after the other provisions which are examined in this book. In this sense, the analysis begins from the end. The provision incorporates the rule that member States do not bear international responsibility for internationally wrongful acts of the International Organisation. I suggest that the ILC should have clearly premised the drafting of both limbs of Article 62 (ie Article 62(1)(a) and (1)(b)) and the commentaries to it on the understanding of the member State-International Organisation relationship outlined above. The ARIO, however, fail to articulate an elaborate analysis of the member State-International Organisation relationship and that is why the loosely justified 'exclusive International Organisation responsibility' rule (in the commentaries) and its exceptions (Article 62(1)(a) and (1)(b)) must be understood under this prism. What is more, Article 62 in the way advocated in the ARIO, further entangles international responsibility with the relative notion of liability and perpetuates the confusion surrounding their establishment and function. On the normative basis provided by the member State-International Organisation relationship and the foundational principles of international responsibility, I suggest how the provision and the commentaries should have been drafted, so that both the 'exclusive International Organisation responsibility' rule and the one valid exception to this rule are justified.

The second Part is centred around the other type of interaction: that between member States and the International Organisation as independent subjects of international law. The first chapter in this Part (Chapter 4) turns the focus on these ARIO provisions regulating such interaction, which were drafted according

to the respective ASR template. In the way advocated by the ILC and analysed by commentators, these provisions exist in a problematic relationship with the premises of international responsibility. The provision on ‘aid or assistance’ has seemingly eradicated the prerequisite of breach for the establishment of an internationally wrongful act and thus of international responsibility, while both ‘direction and control’ and ‘coercion’ provisions seemingly suggest that an internationally wrongful act can arise without attribution of conduct. I reinterpret the provisions through the prism of the general principles I identified in Chapter 2 and thus realign them with the nature of international responsibility.

The main argument running throughout the chapter suggests that indirect responsibility provisions operate according to specific responsibility models. Apart from the ‘independent responsibility’ model, which is attached to direct responsibility, it is submitted that two more normative schemes, attached to indirect responsibility, can be identified: derivative responsibility and complicity. The complicity model addresses scenarios in which an actor participates in the internationally wrongful act of another and the derivative responsibility model regulates the responsibility of an actor for the conduct of another. The normative elements found in both ‘direction and control’ and ‘coercion’ place these provisions under the derivative responsibility model, while the complicity model is attached to ‘aid or assistance’. Arguably, the two must be distinguished and kept apart, as they each affect differently the responsibility of the relevant subjects. On the basis of these models, I propose new interpretations of the provisions reflective of the progressive development of the law.

The next two chapters deal in turn with two mirroring situations. Articles 17 and 61 were adopted following several reformulations of their wording and heated debates during their drafting. They revolve around the notion of circumvention and give expression to the basic principle that one cannot do through another what one cannot do oneself. While they do not find a parallel in inter-State relations, they regulate interaction between member States and the International Organisation of which they are members as independent subjects of international law. This is why they operate according to the responsibility models I identify in Chapter 4.

Article 17 pertains to circumvention of obligations binding an International Organisation through decisions and authorisations issued by the International Organisation that are addressed towards its member States. The second chapter in Part II (Chapter 5) explains how the provision under scrutiny fits within the responsibility models attached to indirect responsibility, and how its wording is to be realigned with the foundations of international responsibility. Arguably, there is a strong case to draw parallels between Article 17 and the two indirect responsibility models identified in the previous chapter. Paragraph 1 of Article 17, referring to binding decisions, makes sense when seen under the lens of derivative responsibility, while paragraph 2 clearly references complicity. Such analogies, it is contended, provide adequate answers to underlying

questions of shared, joint or parallel responsibility which were too complicated for the ILC to directly address. Since analysis of the provision as a whole would result in deeper confusion, the disentanglement put forward here is a prerequisite for a normative explanation of Article 17. Through this prism, the provision finds a perfect fit within the law of international responsibility; it reflects the progressive development of the law and is of use for international courts and tribunals.

The new understanding of Article 17 proposed here provides an efficient approach to the regulation of recurring scenarios. The application of the provision in UN targeted sanctions cases suggests that Article 17 provides a just and effective regulatory basis for the resolution of conflicts of obligations that have been (to date) too complex for courts to handle. Even if it is not yet *lex lata*, it is submitted here that a consistent application of the provision by interested actors (States, International Organisations and courts) can have an effect on its normative status and transform it into a customary rule. Beyond the normative analysis, I argue that due to the broad range of cases it covers and the practical ramifications that come with its application, Article 17 should be seen as an opportunity to initiate a change in the way International Organisations operate in the international arena.

Article 61, on the contrary, is a strange combination of the indirect responsibility models analysed in Chapter 4. In Chapter 6, I argue that, as it stands at present, Article 61 does not reflect the progressive development of the law. The lack of normative analysis behind the drafting of the provision, is evinced by two factors. First, the Commission sought to accommodate a wide array of scenarios by drafting a ‘package-deal’ provision and Article 61 incorporates both indirect responsibility models in one single provision. This is why I argue that, like its counterpart (ie Article 17), Article 61 should have been split into two paragraphs, each one addressing a different model. Second, the ILC should have avoided any reference in the commentaries to ECtHR case law. The latter pertains to direct responsibility and therefore does not incorporate valid authoritative statements in support of Article 61. This relationship between Article 61 and existing case law, the ILC has established, is the main reason that provoked some misplaced criticism and an inaccurate understanding of the provision. Instead, a rule on circumvention of State obligations through member State conduct on the basis of the present analysis would have constituted the progressive development of the law and could potentially transform into a customary rule of international law.

In the last Part, comprised of Chapter 7, I test how my theoretical framework applies in practice. With this in mind, I use decision-making procedures within International Organisations as a case-study. The scenarios analysed do not cover only member States’ votes but any type of influence a State can exert during these procedures. A thorough understanding of the establishment of international responsibility in the context of decision-making procedures

of International Organisations is premised on a *tour d'horizon* of most issues discussed throughout the book. And I think it is only pertinent to conclude the argument through an applied synthesis of all intermediate findings.

The starting and end-point of the analysis will be the regulation of the matter within ARIO, Articles 58, 59 and 61, but also within existing case law. It is fitting to do so with respect to decision-making, for three main reasons: first, it is timely to bring Articles 58(2) and 59(2) into the analysis, as such procedures were the main reason why these provisions were inserted in the ARIO. The criterion of accordance of State conduct with the rules of the International Organisation they incorporate echoes the threshold I advocated in Chapter 3 for the occurrence of interaction on the basis of membership. Second, State conduct during decision-making procedures could occur both inside and outside the particular member State-International Organisation relationship. The type of interaction then shifts in these procedures, and that is why they provide a good illustration of both types of interaction and a figurative way to keep the cleavage as clear as possible. Third, while international responsibility can be established on certain occasions, it will seldom substantiate as jurisdictional bars will inhibit its fruition before a court. Decision-making procedures, then, are pertinent to keep clear another distinction – that between establishment and implementation of international responsibility.