

FOUNDATIONS OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW Conference • 17 and 18 November 2011 • Amsterdam

*** Call for papers ***

The research project on **Shared Responsibility in International Law (SHARES)** seeks to rethink the allocation of international responsibilities in cases where multiple actors, through concerted action, joint enterprise or other forms of interaction contribute to an international wrong. It seeks to uncover the extent and nature of the problem of scattering international responsibilities and will provide a fresh perspective on how international cooperation, and, more generally, the ever increasing interdependence in the international legal order, can be better matched with a proper system of shared responsibility.

This is far from just a theoretical consideration. Questions of shared responsibility have been raised, directly and indirectly, in an increasing number of cases, before a variety of international fora. The European Court of Human Rights has dealt with such questions repeatedly. In 2004, it had to deal with the issue of how *de facto* control by one State and *de jure* control by another over a territory affected the distribution of responsibility between Russia and Moldova over the autonomous region of Transnistria (*Ilascu*). In 2007, it had to rule on the distribution of responsibility between international organizations and its member states in relation to the actions of the UN and NATO in Kosovo (*Bherami and Saramati*). In 2011, it had to consider the responsibility of two States (Belgium and Greece) in relation to the treatment of refugees (*MSS*). The International Court of Justice has also dealt with such issues in the past (*East Timor Case* (1991), *Corfu Channel Case* (1947)), and so have various *ad hoc* institutions, such as the Arbitral Tribunal that issued an award in 2007 in relation to the Eurotunnel dispute, where questions of joint responsibility between France and the UK arose.

The Conference on **Foundations of Shared Responsibility in International Law**, organized at an early stage in the SHARES project, will explore fundamental and conceptual issues that explain the state of law, allow for identification of gaps and provide insights on possibilities and limitations for further development of the law pertaining to shared responsibility.

These questions are of theoretical and practical relevance in themselves, and will inform future developments of the SHARES project as a whole. The Conference also will be a first take on the findings of the SHARES project so far, and will allow for a confrontation with other competing and/or complementary approaches.

The Conference will explore four themes:

I. RETHINKING THE NATURE OF INTERNATIONAL RESPONSIBILITY

Whether and how international law does or should allow for principles or procedures for the sharing of responsibility depends in part on the question whether such principles should allow for an allocation of loss (as in a private law model) or whether they serve to ensure a return to legality (in a more public law oriented model). In turn, these questions depend on one's understanding of the nature of the international legal order and the role of international responsibility within that legal order.

This panel will look into the nature of international responsibility. It will consider competing views of the international legal order (including constitutionalism and traditional consent-based 'horizontalism') and examine the implications for the law of international responsibility.

Topics and questions that will be explored include:

- The implications of a constitutionalist perspective on the international legal order for the role of international responsibility in general and for principles of shared responsibility in particular;
- Shared responsibility from the perspective of global administrative law;
- Are the ILC articles capable of dealing simultaneously with private and public order interests?
- Consequences of aggravated responsibility for shared responsibility;
- Revisiting the distinction between responsibility and liability - a distinction not made by the ILC in its work on state responsibility but one that might be relevant for questions of joint, or joint and several liability.

II. DEROGATORY REGIMES OF SHARED RESPONSIBILITY

Questions of shared responsibility will often be answered not so much on the basis of the general law of international responsibility, but on the basis of what the relevant actors agreed to in mutually binding obligations. In the traditional understanding, they thus would be determined by primary (rather than secondary) rules, and/or by *lex specialis*. A notable example is Article 4(6) of the Kyoto Protocol, stating that:

'If Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Protocol, each member State of that regional economic integration organization individually, and together with the regional economic integration organization [...], shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this Article.'

This panel will re-examine the distinction between primary and secondary rules, and between the general law and *lex specialis*.

Topics and questions that will be explored include:

- Do primary rules/*lex specialis* that provide for shared responsibility (such as Article 4(6) of the Kyoto Protocol) reflect general international law or do they constitute isolated regimes?
- When, and in what situations, is there a need for/ground for special regimes of shared responsibility?

- Is the traditional distinction between primary and secondary rules useful for understanding and explaining the principles of shared responsibility that apply in any given case?
- How do primary and secondary rules interact? When, and on what grounds, would secondary rules on shared responsibility apply when a particular regime contains its own primary rules and/or *lex specialis*? What is the extent of permissible derogation and the relationship between the general regime and derogatory regimes?
- What is the conceptual relationship between primary rules and *lex specialis* secondary rules, and it is possible or helpful to consider these as part of the same category?

III. CRITERIA FOR ALLOCATING RESPONSIBILITY BETWEEN MULTIPLE ACTORS

In any given case where multiple actors are responsible, the question may arise on the basis of which criteria responsibility and liability are to be allocated. In the Genocide case, the ICJ suggested relevant factors such as the capacity to effectively influence the action of authors of illegal acts, which in turn would depend on 'the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events' (para. 430).

This panel will explore the possible grounds for identifying degrees of shared responsibility, and for allocating responsibility between multiple responsible parties.

Topics and questions that will be explored include:

- Moral criteria for allocating "blame";
- The role of fault in international responsibility in general and for allocating degrees of responsibility;
- The role of "efficiency" as a criterion, possibly through an economic analysis of international relations;
- The role of control as the basis for the allocation of responsibility;
- How do the allocation principles function and vary in relation to the involvement of multiple types of actors, such as individuals and non-state entities?
- The role, if any, of causation in allocating responsibility.

IV. PROCEDURAL ASPECTS OF SHARED RESPONSIBILITY

The possibility to implement principles of shared responsibility depends in part on the question whether the procedural rules of various relevant institutions are adequate for dealing with shared responsibility. For instance, the bilateralist procedure of the ICJ does not necessarily favor full consideration of relevant issues.

This panel would look at the role of procedures in the implementation of shared responsibility.

Topics and questions that will be explored include:

- Does (shared) responsibility depends on invocation and claims or is it of an objective nature, and, if so, what does that mean?
- The relationship between the substantive law of responsibility and the procedural law of international courts and tribunals;

- Are the procedures of various international courts and tribunals attuned to question of shared responsibility? Can they properly deal with situations of multiple tortfeasors that are not a party to the dispute?

CALL FOR PAPERS

This call for papers invites the submission of proposals for panels that will be articulated around these four themes. The proposal should contain an abstract (max. 300 words), as well as name, affiliation, contact details and a brief CV. The deadline for submission of the proposal is **15 May 2011**. Accepted authors will be expected to submit a draft of their presentation by the 1st of October 2011.

Proposals should be sent to Isabelle Swerissen (I.Swerissen@uva.nl). Any enquiry about the conference can be directed to Dov Jacobs (D.Jacobs1@uva.nl). For more information on the SHARES project please visit: www.sharesproject.nl.