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### **Shared Responsibility in International Law: A Conceptual Framework**

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# Shared Responsibility in International Law:

## A Conceptual Framework

André Nollkaemper & Dov Jacobs

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# Shared Responsibility in International Law: A Conceptual Framework

André Nollkaemper & Dov Jacobs

## 1. Introduction

In this article we explore the phenomenon of shared international responsibility among multiple actors who contribute to outcomes that international law seeks to prevent.<sup>1</sup> We examine the foundations and manifestations of shared responsibility, explain why international law has had difficulty in grasping its complexity, and set forth a conceptual framework that allows us to better to understand and study the phenomenon, and that provides a basis for further development of principles of international law that correspond to the needs of an era characterized by joint and coordinated, rather than by independent action.

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<sup>1</sup> See for the concept 'outcomes' further *infra*, section 2.

Questions of shared responsibility are critical to many pressing issues in international law. Consider the following examples. If states do not meet obligations to cut emissions to prevent climate change, and human displacement and environmental harm occurs, the question will arise which states are responsible.<sup>2</sup> If states or international organizations fail to live up to the collective ‘responsibility to protect’ human populations from mass atrocities,<sup>3</sup> a responsibility that rests in part on multilateral obligations that are binding on a plurality of states, or organizations,<sup>4</sup> the question will arise of who is responsible for the failure to act.<sup>5</sup> If two or more states or international organizations carry out joint military operations, and soldiers violate international humanitarian law, the distribution of responsibility among these states and organizations, as well as between these actors and individual perpetrators, will

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<sup>2</sup> The question is not entirely hypothetical, as thought has been given to the possibility of claims that vulnerable states or populations may make against states that would be responsible for (part of) the problem. M. Faure and A. Nollkaemper, ‘International Liability as an Instrument to Prevent and Compensate for Climate Change’ (2007) 43 *Stanford Journal of International Law* 124; R. Lord et al (eds), *Climate Change Liability* (Cambridge University Press 2011).

<sup>3</sup> *Implementing the Responsibility to Protect*, Report of the Secretary-General (12 January 2009) UN Doc A/63/677, available at [www.responsibilitytoprotect.org/index.php/featured\\_reports/2105](http://www.responsibilitytoprotect.org/index.php/featured_reports/2105).

<sup>4</sup> D. Amnéus, *Responsibility to Protect by Military Means – Emerging Norms on Humanitarian Intervention?* (Department of Law Stockholm University 2008); A. J. Vetlesen, ‘Genocide: A Case for the Responsibility of the Bystander’ (2000) 37(4) *Journal of Peace Research* 519, 529; M. Hakimi, ‘State Bystander Responsibility’ (2010) 21 *European Journal of International Law* 341.

<sup>5</sup> This question was considered in some form by the ICJ in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, 43; J. Pattison, ‘Assigning Humanitarian Intervention and the Responsibility to Protect’ in J. Hoffmann and A. Nollkaemper (eds) *Responsibility to Protect. From Principle to Practice* (Amsterdam University Press 2012) 173.

arise.<sup>6</sup> If states agree to cooperate, whether or not through international institutions, to conserve fish stocks beyond their Exclusive Economic Zone (EEZ), but fail to realize that objective, the responsibility and distribution thereof among the wrongdoing states will have to be determined.<sup>7</sup> If two states contribute to joint FRONTEX missions to control the external borders of the EU, and the rights of persons seeking asylum are violated, the question will arise whether the EU, and/or one or both of the states involved are responsible and, if so, how responsibility is distributed among them.<sup>8</sup> And, as a final example, if two or more states agree to allocate tasks for hosting refugees and one of them does not live up to its obligations, the question may arise whether only that latter state, or both states, or perhaps also UNHCR if this body has been given a role, are responsible.<sup>9</sup>

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<sup>6</sup> This question was raised after the invasion by the US and the UK in Iraq in 2003; see e.g. C. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in P. Shiner and A. Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008); For an example of a joint operation by two international organizations, see the African Union and United Nations mission in Darfur: S. E. Kreps, 'The United Nations-African Union Mission in Darfur: Implications and prospects for success' (2007) 16(4) *African Security Review* 65.

<sup>7</sup> See for instance: The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

<sup>8</sup> M. den Heijer, 'Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 169; and E. Papastavidris, 'Fortress Europe and FRONTEX: Within or Without International Law?' (2010) 79 *Nordic Journal of International Law* 75.

<sup>9</sup> Council Regulation (EC) No 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (18 February 2003) OJ L-50/1, 25 February 2003 ('Dublin Regulation'); A.

A study of shared responsibility in international law is therefore timely. As states, international institutions and other actors increasingly engage in cooperative action, the likelihood of harm or other outcomes that international law proscribes multiplies. Injured parties may then be faced with a plurality of wrongdoing actors.

The examples multiply rapidly once we recognize the variety of actors who can contribute to outcomes that from the perspective of international law are undesirable. In this article we focus mainly on states and to a lesser extent international organizations.<sup>10</sup> However, in the above examples of climate change and atrocities committed during armed conflicts, the role of non-state actors is critical. Situations of shared responsibility often bring into play the responsibility of individuals and other private actors, the analysis of which is essential to comprehensively understand the issue – even though they may somewhat sometimes fly below the radar of international law.

The apparent increase of situations of shared responsibility raises fundamental questions for positive law and legal doctrine. The principles of international law on

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Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009); M. Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' (2009) 21(3) *International Journal of Refugee Law* 387, 392.

<sup>10</sup> We acknowledge that the multi-layered nature of international organizations may pose additional challenges for the law of international responsibility to which the general rules of state responsibility are not *mutatis mutandis* applicable. See C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) *ACIL Research Paper No 2011-03 (SHARES Series)* [finalized 26 April 2011], available at ([www.sharesproject.nl](http://www.sharesproject.nl)).

the basis of which responsibility between multiple actors is allocated are, in the words of Brownlie, ‘indistinct’<sup>11</sup> and do not provide clear answers. There is still much truth to the observation that Noyes and Smith made in 1988: ‘The law of multiple state responsibility is undeveloped. The scholarly literature is surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility. Judicial or arbitral decisions addressing a state's assertions that other states share responsibility are essentially unknown’.<sup>12</sup> While the latter statement is not entirely correct in light of recent judicial developments,<sup>13</sup> it remains true that due to jurisdictional limitations and undeveloped principles of shared responsibility, the contribution of the case-law is limited. In legal scholarship, we find useful contributions that may help us identify the conceptual tools and the perspectives for reaching satisfactory solutions in regard to situations where two or more states or other actors collectively are involved in an act or omission causing injury to third parties. However, a comprehensive conceptual framework within which to better understand the phenomenon of shared responsibility still needs to be formulated.

As the variety and frequency of cooperative endeavors between states and other actors expands, there is a need for new perspectives that allow us to understand how the international legal order deals and could deal with shared responsibilities. Such new

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<sup>11</sup> I. Brownlie, *Principles of Public International Law* (7<sup>th</sup> edn, Oxford University Press 2008) 457; See also R. P. Alford, ‘Apportioning Responsibility Among Joint Tortfeasors for International Law Violations’ (2011) 38(2) *Pepperdine Law Review* 233, 240: ‘[T]here is insufficient guidance under international law with respect to questions of apportioning responsibility’.

<sup>12</sup> J. E. Noyes and B. D. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 (2) *Yale Journal of International Law* 225.

<sup>13</sup> See *infra*, section 6.3.1.



perspectives might eventually help relevant actors to develop international principles and processes that are suited to address such situations. Improving a regime for shared responsibility will serve the interests of injured parties, who may otherwise experience difficulty in identifying the entities responsible and the scope of that responsibility, as well as the interests of states more generally by providing some predictability as to how their own responsibility might be engaged.

In attempting to formulate such new perspectives, we have to cover a vast terrain. This has to include the design, contents and role of primary rules that define the respective obligations of states and other actors in case of concerted action. We also have to cover the content and implementation of secondary obligations: how can principles of responsibility for wrongdoing address shared responsibility? We furthermore cannot neglect the procedural law of international courts and tribunals, where eventually claims arising out of shared responsibility may be played out and which, at least in some cases, are ill-suited to deal with claims that transcend a bilateralist framework. We moreover have to consider the wide variety of practices by which actors can be held accountable for their involvement in collective wrongdoing, but which cannot be qualified in terms of formal international responsibility and which will not be treated as such by international courts. Addressing shared responsibility requires that these problems be considered in their interrelationship, rather than in isolation. And finally, each of these dimensions of shared responsibility raises fundamental underlying normative questions of how and on the basis of which criteria (justice, equity, effectiveness, power, etc.) responsibility between multiple actors can be apportioned. Indeed, the current regime also serves particular normative

interests, and the dynamics, potential and limits of this regime cannot be understood without considering such normative dimensions.

In this article we identify what international law has to offer for situations of shared responsibility and what is lacking, and provide the building blocks for a new perspective that may be better able to grasp the legal complexities arising out of such situations. Our main argument is that current international law is based on the notion of independent international responsibility (mainly of states and international organizations), that this notion does not provide the conceptual or normative tools for allocating responsibility between a plurality of actors, and that such tools cannot properly be developed unless we abandon the fiction that international responsibility is a unitary system in which a limit set of principles can address all questions of shared responsibility, irrespective of the nature of the actors, the interests at issue and the nature of the conduct in question. In short, we advance a model for a more differentiated system of international responsibility that can better address questions of shared responsibility.

Our methodology is dialectical, adopting both a holistic and pluralist approach to international responsibility. It is holistic in the sense that we suggest that we need not necessarily abide by the primary/secondary dichotomy that often structures debates on international responsibility. Analyses of situations of shared responsibility must take into account both the content and nature of an obligation and the regime of responsibility that applies to its violation. However, we also adopt a pluralist approach, as we argue that in particular cases one needs to distinguish between public and private dimensions of international responsibility, and that differentiated approaches

better reflect the plurality in the nature of obligations and the diversity of objectives of international responsibility.

We will first identify and define the core concepts that allow us to assess the law pertaining to shared responsibility (section 2). We then identify the fundamental changes in the international legal order that explain the emergence of situations of shared responsibility and that need to be taken into account in framing the relevant legal principles and procedures (section 3). Subsequently, we discuss the content and limits of the current framework of international responsibility in dealing with situations of shared responsibility (section 4). Section 5 will then contextualize the need for developing principles of shared responsibility by revisiting the foundations of the law of state responsibility and to construe them in a manner that is better adapted to the needs of addressing shared responsibility. Section 6 discusses the principles and processes of shared responsibility in this light of these reconstructed foundations. In section 7 we draw brief conclusions.

## **2. A semantic toolbox of shared responsibility**

The examples given in the introductory section illustrate that questions of shared responsibility may arise in a wide variety of forms and may involve a number of different modalities. It is therefore necessary to provide a preliminary typology, which transcends the casuistics of the diversity of possible situations. In this section we therefore propose a 'semantic toolbox' of terms and concepts that form a common point of reference for constructive scientific dialogue on questions of shared responsibility.

## *Responsibility*

We use the term 'responsibility' to refer to *ex post facto* responsibility for contributions to injury. Our main interest is in situations where two or more actors collaborate and fail to produce what was promised or fail to protect the rights or interests of affected parties, and the question arises which actor is responsible for what.

The term 'responsibility' also has frequently been used to refer to obligations that *ex ante* structure the conduct of the relevant actors. Examples are Principle 21 of the 1972 Stockholm Declaration that confirms the responsibility of all states to prevent transboundary environmental harm, or the use of the term responsibility in the 'responsibility to protect'.<sup>14</sup> It also appears that the Obama administration has used the term 'shared responsibility' primarily in this (*ex ante*) sense.<sup>15</sup> *Ex ante* and *ex post* shared responsibility can be closely related. When two or more actors have a shared responsibility in the former sense and to not do what is required, shared responsibility in the latter sense may follow. However, for semantic clarity and so as to prevent

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<sup>14</sup> On this very point concerning the semantics of the term "Responsibility to protect" (formed by a bundle of primary obligations), see S. Szurek, 'Responsabilité de Protéger: nature de l'obligation et responsabilité internationale' in *La responsabilité de protéger: colloque de Nanterre / Société française pour le Droit international* (Pédone 2007); See also S.I. Skogly, 'Global Responsibility for Human Rights' (2009) 29(4) *Oxford Journal of International Law* 827, 836 (arguing that the notion of shared responsibility should consist both of a preventative and a reactive dimension).

<sup>15</sup> See e.g. the 'Remarks by the President on a New Strategy for Afghanistan and Pakistan' 27 March 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-a-New-Strategy-for-Afghanistan-and-Pakistan](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-a-New-Strategy-for-Afghanistan-and-Pakistan) (last visited 21 February 2012).

confusion as to what exactly is being studied, we will resist as much as possible using the word ‘responsibility’ to describe *ex ante* obligations.

We use the term “responsibility” in this *ex post facto* sense as an umbrella concept, covering all manners of responsibility based on an assessment of acts or omissions against international legal obligations. It covers situations of international responsibility in the meaning of the legal consequences of an internationally wrongful act. But it also may involve responsibilities that cannot be captured by the formal concept of international responsibility in the sense of responsibility for an internationally wrongful act. For this latter meaning of responsibility, we use the term (shared) accountability, as further defined below.

#### *Shared responsibility*

We define the term *shared* responsibility (as distinct from responsibility as such) by three main features. First, it refers to responsibility of multiple actors. These actors obviously include states and international organizations, but, for shared accountability, also can include other actors, such as multinational corporations and individuals.

Second, the term refers to responsibility of multiple actors for their contribution to a single outcome. Such outcome may take a variety of forms, including material or non-material damage to third parties. It thus also can result from the failure to perform an obligation assumed towards a collectivity of states. As we will further explain below,

on this point we distance ourselves from the concept used by the ILC that opted for the more narrow approach of contribution to a single wrongful act.<sup>16</sup>

The choice for the term outcome as a defining element of shared responsibility finds support in the notion of outcome as a basis for responsibility in legal theory, though we do not necessarily follow the particular meanings that have been associated with outcome responsibility.<sup>17</sup> Different conceptualizations of shared responsibility may be considered, for instance by defining it in terms of a contribution to a single injury or a single harm.<sup>18</sup> However, this would force us to expand beyond the commonly considered notion of injury as a constitutive element as a particular wrongful act vis-à-vis particular parties, and to encompass public order dimensions of international responsibility.<sup>19</sup> The latter option has the drawback that responsibility can arise quite

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<sup>16</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ASR') (2001) UN Doc A/56/10, art. 47; ILC Draft Articles on Responsibility of International Organizations ('ARIO') (2011) UN Doc A/CN.4/L.778, art. 48.

<sup>17</sup> See e.g. David Miller, 'National responsibility and global justice' (2008) 11(4) *Critical Review of International Social and Political Philosophy* 383; T. Honoré, *Responsibility and Fault* (Hart 1999) 27 (defining outcome responsibility in terms of responsibility for the good and bad outcomes of a person's conduct); See also P. Cane, 'Responsibility and Fault; a Relational and Functional approach to Responsibility' in P. Cane and J. Gardner (eds), *Relating to Responsibility* (Hart 2001) 88; B. Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury' in M. Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005) 93.

<sup>18</sup> See for the former e.g. B. Stern, *ibid*; and for the definition of responsibility in term of contribution to harm J. Feinberg 'Collective Responsibility'(1968) 65 *Journal of Philosophy* 674.

<sup>19</sup> See e.g. Report of the International Law Commission on the work of its fifty-third session ('ASR, with commentaries') (2001) UN Doc A/56/10, commentary to art. 31, par 5.

irrespective of harm caused.<sup>20</sup> We thus opt for contribution to outcomes that the law seeks to prevent, irrespective of the question of whether such an outcome causes injury to a particular actor. This will allow us, later in this paper, to conceptualize shared responsibility both in its private law and public law dimensions.

The third defining feature of shared responsibility in this broad sense is that the responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively.<sup>21</sup> If the responsibility would rest on a collectivity, it would no longer be shared, but rather be responsibility of the collectivity as such.<sup>22</sup> Thus, responsibility of the European Union, for instance, for its Frontex policies, is not a shared responsibility, while responsibility of the member states, or of the member states and Frontex, is.

However, shared responsibility is not simply the aggregation of two or more individual responsibilities. The two or more actors stand in some relationship to each other, if only because of the fact that they contribute to the same outcome, often also because of the fact that the actors have agreed to cooperate to pursue particular aims. Indeed, perhaps the most relevant application of the concept is to situations where responsibility is based on multiple actors contributing to each other's acts and thereby to the eventual outcome, without such responsibility necessarily being based on the

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<sup>20</sup> *Ibid*, compare commentary to art. 31, par 6.

<sup>21</sup> L. May, *Sharing Responsibility* (University of Chicago Press 1996).

<sup>22</sup> *Ibid*, 116. A major reason why in the present state of international relations exclusive collective responsibility in cases of cooperative action is not an attractive option is that the organizational structures remain too weak and the power of states too strong,

same wrongful act.<sup>23</sup> This notion of shared responsibility bears some similarity to what others have referred to as 'complex responsibility', but the latter term fails to capture the element of sharing that is fundamental to our inquiry,<sup>24</sup>

#### *Cooperative and cumulative shared responsibility*

Instances of shared responsibility can be divided in two groups. Our main interest is in shared responsibility that arises out of joint or concerted action. We refer to such instances of shared responsibility as *cooperative responsibility*. This covers such examples as coalition warfare, joint patrols to protect borders against immigration, responsibility that may result from one state aiding another state in committing a wrongful act, or responsibility that may result from the collective failure of states to set standards for emissions from airlines industry, as mandated by the Kyoto Protocol.

Questions of shared responsibility also can arise when there is no concerted action. For these cases we adopt the notion of *cumulative responsibility*. In such cases, we recognize the need for the injured party to be able to claim against several entities, despite there being no link between the actions of these entities. Examples are cumulative pollution caused by two or more riparian states of an international watercourse, or climate change caused by emissions in several states (though in both these examples, emissions also may be based on an agreement between the parties and as such lead to cooperative responsibility).

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<sup>23</sup> L. May, *supra* note 21, 36-38.

<sup>24</sup> A. Linklater, *The Problem of Harm in World Politics. Theoretical Investigations* (Cambridge University Press 2011) 121.



The distinction between these two categories may be legally relevant, as the consent to a collective action, which may extend to agreement on possible consequences, will be absent in situations of cumulative responsibility. This may lead to distinct rules, in terms of attribution and presumptions of conduct and consent.<sup>25</sup>

*Shared responsibility strictu sensu (joint responsibility)*

With the term shared responsibility *strictu sensu* we refer to international responsibility for wrongful acts in the meaning of the ILC articles on responsibility of states and international organizations.<sup>26</sup> To refer to such situations of shared responsibility *strictu sensu*, we also use the term “joint responsibility”. We emphasize that, at this stage, the term ‘joint’ is meant to be descriptive and should not be seen as entailing specific legal consequences, in terms of substance or procedure, as would the expression “joint and several responsibility”, as discussed in section 6.1.

*Shared accountability*

Finally, we use the concept of shared accountability to cover situations in which a multiplicity of actors is held to account for conduct in contravention of international norms, but where this does not necessarily involve international responsibility for internationally wrongful acts in its formal meaning. In this article we will leave the concept of shared accountability largely aside and confine ourselves to international responsibility proper. We do note, however, that the concept would allow us to identify and frame a range of fundamental phenomena.

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<sup>25</sup> See for the difference between the two types of actions J. E. Noyes and B. D. Smith, *supra* note 12, 228.

<sup>26</sup> See ASR and ARIO, *supra* note 16.

For instance, the concept of shared accountability will help to comprehend situations where, in addition to the responsibility of States and international organizations, the ‘responsibility’ of non-state actors and individuals would be sought. The term is also applicable to ‘responsibility’ of international organizations under their internal rules.<sup>27</sup> The term will also allow for the study of different types of responsibilities, both judicial and quasi-judicial, dealing with complementary but distinct aspects of a situation, such as the formal legal responsibility of the State and the criminal and civil liability of the individuals involved, both before national and international tribunals. Within this concept, would in addition be included situations where quasi-judicial or political procedures might replace formal judicial procedures because they are the preferred process for ‘policing’ compliance by the actors involved in joint action,<sup>28</sup> and, for international organizations, because of the near impossibility to find a judicial institution to litigate claims against international organizations.

### **3. Underlying dynamics**

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<sup>27</sup> P. Klein, ‘Médiateurs et Mécanismes Informels de Contrôle des Activités des Organisations Internationales: Entre Accountability et Responsibility’ in J. Crawford and S. Nouwen (eds) *Select Proceedings of the European Society of International Law – No. 3* (Hart Publishing 2012) 217; B. Kingsbury et al, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law & Contemporary Problems* 15.

<sup>28</sup> E.g. Treves et al, *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press 2009).

The increase in situations of shared responsibility can be explained in the light of the evolutions that international society and the international legal order have gone through in recent decades. We identify four fundamental trends that contextualize the phenomenon of shared responsibility: interdependence, moralization, heterogeneity, and permeability. These trends influence each other in an intertwined way. This interaction should be kept in mind, their chronological presentation in the following sections being somewhat artificial, because they are often just different ways of describing the same phenomena and more specifically they are both causes and consequences of each other. Indeed, it is in their combination they help to explain the need for the international legal system to address shared responsibility and to find proper solutions.

### **3.1. Interdependence**

The first trend that is relevant to shared responsibility is that of interdependence, underlying the passage from a society of coexistence to a society of cooperation.<sup>29</sup> It is a truism that states have increasingly become dependent on each other to protect

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<sup>29</sup> See W. Friedmann, 'Cours général de droit international public' (1969) *Recueil des Cours de l'Académie de Droit International* 47, 127; G. Abi-Saab, 'Whither the International Community?' (1998) 9 *European Journal of International Law* 248; P. M. Dupuy, 'International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions' (1998) 9 *European Journal of International Law* 278.

common goods, and have felt compelled to address these issues collectively.<sup>30</sup> The underlying reasons are both objective and subjective. As to the former, in certain areas, we can identify factual effects across borders. International economy, for example, is more and more integrated, with any local crisis having immediate impact globally. In other areas it is merely the perception that has changed, rather than a reality. The recognition that it is no longer acceptable that a genocide be committed without some international intervention to stop it is an example.<sup>31</sup>

Responding to situations of interdependence by cooperation certainly involves an objective of efficiency, such as in the case of multilateral trade agreements, but also, in a number of cases, legitimacy is an important incentive for collective endeavors. A state acting on its own will more easily be open to the criticism of acting for its own interests.<sup>32</sup>

Interdependence, whether perceived or real, directly influences the occurrence of situations of shared responsibility. First, the increase in mutual transborder effects in areas such as financial markets, the environment, or organized crime is bound to result in an increase in situations where such effects originate in cooperative or cumulative

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<sup>30</sup> E-U. Petersmann, 'International Economic Law, "Public Reason", and multilevel governance of interdependent public goods' 14 (1) *Journal of International Economic Law* 23.

<sup>31</sup> See *supra*, section 3.1.

<sup>32</sup> P. Buhler, 'Military Intervention and Sources of Legitimacy' in G. Andréani and P. Hassner, *Justifying war? From Humanitarian Intervention to Counterterrorism* (Palgrave Mcmillan 2008) 167 and N. Tsagourias, 'Cosmopolitan Legitimacy and UN Collective Security' in R. Pierik and W. Werner (eds), *Cosmopolitanism in context: perspectives from international law and political theory* (Cambridge University Press 2010) 129.

action of states, possibly leading to shared responsibility. There are simply more opportunities for collectively caused harm.<sup>33</sup>

Second, interdependence drives cooperation, whether or not through international institutions, such as the G20.<sup>34</sup> This informs the corresponding shift in international discourse towards “global governance”, thus creating an increase in the number of situations where cooperation does not deliver what was promised, and ex post facto questions of shared responsibility will arise.<sup>35</sup> The relationship between interdependence, cooperation and shared responsibility is not direct, however. The cooperative, collective context is prone to lead to a diffusion of responsibility, for which shared responsibility can be an antidote.<sup>36</sup>

Third, increased interdependence (and more generally globalization) may also enhance the degree in which states and other actors feel related to events in other

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<sup>33</sup> A. Linklater, *supra* note 24; L. May, *supra* note 21, 4.

<sup>34</sup> The Group of Twenty: A History (produced by the G20, 2008) available at [http://www.g20.org/Documents/history\\_report\\_dm1.pdf](http://www.g20.org/Documents/history_report_dm1.pdf) ; See also G-20 Toronto Summit Declaration of 27 June 2010 noting in its Preamble that the G-20 is a ‘premier forum for international economic cooperation’.

<sup>35</sup> A. Buchanan and R. O. Keohane. ‘The Legitimacy of Global Governance Institutions’ (2006) 20(4) *Ethics and International Affairs* 405, 437; C. Harlow, ‘Accountability as a Value in Global Governance and for Global Administrative Law’ in G. Anthony (ed), *Values in Global Administrative Law* (Hart Publishing 2011) 173.

<sup>36</sup> A. Linklater, *supra* note 24, 57 and 225; L. May, *supra* note 21, 38 and 73.

states, and feel compelled to act.<sup>37</sup> This underlies for instance the notion of R2P, which, because of its collective nature, may result in shared responsibility.<sup>38</sup>

### 3.2 Moralization

Moving away from the realist view of international relations in which States seek the protection of their own interests, a combination of actors (including some, notably European, States, international organizations, NGOs and scholars) have construed the international legal order in the direction of an increased “moralization”. We use the word ‘moralization’ here in the most neutral way possible, as a description of the change in the discourse and *telos* of international law, rather than as an evaluation of the desirability of this trend.

In a nutshell, this trend, that has been vastly commented upon<sup>39</sup> entails a fundamental paradigm shift from state sovereignty as the cornerstone of the legal order, to a

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<sup>37</sup> A. Linklater, *supra* note 24, 151 and 254; This is, in a domestic context, the argument of N. Elias, *The Civilizing Process* (Blackwell Publishing revised edition 2000).

<sup>38</sup> J. Pattison, *supra* note 5.

<sup>39</sup> A. A. Cancado Trindade, *International Law for Humankind, Towards a new Jus Gentium* (Martinus Nijhoff Publishers 2010); A. Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 *European Journal of International Law* 513; S. Yee, ‘Towards a Harmonious World: The Roles of the International Law of Co-progressiveness and Leader States’ (2008) 7 *Chinese Journal of International Law* 99, 102 (‘coining the term “co-progressiveness”, defined as ‘a society that is all encompassing (hence “co”), preoccupied with advancements in moral and ethical terms more than in other respects and having human flourishing as its ultimate goal (hence “progressiveness”)’).

paradigm based on rights of the individual,<sup>40</sup> on the one hand, and the values and interest of international community, on the other.<sup>41</sup>

While this trend of moralization is far from being universally accepted,<sup>42</sup> it has had an undeniable impact on international law. It induces the recognition of a hierarchy of norms, where certain norms carry more importance for the international community as a whole and the violation of which might entail a different regime of responsibility.<sup>43</sup> It also has affected the content and development of international norms, through the

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<sup>40</sup> And, by extension, the “peoples”, see ICJ, Advisory Opinion on *Accordance With International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo*, 22 July 2010, Separate Opinion of Judge A. A. Cancado Trindade; In view of the centrality of the human person in this trend, other authors have referred to this trend as ‘humanisation’ of international law: T. Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006); A. Peters, *supra* note 39.

<sup>41</sup> For an overview of the historical evolution towards the taking into account of community interests in the law of state responsibility, see G. Nolte, ‘From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations’ (2002) 13 *European Journal of International Law* 1083; See also S. Villalpando, *L’émergence de la communauté internationale dans la responsabilité des Etats* (PUF 2005).

<sup>42</sup> See e.g. J. d’Aspremont, ‘The Foundations of the International Legal Order’ (2007) 18 *Finnish Yearbook of International Law* 219 and Y. Onuma, ‘In Quest of Intercivilizational Human Rights: “Universal” vs. “Relative”’ (2000) 1 *Asia-Pacific Journal on Human Rights and Law* 53.

<sup>43</sup> A. Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’ (1999) 10 *European Journal of International Law* 42; D. Shelton, ‘Righting Wrongs: Reparations in the Articles on State Responsibility’ (2002) 96 *American Journal of International Law* 833, 841 et seq.; E. Wyler, ‘From “State Crime” to Responsibility for “Serious Breaches of Obligations under Peremptory Norms of General International Law”’ (2002) 13 *European Journal of International Law* 1147, 5;

P. Klein, ‘Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law’ (2002) 13 *European Journal of International Law* 1241.

operation of particular rules of interpretation,<sup>44</sup> or through the process of identification of the substance of international customary law.<sup>45</sup> More generally, this moralization underlies the public order dimension of international law, which coexists and to a limited extent replaces the horizontal interstate model.<sup>46</sup>

The trend of moralization is a highly relevant contextual element for understanding the phenomenon of shared responsibility. Situations of shared responsibility arise predominantly in areas that carry heavy moral undertones (such as responsibility to protect, protection of civilians during armed conflict, protection of populations from climate change, and so forth). Indeed, there is a direct connection, in most discourses, between the *moral* arguments underlying a “shared responsibility” to take action to achieve certain interests, on the one hand,<sup>47</sup> and the *legal* questions that surround a more narrowly (legally) defined ex post facto “shared responsibility” that stem from such situations. The former justifies that the latter be developed in a more extensive way to allow for the underlying moral rationales to be better taken into account.

A separate dimension of moralization that is relevant to the phenomenon of shared responsibility is the increased value attached to accountability as such. We have seen

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<sup>44</sup> R. Gardiner, *Treaty Interpretation* (Oxford University Press 2008).

<sup>45</sup> For an example in international criminal law, see N. J. Arajärvi, ‘The Lines Begin to Blur? Opinio Juris and the Moralisation of Customary International Law’ (2011), available at SSRN: [www.ssrn.com/abstract=1823288](http://www.ssrn.com/abstract=1823288).

<sup>46</sup> See *infra*, section 5.3.1.

<sup>47</sup> L. May, *supra* note 21.



the emergence of a culture of accountability at the international level.<sup>48</sup> Both in practice and in legal scholarship more and more weight is attached to holding actors who do not deliver accountable for their conduct. This development, that is part of a more general trend towards good governance and transparency,<sup>49</sup> has substantially increased the number of situations where questions of shared responsibility have been raised.

### 3.3. Heterogeneity

The multiplication of actors that participate in international society is a third trend that has had a direct bearing on questions of shared responsibility.<sup>50</sup> This is most immediately obvious for international organizations. The fact that states now regularly defer to international organizations to 'legislate' on a wide-ranging array of topics, from cultural heritage to health and environmental law,<sup>51</sup> is likely to lead to questions

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<sup>48</sup> M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press 1998); C. Harlow, *supra* note 35.

<sup>49</sup> P. Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance' (2008) 11(4) *Journal of International Economic Law* 779.

<sup>50</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

<sup>51</sup> The WTO illustrates this trend, by providing a formal negotiation forum for international trade, thus centralizing discussions on this issue within one institution. In relation to this, see M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 914 (arguing that '...the procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law').

of shared responsibility between multiple organizations and/or between organizations and states. The layered nature of international organizations, which are legal persons but at the same time consist of sovereign states and members facilitates the construction of responsibility for wrongdoing as a shared responsibility between the organization and member states.<sup>52</sup> The 2011 ILC Articles on Responsibility of International Organizations indeed envisage that an organization can be responsible in connection with the wrongful acts of states, including the possibility that an organization is responsible for adopting decisions that require states to commit acts that contravene international obligations.<sup>53</sup> Significantly, the Articles acknowledge that in such situations both the organization and the state can be responsible, resulting in a situation of shared responsibility.<sup>54</sup>

Also the increased role of private actors in international relations will lead to a multiplication of questions of shared responsibility. The practice of states of delegating powers to private entities (the use of private military contractors by States is an obvious example) raises questions on the corresponding distribution of responsibility for damages caused.<sup>55</sup> We have seen comparable phenomena for

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<sup>52</sup> See generally on the layered nature of international organizations C. Brölmann. *The International Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Hart Publishing Ltd 2007).

<sup>53</sup> ARIIO, *supra* note 16, art 17.

<sup>54</sup> ARIIO, *supra* note 16, art 19.

<sup>55</sup> N. D. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19 *European Journal of International Law* 965.

international institutions who rely on public – private partnerships.<sup>56</sup> While the orthodox position is that as a matter of international law only the delegating state (or organization) can be responsible,<sup>57</sup> there is an increasing ambition to consider the role and co-responsibility of the private entity itself. Illustrative of this point, are the UN guiding principles on Business and Human Rights, which provide for a distribution of responsibilities between States and businesses that operate in delicate human rights situations or conflict-areas.<sup>58</sup>

Apart from delegation by states or international institutions, some private entities exercise powers, directly or through their influence on states, that cannot be ignored in assessing shared responsibilities. This is most certainly true in relation to the world economy, where corporations wield influence equal – and sometimes greater – to some States.<sup>59</sup> The financial crisis in the EU in recent years, with the intricate relationship between national policies, European policies and the influence of private

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<sup>56</sup> L. Clarke, 'Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships' (2011) 12 *Chicago Journal of International Law* 47.

<sup>57</sup> ASR, *supra* note 16, art. 5.

<sup>58</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) UN Doc. A/HRC/17/31. These guiding principles, in addition to recalling the current obligations of states and businesses under positive law not to contribute to human rights violations, suggests a series of more flexible due diligence obligations that can help anticipate any future violations.

<sup>59</sup> See e.g. C. M. Vasquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2004-2005) 43 *Columbia Journal of Transnational Law* 948 ('some multinationals have become powerful enough to exert significant pressure on many governments'); N. Fagre and L. T. Wells, Jr., 'Bargaining Power of Multinationals and Host Governments' (1982) *Journal of International Business Studies* 9.

actors, such as rating agencies provides a good illustration thereof.<sup>60</sup> Even when private actors generally will not be responsible as a matter of international law, as a factual matter they may contribute to (financial) damage, raising the question whether and how that influence should be relevant as a matter of international law.

Where private parties hold subjective rights under international law,<sup>61</sup> the number of legal relationships governed by international law, potentially leading to situations of (shared) responsibility increases proportionally.<sup>62</sup> The strengthened role of the individual in the international legal order has contributed significantly to the number of cases where questions of shared responsibility have arisen. Moreover, it explains the increase number of situations where international or national institutions can assess such questions of (shared) responsibility, as individuals have been provided, under certain conditions, with access to fora, both international and national, notably

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<sup>60</sup> See e.g. J. Katz et al, 'Credit Rating Agencies: No Easy Solutions, Crisis Response' (2009), available at <http://rru.worldbank.org/documents/CrisisResponse/Note8.pdf> (stating that in the United States and Europe, faulty credit ratings and flawed ratings processes are widely perceived as being among the key contributors to the global financial crisis); See also, COM (2008) 704 final 2008/0217 (COD) Proposal for a regulation of the European parliament and of the Council on Credit Rating Agencies {SEC(2008) 2745} {SEC(2008) 2746}, Brussels, 12 November 2008, 2.

<sup>61</sup> A. Peters, 'The Subjective International Right' (2011) 59 *Jahrbuch des öffentlichen Rechts der Gegenwart*, Social Science Research Network, 411.

<sup>62</sup> For the longstanding debate on individuals as subjects of international law, see P. P. Remec, *The position of the individual in international law according to Grotius and Vattel* (Nijhoff 1960); A. Orakhelashvili, 'The position of the individual in international law' (2001) 31 *California Western International Law Journal* 241.

in international investment arbitration<sup>63</sup> and human rights bodies.<sup>64</sup> The cases before the ECtHR relating to extraterritorial migration policy and violations of international humanitarian law during joint military operations illustrate the relevance for shared responsibility.<sup>65</sup>

Likewise, the possibility for individuals to be bound by international obligations and subjected to individual responsibility is relevant to shared responsibility and more

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<sup>63</sup> Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) 575 UNTS 159, art. 25 [“ICSID Convention”]; L. Reed, J. Paulsson and N. Blackaby, *Guide To ICSID Arbitration* (2<sup>nd</sup> edn, Kluwer Law International 2010) 24.

<sup>64</sup> P. Sardaro, ‘The Right of Individual Petition to the European Court’ in P. Lemmens and W. Vandenhoele (eds) *Protocol no. 14 and the reform of the European Court of Human rights* (Intersentia 2005) 45; A. F. Bayefsky, ‘Direct Petition in the UN Human Rights Treaty System’ (2001) 95 *American Society of International Law Proceedings* 71; Individual petition systems (IPs) have been created under the following treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (6 October 1999) 38 ILM 763 [“CEDAW Optional Protocol”]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, art. 22 [“CAT”]; Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 302 [“ICCPR Optional Protocol”]; American Convention on Human Rights (22 November 1969) 1144 UNTS 123 [“ACHR”]; European Convention, Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 (as amended by Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (11 May 1994) ETS no 155); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III).

<sup>65</sup> See *infra*, text to notes 82-83.

particularly in relation to what we call shared accountability.<sup>66</sup> Individuals can cause part of a proscribed outcome to which states or other actors also contribute, and their responsibility can be understood as part of a larger picture. There is merit in seeing, in the context of the genocide in Srebrenica in, the responsibility of Serbia, the UN, the Netherlands, or General Mladic in their mutual relationship.<sup>67</sup>

### 3.4. Permeability

A fourth trend which explains the emergence of shared responsibility, and will help shape the principles and procedures relating to such responsibility, is the permeability of the international and national legal orders.<sup>68</sup>

For one, the fact that the formal separation of legal orders has become more blurred, underlies and reflects the shift to the individual as a subject of international law and the corresponding increased access that individuals have to international institutions (described above as part of the trend of heterogeneity).

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<sup>66</sup> See *supra* section 2.

<sup>67</sup> See generally on the interplay between responsibility of individuals and states A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 *The International and Comparative Law Quarterly* 615; P. S. Rao, 'International Crimes and State Responsibility' in M. Ragazzi (ed), *supra* note 17, 63.

<sup>68</sup> J. Nijman and P. A. Nollkaemper, *New Perspectives on the Divide between International and National Law* (Oxford University Press 2007) 416.

Second, at the institutional level, national courts can increasingly be thought of as part of a comprehensive system of adjudication in international law, in a realization of the *dualité fonctionnelle* of Scelle.<sup>69</sup> In many (but certainly not all) parts of the world national courts adjudicate claims based on international law, and the number of such decisions vastly outnumbers the number of judgments by international courts. Even if one does not accept that national courts can formally determine situations of international responsibility,<sup>70</sup> they are an intrinsic part of the system of accountability.

While it is unlikely that claims against multiple responsible actors will be adjudicated by national courts, this does open the prospect that claims against one state, or, more likely, a private actor, are litigated in a national court, and claims against other actors who contributed to a single harmful outcome are litigated in another (either foreign or international) venue.

This permeability of the dividing line between international and national legal orders resembles to some extent the permeability between the general international legal order, on the one hand, and the internal order of international organizations, on the other. Formally these legal orders are separated, as international organizations determine whether and to what extent general international law applies within their legal order, and as general law of international responsibility in principle does not

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<sup>69</sup> G. Scelle, 'Règles générales du droit de la paix' (1933) 46 *Recueil des Cours de l'Académie de Droit International* 331, 356 ; See for a discussion of Scelle's theory, A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoulement fonctionnel) in International Law' (1990) 1 *European Journal of International Law* 210, 210.

<sup>70</sup> A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *The American Journal of International Law* 760.

apply internally out of its own force.<sup>71</sup> However, the boundaries are not watertight. For instance, according to the ARIO, organizations can be responsible on the basis of decisions that they direct to member states, even though these are internal acts.<sup>72</sup> Moreover, internal accountability mechanisms (for instance non-compliance committees) can result in findings relevant to shared responsibility.<sup>73</sup> Both scenario's can contribute to situations of and determinations on shared responsibility.

Third, the permeability of international and national legal orders supports the legitimacy of a comparative law methodology in assessing rules of shared responsibility. Indeed, moving beyond the simple assessment that international law did not emerge *ex nihilo* removed from the legal traditions of the states that compose the international legal order, this permeability of legal orders implies that the principles that apply in each can have some relevance for the other. This applies for instance in regard to such concepts as joint and several liability. While obviously care must be taken against borrowing domestic concepts “lock, stock and barrel”,<sup>74</sup> Judge Shahabuddeen rightly observed that nothing in those differences requires mechanical disregard of a situation in municipal law. His observation that ‘to speak of a joint

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<sup>71</sup> C. Ahlborn, *supra* note 10.

<sup>72</sup> ARIO, *supra* note 16, art. 17.

<sup>73</sup> See on the relationship between such findings and formal responsibility M. Koskenniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’ (1992) 3 *Yearbook of International Environmental Law*.

<sup>74</sup> *International Status of South West Africa*, Separate Opinion Judge McNair, I.C.J. Reports 1950, 146 and 148.



obligation is necessarily to speak of a municipal law concept<sup>75</sup> has wider relevance for the topic at hand.

In combination, the four trends identified, first explain the increased degree in which questions of shared responsibility arise, second influence the development of more and more cases where such questions will be reviewed by international or national institutions, and third, shape the development of principles and procedures relating to shared responsibility, including the principle shared or joint responsibility.

It is against this background, that we now have to examine the main principles of international law relevant to questions of shared responsibility.

#### **4. Overarching Principles of International Law Relevant to Shared Responsibility**

Questions of shared responsibility are not new to international law. The ICJ has considered aspects of shared responsibility in several cases.<sup>76</sup> For instance, in the *Corfu Channel* case, the ICJ adjudicated a claim against Albania for its failure to warn the United Kingdom of the presence of mines, in a situation in which it was alleged that Yugoslavia had at least contributed to the injury suffered by the United Kingdom

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<sup>75</sup> *East Timor (Portugal v. Australia)*, Judgment, Separate Opinion Judge Shahabuddeen, I.C.J. Reports 1995, 119.

<sup>76</sup> A.Nollkaemper, 'Issues of Shared Responsibility Before the International Court of Justice' in E. Rieter and H. de Waele (eds), *Evolving Principles of International Law. Studies in Honour of Karel C. Wellens* (Martinus Nijhoff Publishers 2012) 199.

as it actually had laid the mines in Albanian waters.<sup>77</sup> Other examples are the *Certain Phosphate Lands in Nauru* case (involving the possible shared responsibility of Australia, New Zealand and the United Kingdom for mismanagement of the resources of Nauru),<sup>78</sup> the *East Timor* case (involving the possible shared responsibility of Australia and Indonesia for violation of the right of self-determination of the people of East Timor)<sup>79</sup> and the *Legality of the Use of Force* cases (involving the shared responsibility of multiple NATO states for military actions in the former Yugoslavia in response to events in Kosovo).<sup>80</sup>

The ECtHR has likewise addressed questions of shared responsibility.<sup>81</sup> In 2004, for example, the ECtHR 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 Transdniestria (*Ilaşcu*).<sup>82</sup> The Court found that both states were, on different grounds, responsible and thus in effect found that responsibility was a shared one. In 2011, it

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<sup>77</sup> Corfu Channel, *supra* note 77.

<sup>78</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, 240.

<sup>79</sup> *East Timor (Portugal v Australia)*, Judgment, I. C.J. Reports 1995, 90.

<sup>80</sup> *Legality of the Use of Force (Yugoslavia v United States of America)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 916.

<sup>81</sup> M. den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (2012) *Amsterdam Center for International Law Research Paper No. 2012-04*, available at <http://www.sharesproject.nl/wp-content/uploads/2012/01/Den-Heijer-Maarten-Issues-of-Shared-Responsibility-before-the-European-Court-of-Human-Rights-ACIL-2012-041.pdf> (last visited 21 February 2012).

<sup>82</sup> *Ilaşcu and Others v Moldova and Russia* [GC] no. 48787/99, ECHR 2004-VII.

had to consider the responsibility of two states (Belgium and Greece) in relation to the treatment of refugees (*MSS*).<sup>83</sup> It found that both Greece (for mistreating an asylum seeker) and Belgium (for sending the asylum seeker in question back to Greece with the knowledge of potential mistreatment) were responsible.

Other international tribunals that were faced with questions of shared responsibility include the Arbitral Tribunal in the *Eurotunnel* dispute, that had to consider whether France and the UK were jointly responsible for failure to prevent the entry of asylum seekers in the Channel Tunnel,<sup>84</sup> and the International Seabed Authority, that affirmed the possibility of joint responsibility between states that sponsor an entity that engages in the exploration or exploitation of the deep-seabed.<sup>85</sup>

In part based on this case-law, the ILC has identified certain principles that are relevant to questions of shared responsibility. Both the ILC Articles on the Responsibility of States<sup>86</sup> and International Organisations<sup>87</sup> contain such principles; for instance the principle of ‘complicity’,<sup>88</sup> shared responsibility of a state or organization that direct another state, on the one hand, and the directed state, on the

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<sup>83</sup> *M.S.S. v Belgium and Greece* [GC] no. 30696/09, ECHR 2011.

<sup>84</sup> Eurotunnel Arbitration (*The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France*) Partial Award 2007, par 165-169.

<sup>85</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, No. 17, ITLOS, 1 February 2011.

<sup>86</sup> ASR, *supra* note 16.

<sup>87</sup> ARIO, *ibid*.

<sup>88</sup> ASR, *ibid*, art. 16; ARIO, *ibid*, art. 14.

other, and the principle that if two states contribute to a single wrongful act, each state is responsible for its own wrong.<sup>89</sup>

Based on the work of the ILC and the (limited) international case-law, in this section we first identify the main features of the dominant legal framework (4.1) and discuss how these could be relevant for situations of shared responsibility (4.2). Subsequently, we identify the limits of the prevailing principles (4.3) and note the attempts to mitigate or repair the shortcomings, without however fundamentally addressing the underlying difficulties (4.4).<sup>90</sup>

#### **4.1. The principles of independent and exclusive responsibility**

##### 4.1.1. The dominant role of the principles of independent and exclusive responsibility

The dominant approach of international law to the allocation of international responsibility is based on the notion of ‘individual’ or ‘independent’ responsibility of

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<sup>89</sup> ASR, *ibid*, art. 47; ARIO, *ibid*, art. 48.

<sup>90</sup> For reasons of brevity, this section will focus primarily on state responsibility. This however should not be read as an exclusion of the issue of the responsibility of international organizations in relation to third states. The Articles on the Responsibility of International Organizations generally follow the same logic.

states and international organizations.<sup>91</sup> Under the principle of independent responsibility, the state, or international organization, as the case may be, is responsible for its own conduct and its own wrongs. That is, it is responsible for the conduct that is attributable to it and which is deemed in breach of its obligations.<sup>92</sup>

The principle of independent responsibility is firmly established in the ASR. The basic principle embodied in articles 1 and 2 ASR (“every internationally wrongful act of a State entails the international responsibility of that State” and “There is an internationally wrongful act of a State when conduct consisting of an action or omission” is attributable to the State and constitutes a breach of an obligation of the State) underlies the ASR as a whole.<sup>93</sup> In view of the possibility that a State would be responsible not only for its own act but also for the act of others, Special Rapporteur 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.<sup>94</sup> However, the ILC was of the opinion that the cases in which responsibility was attributed to a State other than the State that committed the internationally wrongful act were so exceptional that they should not

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<sup>91</sup> To prevent confusion with “individual responsibility” as a term that refers to responsibility of individuals under international criminal law, in the remainder of this paper we use the term “independent responsibility”.

<sup>92</sup> See ASR, with commentaries, *supra* note 19, commentary to art. 47, par 8.

<sup>93</sup> Article 16.18 to some extent form an exception, see *infra* section 4.4.

<sup>94</sup> Roberto Ago, Special Rapporteur, *Second report on State Responsibility* (1970), UN Doc A/CN.4/233, par 29-30.

influence the basic principle in article 1.<sup>95</sup> It believed that following Ago would have detracted from the principle's basic force,<sup>96</sup> and thus State responsibility for *own* wrongful conduct came to be the basic rule underlying the ASR.<sup>97</sup>

In the ARIO, however, the ILC considered that this model was no longer tenable. Indeed, given that in all legal systems models of personal liability exist side by side with models of liability for acts of others,<sup>98</sup> and given the possibility that international organizations can be involved in the wrongful acts of member states,<sup>99</sup> it was unpersuasive to base the entire body of international responsibility on responsibility for one's own acts. 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

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<sup>95</sup> Roberto Ago, Special Rapporteur, *Third report on State Responsibility* (1971) UN Doc A/CN.4/246 and Add.1-3, par 47.

<sup>96</sup> Report of the International Law Commission on the work of its twenty-fifth session (1973) UN Doc A/9010/Rev.1, 176, par 11.

<sup>97</sup> But see ASR, with commentaries, *supra* note 19, commentary to art. 17, par 9 (stating that the directed state can also be responsible, since the mere fact that it was directed to carry out an internationally wrongful act does not constitute a circumstance precluding wrongfulness). But Chapter IV is treated as an exception to this basic rule, see ASR, *supra* note 16, 32 and 64.

<sup>98</sup> J. Spier (ed), *Unification of Tort Law: Liability for Damage Caused by Others* (Kluwer Law International 2003); See e.g. Principles of European Tort Law, in European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer 2005), art. 6.102: "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"; See also Commission on European Contract Law, Principles of European Contract Law, Volumes 1-2 (Kluwer Law International 2000) 378, art. 8.107 ("[a] party who entrusts performance of the contract to another person remains responsible for performance".)

<sup>99</sup> See in particular ARIO, *supra* note 16, art. 14-17.

international organization for its own wrongful conduct, but rather to “the international responsibility of an international organization for *an* internationally wrongful act.”<sup>100</sup> 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.<sup>101</sup>

The scope of this extension of the bases of responsibility remains unclear, however. The ILC could not provide much evidence in the practice of states and international organisations that supports this rule, and it appears that in most cases the relevant actors continue to construe responsibility in terms of independent responsibility, rather than in terms of responsibility for the acts of others.

The principle of independent responsibility is directly related to the principle of exclusive responsibility. This latter principle in fact involves two separate points. The first is that conduct is in principle attributed to one actor only. Dual attribution, if possible at all, is very rare. Although a few scholars have defended the possibility of dual attribution, in particular in the context of peacekeeping operations,<sup>102</sup> this is a

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<sup>100</sup> Art. 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.

<sup>101</sup> ARIO, with commentaries, *supra* note 93, commentary to art. 1, par 4.

<sup>102</sup> L. Condorelli, ‘Le statut des forces de l’ONU et le droit international humanitaire’ (1995) 78 *Rivista di diritto internazionale* 881 and L. Condorelli, ‘Le statut des forces des Nations Unies et le droit international humanitaire’ in C Emmanuelli (ed) *Les casques bleus: policiers ou combattants?* (Wilson and Lafleur 1997) 87; N. Tsagourias, ‘The Responsibility of International Organisations for Military Missions’ in M. Odello and R. Piotrowisz (eds), *International Military Missions and International Law*

minority opinion and there is little practice to support it.<sup>103</sup> The commentary to Article 6 of the ARIO emphasizes that in principle the attribution of wrongful conduct is made on an individual basis and that attribution is an exclusive operation.<sup>104</sup> Illustrative is Ago's treatment of acts of organs of a state that are put at the disposal of another state. In his Third Report,<sup>105</sup> Ago recognized that 'it may be that if another State is given an opportunity to use the services of such an organ, its demands may not be so exacting as to prevent the organ from continuing to act simultaneously, though independently, as an organ of its own State'.<sup>106</sup> However, he appeared to exclude the possibility that an act of such an organ would be attributed to the two

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(Martinus Nijhoff Publishers, forthcoming), who discusses the criterion of effective control as a prerequisite for attribution of wrongful conduct and recognizes the possibility of multiple attribution of conduct to both international organizations and troop-contributing states in case of application of this criterion; T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard International Law Journal* 113; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 *Human Rights Law Review* 151.

<sup>103</sup> See e.g. *HN v Netherlands* (Ministry of Defence and Ministry of Foreign Affairs), First instance judgment of 10 December 2008, District Court of the Hague, ILDC 1092 (NL 2008), par 47-49.

However, the Court of Appeal departed from this holding, and found that one act could both be attributed to the Netherlands and the UN. See *Nuhanović v Netherlands*, *Gerechtshof*, 5 July 2011, LJN BR 0133; and A. Nollkaemper, 'Dual attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 *Journal of International Criminal Justice* 1143.

<sup>104</sup> ARIO, with commentaries, *supra* note 93, commentary to art. 6, par 1 ('specific conduct of the lent organ or agent is to be attributed to the receiving organization or to the lending State or organization') and par 9.

<sup>105</sup> Roberto Ago, Special Rapporteur, *supra* note 95, par 201.

<sup>106</sup> *Ibid.*



states concerned. He noted that in such cases it will be necessary ‘to ascertain in *each particular instance on whose behalf and by whose authority a specific act or omission has been committed*’.<sup>107</sup> He also recognized that it may be that a state at whose disposal a foreign state has placed a person belonging to its administration will appoint this person to a post in its service, ‘so that at a given moment he will formally be an organ of two different States at the same time.’<sup>108</sup> However, also in such a situation, ‘the person in question will in fact be acting *only for one* of the two States or at all events in different conditions for each of them’.<sup>109</sup> According to that view, the defining criterion of ‘genuine and exclusive authority’<sup>110</sup> by definition only can be fulfilled for one state at a time.<sup>111</sup>

The second prong is that in those cases where a state is not responsible for its own acts, but can be responsible in connection with the wrongful act of another state,<sup>112</sup> the question is whether responsibility of one actor excludes responsibility of the other.

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<sup>107</sup> *Ibid* [emphasis added].

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid* [emphasis added].

<sup>110</sup> *Ibid*, par 202 and 206.

<sup>111</sup> See also Roberto Ago, Special Rapporteur, *Fourth Report on State Responsibility*, 24<sup>th</sup> session (1972) UN Doc A/CN.4/264 and Add.1 (in Yearbook, 1972 Vol. II), 147 (If, on the other hand, as we pointed out, the persons concerned, although acting in the territory of another State, are still under the orders and exclusive authority of their own State or of the organization to which they belong, any acts or omissions by them are, and remain, acts of that State or organization. In no circumstances can they be attributed to the territorial State or involve its international responsibility).

<sup>112</sup> ASR, *supra* note 16, art. 16-18.

The question was answered in the affirmative by Ago.<sup>113</sup> The ILC eventually decided otherwise,<sup>114</sup> but the situation remains controversial. For instance, in case of a state directing or controlling another state,<sup>115</sup> the question may arise of whether the directing state is solely responsible, or whether this responsibility is shared with the dependent state. Dominicé answers the question in the former way: it is only the controlling state that is responsible, ‘for it is either that the state is responsible for the act of another carried out under its direction or control, or the dependent state maintains a certain degree of freedom, in which case it is responsible for its own conduct’.<sup>116</sup> He adds that in the latter case, ‘the dominant state may have incited the conduct, but mere incitement is not unlawful’.<sup>117</sup> Likewise, in the case of coercion, only the coercing state would be responsible,<sup>118</sup> even though it may well be argued that even a coerced state has a degree of freedom that would justify the consideration of its international responsibility.<sup>119</sup>

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<sup>113</sup> Robert Ago, Special Rapporteur, *Eighth Report on State Responsibility*, 31<sup>st</sup> session (1979) UN Doc A/CN.4/318 and Add. 1-4 (F), par 45.

<sup>114</sup> ASR, *supra* note 16, art. 19.

<sup>115</sup> ASR, *supra* note 16, art. 18.

<sup>116</sup> C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 284-288.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, 289.

<sup>119</sup> J. D. Fry, ‘Coercion, Causation, and the Fictional Elements of Indirect State Responsibility’ (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611, 639.

As noted, eventually the ILC did not follow the approach of Ago, however, and both the ASR and the ARIO<sup>120</sup> recognize that the responsibility of a state or organization that is incurred as a result of directing and controlling, or, in the case of an organization, for enacting normative acts to states, does not exclude the responsibility of the other state or organization.<sup>121</sup> However, practice remains rare, and the modalities of sharing of responsibility remain uncertain. In the relatively scarce case-law, international courts have based themselves on the principle of independent and exclusive responsibility. The ICJ focused on independent wrongdoing in the *Corfu Channel*<sup>122</sup> and in the *Certain Phosphate Lands in Nauru*<sup>123</sup> cases. Likewise, the ECtHR considered in *M.S.S. v. Belgium and Greece* the responsibility of Belgium and Greece independently.<sup>124</sup> The Tribunal in the *Eurotunnel* case also preferred to approach international responsibility for common conduct through the lens of independent responsibility, and based solutions to wrongs committed by concerted action on the primary rules in question.<sup>125</sup>

#### 4.1.2. Factors that explain the dominance of the principles of independent and exclusive responsibility

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<sup>120</sup> ASR, *supra* note 16, art. 19; ARIO, *supra* note 16, art. 19 and art. 63.

<sup>121</sup> ASR, *supra* note 16, art. 47; ARIO, *ibid*, art. 48 recognizing the possibility of joint responsibility.

<sup>122</sup> *Corfu Channel*, *supra* note 77.

<sup>123</sup> *Nauru*, *supra* note 78.

<sup>124</sup> *M.S.S. v. Belgium and Greece* [GC] no. 30696/09, ECHR 2011.

<sup>125</sup> *Eurotunnel Arbitration*, *supra* note 84, par 187.

Two factors in particular explain the dominance of the principles of independent and exclusive responsibility. Perhaps the main explanatory factor, specifically applied to states, is the principle of sovereignty, defined in terms of independence and liberty from other states.<sup>126</sup> Sovereignty implies that a state is not responsible for acts of another state. Just as in international criminal law where the principle of individual autonomy resists the responsibility of individuals for acts that they themselves did not commit,<sup>127</sup> it is normatively problematic to hold a state responsible, with all the possible consequences that may result from such responsibility in terms of reparation, for a conduct that is not its own.<sup>128</sup>

An illustration of this reticence in holding a state responsible for acts it did not commit can be found in the high threshold for attribution of acts by private persons to states. As the ICJ explained in the *Genocide case*:

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<sup>126</sup> At this stage of the paper, we use a traditional approach to ‘sovereignty’ as an historical paradigm and for descriptive purposes.

<sup>127</sup> This argument is related to the point made by H.D. Lewis in ‘Collective Responsibility’ (1948) 24 *Philosophy* 3, 3-6 (arguing that ‘Value belongs to the individual and it is the individual who is the sole bearer of moral responsibility. No one is morally guilty except in relation to some conduct which he himself considered to be wrong... Collective responsibility is ... barbarous.’). See for a critique on collective responsibility also M. R. Reiff, ‘Terrorism, Retribution and Collective Responsibility’ (2008) 28(3) *Social Theory and Practice* 442.

<sup>128</sup> We recognize that there is a dual relation between the collective and the individual level. In relation to a collectivity of states or international organizations, the single state is comparable to the individual level. But in the relation between the state and the individual, the state represents the collectivity. The methodological individualism of for instance Lewis would of course lead to a critique on opting for the level of the state as the individual. However, we take the position that there are good reasons to accept, in the relationship state-individual, collective responsibility at the level of the state.

the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf...[T]he overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.<sup>129</sup>

Just as a state would not want to be held responsible for acts of private persons that it did not effectively control, it would not want to be held responsible for acts of other states on the basis of a loose involvement with those other states.

The second main explanatory factor, which is linked to the principle of sovereignty, is the bilateralist nature of the procedural principles of invocation of responsibility and of dispute settlement. In the ICJ, this bilateralist structure of dispute settlement limits the possibility that the Court exercises jurisdiction over multiple responsible states.<sup>130</sup> This limits both the possibility of findings in individual instances of shared responsibility, as well as the possibility that the Court contributes to the development of the principles applicable in such situations.

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<sup>129</sup> Genocide case, *supra* note 5, par 406.

<sup>130</sup> The Court has no power to order such a state to participate in proceedings. See eg Jurisdictional Immunities of the State (*Germany v Italy*), Application by the Hellenic Republic for Permission to Intervene, Order of 4 July 2011, I.C.J. General List No. 143.

This bilateralist procedural set-up may be contrasted with international criminal criminal tribunals, which have been endowed with powers to bring individuals before them irrespective of their individual consent, bypassing the structural limits of interstate bilateral litigation. Moreover, these tribunals have developed such concepts as joint criminal enterprise, thus allowing individuals to be held responsible for acts with which they were, in some cases at least, only loosely associated,<sup>131</sup> and have been given powers to join related cases.<sup>132</sup> The fundamentally different position of courts and tribunals with jurisdiction over states has both impeded the possibility to hold multiple actors responsible, in single proceedings or a series of related proceedings, and has hampered their ability to develop international law into a direction where it would be better capable of dealing with questions of shared responsibility.

It should be noted that the situation is not the same among all international courts. The compulsory jurisdiction of the ECtHR has allowed it to deal with a larger number of multi-defendant cases.<sup>133</sup> Nonetheless, the underlying principle may still be relevant in cases where the legal interests of a non-Contracting State are at issue. In extradition and expulsion cases, the Court has often underlined cases that, although the establishment of the responsibility of the expelling State “inevitably involves an assessment of conditions in the requesting country against the standards of Article

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<sup>131</sup> See e.g. H. van der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’ (2007) 5 *Journal of International Criminal Justice* 91.

<sup>132</sup> Rules of Procedure and Evidence, IT/32/Rev. 45, 8 December 2010, rule 48; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (“Rome Statute”), art. 64 (5).

<sup>133</sup> M. den Heijer, *supra* note 81.

3 ... of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise.”<sup>134</sup>

Notwithstanding these differences between states, on the whole the principle of independent and exclusive responsibility is firmly entrenched in the law of international responsibility and the procedural law of institutions that may be charged with their implementation.

#### **4.2. How independent (and exclusive) responsibility may be relevant to shared responsibility**

While, as is explained in the next section, the ILC framework has obvious shortcomings in situations of shared responsibility, it is not entirely powerless in relation to such situations.

Independent responsibility obviously is applicable, and adequate, in situations of cumulative responsibility, where each of the individual acts in itself is a violation of an international obligation.

In certain cases, also cooperative action may be ‘debundled’ in individual conduct. The principle of individual responsibility may then be adequate for dealing with

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<sup>134</sup> *Soering v United Kingdom*, no 14038/88, ECHR 1989, par 91; *Cruz Varas a.o. v Sweden*, no 15576/89, ECHR 1991, par 60; *Mamatkulov and Askarov v. Turkey* [GC], no 46827/99 and 46951/99, ECHR 2005, par 67; *Saadi v Italy* [GC], no 37201/06, ECHR 2008, par 126.

cooperative action. Thus, in the *East Timor case*, the ICJ noted that ‘even if the responsibility of Indonesia is the prime source, from which Australia’s responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility’.<sup>135</sup> Australia’s own role in regard to the treaty was therefore sufficient for its (independent) responsibility. And in respect of a situation where two states set up a common organ (for instance the Coalition Provisional Authority set up by the UK and the USA during the occupation of Iraq), the ILC took the position that ‘the conduct of the common organ cannot be considered otherwise than as an act of each of the states whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more states will concurrently have committed separate, although identical, internationally wrongful acts.’<sup>136</sup>

Specifically in the context of the ICJ, debundling collective action in individual conduct and wrongdoing can have the added benefit of making it less likely that proceedings will be dismissed because a potential party is not involved in the proceedings, within the limits of the *Monetary Gold* principle.<sup>137</sup>

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<sup>135</sup> *East Timor (Portugal v Australia)*, Dissenting Opinion Judge Weeramantry, I. C.J. Reports 1995, 139 and 172, par iii.

<sup>136</sup> Report of the International Law Commission on the work of its forty-eight session (‘ASR, with commentaries’, thereto adopted by the International Law Commission on first reading) (1996) UN Doc A/51/10, commentary to art. 27, par 2.

<sup>137</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, 19. In this case, the Court formulated an exception to the principle that the absence of a state who is concurrently or jointly responsible for a wrongful act does not preclude the exercise of jurisdiction.



Also the practice of the ECHR shows that the principle of independent responsibility allows the assignment of responsibility in cases where two or more states were, either independently or through cooperative action, involved in a wrongful act<sup>138</sup>

In sum, there is indeed some room in the current framework to implement shared responsibility. However, the power of the principle of independent responsibility to address questions of responsibility that arise in cases where there is a multiplicity of wrongdoing actors is in several aspects limited, as will now be discussed.

### **4.3. The Limitations of Independent Responsibility**

Reducing complex relationships to the responsibility of an individual state may, for a number of reasons, be unlikely to result in a satisfactory outcome. In combination with the procedural limitations of dispute settlement, the conceptual tools of exclusive individual responsibility of states have led courts to reduce complex cooperative schemes to binary categories, without resulting in principled discussions of the shared nature of responsibility.<sup>139</sup> A noteworthy example is the decision of the European

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For a recent statement of the principle, see Jurisdictional Immunities of the State (*Germany v Italy*; Greece intervening), par 127.

<sup>138</sup> M. den Heijer, *supra* note 81.

<sup>139</sup> Corfu Channel, *supra* note 77; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Judgment, I.C.J. Reports 1986, 14; Nauru, *supra* note 78; East Timor (*Portugal v Australia*), Judgment, I. C.J. Reports 1995, 90; and Legality of Use of Force (*Serbia*

Court of Human Rights in *Behrami*. The Court allocated all acts and omissions in regard to a failure of de-mining operations in Kosovo exclusively to the UN, not the Member States, without considering the possibility of a less black and white solution in which responsibility would be shared.<sup>140</sup> This raises a range of questions. Is it conducive to a rule-based society in which responsibility fulfills the essential function of ensuring a return to legality?<sup>141</sup> What are the costs of such accountability gaps? If only the directed state is held responsible, do we have a proper set of principles that allows us to establish for which part of the injury to a third party it is responsible? If so, it is fair to leave the injured party with the remaining costs? If not and the directed state is responsible for all injury, is it fair to hold only the latter state responsible and not the former? The larger point here is therefore that reducing situations of shared responsibility to individual responsibility often will imply an accountability gap that brings costs for the injured parties and the larger system, and raise questions of fairness between the responsible parties.

Two more specific drawbacks can be pointed out in related to the prevalent system of individual responsibility. First, the normative basis of situations of shared responsibility remains unsettled, and often it is not clear at all on which basis one or more of the actors involved can be held responsible. This holds both for the question of whether dual attribution is possible,<sup>142</sup> and for the question whether a state or

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*and Montenegro v United Kingdom*), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 826.

<sup>140</sup> *Behrami and Behrami v France*; *Saramati v France, Germany and Norway* (dec) [GC], no 71412/01 and no. 78166/01, ECHR 2007.

<sup>141</sup> I. Brownlie, *The Rule of law in International Affairs* (Kluwer Law International 1998) 79.

<sup>142</sup> See e.g. Condorelli, *supra* note 102; and other references in that note.

organization can be responsible without having committed a wrongful act. As to the latter, the ILC has suggested that in certain situations shared responsibility may not arise from a combination of wrongful conduct attributable to one actor, on the one hand, and responsibility attributed to another actor. Responsibility thus is not necessarily based on an act attributed to an actor (state or organization) that is in breach of its obligation, but can also be directly attributed to an actor, even that was not engaged in a wrongful act. Examples of such situations, that almost by definition open the possibility of shared responsibility since the attributed responsibility co-exists with the responsibility of the actor to whom the wrongful conduct was attributed,<sup>143</sup> are the responsibility of actors arising out of aid and assistance,<sup>144</sup> direction and control,<sup>145</sup> coercion,<sup>146</sup> shared responsibility of international organizations and states based on a combination of decisions of the organization and wrongful acts of the state(s) in question,<sup>147</sup> or for shared responsibility arising out of a combination of attributions of responsibility to a state and wrongful conduct by an

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<sup>143</sup> ARIO, *supra* note 16, art. 63.

<sup>144</sup> *Ibid*, art. 14 and 58; See also A. 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* 63; H. Aust, *Complicity and the Law of State Responsibility* (Cambridge Studies in International and Comparative Law) (Cambridge University Press 2011, forthcoming).

<sup>145</sup> ARIO, *supra* note 16, art. 14 and 59; See also A. Reinisch, *ibid*.

<sup>146</sup> ARIO, *supra* note 16, art. 16 and 61; See also J. D. Fry, *supra* note 119.

<sup>147</sup> ARIO, *supra* note 16, art. 17; See also N. 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* 35.

organization.<sup>148</sup> However, it remains controversial whether the responsibility of the state or organization to which the conduct in question is not attributed is based on an independent wrong, on contribution to the conduct, or on contribution to the proscribed outcome.<sup>149</sup> In this situation where the normative basis is undetermined, it is a rather empty proposition to say that the state or organization to whom responsibility is attributed can be responsible on the basis of its own act – in any case it is not on the basis of its own wrongful act. The foundations of the construction are very much undertheorized, and their relationship with the normal conditions of wrongfulness not at all well-articulated.

The second, related point is that the principle of independent responsibility in itself provides no basis for apportionment of responsibility and in particular reparation. In each of the above cases, but also in cases of dual attribution and in cases where wrongful acts are attributed to two or more actors involved in concerted action, holding only one state responsible will raise the question for what part of the injury caused to a third party that state is responsible. If two or more states are held responsible based on their individual wrongful act, the question likewise may arise how responsibility and reparation is apportioned between them. As a consequence, the absence of proper criteria for allocating responsibility may either result in too little or too much responsibility for any individual state or other actor.

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<sup>148</sup> ARIO, *supra* note 16, art. 61; J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) *International Organizations Law Review* 91.

<sup>149</sup> N. Nedeski and A. Nollkaemper, 'Responsibility of International Organizations in Connection with Acts of States' (2012, forthcoming) *International Organizations Law Review*.

The absence of proper criteria for allocating responsibility may result in too little responsibility, because impossibility to determine with sufficient certainty which of the states involved was responsible for which wrongdoing may effectively prevent a finding of responsibility. An example of this phenomenon was the *Saddam Hussein* case before the European Court of Human Rights. Saddam Hussein brought a case against 21 states that allegedly were implicated in the invasion of Iraq and his capture. The Court held that as long as the applicant could not identify the specific wrongful acts of the member states, no responsibility of any member state in connection with the invasion of Iraq and/or the detention of Hussein could be found.<sup>150</sup> As indicated above, the decision of the European Court of Human Rights in *Behrami* is also an example where the binary approach resulted in a questionable escape from responsibility by the Member States concerned.<sup>151</sup>

Moreover, the involvement of a multiplicity of actors in cases of concerted action may lead to blame-shifting games (or ‘buck-passing’) between the various actors that are involved.<sup>152</sup> In the Srebrenica cases, implicating both acts and omissions of the United Nations and of the Netherlands in regard to the protection of the safe haven of

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<sup>150</sup> *Hussein v Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom* (dec), no. 23276/04, ECHR 2006.

<sup>151</sup> *Behrami and Behrami v France; Saramati v France, Germany and Norway*, *supra* note 140.

<sup>152</sup> See generally C. Hood, ‘The Risk Game and the Blame Game’ (2002) 31(1) *Government and Opposition* 15.

Srebrenica in 1995, both the UN and the Netherlands denied responsibility and effectively passed the “buck” to each other.<sup>153</sup>

In effect, a multiplicity of actors may, also at the international level, lead to the following paradox of shared responsibility: ‘as the responsibility for any given instance of conduct is scattered among more people, the discrete responsibility of every individual diminishes proportionately.’<sup>154</sup>

On the other hand, the lack of a clear conceptual basis for allocation of responsibility between multiple wrongdoing actors can result in too much responsibility. As responsibility cannot easily be apportioned, the result can be that a state is to shoulder the entire blame. Judge Ago noted in his dissenting opinion in the *Nauru* case that given the fact that the wrong to Nauru involved concerted action between Australia, New Zealand and the United Kingdom, it would be on ‘an extremely questionable basis’ if the Court were to hold that Australia was to shoulder in full the responsibility in question.<sup>155</sup>

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<sup>153</sup> A. Nollkaemper, ‘Multilevel Accountability in International Law: A Case Study of the Aftermath of Srebrenica’ in Y. Shany and T. Broude (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Hart Publishing 2008).

<sup>154</sup> M. Bovens, *supra* note 48, 46; See for a comparable point L. May, *supra* note 21, 37-38; I. Brownlie, *System of the Law of Nations: State Responsibility* (Part 1) (Oxford University Press 1983) 7-8. See for a further discussion D.F. Thompson, ‘Designing Responsibility: The Problem of Many Hands in Complex Organizations’ in J. van den Hoven et al, *The Design Turn in Applied Ethics* (Cambridge University Press 2012, forthcoming).

<sup>155</sup> Dissenting Opinion Judge Ago in *Nauru*, *supra* note 78, 326.

The general point here is that the principle of individual responsibility provides no basis for the task of apportioning responsibilities between multiple wrongdoing actors. When two or more actors have breached, for instance, the obligation to cooperate to conserve shared fish stocks or the responsibility to protect populations from genocide or crimes against humanity,<sup>156</sup> it may be necessary to apportion responsibility or the resulting obligation to provide reparation between the entities involved.<sup>157</sup> But on the basis of what criteria is this to be done? In the *Nauru* case, the Court did not reach the question of allocation. Judge Shahabuddeen noted that the question whether “Australia alone can be sued, and, if so, whether it can be sued for the whole damage” was a matter for the merits.<sup>158</sup> But it is far from obvious how the Court could have dealt with the question.

The principle of independent responsibility in itself provides no basis for this task. Article 47 of the ASR deals in some way with this issue.<sup>159</sup> However, although this Article is a welcome acknowledgement of situations of multiple wrongdoers, it raises as many questions as it answers. The ILC declined to express a clear opinion on

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<sup>156</sup> ASR, *supra* note 16, art. 41.

<sup>157</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion Judge Simma, I.C.J. Reports 2003, 324.

<sup>158</sup> *East Timor (Portugal v. Australia)*, Judgment, Separate Opinion Judge Shahabuddeen, I.C.J. Reports 1995, 119.

<sup>159</sup> It provides “1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. 2. Paragraph 1:

(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) is without prejudice to any right of recourse against the other responsible States.”

whether their responsibility is joint, or joint and several, and it provided few answers as to whether and how any responsibility between multiple responsible parties should be allocated.

As a consequence, the principle of individual responsibility and the accompanying procedures may undermine the main functions of responsibility, in particular the restoration of legality (if states can effectively shift blame to other states, not all involved actors will be required to change its conduct) and the protection of the rights of injured parties (who may not be able to bring successful claims against all responsible parties).<sup>160</sup>

#### **4.4. Tentative yet unsatisfactory solutions**

Two ways to deal with these difficulties would be for the relevant actors to agree on *ex ante* arrangements (4.4.1) or propose some adjustments in the secondary rules (4.4.2). However, as will be suggested below, these approaches are unsatisfactory or at least presuppose a prior fundamental rethinking of the nature of responsibility and the interests that it serves (4.4.3).

##### **4.4.1. Relying on *ex ante* arrangements**

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<sup>160</sup> The functions of responsibility are of course open to discussion. This will be discussed in more detail in section 5, especially in light of the public and private dimensions of international responsibility.



First, it may be contended that questions of shared responsibility could be solved by relying on *ex ante* arrangements. After all, whether or not two states are jointly responsible for a particular act is first and foremost governed by what states had actually agreed to, whether in drafting the primary obligations, or in providing for specific secondary rules of responsibility.<sup>161</sup> If states and other actors would wish to prevent the above noted problems of too much or too little responsibility, they simply should agree on the modalities of sharing *ex ante*.

We recognize that such *ex ante* arrangements (whether of a primary or secondary nature - if that distinction can be made at all)<sup>162</sup> are of key importance for addressing problems of shared responsibility. The type of responsibility (whether individual or shared) is to a large extent a function of the nature of the underlying obligations. In case states accept a joint obligation,<sup>163</sup> or when obligations provide for collective action,<sup>164</sup> shared responsibility may be implied in case of breach.<sup>165</sup> If, contrariwise,

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<sup>161</sup> Eurotunnel Arbitration, *supra* note 84.

<sup>162</sup> See *infra*, section 4.4.3.

<sup>163</sup> See the discussion of the concept in the Separate Opinion Judge Shahabuddeen in Nauru, *supra* note 78, 44-57.

<sup>164</sup> One of many examples is Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) UN Doc FCCC/CP/1997/7/Add.1; (1998) 37 ILM 22, art. 2(2) [“Kyoto Protocol”], stipulating that that Annex I parties ‘shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively’.

<sup>165</sup> Eurotunnel Arbitration, *supra* note 84.

obligations provide for individual action, no questions of shared responsibility need arise (though they may arise, for instance in case of cumulative responsibility).<sup>166</sup>

The prospect of litigation in situations of shared responsibility, precisely in view of the uncertain rules of apportionment of responsibility and liability, may induce states to clarify the respective obligations and responsibilities beforehand. While responsibility as we construe it essentially is a retrospective process (involving giving an account of prior conduct), it may trigger negotiations and standard-setting. An example are the agreements made by states in respect to climate change under the Kyoto protocol, which can be considered as an *ex ante* apportionment of responsibility.<sup>167</sup>

The criteria that may be used in apportioning responsibilities *ex ante* may not be dissimilar from those used to apportion responsibilities after harm is caused. Criteria such as of capacity, contribution, control and causation will be relevant both when states *ex ante* agree who is to carry what burden, and when *ex post facto* determinations of responsibility need to be made.<sup>168</sup>

By providing clarity on such points, the possibilities that parties will be willing to entrust adjudication of claims of shared responsibility to courts may increase.<sup>169</sup>

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<sup>166</sup> See *supra*, section 2.

<sup>167</sup> Kyoto Protocol, *supra* note 164; See also C. Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 *The American Journal of International Law* 276.

<sup>168</sup> See further *infra*, section 6.2.2.

<sup>169</sup> D. Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' in R. B. Lillich and D. B. Magraw (ed), *The Iran-United States Claims Tribunal: Its Contribution to the Law of*

#### 4.4.2. Modifying the ‘general’ secondary rules of responsibility

A second possible approach to the difficulties raised would be to develop principles of shared responsibility to fill the “gaps” of the ILC Articles. Such principles could replace the fiction of exclusive attribution (eg under Articles 6 or 18 of the ASR) with an express acknowledgement of the possibility of dual attribution or a combination of attribution of conduct and attribution of responsibility,<sup>170</sup> and could clarify how to divide responsibility and damages between multiple tortfeasors, including the role of fault and causation; the legal basis for a responsible state to claim part of the damages due from a co-responsible state,<sup>171</sup> etc.

The ILC has in fact to some extent proceeded in this direction. The draft Articles on the Responsibility of International Organizations are a noteworthy improvement over the Articles on State Responsibility by acknowledging that organizations can be responsible in connection with wrongful acts of states and vice versa, and by openly recognizing the possibility that the responsibility of an organization does not exclude

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*State Responsibility* (Transnational Publishers 1998) 163 (noting that it will be not ‘simple for arbitrators to determine the percentage of contribution or that States will feel comfortable with leaving such a difficult determination to arbitrators.’).

<sup>170</sup> J. D. Fry, *supra* note 119, 638.

<sup>171</sup> C. Dominicé, *supra* note 116.

responsibility of one or more member states<sup>172</sup> and vice versa.<sup>173</sup> As we have indicated above, however, the scope of this extension of the bases of responsibility remains unclear. The ILC could not provide much evidence in the practice of states and international organisations that supports this rule, and the basis and consequences are undetermined.

Second, the ILC has to some extent accommodated the possibility of shared responsibility in Article 47 ASR, providing that if two states are responsible for the same wrongful act, each state can be held responsible.<sup>174</sup> Article 48 ARIO contains a comparable provision.<sup>175</sup> While these articles provide for independent responsibility, the possibility of parallel or concurrent independent wrongs makes it directly relevant to questions of shared responsibility. However, as also indicated above, the article has little normative content and, moreover, raises several questions. The core question is what is the meaning of the requirement that two conducts of two or more states or international organizations results in the ‘same wrongful act’.

From the Commentary to the ARIO, it is clear that the ILC considered that the responsibility of two or more States or international organizations for the same

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<sup>172</sup> See e.g. ARIO, *supra* note 16, art. 19 (stipulating that ‘This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.’).

<sup>173</sup> *Ibid*, art. 63

<sup>174</sup> *Ibid*, art. 48; ASR, *supra* note 16, art. 47.

<sup>175</sup> ARIO, *ibid*, art. 48(1) stipulates ‘Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.’

wrongful act can be a joint responsibility.<sup>176</sup> Some of the examples given in the Commentary to Article 48 indeed may concern ‘the same wrongful act’. This holds in particular for direction and control,<sup>177</sup> coercion,<sup>178</sup> and circumvention of international obligations through decisions and authorizations<sup>179</sup> - though in some situations these situations may imply different wrongful acts (ie when a decision of an organization as such is in contravention of an international obligation).

Apart from the less than perfect fit between principle and examples, there are fundamental problems with defining joint responsibility in terms of the ‘same wrongful act’ rather than (as is done in domestic systems) in terms of the ‘same injury’.<sup>180</sup> This first problem is that it may be underinclusive, as it excludes the possibility to construe situations where an organization and a State commit different wrongful acts in terms of joint responsibility. One example is the situation where two or more states commit independent wrongs resulting in a single harmful outcome.<sup>181</sup> Another example is aid and assistance (or ‘complicity’). There is good authority for the proposition that an aiding State/organization and the State/organization that is aided can be jointly responsible for the result produced by these separate acts.<sup>182</sup> This

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<sup>176</sup> ARIIO, with commentaries, *supra* note 93, commentary to art 48, par 2.

<sup>177</sup> Art. 15 ARIIO, *supra* note 16, art 15.

<sup>178</sup> *Ibid*, art. 16.

<sup>179</sup> *Ibid*, art. 17; See also N. Blokker, *supra* note 147; J. d’Aspremont, *supra* note 148.

<sup>180</sup> See critically on the failure to recognize the role of legal injury: B Stern, *supra* note 17.

<sup>181</sup> Cumulative responsibility, see *supra* section 2.

<sup>182</sup> L. May, *supra* note 21, 37-38; I. Brownlie, *supra* note 154, 191; A. Orakhelashvili, ‘Division of Reparation Between Responsible Entities’ in J. Crawford, A. Pellet, and S. Olleson (eds), *supra* note 116, 658.

is in conformity with the situation in domestic law.<sup>183</sup> It appears that that ILC intended to follow this approach, and it used the term ‘joint responsibility’ to refer to responsibility triggered by aid or assistance to a State that commits an international wrong.<sup>184</sup> However, 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. Aid and assistance is defined precisely by the fact that it is a *separate*, not the same, wrong.<sup>185</sup> It might well be argued that it is only if aid and assistance has a certain scale, and the aiding state contributes to such an extent to the wrong, that we speak of joint responsibility.<sup>186</sup> But in that case aid and assistance would no longer be a separate wrong. If aid and assistance as such is to be considered as an example of joint responsibility, as the ILC apparently intended, that cannot be based on the concept of joint responsibility for the same wrongful act, but has to be defined differently, for example in terms of the injury that the wrong causes to third parties.

A better conceptual foundation for joint (and thus shared) responsibility may be found in defining joint responsibility not in terms of a contribution to a single wrongful act, but in terms of contribution to a proscribed outcome (that may encompass injury to individual states), as also suggested in our conceptual approach to shared

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<sup>183</sup> Principles of European Tort Law, *supra* note 98, art. 9.101(a).

<sup>184</sup> ARIO, *supra* note 16, art. 14; See also A. Reinisch, *supra* note 144.

<sup>185</sup> H.P. Aust, *supra* note 144, 289.

<sup>186</sup> See on the need for differentiation B. Graefrath, ‘Complicity in the Law of International Responsibility’ (1996) 29 *Revue Belge de Droit International* 370-380 (stating that the article ‘seemed to leap the barrier between secondary and primary rules.’); H. P. Aust, *supra* note 144, 219-220.

responsibility.<sup>187</sup> In domestic legal systems, joint responsibility does not refer some abstract responsibility for a single act, but rather to the possibility that injured parties can direct a claim to provide reparation for undivided injury at each of the responsible actors.<sup>188</sup> It would seem that if joint responsibility is to be a useful concept in international law, it should likewise be defined in terms of what injured parties, or international institutions, can demand of each of the responsible States. Allowing injured parties to direct a claim at each of the responsible actors only makes sense if this is combined with reparation based on injury. Indeed, allowing third parties to direct a claim towards all responsible actors –which necessarily is based on the same injury – is the reason why provision is made for joint responsibility at all. However, as we will explain below, this option needs to be qualified in terms of the mixed private-public nature of international responsibility..

#### 4.4.3. The illusive character of these solutions

The previous comments already indicate that both reliance on ex ante agreements rules or changes in a few secondary rules cannot be expected to solve the problems of shared responsibility, without a fundamental reflection on the grounds and nature of shared responsibility.

As to the former, while states and organizations may consider including such provisions in future arrangements, it is not realistic to expect an overhaul of the large

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<sup>187</sup> See *supra*, section 2.

<sup>188</sup> Principles of European Tort Law, *supra* note 98, art. 10.101 and 10.104.

number of existing treaty arrangements. In any case, this solution is unlikely to work for customary international law.

Even if there is *ex ante* allocation, it is unlikely to address all aspects of the attribution of responsibility, and more specifically shared responsibility, in relation to issues such as fault, causation, quantum and criteria for reparations, etc. There will always be a need for a more general and comprehensive set of secondary rules dealing with state responsibility.<sup>189</sup>

Another problem that may be advanced is that if states would provide for specific primary obligations and / or specific principles of responsibility tailored to particular situations, this could lead to different rules for similar situations which, in turn, would raise issues of legitimacy and foreseeability. Such concerns are present in the domestic setting, where it is inconceivable that such issues would be left to *inter se*, *ex ante* arrangements.<sup>190</sup> It should be noted that this need for consistency applies, irrespective of the proposed framework below envisaging having differentiated regimes of responsibility<sup>191</sup>. Indeed, within each differentiated regime, the possible consequences of leaving things to be dealt with by *ex ante* arrangements still need to be assessed.

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<sup>189</sup> B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

<sup>190</sup> In this respect there is a close relationship between the principles applying to (shared) responsibility and the rule of law; See on this I. Brownlie, *supra* note 141, 79; See for the role of legality and foreseeability as rule of law criteria, A. Watts 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15.

<sup>191</sup> See *infra*, section 5.4.1.



Nonetheless, we submit that formulating a set of primary rules or a few new secondary principles raises fundamental conceptual, methodological and political challenges. Given the normative implications of alternative arrangements, formulating principles on shared responsibility can hardly be conceived as a technical exercise. It would be intellectually unsatisfactory, a little bit like adding floors to a building without considering its foundations. As indicated above, the openings that the ILC has created in the ASR (notably Article 47) and in the ARIO (articles 14-17, as well as Article 48) raise a range of questions that are not easily answered in view of ambiguities in the law of responsibility itself.

It will appear in the next section that the fundamental changes in the international legal order that give rise to situations in which shared responsibility may occur, require a fundamental reflection on how international law can accommodate such changes. The evolving nature of the international system justifies not only that we think about how to deal with shared responsibility, but also whether the current framework allows us to do so, not only in a technical sense, as was shown previously, but also in a conceptual one.

## **5. New Conceptual Foundations for Shared Responsibility: Revisiting International Responsibility as a set of differentiated regimes**

Against the background of the fundamental changes identified in Section 3, the following sections will revisit three foundations of the current law of international responsibility that are of central importance to the principles and procedures applying

to shared responsibility, namely the unity of international responsibility (5.1), the dichotomy between primary and secondary norms (5.2) and the dichotomy between responsibility and liability (5.3). Based on these findings, the final part of this section will suggest a new approach to shared responsibility based on the identification of differentiated regimes of international responsibility (5.4).

### **5.1. Moving away from the unity of the law of international responsibility**

How we address questions of shared responsibility depends in part on the understanding of the nature and aims of international responsibility. Questions of joint and several liability are strongly associated with a private law paradigm, and involve a transposition of notions of private law to the international level. Tellingly, in his Separate Opinion in the *Oil Platforms* case, Judge Simma examined private law principles and derived from these a general principle.<sup>192</sup> Alford similarly compares national legal systems to identify a possible international principle of joint (and several) liability.<sup>193</sup> However, it may be possible to conceive shared responsibility in terms that are less associated with private law regimes. For instance, the proposition of counsel for Yugoslavia in the *Legality of the Use of Force* case that NATO states were involved in a joint enterprise<sup>194</sup> has as many connotations with the criminal law

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<sup>192</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, 161; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion Judge Simma, *supra* note 157, 354-358.

<sup>193</sup> R. P. Alford, *supra* note 11.

<sup>194</sup> *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Oral Proceedings, Public Sitting 12 May 1999, CR 1999/25, 16.

notion of joint criminal enterprise as it does with private law. More generally, it seems that a concept of shared responsibility that is based on domestic private law analogies and that fulfills functions that are comparable to private law can only capture part of the modern practice of international responsibility.

We argue that the concept of shared responsibility can encompass several legal phenomena, some of which are more akin to private law concepts, and some of which resemble more public law ones. The developments identified in section 3 sustain and strengthen both aspects, making it more difficult for one set of principles to cater to both interests. In effect, we need to debundle the dominant notion of the law of international responsibility as a unitary phenomenon.

#### 5.1.1. What is the unity of international responsibility?

The common understanding is that the rules on the International Responsibility of States and the Responsibility of International Organizations form a single, unitary system.<sup>195</sup> Since the international legal system is essentially different from domestic legal systems, the domestic notions of private or public law cannot easily be transposed to the international level. Pellet rightly warned against undue domestic analogies when he wrote that international responsibility is neither public nor private, but ‘simply international’.<sup>196</sup> Indeed, international law does not distinguish between

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<sup>195</sup>J. Crawford and S. Olleson, ‘The Nature and Forms of International Responsibility’ in M. Evans (ed), *International Law* (Oxford University Press 2003) 451.

<sup>196</sup>A. Pellet, *supra* note 43, 433-434; A. Pellet, ‘The Definition of Responsibility in International Law’ in Crawford et al (eds), *supra* note 116, 3-16.

contractual and tortious responsibility, or between civil, criminal, or other forms of public law (administrative) responsibility.<sup>197</sup>

What is meant by the law of responsibility as a unitary system, is that the various forms of responsibility (fault-strict, ordinary wrongs, wrongs arising out of serious breaches of peremptory norms, etc.) are subject to the same general principles of responsibility, and that they form a relatively coherent whole. For instance, it is thought, though not without controversy,<sup>198</sup> that serious breaches of peremptory norms are subject to the same principles of attribution, defenses, and reparation as ordinary wrongful acts. In the *Genocide* case, the ICJ stated that the particular characteristics of genocide do not justify that the Court depart from the criteria for attribution as they apply under general international law.<sup>199</sup>

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<sup>197</sup> *Rainbow Warrior (New Zealand v France)*, 1990 Arbitration Tribunal, 20 RIAA 217; Crawford and Olleson, *supra* note 195, 451-452.

<sup>198</sup> G. Abi-Saab, 'Whatever Happened to Article 19' in A. Fischer-Lescano and M. Bothe (eds), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos 2008) 821; P. M. Dupuy, 'Action publique et crime international de l'Etat: à propos de l'article 19 du projet de la Commission du droit international sur la responsabilité des états' (1979) 25 *Annuaire Français de Droit International* 539; S. Rosenne, 'State responsibility and international crimes: further reflections on Article 19 of the Draft Articles on State Responsibility' (1997) 30 *New York University journal of international law and politics* 145.

<sup>199</sup> *Genocide case*, *supra* note 5, par 401. See for a brief discussion of the question whether attribution in case of serious breaches of peremptory norms necessary is governed by the same principles as ordinary wrongs: P. A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International and Comparative Law Quarterly* 615.

The question is whether principles that might be applicable to shared responsibility, *de lege lata*, or *de lege ferenda*, can be captured within this single unitary system. We argue that there is reason to be critical of the unitary perspective, and that this has hampered the development of international responsibility to fulfill the necessary functions in regard to shared responsibility.

At the outset, therefore, it is necessary to identify the distinct private and public law dimensions of international responsibility.

#### 5.1.2. The private law dimensions of international responsibility

International responsibility traditionally has served interests of individual states (rather than the general interest),<sup>200</sup> and is characterized by equality rather than subordination. In these respects, it shares a dominant feature of private law.<sup>201</sup> The core of the traditional law of international responsibility is the notion of legal injury of individual states caused by a breach of the law by another state.<sup>202</sup> Anzilotti wrote that responsibility derives its *raison d'être* from the violation of a right of another state.<sup>203</sup>

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<sup>200</sup> A. Bleckmann, 'The Subjective Right in Public International Law' (1985) 28 *German Yearbook of International Law* 144.

<sup>201</sup> R. Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 41(1) *San Diego Law Review* 3 (discussing the concept of interactive justice).

<sup>202</sup> B. Stern, *supra* note 17.

<sup>203</sup> D. Anzilotti, 'Teoria generale della responsabilità dello Stato nel diritto internazionale', in *Opere Di Dionisio Anzilotti*, II 1 (1956) cited in Second Report on State Responsibility, by R. Ago, Special Rapporteur – the origin international responsibility, extract from the *Yearbook Of the International Law*

In view of these structural similarities, Lauterpacht concluded that public international law ‘belongs to the *genus* private law,’<sup>204</sup> and Holland said that international law is ‘private law writ large.’<sup>205</sup> There indeed is a remarkable overlap between the key principles of international responsibility, as partly codified by the ILC, and the Principles of European Tort Law—an authoritative set of principles that, to a large extent, are common to domestic systems in Europe.<sup>206</sup>

This private law dimension remains relevant to shared responsibility. Principles such as causation,<sup>207</sup> contribution to the injury by the victim (state),<sup>208</sup> responsibility based on negligence or lack of due diligence,<sup>209</sup> defenses,<sup>210</sup> and reparation<sup>211</sup> — all

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*Commission Vol. 2* (1970) 192, note 102, available at ([http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_233.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_233.pdf)).

<sup>204</sup> H. Lauterpacht, *Private law sources and analogies of international law* (Longmans, Green and Co 1927, reprinted in 2002) 81.

<sup>205</sup> T. E. Holland, *Studies in international law* (Clarendon Press 1898) 152.

<sup>206</sup> Principles of European Tort Law, *supra* note 98 (see further European Group of Tort Law website, available at [www.civil.udg.es/tort/Principles/](http://www.civil.udg.es/tort/Principles/)).

<sup>207</sup> *Ibid*, art. 3.101; compare the formulation of the standard of causation by the ICJ in the Genocide case, *supra* note 5, par 462.

<sup>208</sup> *Ibid*, art. 3.106 and 8.101; compare ASR, *supra* note 16, art. 39.

<sup>209</sup> *Ibid*, art. 4.101 and 4.102; compare the general due diligence standards in international law as discussed by R. Pisillo-Mazzeschi, ‘The due diligence rule and the nature of the international responsibility of states’ (1992) 35 GYIL 9.

<sup>210</sup> *Ibid*, art. 7.101; compare ASR, *supra* note 16, art. 20-27.

<sup>211</sup> *Ibid*, art. 10.101; compare ASR, *supra* note 16, art. 31.

recognized in the Principles of European Tort law –, are relevant for apportioning responsibility and damages between multiple wrongdoing states.<sup>212</sup>

### 5.1.3. The public law dimensions of international responsibility

However, modern international law of responsibility also has a distinct public law dimension. The law of responsibility as construed by the ILC is of an objective nature, in the sense that responsibility can arise regardless of damage to any particular state or organization.<sup>213</sup> Both the Articles on State Responsibility and the Articles on the Responsibility of International Organizations provide for two conditions for the existence of an internationally wrongful act: the act must breach an obligation of the state and the act must be attributable to the state. There is no mention of damage or injury.<sup>214</sup> Responsibility thus is not contingent upon the showing that a disputed act has caused injury to a state or other person vis-à-vis whom an international obligation

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<sup>212</sup> Compare also the influence of domestic tort law on general principles; see *Oil Platforms*, Separate Opinion Judge Simma, *supra* note 157.

<sup>213</sup> See A. Pellet, *supra* note 43. Another way of illustrating this irrelevance of legal injury is its inclusion in the notion of wrongfulness itself, as expressed by D. Anzilotti, ‘La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers’ (1906) 8 *Revue Générale de Droit International Public* no. 1, 13: ‘Le dommage se trouve compris implicitement dans le caractère antijuridique de l’acte. La violation de la règle est effectivement toujours un dérangement de l’intérêt qu’elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l’intérêt appartient’.

<sup>214</sup> See ASR, with commentaries, *supra* note 19, commentary to art. 2, par 9.

is owed, but rather is premised on the notion of an illegal act.<sup>215</sup> In this construction, the law of international responsibility does not only protect rights of injured parties, but protects the international legal order as such against acts that violate international law.<sup>216</sup>

One practical consequence of the elimination of damage as a condition of responsibility is that the obligations of cessation, continued performance, and reparation are not contingent on invocation by a responsible state. Whereas reparation traditionally was considered a right of the injured state in the traditional law of state responsibility, the ILC – following the lead of Roberto Ago – took the position that the obligation to provide reparation is not dependent on a prior invocation of responsibility.<sup>217</sup> The ILC thus introduced the protection of legality as a freestanding legal objective. Indeed, the obligation of cessation,<sup>218</sup> and the obligation to provide

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<sup>215</sup> A. Pellet, ‘Remarques sur une révolution inachevée. Le projet d’articles de la CDI sur la responsabilité des Etats’ (1996) 42 *Annuaire Français de Droit International* 7; 101.

<sup>216</sup> B. Stern, *supra* note 17, 94 (noting that it would introduce a “review of legality through the institutions of international responsibility”).

<sup>217</sup> According to Pellet, ‘Ago’s revolution’ is most evident in Article 1 of the ASR, which simply states that “[e]very internationally wrongful act of a State entails the international responsibility of that State”, without any reference to injury. See A. Pellet, ‘The ILC’s Articles on State Responsibility’ in J. Crawford et al (eds), *supra* note 116, 76-77; See also the discussion of principles of reparation by J. Crawford, Third Report on State Responsibility (2000) UN Doc. A/CN.4/507, par 26 (stating that “the general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form that reparation should take in the circumstances may be contingent.”).

<sup>218</sup> ASR, *supra* note 16, art. 30(a).



guarantees of non-repetition,<sup>219</sup> have more to do with a return to legality than with reparation for.<sup>220</sup> While a few states have voiced their concern about the fundamental nature of the shift in the law of international responsibility that is brought on by the introduction of the notion of objective responsibility,<sup>221</sup> most states appeared to have few problems with the notion.

Basing responsibility on illegality rather than injury is a significant symbolic step towards a more public law oriented law of responsibility. This step is further buttressed by the abovementioned developments of interdependence<sup>222</sup> and moralization.<sup>223</sup> This conceptual move may have important benefits as it may redress a fundamental weakness of the traditional law of international responsibility: the fact that the absence of invocation (for political or other reasons) rendered the law of responsibility non-operational in regard to acts that upset the international legal order.

Construing responsibility as not being based on injury to individual states also allows us better to consider questions of shared responsibility as these arise in the context of

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<sup>219</sup> ASR, *supra* note 16, art. 30(b).

<sup>220</sup> But see B. Stern, *supra* note 17, 102 (arguing that both legal consequences can be based on the notion of injury).

<sup>221</sup> France in its comments on the ILC draft articles commented that draft Article 1 of the Articles on State Responsibility was not acceptable because it attempts to set up an international public order and to defend objective legality, rather than subjective rights of states. The aims of the law of responsibility should not be extended to protection of international law itself. State Responsibility, Comments and Observations Received from Governments, General Assembly (1998) UN Doc A/CN.4/48; See B. Stern, *ibid*, 99.

<sup>222</sup> See *supra*, section 3.1.2.

<sup>223</sup> See *supra*, section 3.1.1.

multilateral agreements which protect the collective interests of the parties. Several aspects of joint liability as it has developed in a domestic law context cannot be easily transplanted in such a public law-type context. While, for instance, joint responsibility in regard to transboundary environmental harm may function in a way that resembles its domestic tort law origins (for instance when two upstream riparian states cause damage to a downstream state), this is much different in settings which resemble more public law / administrative law, for instance in the context of non-compliance institutions under multilateral environmental agreements. While these institutions do not make formal determinations on State responsibility,<sup>224</sup> they make findings on whether states meet their obligations and, if not, what consequences flow from this.

However, the rejection of injury as a necessary constitutive element of (shared) responsibility does not mean that we have to discard the concept as injury altogether. Indeed, it remains a critical element of those cases where multiple actors interfere with the rights of third parties.

#### 5.1.4. Downsides of maintaining unity

It appears from the above that the law of international responsibility encompasses quite distinct concepts and principles, serving different functions. It may be said that

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<sup>224</sup> M. Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law* 123; A. Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2011) *Journal of Environmental Law* (2011) 103.

these concepts and principles have co-existed without major difficulties and that the unitary approach to the law of responsibility can serve a multitude of functions at the same time. However, we argue that precisely in relation to shared responsibility the unitary nature of international responsibility shows its limitations, for the system is devoid of the necessary principles, procedures and mechanisms that allow it to address such problems.

Hanging on to the unitary approach to international responsibility has a number of negative consequences for the role that the law of international responsibility can play in addressing questions of shared responsibility. For one, the application of the current rules in this unitary context creates a certain substantial and institutional ambiguity (5.1.4.1). Moreover, unity can only be maintained to the detriment of the refinement of certain rules, both applying to the private and to the public dimensions of international responsibility (5.1.4.2).

#### 5.1.4.1. Substantial and institutional ambiguity

The coexistence of a private and a public law dimension within the general law of responsibility will lead to inconsistencies in the way the rules are articulated. It is not always easy to reconcile the private law dimensions of some of the rules of state responsibility, with the public law dimensions. While causation may be less relevant in the public law dimension of international responsibility, it will be key relevant for its private law dimension. Likewise, while the notion of injury to individual states

seems pivotal in a private law approach to international responsibility,<sup>225</sup> it is much less central and arguably even superfluous in a public law perspective.

While, on paper, all forms of responsibility may be subjected to similar conditions and conceptual strictures, the resolution of ambiguity is only spurious. For instance, responsibility, abstracted from any particular injured party who may seek relief, becomes a rather esoteric notion. It is not easy to see how a court or other institution could consider a case of responsibility, determine injury, and fashion appropriate relief if there are no injured parties.<sup>226</sup>

Clinging on to unity also creates tensions in the institutional role of international courts. The emphasis that the ECtHR now places on guarantees of non-repetition, as well its resort to ‘pilot-judgments’, may signal its increasing constitutional role in the protection of legality, but also may make the ECtHR less accessible for compensation claims—and thus collides with an approach based on individual injury.<sup>227</sup> These effects are primarily a consequence of organizational problems of the ECtHR, but they also are a necessary consequence of the use of competing public and private law conceptions of the role of the Court.

The example of the International Criminal Court is also telling. Indeed, although it does not directly relate to state responsibility, it illustrates the tensions that arise when

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<sup>225</sup> See *supra*, text to notes 202 ff.

<sup>226</sup> Pellet wrote that these public forms of international responsibility are platonic; N. O. Dinh and A. Pellet, *Droit International Public* (6<sup>th</sup> edn L.G.D.J 1999) 765.

<sup>227</sup> See e.g. L. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principles of the European Human Rights Regime’ (2008) 19 *EJIL* 125.

both public and private interests are expected to be attained within a single institution. By adding a civil reparations dimension to the ICC Statute,<sup>228</sup> and more generally providing for the participation of victims in the criminal process,<sup>229</sup> the drafters have burdened this court with finding a balance between vastly competing interests, most notably the rights of the victims and the rights of the defense.

#### 5.1.4.2. Unity at the cost of refinement

Maintaining unity may go at the cost of refinement, detail, and progress in those areas where there is no common ground. Both the principles of responsibility applying to reparation for injury, and the principles seeking a more public law function, remain relatively primitive as a result of the attempt to keep them together.

As to the former, issues that need to be addressed when claims against multiple wrongdoers have to be decided are barely developed. Examples are questions of extinctive prescription,<sup>230</sup> joint and several liability,<sup>231</sup> and causation.<sup>232</sup> Perhaps such

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<sup>228</sup> ICC Statute, art. 75; See W. Schabas, *The International Criminal Court, a Commentary to the Rome Statute* (Oxford University Press 2010) 878-883 and C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *Leiden Journal of International Law* 667.

<sup>229</sup> ICC Statute, art. 68(3); See also C. Stahn, H. Olásolo and K. Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4 *Journal of International Criminal Justice* 219; C. Jorda and J. Hemptinne, 'The Status and Role of the Victim' in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Vol II, Oxford University Press 2002).

<sup>230</sup> K. Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (Iustus 2001).

<sup>231</sup> J. E. Noyes and B. D. Smith, *supra* note 12.

lacunae often go unnoticed due to the fact that few interstate claims actually lead to monetary damages,<sup>233</sup> but the increasing judicialization of the law of international responsibility may make the need for a developed system of “private wrongs” for the handling of international claims more important. The rather undeveloped principles for handling civil claims was, for instance, felt in the determination of loss in the UN Compensation Commission,<sup>234</sup> the Ethiopia-Eritrea claims Commission,<sup>235</sup> and in the virtual absence of “private law” principles that the International Criminal Court can apply in handling claims by a victim.<sup>236</sup> Also, the ECtHR has been forced to develop its own *lex specialis* on several of these issues.<sup>237</sup>

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<sup>232</sup> F. Rigaux, ‘International Responsibility and the Principle of Causality’ in Raggazi (ed), *supra* note 17, 81; T. Becker, *Terrorism and the State: Rethinking The Rules of State Responsibility* (Hart 2006).

<sup>233</sup> It is noteworthy, however, that in practice compensation regularly takes precedence over other forms of reparation, in particular restitution. For a discussion of the rather theoretical primacy given to restitution, see C. Gray, ‘The Different Forms of Reparation: Restitution’ in J. Crawford et al (eds), *supra* note 116, 589.

<sup>234</sup> D. D. Caron, ‘The UNCC and the Search for Practical Justice’ in *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (1995) 367.

<sup>235</sup> J. d’Aspremont and P. D’Argent, ‘La Commission des réclamations Erythrée-Ethiopie: un bilan à mi-parcours’ (2007) *Annuaire français de droit international* 347; and W. Kidane, ‘Civil Liability for Violations of International Law: the Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague’ (2007) 25(1) *Wisconsin International Law Journal* 23.

<sup>236</sup> G. Greco, ‘Victims’ Rights Overview under the ICC Legal Framework: a Jurisprudential Analysis’ (2007) 7(2/3) *International Criminal Law Review* 531.

<sup>237</sup> M. Pellonpää, ‘Individual Reparation Claims under the European Convention on Human Rights’ in A. Randelzhofer and C. Tomuschat (ed), *State Responsibility and The Individual: Reparation in Instances of Grave Violations of Human Rights* (Nijhoff 1999) 109.

Also the public law dimensions of the law of international responsibility remain relatively undeveloped and have been dealt with in an unprincipled and *ad hoc* manner, mostly outside the law of international responsibility. Given the fact that the unitary law of responsibility leaves little room for detailing such principles, as they might become inconsistent with other principles, states and organizations have opted to develop public law type principles (now often discussed in terms of global administrative law)<sup>238</sup> outside the law of responsibility.

The preference of relevant actors to address public order aspects arising out of non-performance of international obligations outside the law of international responsibility is obvious for political issues. One of the reasons for the demise of the concept of state crimes was the fact that states preferred to leave the consequences of serious violations of fundamental international norms to political organs, notably the UN Security Council.<sup>239</sup> Also more generally states and international organizations do not treat public order questions in terms of responsibility. They do not consider non-compliance mechanisms under international environmental treaties as a matter of

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<sup>238</sup> B. Kingsbury et al, *supra* note 27; B. Kingsbury and R. B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance : the Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' in *International Administrative Tribunals in a Changing World: United Nations Administrative Tribunal Conference*, organized under the auspices of the Executive Office of the Secretary-General, New York, 9 November 2007 (Esperia Publications 2008) 193.

<sup>239</sup> See e.g. the position of the US, State Responsibility – Comments and Observations received from Governments (2001) UN Doc A/CN.4/515, 53.

international responsibility.<sup>240</sup> Indeed, they are precisely a response to the limits of the conceptual structures and limitations of the classical doctrine of state responsibility.<sup>241</sup> Such procedures are not primarily concerned with making things good for victims, but are instruments to secure control of public power, to limit abuses of power, and to further the rule of law. They resemble more a public law concept of *ultra vires* acts and, in many respects, may be more akin to constitutional or administrative law principles.<sup>242</sup>

This approach to “public wrongs” outside the law of responsibility, in particular may be an area of potential growth for shared responsibility, eg a layer of legal processes short of international responsibility procedures which acknowledge burden sharing, good governance and global international administrative values.

However, while there thus has been some development of such public mechanisms by some form of global administrative law, the nature and contents of the accountability principles and their relationship with the law of responsibility<sup>243</sup> remains unclear, in

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<sup>240</sup> G. Ulfstein et al (ed), *Making Treaties Work: Human Rights, Environment And Arms Control* (Cambridge University Press 2007).

<sup>241</sup> J. Brunnée, ‘International Legal Accountability Through the Lens of the Law of State Responsibility’ (2005) 36 *Netherlands Yearbook of International Law* 21.

<sup>242</sup> B. Kingsbury et al, *supra* note 27.

<sup>243</sup> We do recognize that some non-compliance procedures, for instance under the Aarhus Convention, do frequently refer to principles of responsibility. See Case Law of the Aarhus Convention Compliance Committee (2004-2008) (Andrusevych Alge Clemens ed. 2008).



particular where it concerns principles to situations of shared responsibility, for which practice seems to be extremely limited.<sup>244</sup>

We do recognize that the principles of reparation as these are now laid down in the ASR and the ARIO allow for a wide variety of legal consequences, that may be tailored to particular circumstances, taking into account the nature of the obligation and the nature of the breach, and indeed the public nature of the interests at stake. Indeed, it may be argued that the law as formulated by the ILC, while not perfect, offers sufficient flexibility for addressing questions of shared responsibility.

However, two comments are in order. First, it is precisely in the further fleshing out of principles relevant to shared responsibility that a unitary model is less plausible, as such principles need to cater to different types of interest. In this sense, unity may only be tenable at a high level of abstraction. Second, in some respects, the system of international state responsibility contains tensions that might impede this normative development, mostly related to the role of the injured state,<sup>245</sup> which thus reduces the potential flexibility of the modes of reparation.<sup>246</sup>

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<sup>244</sup> U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System' (2009) 78 *Nordic Journal of International Law* 53.

<sup>245</sup> ASR, *supra* note 16, art. 42.

<sup>246</sup> *Ibid*, art. 48 ASR (invocation by non-injured parties) at present does not provide more than a theoretical option remedy for that shortcoming, whose full conceptual and practical aspects are yet to be explored; See however, for example, A. Gattini, 'A Return Ticket to "Communitarisme", Please' (2002) 13 *European Journal of International Law* 1181; and P. M. Dupuy, 'A General Stocktaking of

In sum, both in its private law and in its public law dimensions, the law of responsibility is in need of further development, but it is highly unlikely that this can be achieved within a unitary set of principles. Different problems call for different solutions.

## **5.2. Reconsidering the distinction between primary and secondary norms**

We argue that in examining any particular question of shared responsibility, it often will be required to assess primary and secondary rules in their mutual connection. After having highlighted the difficult application of the dichotomy in the ILC Articles (5.2.1), this section will show the shaky conceptual foundations and confusion created by it (5.2.2) before suggesting how to move away from it (5.2.3).

### **5.2.1. The use of the dichotomy by the ILC**

The rules relating to international responsibility are considered to be secondary rules of international law, as opposed to the primary rules of international law which provide for the content of the obligations of states and international organizations. This distinction was fundamental in the work of the ILC, illustrated by the fact that it appears at the very beginning of the commentary of the ASR:

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the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' (2002) 13 *European Journal of International Law* 1053.

“The emphasis is on the secondary rules of State Responsibility: that is to say the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The Articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of primary rules, whose codification would involve restating most of the substantive customary and conventional international law”.<sup>247</sup>

Despite this clear description of the distinction between primary and secondary rules, a reading of the Articles highlights its difficult application by the ILC itself. Indeed, it seems difficult to affirm that the Articles just deal with secondary norms. For example, Article 16, on aid or assistance in the commission of an internationally wrongful act, is clearly conceived as giving rise to a distinct obligation than the one not to breach the initial obligation by the state. The commentary to this article explicitly states that the complicit State is not held responsible for the international wrongful act of the main perpetrator, but for the act of aiding and abetting itself,<sup>248</sup> In this sense, Article 16 is a primary rule, rather than a secondary one.<sup>249</sup>

More generally, it is difficult to categorize the subject-matter of Part II of the Articles, relating to the content of the international responsibility of a state. Whereas it is true that these relate to consequences of wrongful acts, and therefore can be considered to be secondary norms, they also provide in themselves for obligations (cessation and

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<sup>247</sup> ASR, with commentaries, *supra* note 19, 31.

<sup>248</sup> *Ibid*, 66.

<sup>249</sup> B. Graefrath, *supra* note 186.

non-repetition<sup>250</sup> and reparation<sup>251</sup>) that can be breached and as such be subjected to secondary norms, which make them to a certain extent primary norms.<sup>252</sup>

This dual nature of Part II means that if the primary/secondary dichotomy had been strictly followed, as a conceptual distinction, rather than as a pragmatic one, as described below, Part II could not have existed at all, the existence of an obligation to repair, or at the very least the scope and extent of that obligation, being left to the content of each individual primary obligation, in the same way that the requirement of fault or damage is left to primary obligations. To be clear, this would certainly be impractical, and is not the solution we argue for. However, it does illustrate the difficult identification of what really constitutes a primary or a secondary norm, beyond the pragmatic considerations of efficiency. Following this same logic, one can even argue that the rules of attribution could very well have been considered to be part of primary obligations, in the same way as fault or damage. The same holds true of circumstances precluding wrongfulness, to the extent that they affect the initial violation itself, rather than the responsibility of the state.<sup>253</sup>

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<sup>250</sup> ASR, *supra* note 16, art. 30.

<sup>251</sup> *Ibid*, art. 31.

<sup>252</sup> See J. Crawford, Third Report of the International Law Commission on the work of its fifty-second session (2000) UN Doc A/CN.4/507, par 7 (noting the ‘internal application’ and the ‘reflexive nature’ of the draft Articles on State Responsibility).

<sup>253</sup> E. David, ‘Primary and Secondary Rules’ in J. Crawford et al (ed), *The Law of International Responsibility* (Oxford University Press 2010) 27, 29.

### 5.2.2. The conceptual limits and confusion of the dichotomy

The above examples highlight the unclear criteria for establishing what part of responsibility should be left to primary rules entirely (fault, damage) and what should not (attribution, reparation). The ILC seems to refer to a Hartian model, whereby the primary rules are the strict rules of conduct and all the rules of responsibility should be considered as secondary rules of adjudication.<sup>254</sup>

However, it appears that the dichotomy between primary and secondary rules was adopted for essentially pragmatic reasons rather than conceptual ones. This is confirmed by the drafting process and the discussions in the ILC. The dichotomy allowed the ILC to circumscribe its work, which had reached an impasse, most notably on the question of injuries to aliens and their property, by excluding from its purview the question of the sources of the obligations, only looking at the determination of the breach of an obligation and the consequences of such a breach.<sup>255</sup> Crawford confirms the fundamentally pragmatic approach adopted and the rejection of any conceptual objective: ‘the distinction between primary obligations and secondary rules of responsibility is to some extent a functional one, related to the development of international law rather than to any logical necessity.’<sup>256</sup> He adds that since the ILC is not engaged in posterior analytics, that does not seem to be much of a

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<sup>254</sup> J. d’Aspremont, ‘Hart et le Positivisme Post-moderne en Droit International’ (2009) 113 *Revue Générale de Droit International Public* 635.

<sup>255</sup> E. David, *supra* note 253.

<sup>256</sup> J. Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 *American Journal of International Law* 874, 879.

criticism.<sup>257</sup> The positive consequence of such an approach at the ILC must be recognized, because it enabled the Commission to move forward and ultimately conclude its work on its ASR (and later on the ARIO).

However, this dichotomy can be questioned in its conceptual relevance. It appears that the dichotomy was not meant as being conceptual at all, apart from its functional character, and masked an entirely different criterion for inclusion in the ILC Articles, that of generality: ‘what defines the scope of the articles is not their “secondary” status but their generality: the articles represent those areas where the ILC could identify and reach consensus on general propositions that can be applied more or less comprehensively across the entire range of international law’.<sup>258</sup> Crawford noted: ‘to some extent the classification of a rule of responsibility as secondary or not is linked to its generality. The articles are aimed at specifying certain *general* rules concerning the existence or consequences of the breach of an international obligation’.<sup>259</sup>

As said previously, the ILC’s pragmatism is certainly laudable as allowing the Commission to finish its work on the Articles. It does however raise the question of why “burden” the theoretical debate on responsibility with the primary/secondary dichotomy. Indeed, it creates a certain number of unnecessary confusions.

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<sup>257</sup> *Ibid*, 879.

<sup>258</sup> D. Bodansky and J. R. Crook, ‘Introduction and Overview’ (2002) 96 *American Journal of International Law* 773, 780-781.

<sup>259</sup> J. Crawford, *supra* note 256 [emphasis in the original].

For one, it creates an illusion of a chronological evaluation between the two types of rules,<sup>260</sup> the primary rules being the main source of obligations and the secondary rules a subsidiary set of principles and source of obligations. But the operation of establishing the responsibility of states and international organizations is both more complex and more holistic. The operation of attribution implies some consideration of the content of the obligation,<sup>261</sup> just as the drafting of the primary obligation may be influenced by a consideration of the reparation that may apply in case of breach and, moreover, will affect the requirements of reparation<sup>262</sup>. There is an interaction between the two sets of rules which, if only semantically, makes the primary/secondary model confusing.

Second, if we base the primary/secondary distinction on generality of the latter category, the relation of this distinction on the one hand and the notion of *lex specialis*, on the other, is somewhat confusing. Whereas primary rules are out of the ILC Articles, and can as such be subject to agreement by states, also the category of *lex specialis* allows for the possibility that States apply different rules than those that the ILC provide for. Once we establish that the ILC labeled certain principles that could well have been considered as principles of responsibility as primary rules, such as the question of fault, we are left with the question what is the distinctive nature of *lex specialis*. The easy answer is that this category applies only to those rules of responsibility that the ILC considered, but this is not helpful for all other relevant

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<sup>260</sup> N. Bobbio, 'Nouvelles réflexions sur les normes primaires et secondaires' in C. Perelman (sous la direction de) *La règle de droit* (Bruylant 1971) 104.

<sup>261</sup> See e.g. J. d'Aspremont, 'Le tyrannicide en droit international' in C. Tomuschat, E. Lagrange and S. Oeter (eds), *The Right to Life* (Martinus Nijhoff 2010) 287.

<sup>262</sup> As well as being affected by the public/private interests protected, see *infra*, section 5.4.

rules of responsibility that might have been left out for entirely pragmatic reasons. Crawford confirms the relative nature of the distinction: ‘The distinction between primary and secondary obligations was, and is, somewhat relative. A particular rule of conduct might contain its own special rule of attribution or its own rule about remedies. In such a case, there would be little point in arguing about questions of classification. The rule would be applied and it would normally be treated as a *lex specialis*, that is, as excluding the general rule.’<sup>263</sup>

### 5.2.3. Shifting away from the dichotomy

In the light of the uncertainty of the conceptual foundation of the dichotomy for the ILC, as explained in more detail below,<sup>264</sup> we argue for a holistic and integrated approach, irrespective of any primary/secondary categorization, that looks at both the content of obligations, as well as the rules that were treated by the ILC as rules of responsibility. Moreover, we need to consider all the rules of responsibility, without being held by the ILC framework. Notably, the specific arrangements on shared responsibility between states, contained in treaty mechanisms for example, which were formerly either thought to be primary rules or *lex specialis*, depending on whether the ILC included discussion of them or not, should be considered together, and indeed can be labeled under a category of differentiated regimes, in contrast to the general regimes of responsibility that might apply<sup>265</sup>.

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<sup>263</sup> J. Crawford, *supra* note 256, 877.

<sup>264</sup> See *infra*, section 5.4.

<sup>265</sup> See *infra*, section 5.4.



### 5.3. The responsibility/liability dichotomy

The terms liability and responsibility are often used interchangeably to address either issues of responsibility *stricto sensu* or issues of reparations.<sup>266</sup> Some treaties use the term liability in a way that seems identical to responsibility. Article 235 of the UNCLOS provides ‘States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.’ The former sentence may be understood as referring to the contents of primary obligations, whereas the second sentence refers to the responsibility in the sense used by the ILC.<sup>267</sup> Article 6 to Annex IX of the same Convention provides for ‘joint and several liability’ of the EU and Member States. It does not appear that ‘liability’ in this context means anything else than ‘responsibility’ as used by the ILC.<sup>268</sup>

However, there is a considerable ambiguity in the use of the terms ‘responsibility’ and ‘liability’, both in international and in comparative law literature. The decision of the ILC to reserve the term ‘liability’ to the obligations in respect of injurious

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<sup>266</sup> See e.g. J. Noyes and B. Smith, *supra* note 12; J. Crawford and J. Watkins, ‘International Responsibility’ in S. Besson and J. Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press 2010) 283.

<sup>267</sup> Quentin-Baxter, Fifth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (1984) UN Doc A/CN.4/383, par 39.

<sup>268</sup> *Ibid*; See also Quentin-Baxter, Preliminary Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (1980) UN Doc A/CN.4/334, 250-251.

consequences arising out of acts not prohibited by international law,<sup>269</sup> and, later, to civil liability<sup>270</sup> has made the use of the term liability in connection to internationally wrongful acts confusing.<sup>271</sup>

It appears that many of the cases where the term (joint) liability is used, seems to pertain specifically to the obligation to provide compensation for *damage*. That certainly is true is for the use of the term in domestic law,<sup>272</sup> in civil liability conventions, as well as the work of the ILC on allocation of loss in the case of transboundary harm arising out of hazardous activities.<sup>273</sup> It also is true for some treaties dealing with damage caused by States.<sup>274</sup> The term ‘(joint) liability’ then

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<sup>269</sup> J. Barboza, *The Environment, Risk and Liability in International Law* (Martinus Nijhoff Publishers 2011).

<sup>270</sup> Report of the International Law Commission on the work of its fifty-eight session (Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities) (2006) UN Doc A/61/10, 106.

<sup>271</sup> See generally on the distinction M. B. Akehurst, ‘International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law’ (1985) 16 *Netherlands Yearbook of International Law* 3; A. E. Boyle, ‘State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?’ (1990) 39 *ICLQ* 1; K. Zemanek, ‘State Responsibility and Liability’ in W. Lang, H. Neuhold and K. Zemanek (eds), *Environmental Protection and International Law* (Graham and Trotman 1991) 197.

<sup>272</sup> Principles of European Tort Law, *supra* note 98, art. 1.101 (‘person to whom damage to another is legally attributed is liable to compensate that damage’).

<sup>273</sup> Report of the International Law Commission on the work of its fifty-eight session, *supra* note 269.

<sup>274</sup> This seems to be the case e.g. in the United Nations Convention on the Law of the Sea (done 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art. 232 [“UNCLOS”] (‘States shall be liable for damage or loss attributable to them’); UNCLOS, art. 235(2); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the

indicates that in a case where multiple tortfeasors together have caused damage, the plaintiff can collect the entire sum of compensation from either one of the defendants. This is also how the term is used in, for instance, the Outer Space Liability Convention<sup>275</sup> and in UNCLOS,<sup>276</sup> as well as in civil liability schemes.<sup>277</sup>

We acknowledge that using the term liability to refer to the legal consequences of a wrongful act in terms of reparation can be confusing if not misleading. This is not only so because some (UN) languages do not have an equivalent for the term responsibility and thus can only use the term liability (or its equivalent),<sup>278</sup> but also because it is precisely these consequences that form the very contents of international responsibility. Moreover, construing a freestanding concept of responsibility

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Moon and Other Celestial Bodies (done 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, art. 7.

<sup>275</sup> Convention on International Liability for Damage Caused by Space Objects (done 29 March 1972, entered into force 1 September 1972) (1973) 24 UST 2389; TIAS 7762, art IV [“Liability Convention”].

<sup>276</sup> UNCLOS, *supra* note 273, art 139.

<sup>277</sup> E.g. International Convention on Civil Liability for Oil Pollution Damage (done 29 November 1969, entered into force 19 June 1975) 973 UNTS 3, art. 4 [“CLC”] (stating that ‘When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable.’); See also UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment, Guideline 7, reproduced in UNEP, Report of the Governing Council, eleventh session (2010), UN Doc A/65/25, 18.

<sup>278</sup> J. Crawford and J. Watkins, ‘International Responsibility’ in S Besson and J Tasioulas (ed), *supra* note 265, 283.

disconnected from the legal consequences is problematical and in fact may shield states and international organizations from such consequences.<sup>279</sup>

Nonetheless, from the perspective of analyzing shared responsibility, a twofold qualification of the common equation of responsibility and liability is called for. First, in line with our earlier distinction between public and private law dimensions of international responsibility, we need to recognize that determination of responsibility, on the one hand, and determination of the legal consequences of such responsibility in terms of compensation to injured parties raise different questions, in particular in regard of the apportionment of damages. To say that two states and/or international organizations are jointly responsible for a particular wrongful act does not necessarily mean that these states and/or international organizations will be obliged to pay full compensation for the injury (as is often implied by the concept of joint liability). As we will further explain below, the operation of principles of shared responsibility may differ between these aspects.

Second, we need to recognize the different ways in which liability, in the sense of an obligation to provide reparation, can come into existence. This holds first and foremost for liability for non-internationally wrongful acts: the principle of joint liability under the Outer Space Treaty is not contingent on a finding of

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<sup>279</sup> P. Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 1.

wrongfulness.<sup>280</sup> Following from that, and pushing this logic further, we would argue that the term liability can be applied methodologically to all situations where obligations to compensate arise, irrespective of whether the wrongfulness of the act or the responsibility of the compensating entity has been considered. This expansion allows for a more comprehensive and holistic discussion of reparation for injury in international law because it covers not only formal judicial decisions that establish the responsibility of an entity and the corresponding obligations of reparation, but also any agreement that provides for reparation irrespective of responsibility (strict liability), a decisions of quasi-judicial or political bodies (reparation commissions, for example), and even unilateral acceptances of obligations to provide reparation.

#### **5.4. A new approach to international responsibility: from a unitary regime to differentiated regimes**

On the basis of the above discussions, we argue that we need to move away from a unitary approach towards a differentiated approach to responsibility, which reflect the differences between norms and their breaches as well as the various objectives of international responsibility (5.4.1). Within differentiated regimes of responsibility, we need to consider both the principles in the general regime of responsibility, and

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<sup>280</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, *supra* note 273; M. Lachs, *The Law of Outer Space: An Experience in Contemporary Law-Making* (Martinus Nijhoff 2010).

possible 'derogatory' regimes (that would in particular be contained in treaties, but not only<sup>281</sup>) which would modify the application of the general regime (5.4.2).<sup>282</sup>

#### 5.4.1 Differentiated regimes

Three preliminary points should be made on our use of the notion differentiated regimes. First, the dichotomy between public and private law models is not watertight, and to some extent they should be considered as a continuum with shades of grey rather than as a black and white separation, and with strong interactions between public and private law dimensions. Indeed, to do otherwise would be somewhat open ourselves to the compelling critique on the private-public dichotomy in international law.<sup>283</sup> Nonetheless, we submit that it is useful and possible to identify distinctions between public and private law dimensions of responsibility, which might crystallize in different sets of rules, which the term 'regimes' seeks to capture.

Second, while we use the term regime here primarily to refer to the principles of responsibility, such principles mostly are embedded in and interrelated with institutional structures that mirror the differences between private and public

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<sup>281</sup> It is also conceivable that such regimes emerge by particular custom, at the regional level for example, B. Simma and D. Pulkowski, 'Leges Speciales and Self-Contained Regimes' in J. Crawford et al (ed), *supra* note 116, 139 and 140.

<sup>282</sup> At this stage, we do not take a definitive position on the order in which these need to be looked at. The order in which the regimes should be considered will depend, among other things, on the approach to the international legal order from the angle of unity, or the angle of fragmentation. *Ibid*, 146-147.

<sup>283</sup> See e.g. C. Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *EJIL* 387-395.

dimensions. The nature and institutional set up of non-compliance mechanisms in international environmental law is a good example.<sup>284</sup>

Third, it should be pointed out that the “differentiated regimes” envisioned in our model do not correspond to fields of international law such as human rights, law of the sea, refugee law or environmental law. Of course, in the current state of international law, we acknowledge that these fields have developed sometimes (semi-) autonomously, with specific rules of responsibility, and discrete and specific mechanisms of implementation. In this sense, one can say that at least descriptively; there is considerable practical overlap between “differentiated regimes” and such areas of law. However, conceptually, our model aims at transcending these apparently separate areas of law and looking at the interests protected behind them.

With this caveat in mind, we will first identify sources of differentiation (the nature of the norm and the nature of the breach) (5.4.1.1) and subsequently discuss legal requirements for establishing responsibility, which may vary between differentiated regimes, notably fault and injury (5.4.1.2) and the different situations in respect of invocation (5.4.1.3).

#### 5.4.1.1. Sources of differentiation

A central proposition in our model is that the nature of the obligation may determine the nature of corresponding responsibility. The nature of the obligation can be approached from two angles: the hierarchy of norms and the addressees of the norm.

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<sup>284</sup> E.g. Treves et al, *supra* note 28.

For one, the increased differentiation of norms in the international legal order affects the nature of responsibility. The paradigmatic example is the development of norms of *jus cogens*, but this has opened a more general discussion on a possible hierarchy of norms, with at the top of the hierarchy a series of 'constitutional' principles,<sup>285</sup> such as certain human rights obligations.<sup>286</sup> In this sense, it is conceivable that an obligation can be qualified as having *per se* a public or a private objective, triggering the application of a particular regime of responsibility that comes to ensure the protection of that objective. This would apply to norms that do not directly affect or injure a particular state, but the *telos* of which is ontologically communitarian, such as the prohibition of polluting the high seas.<sup>287</sup>

On a connected level, and in relation to the addressees of the obligation, obligations vary from being bilateral, to multilateral, to *erga omnes*, which might put them on different places on the public/private scale. For example, obligations contained in a bilateral trade agreement will not necessarily "carry" the same regime of responsibility and the same consequences in terms of possible shared responsibility as a multilateral treaty on the conservation of fish stocks. We thus have to recognize the

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<sup>285</sup> S. Kadelbach and T. Kleinlein, 'International Law: a Constitution for Mankind? : an Attempt at a Re-appraisal with an Analysis of Constitutional Principles' (2007) 50 *German Yearbook of International Law* 303 and J. Klabbers et al., *The constitutionalization of international law?* (Oxford University Press 2009).

<sup>286</sup> L. Caplan, 'State Immunity, Human Rights and "jus cogens": A Critique of the Normative Hierarchy Theory' (2003) 97 ASIL 741.

<sup>287</sup> UNCLOS, *supra* note 273.



possibility of classifying obligations according to their nature and how this might affect the shared responsibility for their breach.<sup>288</sup>

It is however likely that the nature of the obligation itself will often not inform us on the applicable regime of responsibility (and the possibility of implementing shared responsibility). In situations where the obligation will be framed neutrally, in terms of its addressees and the protected interest, it will be the interest protected by the regime itself that will trigger particular principles and procedures of responsibility, depending on the interest protected by the regime itself. This is closer to the way the law of responsibility is applied in any legal system, where different regimes (tort, criminal, administrative, etc) may apply to the same violation of an obligation with their distinct set of rules in terms of procedure and invocation, as considered below.<sup>289</sup> Such a framework will allow us to imagine different rules for different situations, without having necessarily to choose between them in an institutional void and in a Manichean way, as the unitary approach to international responsibility imposes on us today.

#### 5.4.1.2. Differentiated requirements for establishing responsibility

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<sup>288</sup> Incidentally, this will also challenge the idea that the source of the obligation is irrelevant for international law. Indeed, the violation of a treaty obligation of a bilateral nature could lead to different consequences than the violation of a customary norm of *jus cogens*. In the same way, the relationship between *erga omnes partes* treaty obligations and *erga omnes* customary obligations, even if they can overlap in cases of near to universal ratification of a given treaty, will need to be explored in light of the public or private nature of the interest being protected. On the different “types” of *erga omnes* obligations. See *infra*, section 5.4.1.3.

<sup>289</sup> See *supra*, section 4.2.

In terms of the requirements for responsibility, two examples can be given: the question of fault and the role of injury. We note however that the above considerations can also affect other possible conditions for establishing responsibility or allocating loss, such as causation, effective control or geographical proximity.

First of all, it is conceivable that the fact that the nature of the conduct that triggers responsibility is different depending on the protected interest, allows for a gradation between fault and objective responsibility. In contrast to 'normal' situations of responsibility, in cases of aggravated responsibility, that we associate with the public dimensions of responsibility, fault will invariably be a component of the responsibility regime.<sup>290</sup>

However, the relationship between the nature of the interests and the requirement of fault are not straightforward and may depend on the foundations and justifications for responsibility. For example, a utilitarian approach could justify that the more crucial the interest is and the consequences of a breach are (in the case of nuclear activities for example) the less fault should play a role.<sup>291</sup> On the other hand, a more Kantian approach could suggest that moral blame should only rest on the State that had an intent to commit the breach, so as not to attach the stigma of establishing

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<sup>290</sup> E.g. G. A. Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in M. M. Virally (ed), *Le droit international au service de la paix de la justice et du développement* (Pedone 1991).

<sup>291</sup> I. Brownlie, *supra* note 154, 38.

responsibility too widely, and, should the intent be established, that stronger consequences in terms of reparations be attached to the breach.<sup>292</sup>

The second example is that of injury. As discussed previously, injury has been removed from the conditions of establishing responsibility.<sup>293</sup> However, also in this respect distinctions may need to be made. We take the position that the removal of injury, and more generally of outcome from the conditions of responsibility, is conceptually problematic, and that a concept of responsibility that expressly would have been based on injury would conceptually have been preferable.<sup>294</sup> Nonetheless, also here it may be needed to differentiate between different roles of the concept of injury. The concept plays a cardinal role in a case of breach of a bilateral treaty obligation, which is therefore of a private (contract) law nature, which causes injury to the other party. Injury suffered by the direct beneficiary of the obligation is then the measure of responsibility and reparation. On the other hand, in more public law-oriented situations, the interest protected by the existence of the norm requires that neither the responsibility nor reparation is made contingent on specific injury on the side of other states or other actors, thus reducing the importance of injury as a component of responsibility, even if it might be taken into account in the liability phase.<sup>295</sup>

#### 5.4.1.3. Differentiated conditions for invocation

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<sup>292</sup> For the implications on Shared Responsibility, see *infra*, section 4.

<sup>293</sup> See *supra*, section 4.1.3.

<sup>294</sup> B. Stern, *supra* note 17.

<sup>295</sup> For the implications on Shared Responsibility, see *infra*, section 6.

In terms of the implementation of responsibility, the recognition of differences between public and private law dimensions calls for a revisiting of the conditions of invocation. In light of the public/private dichotomy it is possible to analyze what States will benefit from the *locus standi* depending on the applicable regime of responsibility.

The ILC recognized that on this point differences needed to be made, and indeed the topic makes clear that the unitary model of the law of international responsibility is not tenable. Article 42 allows either the State to which the obligation is owed individually<sup>296</sup>, or other States that might be specially affected by the violation of the obligation if that obligation is owed to a group of States or the international community as a whole.<sup>297</sup> This invocation mechanism fits the private law model of international responsibility by insisting on the specific interest of the injured State to found *locus standi*. Article 48, on the other hand, functions very differently. It does not require that the invoking State be an injured State if the obligation protects a collective interest of a group of States<sup>298</sup> or is owed to the international community as a whole.<sup>299</sup> This is clearly a public law approach, where the State acting under article 48 is clearly acting on behalf of the community (either of some States or all States) to protect a community interest.<sup>300</sup>

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<sup>296</sup> ASR, *supra* note 16, art. 42(a).

<sup>297</sup> *Ibid*, art. 42(b).

<sup>298</sup> *Ibid*, art. 47(1)(a).

<sup>299</sup> *Ibid*, art. 47(1)(b).

<sup>300</sup> For an overview of the historical evolution towards the taking into account of community interests in the law of state responsibility, see G. Nolte, *supra* note 41; See also S. Villalpando, *supra* note 41.

This analysis highlights that there is a notable ambiguity in the expression of an obligation “owed to the international community as a whole”, or *erga omnes* obligations. There exist in fact two types of obligations *erga omnes*, depending on the interest protected by the obligation and the legal regime of responsibility applied. For example, in national law, the tort law obligation not to cause damage is owed to everyone, but the responsibility of the tortfeasor, and most importantly for the discussion of *locus standi*, the procedure for the implementation of that responsibility is triggered by the specific damage suffered by one person. On the other hand, the obligation not to kill under criminal law is also owed to everybody, but the damage to a specific individual, if it might be a condition of responsibility, will not trigger the implementation, which will be left to a public authority<sup>301</sup>. This applies *mutatis mutandis* to international law. For example, the obligation to respect diplomatic immunity is in the abstract owed to all states, and in this sense is *erga omnes*, but should it be breached, it is only the injured state that will be able to claim. On the other hand, the obligation not to commit genocide is not only *erga omnes* in the abstract, but its breach will grant *locus standi* not only to the injured state, but also to any other state acting on behalf of the international community.

This confusion, which can in part be explained by the near equivalence given in the ILC Articles between peremptory norms and *erga omnes* obligations,<sup>302</sup> is once again the result of the unitary approach to international responsibility. The dissociation of

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<sup>301</sup> This is a general model. A number of national systems provide for privately triggered public prosecutions, but they all involved to a large extent public authorities exercising some form of discretion in the opportunity of going ahead with the investigation and/or prosecution.

<sup>302</sup> P. M. Dupuy, *supra* note 246, 1074.

public and private dimensions leads to results that better address the different objectives of international responsibility. Indeed, the injured State under article 42 and the non-injured State acting under 48, essentially as a public prosecutor, cannot be subject to the same requirements, given the different logics of the interests protected. The ILC while recognizing the different aims and foundations of the two models of invocation has not reasoned the point to the logical conclusion, and in developing the technical requirements of invocation remained trapped in the ideal of unity. In particular, one can question whether all requirements of article 48 fit the public law dimension of that article. For example, should a State falling under that article be subject to Article 45 (on the loss of the right to invoke responsibility)?<sup>303</sup>

The manifestations of invocation in its public and private law dimensions have notable, if sometimes indirect, relations to shared responsibility. In particular, they leave room for differentiating the possible types of reparations available to different claimants in relation to the nature of the responsibility. Certain types of reparations might not be possible against some responsible contributing states based not only on the nature of the obligation breached, but also on the quality of the claimant.

#### 5.4.2. The relationship between general regimes and derogatory regimes

The second dimension of our proposed model is the relationship between the general regimes of responsibility and derogatory regimes of responsibility. This point is not a new one – it is a manifestation of the general relationship between the general law and

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<sup>303</sup> ASR, *supra* note 16, art. 48(3); See A. Gattini, ‘A Return Ticket to “Communitarisme”, Please’ (2002) 13 *EJIL* 1181, 1197.

lex specialis.<sup>304</sup> Moreover, treaties often provide for possible derogations and the limits of these derogations.<sup>305</sup> Within the law of State Responsibility, the question is equally present. The ASR enshrine the principle of *lex specialis derogat legi generali* in its Article 55 according to which the articles do not apply if the issues of responsibility ‘are governed by special rules of international law’.<sup>306</sup>

The relationship between the general regime and the derogatory regimes will likewise be affected by the public or private nature of the interest protected by both the obligation and the responsibility regime. In relation to primary norms, the Vienna Convention on the Law of Treaties provides an example by stating that a treaty cannot derogate from a *jus cogens* norm.<sup>307</sup> The Commentary to Article 55 gives an example, by suggesting that “States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts

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<sup>304</sup> A. Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis’ (2005) 74 *Nordic Journal of International Law* 27; E. Vranes, ‘Lex Superior, Lex Specialis, Lex Posterior: zur Rechtsnatur der Konfliktlosungsregeln’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 391.

<sup>305</sup> See for example Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (done 22 March 1989) 28 ILM 649, art. 11 [“Basel Convention”], which provides that any special agreement should not “derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention.”

<sup>306</sup> See also A. Marschik, ‘Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System’ (1998) 9 *European Journal of International Law* 212. For a recent series of examples discussing, among others, the human Rights systems, the WTO and the EU, see J. Crawford et al (ed), *supra* note 116, 725.

<sup>307</sup> Vienna Convention on the Law of Treaties (done 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 53 [“VCLT”].

contrary to peremptory norms of general international law”.<sup>308</sup> What our differentiated model suggests is that it is not only the nature of the obligation, as discussed previously, but also the objective of the regime of responsibility that may condition possible derogations. This allows for a more subtle array of answers to the question of derogations. Indeed, it will have to be determined whether certain entities can derogate from certain rules in the distribution of responsibility among them, based on the interest protected, and therefore the applicable regime of responsibility. While the commentary of Article 55 would lead to a single solution to a given situation, our model suggests that a same set of facts might give rise to different answers in light of the applicable legal regime. While, following a private law logic, it is conceivable that States exclude their responsibility for civil wrongs and limit their reparation obligations, that will not be possible in the public law dimension of responsibility.

In sum, we argue that we need to recognize the wide variety of regimes for shared responsibility, between such areas as military operations, refugee law, and environmental law. Each of such areas has their own set of (primary) obligations that is relevant to questions of shared responsibility, and has its own private and public law dimensions, and construing shared responsibility in terms of differentiated regimes seems inevitable. Yet, we also will need to assess and interpret such differentiated regimes in the light of general international law and reflect on the coherence that does, and perhaps should, exist between the differentiated regimes.

## **6. Principles and Processes of Shared Responsibility**

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<sup>308</sup> ASR, with commentaries, *supra* note 19, commentary to Article 55, 140.



In the light of our critique of the unitary nature of international responsibility, and of the strict separation between primary and secondary rules, we now will revisit the principles that can be applied to situations of shared responsibility, and that compensate the limitations of independent responsibility.<sup>309</sup> As we identified above, the prevailing system of international responsibility suffers from unclarity as to the question whether and when responsibility can be shared in the first place, in particular because of the contested nature of double attribution and an unarticulated normative basis of attribution of responsibility,<sup>310</sup> as well as to the question what the consequences of such sharing would be. We focus rather on what perhaps is the quintessential question for shared responsibility: how to determine who is responsible for what. We observed in section 4.1 above that the ILC had already recognized, overcoming initial resistance from Roberto Ago, that responsibility of one state did not need to exclude responsibility of another state. However, the question left wide open was how and on the basis of what criteria responsibility can be allocated between multiple parties.

We take the position that in light of the need to connect to the fundamental developments that we have sketched in section 3, the deficiencies identified in section 4, and the conceptual framework proposed in section 5, we need to reconsider how principles and processes of shared responsibility can accommodate the variety of situations where multiple actors contribute to proscribed outcomes. We first examine the principle of joint (and several) responsibility as a possible solution to situations of multiple wrongdoing actors (section 6.1), and then focus respectively on substantive

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<sup>309</sup> See *supra*, section 4.3.

<sup>310</sup> See *supra*, text to notes 120-125.

aspects that concern the allocation of responsibility between multiple wrongdoing states, as well as between wrongdoing states and injured states (section 6.2), and procedural aspects that will arise in (quasi-)judicial proceedings (section 6.3).

### **6.1. Joint (and several) responsibility**

In domestic legal systems, situations where multiple actors contribute to a single injury usually are addressed by resort to the principle of “joint and several responsibility”.<sup>311</sup> What is meant by this expression is that the victim can require the full amount of reparations from one of the responsible actors, which can in turn require compensation from the other responsible actors which might have contributed to the damage.<sup>312</sup>

Several scholars have advocated this principle in international law.<sup>313</sup> The principle is contained in some treaties,<sup>314</sup> and has been considered in some case-law. For example, the Seabed Chamber affirmed the applicability of this principle under the Law of the Sea Convention: ‘Joint and several liability arises where different entities have

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<sup>311</sup> Note that the Principles of European Tort Law have adopted a different terminology. The drafters of these principles project believed that the expression of “joint and several” might be misleading because “it may suggest that the tortfeasors have to be sued together and secondly because of the association with ‘joint tortfeasors’ who form only a part of those exposed to ‘joint and several liability’. They therefore consider that the expression of “solidary liability” is more appropriate; H. Rogers (ed), *Unification of Tort Law: Multiple Tortfeasors* (Kluwer Law International 2004) 272.

<sup>312</sup> Principles on European Tort Law, *supra* note 98, art. 9.101(3).

<sup>313</sup> E.g. C. Chinkin, *supra* note 6, and J. Noyes and B. Smith, *supra* note 12, 259.

<sup>314</sup> See *infra*, section 5.4.

contributed to the same damage so that full reparation can be claimed from all or any of them.<sup>315</sup>

However, application of the principle as a solution to situations of multiple wrongdoers in international law encounters two possible problems.

First, the concept of joint responsibility, being initially based on a private law model, needs to be adapted to public law contexts. While joint responsibility may function in bilateral situations in a way that resembles its domestic tort law origins (for instance when two upstream riparian states cause damage to a downstream state), it is harder to transpose in cases that resembles more a public law / administrative law type setting. In particular, whereas joint and several responsibility can be helpful as a means to provide relief to injured parties, it is much less relevant when return to legality (of all responsible actors) is the aim. This is directly related to the different nature and role of injury in such situations.<sup>316</sup> This does not mean, however, that concepts of joint responsibility from public order fields, such as international criminal law, might not be relevant for the identification of the principles of shared responsibility<sup>317</sup>.

Second, the decentralized nature of the international legal order, combined with the lack of courts with compulsory jurisdiction, implies that the international legal order is much less conducive to application of a principle of joint and several responsibility. For one thing, the principle may imply that an actor is held responsible, and has to

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<sup>315</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, No. 17, ITLOS, 1 February 2011, par. 201.

<sup>316</sup> See *supra*, text to notes 210-220.

<sup>317</sup> See *infra*, Section 6.2.

provide reparation, for injury caused by another actor. As indicated above, this sits uneasily with the fundamental principle of sovereignty in international law. This problem may be accommodated if the co-responsible actors could effectively claim compensation between themselves. Indeed, the principle, in its domestic application, assumes that one responsible person who has compensated a victim, can subsequently bring a claim against other responsible parties. But when no court is available, that possibility might be theoretical, casting doubt on the possible application of the principle in international law.

The difficulty of transposing the principle as such to the international legal order, leads us to reflect further on the substantive and procedural aspects of allocation of responsibility in situations of multi-party responsibility.

## **6.2. Substantive Aspects**

As regards the substantive aspects, two sets of questions have to be considered: the first relating to the relationship between the tortfeasors and the victim and the second relating to the relationship between the tortfeasors. These two aspects will be discussed separately in section 6.2.1 and 6.2.2.

### **6.2.1. The relationship between the victim State and the responsible States**

A core question in situations of shared responsibility is to determine against which state(s) a claim can be brought. Here we need to distinguish between the normative foundations of identifying the addressee of claims (6.2.1.1) and the question what can be claimed (6.2.1.2).

#### 6.2.1.1. The addressee of claims

We suggest that on this point a distinction has to be made between situations of cooperative and cumulative responsibility, respectively involving concerted and independent acts.<sup>318</sup> In situations of concerted action the “traditional” response, as stated previously, would be for responsibility to flow from the individual attribution of the act.<sup>319</sup> The question then is whether there is a basis for holding states, or international organizations, responsible not on the basis of their own act, but on their involvement, or participation, in the wrongful act of another state. As indicated earlier, both the ASR and the ARIIO have recognized this possibility to a limited extent, notably through the constructions of aid and assistance and attribution of responsibility.<sup>320</sup> But the constructions recognized in these articles certainly do not exhaust the range of possible constructions for dealing with cooperative responsibility, and more in particular with attribution of responsibility.

We identify three possible foundations for shared responsibility in such situations: consent, control, and the nature of obligations.

First, one possible avenue is to consider that, under certain conditions, common participation would in and of itself a criterion for being able to raise a claim against a State, even if, by applying the ILC principles, the conduct that led to the wrongful act

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<sup>318</sup> See *supra*, section 2.

<sup>319</sup> See *supra*, section 3.1.

<sup>320</sup> ASR, *supra* note 16, art. 16-18; ARIIO, *supra* note 16, art. 14-17.

is attributable to another State.<sup>321</sup> This approach implies a further shift in the way of thinking of attribution, from the attribution of a specific act to an attribution of responsibility.<sup>322</sup> As indicated above, while the ILC did recognize the possibility of such joint responsibility, the normative basis thereof remains unclear. One possible basis that has not found its way into the ILC texts is a form of implied consent to the consequences of participation in a joint enterprise.

Arguably, whether we move towards such a consent model of attribution will depend on the interest protected by the applicable regime of responsibility. Indeed, such a move might not be appropriate for all regimes of responsibility. Because such an approach would imply that a State might be held responsible even without any direct involvement in the commission of the wrongful act in the traditional sense, it will need to be determined, depending on the *telos* of the regime of responsibility under consideration, whether it is desirable to require individualized attribution of conduct for the determination of responsibility, or whether some form of shared responsibility based on attributed responsibility is acceptable.

In relation to this, one can find some inspiration in the use of concepts of joint enterprise as developed in other fields of international law, such as international

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<sup>321</sup> One way of making this work under the ICL articles, would be to apply article 11 on the adoption of a conduct as his own by a State. Participation in a common enterprise would involve implied consent to adopting the conduct theoretically attributable to another State.

<sup>322</sup> This would be in line with the approach advocated in terms of moral philosophy by L. May in his *Sharing Responsibility*, *supra* note 21.

criminal law.<sup>323</sup> Indeed, from its modern rebirth after the second world war, international criminal law has grappled with this difficulty of moving beyond individual responsibility to encompass the collective dimension of some crimes. While the theory of conspiracy was used in the Nuremberg and Tokyo trials<sup>324</sup>, the International Criminal Tribunals for Former-Yugoslavia and Rwanda developed the notion of Joint Criminal Enterprise. While this concept gave rise to strong criticism<sup>325</sup>, and while the transposition of its conditions (most notably in relation to the mental elements) to the sphere of State responsibility is not without difficulty, it is nonetheless relevant to analyze how the case-law conceptualizes and implements a mode of participation that goes beyond direct commission for the purposes of rethinking shared responsibility in international law.

This approach would also be consistent with the fact that in the ILC Articles the obligation not to provide and assistance (one form of participation) are less stringent in case of serious breaches of peremptory norms than in case of breaches of other international obligations.<sup>326</sup>

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<sup>323</sup> M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S. Darcy and J. Powderly (ed), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press 2010) 184.

<sup>324</sup> F. Mignone, 'After Nuremberg, Tokyo' (1946-47) 25 *Texas Law Review* 475, 487 et seq.; C.

Bassiouni, 'Nuremberg Forty Years After: An Introduction' (1986) 18 *Case Western Reserve Journal of International Law* 261.

<sup>325</sup> J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5 *Journal of International Criminal Justice* 69; A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 *Journal of International Criminal Justice* 109, 114 et seq.; H. van der Wilt, 'Joint Criminal Enterprise. Possibilities and Limitations' (2007) 5 *Journal of International Criminal Justice* 91.

<sup>326</sup> ASR, *supra* note 16, art. 41.

In contrast, in situations of *cumulative responsibility*, where states and/or international organizations act independently and where there is no concerted action, it would seem difficult to adopt a principle of consent-based attribution to make a state responsible for another state's conduct. In such situations, the traditional model of attribution is more adequate and allows for the development of principles of parallel attribution based on independent acts, with as a starting point the principle contained in Article 47 of the Articles on State Responsibility.

Second, an alternative basis for shared responsibility is to base attributed responsibility not on consent but on control.<sup>327</sup> While the control exercised by one actor is not of such a nature that it results in attribution of the conduct itself, it may contribute to the eventual wrong (and injury). Since the contribution of the controlling state and of the acting state may not easily be apportioned, joint responsibility may be a proper response.

This construction, which obviously applies only in cases of cooperative responsibility and not in situations of cumulative responsibility, indeed is a conceptual foundation for attribution of responsibility in the ARIO,<sup>328</sup> which however is not clearly recognized as such in that text. While in the scenario envisaged by the ARIO the wrongfulness of the acts by Member States is a given – it is after all the Member State to whom the act is attributed, the organization would be responsible if the Member

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<sup>327</sup> The term control is here used in a loose sense. Not to be equated with effective control, ARIO, *supra* note 16, art. 7.

<sup>328</sup> *Ibid*, art. 17.



States, under the rules of the organization, *had* to carry out an act that would be wrongful according to the international obligations resting upon the organization. That act could only be withdrawn or changed by the organization, not by the Member States.

Also this scenario works better from a public law than from a private law perspective. For the fundamental question in the latter perspective remains, on what basis a state or organization would be responsible vis-à-vis a third state. This is yet another manifestation of the fact that a system of joint responsibility requires to differentiate between public and private law dimensions.

Third, it may be argued that nature of some obligations themselves affects the allocation of responsibility between responsible parties, especially if some obligations can be, *ex ante*, be qualified as ‘shared’ obligations. If a state commits genocide against another state, and other states may have been in a position to take action to prevent this genocide, the question arises against whom the victim-state can make a claim for the failure to prevention.

One way of dealing with this, is to devise a series of allocation principles to identify the state or states that bear the greatest duty to deal with such a situation. This seems to have been the approach adopted in the *Genocide* case, where the ICJ referred to a number of criteria that could be taken into account to determine *in concreto* the scope of a state’s duty to prevent, such as the “means reasonably available”, “the capacity to influence effectively the action of persons likely to commit, or already committing,

genocide” or the “geographical distance of the State concerned from the scene of the events”.<sup>329</sup>

However, this approach, while certainly having some practical justifications, may not in fact encapsulate the conceptual foundations of such collective obligations. Indeed, this obligation is more than just another obligation. It represents a recognition of a form of primitive social contract at the international level whereby the international community, as a reified entity owes a sort of sovereign duty to protect its subjects, in the same way that a State must protect its citizens against crime.<sup>330</sup> In this sense, the duty is truly a shared obligation and owed by the international community as a whole, and, because there does not exist such a legal entity that can appear before a court, by all states constituting that community, irrespective of their special relationship to the injured State.

In light of this analysis, alternative ways of dealing with these kinds of obligations which do not fit within the logic of traditional State Responsibility may be conceived of. While it is theoretically possible to imagine that a claim be able to be brought against all states, one possible approach, which would accommodate better this collective dimension of these obligations, is to consider that the UN, as the most advanced, if imperfect, embodiment of the international community, be the bearer of such obligations, to the extent that a breach of these obligations falls within the scope of Article 39 of the Charter, with a collective corresponding duty to repair the consequences of the violation of the duty – an approach that would be related to the

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<sup>329</sup> Genocide case, *supra* note 5, par 430.

<sup>330</sup> T. Hobbes, *Leviathan* (Create Space 2009).

emerging literature on the possible obligation of the Council to act in R2P situations.<sup>331</sup>

Quite obviously, such a collective duty on the part of the United Nations is not recognized in positive international law.<sup>332</sup> It also would ignore the essential differences between the relevant actors within the UN in terms of powers, capacities etcetera. As such, there is indeed merit in construing this situation in terms of *shared* rather than *collective* responsibility.<sup>333</sup> However, the alternative of directing claims against the composing members of the international community then requires a fundamental considerations of the relevant factors that might differentiate between responsibilities, that goes much beyond the rather superficial approach advanced in the *Genocide case*.<sup>334</sup>

#### 6.2.1.2. What can be claimed

The above foundations (consent, control, and nature of the obligation) are independent of (if related to) the extent of the claim of the injured party, once the principle of responsibility has been established. What can an injured party claim against a specific state or organization? As indicated above, the idea behind joint responsibility is be that an injured party can claim the whole damages against a state or organization,

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<sup>331</sup> A. Peters, 'R2P and the P5: The Obligation to Give Reasons for a Veto' in J. Hoffmann and A. Nollkaemper, *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press 2012).

<sup>332</sup> See also Peters, *supra* note 331.

<sup>333</sup> Compare L. May, *supra* note 21, 37-38; see also *supra*, section 2.

<sup>334</sup> See for more comprehensive approaches D. Miller, *supra* note 17; J. Pattison, *supra* note 5.

even if that state or organization is only one of a multiplicity of responsible actors. An alternative is that of proportionate liability, when a claim could only be brought for the damage attributable to a given state.

The first option could seem like a natural consequence when responsibility is based, as considered above, on accepted participation in a common endeavor. However, as indicated above, this works better in a private law paradigm than in a public law paradigm, where return to legality by *all* responsible actors is key, and where moreover an acknowledgment of responsibility could be seen as a symbolic enough gesture to satisfy the requirements of the sanctity of the international legal order.<sup>335</sup>

However, fundamental considerations of fairness may oppose holding one party responsible for the entire injury, in particular when the concerted nature of the collective action is weak.<sup>336</sup> Moreover, it has to deal with the problem that the legal basis for claims between responsible actors is uncertain (see 6.2.2 below) and that in international law more often than not no court will be available in which co-responsible parties can direct claims against each other.

The second option raises different questions, mostly linked to attributability and causation. The essential problem here is that in situations of concerted action it will not be easy and often outright impossible to determine a causal contribution by

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<sup>335</sup> One could of course contest this conceptually, arguing that without an actual “sanction” the deterrent purpose loses of its potency, and practically, arguing that an injured party might be unlikely to make a claim if no compensation is envisioned. That is certainly true, but one should not however underestimate the symbolic nature of international legal proceedings.

<sup>336</sup> See also L. May, *supra* note 21, 41-42.

individual actors to the proscribed outcome. Indeed, if such a causal contribution could be identified, there might be no need to resort to joint responsibility at all, and a solution could be found in parallel application of individual responsibility of the actors involved. There thus is a need of alternative bases for apportionment, which could be based on fault or based on a predetermined apportionment, based on the area of law under consideration and the nature of the collective endeavor. We leave these matters for later consideration.

#### 6.2.2. The relationship between the responsible States

A separate set of questions concerns the relationship between the contributing states. This is where “several” liability may come into play. As mentioned previously, “several liability” entails, in its general understanding, that an entity will only be ultimately liable, in the relationship between responsible entities, for what is attributable to it, and can therefore claim from other responsible entities in the event that it had to compensate fully for the damage. Obviously, therefore, the question of several liability only arises when one adopts a system of “solidary” liability, as defined in the European Principles on Tort Law, and it raises similar questions as in the case of proportionate responsibility in relation to causation, and the decisive criteria for apportionment.

The question is whether, outside specific regimes such as the Law of the Sea Convention, international law knows such a principle of ‘several’ liability that allows for claims between responsible states. The issue has not been explored and to our

knowledge not been raised in practice, but nonetheless a few thoughts can be advanced.

In theory we could propose an approach where there is in fact no apportionment between the contributing parties themselves. But this would be hard to defend conceptually: why should a state which has not fully contributed to the damage, but has nevertheless paid full compensation, be prevented from claiming from another state which has committed a wrongful act having caused part of the damage?<sup>337</sup> This would require some kind of “procedural luck” concept, according to which the first to be brought to court should bear the brunt of the reparations.

One could also argue that once full compensation has been paid to the injured party, that puts an end to one procedure, and that the payment of damages results in a transfer of the injured parties’ rights to the contributing state that has compensated. In this sense, this mechanism would be similar to the situation where a person A owes a person B some money. Enters person C who pays off the debt, which therefore has as a consequence that this third person is substituted in B’s rights in relation to A. It will be for the respondent State in this new (and autonomous) phase of the proceedings, i.e., the state that contributed to the damages but whose responsibility had not been sought, to invoke the contributing act of the applicant State, i.e., the state that had to pay compensation to the initial injured state, in order to reduce the quantum of damages.

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<sup>337</sup> The Principles of European Tort Law do mention an interesting scenario where, if one contributing party cannot be made to pay, his share is allocated to the other responsible parties in proportion to their responsibility (see Annex 1, 9.102, par 4). This is therefore one case where some contributing parties may pay more than what they should.

If we accept this analysis, the term of “several” itself, if useful from a descriptive point of view, becomes in fact inadequate from a procedural point of view. In effect, once a state has compensated the injured party fully, the whole process starts over, and the paying contributing state becomes the injured party in relation to other states and may trigger their responsibility and liability in the fashion described previously.

This construction raises fundamental questions, however, mostly in relation to the origin of the responsibility of the contributing state which has not yet paid any reparations. This might logically be said to be the violation of the initial primary obligation – but that obligation was initially only owed to the victim state, and not to the co-responsible states. One could also conceive of an autonomous duty to compensate the paying responsible State. In any case, whatever the legal foundation of the duty to repair, it would factually have to be shown that the State effectively contributed to the initial harm, and to what proportion, making issues of causation and proportionality reappear once again.

### **6.3. Procedural aspects**

In addition to the more substantive principles or shared responsibility discussed above, we also need to consider certain aspects of the procedure and processes of shared responsibility, in particular relating to procedures before international courts.

Indeed, questions of shared responsibility, while raising a number of fundamental conceptual questions, as highlighted in previous sections of this article, will increasingly crystallize before international courts, given the trend to judicialization of the international legal order (6.3.1). This justifies that the limits of the bilateral nature of international dispute resolution be discussed (6.3.2) and that more thought be put in the multilateralisation of dispute settlement (6.3.3).

### 6.3.1. The judicialization of the international legal order

In addition to the four main trends identified previously<sup>338</sup>, one can identify at this point a fifth trend that contextualizes questions of shared responsibility: the increasing judicialization in matters of international law. Judicialization certainly is not limited to international law,<sup>339</sup> but has had a profound impact on it in the last few years. We have seen an increase in the case-load of existing tribunals and the establishment of new tribunals. The practice of the International Court of Justice, the dispute settlement mechanism of the World Trade Organization, investment arbitration, the International Tribunal for the Law of the Sea and regional human rights courts illustrate this trend. Furthermore, supervisory bodies that have been established to control compliance with treaty obligations in respect of human rights, multilateral environmental agreements and international labour law, have adopted decisions in an increasing number of specific cases. National courts further add to the practice of adjudication of claims based on international law. To be sure, this phenomenon co-exists with movements which lead in other directions (such as the increasing amount of global

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<sup>338</sup> See *supra*, section 2.

<sup>339</sup> See M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002).



governance outside the realm of international law proper, and thus also outside international courts). Nonetheless, in quantitative terms the trend towards judicialization is a strong one.

This trend has clear implications for our approach to shared responsibility. It may be said that in the past there was no strong need for detailed rules on shared responsibility, simply because there were few cases and because as long as claims are settled outside courts, these are less likely to resort to such technical rules. But as more claims involving multiple responsible parties will reach the courts, there will be an increasing need for more detailed and subtle rules on allocation of responsibility between multiple responsible parties.

The trend towards judicialization is fuelled by several of the previously identified trends, in particular heterogeneity of actors (the areas where most judicial decisions are rendered are those where private parties have either individual rights – as in human rights and investment law – or individual obligations – as in international criminal law) and the permeability between international and national law (as national courts increasingly adjudicate claims based on international law, and the number of such decisions vastly outnumbers the number of judgments by international courts).

However, we also note that this raises fundamental questions about the authority and legitimacy of international courts, both in terms of their influence on individual cases and on their contribution to the development of international law. Principles and processes of shared responsibility involve fundamental normative questions pertaining

to the allocation of responsibility, and the question should be considered if these decisions are in good hands with international courts.<sup>340</sup>

### 6.3.2. The limits of bilateral dispute settlement mechanisms

The principles of individual responsibility are accompanied by processes for implementation and enforcement that match the characteristics of individual rather than shared responsibility.<sup>341</sup> However, in the increasingly complex character of international relations, ‘legal disputes between States are rarely purely bilateral’.<sup>342</sup> The present system of international dispute settlement is hardly designed to deal with multilateral disputes.<sup>343</sup> Procedures may not be able to capture all parties involved and may not do justice to the complexity of a context consisting of multiple responsible actors.

Given that international dispute settlement mechanisms are based on the consent of States, the mere fact that one State involved has not consented to the judicial process

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<sup>340</sup> A. von Bogdandy and I. Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification’ (2010), available at [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1593543](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1593543).

<sup>341</sup> See on the connection between substance and procedure Martinez, ‘Process and Substance in the “War on Terror”’, 108 *Columbia Law Review* (2008) 1013; Benzing, ‘Community Interests in the Procedure of International Courts and Tribunals’, 5 *The Law and Practice of International Courts and Tribunals* (2006) 369.

<sup>342</sup> Separate Opinion Judge Shahabuddeen in Nauru, *supra* note 78, 270.

<sup>343</sup> L. Fisler-Damrosch, ‘Multilateral Disputes’ in L. Fisler-Damrosch (ed), *The International Court of Justice at a Crossroads* (Hotei Publishing 1987) 376-400.

may suffice to exclude any case of shared responsibility from judicial scrutiny. Likewise, if one of the wrongdoing actors happens to be an international organization, questions of shared responsibility will be deemed inadmissible before most international judicial bodies given that acts of international organizations are not judiciable before them.

For instance, after the beginning of the bombardment of Yugoslavia by the NATO military alliance in 1999, the dispute as a whole was treated at various political levels, including the United Nations Security Council, as a dispute between Yugoslavia and NATO or as a dispute between Yugoslavia and the member states of NATO. A dispute in legal terms only arose after individualization of disputes between Yugoslavia and each of the states.<sup>344</sup> The question is what the consequences are for the collective context in which the attacks originated.

The bilateral nature of dispute settlement proceedings is in particular unsatisfactory for two reasons. On the one hand, if a complex dispute is, in a procedural sense, brought back to a bilateral dispute, it may inevitably have consequences for the non-participating states. Reisman noted that ‘as interaction increases, more bilateral

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<sup>344</sup> Yugoslavia instituted proceedings before the ICJ against 10 NATO member states; these were all NATO member states that had recognized the ICJ’s compulsory jurisdiction; See e.g. *Legality of Use of Force (Yugoslavia v Spain)*, Provisional Measures, I.C.J. Reports 1999, 761; *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Provisional Measures, I.C.J. Reports 1999, 826; *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, I.C.J. Reports 1999, 916.

disputes will have peripheral effects'.<sup>345</sup> A possible determination of the liability of the first state might entail the effective determination of the liability of the other.<sup>346</sup>

On the other hand, the absence of potentially co-responsible parties may adversely affect the interests of a respondent, 'both by its inability to obtain needed evidence and by the differential levels of obligation that could be created when some but not all of the involved states are bound by the Court's judgment'.<sup>347</sup>

Developing the international legal regime in a direction where it can better deal with questions of shared responsibility therefore does not only require adjustment of principles but also of processes of responsibility and adjudication.

### 6.3.3. Dealing with the limits of bilateral mechanisms

In considering how dispute settlement can better take into account the collective context, we distinguish between the two categories of situations as described in the previous paragraphs: how to promote multiparty proceedings and how to deal with the absence of some contributing entities to the proceedings.

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<sup>345</sup> M. W. Reisman, *Nullity and Revision. The review and enforcement of International Judgments and Awards* (Cambridge University Press 1974) 331-332.

<sup>346</sup> Dissenting Opinion Judge Schwebel in *Nauru*, *supra* note 78, 329; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, 19.

<sup>347</sup> Fiesler-Damrosch, *supra* note 343, 391.

First of all, what procedures should be put in place to maximize the most comprehensive participation in the proceedings of all relevant parties? The answer depends on who has the obligation to ensure that this happens. From the point of view of an international court, this may involve consideration of joinder of procedures, granting courts the power to add parties to a procedure and powers to order production of evidence in the hands of third parties. On this point, substantial differences exist between different international courts; the ECtHR and to a lesser extent the WTO panels and Appellate Body have substantially more possibilities than the ICJ.<sup>348</sup> In principle these difference can well be explained by, and indeed support our distinction between, the public and private law nature of international courts. However, in particular in in the ICJ there is a fundamental tension between its structural bilateralist organization, and the public law nature of the claims it may be asked to adjudicate.

In relation to this, although issues of shared responsibility primarily focus on situations of multiple responsible entities rather than multiple claimants, it should be acknowledged that the latter situation can be affected by the existence of the former. For example, the drafting of Article 46, which relates to multiple claimants,<sup>349</sup> is evidently premised on the idea of independent attribution of responsibility which underlies the ILC framework. Indeed, it mentions “the state” which has committed the wrongful act, rather than “the states”. Interestingly, although not unsurprisingly given

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<sup>348</sup> Benzing, *supra* note 341.

<sup>349</sup> ASR, *supra* note 16, art. 46: “Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act”.

the general philosophy of the Articles, this point is not picked up in the commentary, which only says that article 46 enshrines “the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account”.<sup>350</sup> It is therefore likely that rules of shared responsibility will impact the operation of article 46, most notably on the question of whether all injured states can claim against all contributing states and on the question of the nature and quantum of the reparations that can be claimed against one or more states by one or more injured states.

The second issue to consider is how the Court should deal with the absence of a party to the proceedings. Indeed, for a number of reasons, not all responsible entities might be present. This could be due to the fact that a State has not consented to the exercise of jurisdiction (notably in the ICJ), or simply because the plaintiff has directed the claim against only one or a few responsible parties. Moreover, the ICJ does not have jurisdiction over a number of entities that might have contributed to injury, such as international organizations, individuals or other non-state actors.

The starting point for discussion in relation to this latter problem is the *Monetary Gold Principle*. This principle, which has its origin in the 1954 ICJ Judgment,<sup>351</sup> provides that “where the legal interests of a third State, which itself is not subject to the jurisdiction of the respective tribunal, forms the very subject-matter of the dispute, the case cannot be heard or decided. Such third State is considered a ‘necessary third

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<sup>350</sup> ASR, with commentaries, *supra* note 19, commentary to art. 46, par 1.

<sup>351</sup> Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment, I.C.J. Reports 1954, 19.

party' to the case, the interests of which form the very core of the underlying dispute".<sup>352</sup>

The main issue relating to this principle and how it affects situations of shared responsibility relates to its scope. The original Judgment of the ICJ in 1954 was relatively narrow and case-specific. It was narrow in the sense that it found that it could not consider what constituted a legal dispute between Italy and Albania without the consent of Albania. In the Court's words: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well established principle in international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent"<sup>353</sup>. It was case-specific, in the sense that the ICJ was called upon to decide on the very material allocation of gold to Italy, the United Kingdom or Albania. In light of this, at least some of the subsequent extensions of the principle can be subjected to critique, not only because of the barriers they impose for a functioning system of shared responsibility, but also based on the consistency of the case law of the Court itself.

A related question is whether the principle extends, beyond States, to international organizations. This possibility was acknowledged by the dissenting opinion of Judge Schwebel in the *Lockerbie* Case, where he applied *Monetary Gold* to deny the ICJ the

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<sup>352</sup> A. Zimmerman, 'International Courts and Tribunals, Intervention in Proceedings', *Max Planck Encyclopedia of Public International Law*, par 7.

<sup>353</sup> Case of the monetary gold removed from Rome in 1943 (Preliminary Question), *supra* note 351, 32.

possibility to consider the legality of a Security Council Resolution<sup>354</sup>. More recently, the Court implicitly recognized such a possibility by not rejecting *ab initio* the application of the principle to NATO, considering rather that it did not apply in the case under consideration because of factual differences with *Monetary Gold*<sup>355</sup>. Given the fact that a number of collective endeavors are now the result of collaborations between States and International Organizations, or actions of States within the framework of International Organizations, such an extension would have notable consequences on the capacity of the ICJ to adjudicate in situations of shared responsibility. However, one way to counter this broad interpretation of the principle is to go back to its roots, namely the way it was framed in the *Monetary Gold* Judgment. By basing its reasoning on consent, one can argue, as a possible logical consequence, that the principle only applies to entities that could in fact consent to the Court's jurisdiction, which would exclude International Organizations and other non-state entities. In addition, this would fit with the fact that, in the absence of any possible jurisdiction over an entity, the ICJ cannot be said to ever be able to adjudicate (in a technical sense) on the rights of that entity. Finally, should the principle be applied to International Organizations, entities over which it does not have jurisdiction over, what conceptual barrier would exist to applying it to other entities over which the Court does not have jurisdiction over, such as individuals or various non-state actors? The consequence of this would be to seriously impair the role of the ICJ, given that most attribution operations involve, at some level or another,

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<sup>354</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), Preliminary Objections, Judgment, I. C. J. Reports 1998, 115, dissenting opinion Judge Schwebel, 172.

<sup>355</sup> Application of The Interim Accord of 13 September 1995 (*The Former Yugoslav Republic of Macedonia v. Greece*), Judgment, I.C.J. Reports 2011, par. 41-44.



discussion on the acts (and the legality thereof) of individuals or organs acting as *de jure* or *de facto* organs of the State.

## **7. Conclusion**

As illustrated by this article, the changes in modern international relations and the international legal order bring to the fore the necessity to comprehensively discuss issues of shared responsibility. The interdependence of a heterogeneity of actors increases the likelihood of concerted action and damage occurring from it requires that new rules be conceived to address this new reality. Moreover, the growing recognition that international society is based on a solidifying international social contract, implies that the traditional construction of international responsibility needs to be revisited.

More particularly, discussions on shared responsibility cannot remain purely technical without being embedded in a broader conceptual discussion on international responsibility in general. The current framework is the historical fruit of a primitive and horizontal conception of the international legal order. However, this does not correspond any longer with the reality of the international legal order today, which has reached, as most legal orders do in time, a new level of maturity. And with maturity necessarily comes complexity ; complexity of the legal relationships between entities, complexity of interests promoted and protected. This complexity must be acknowledged rather than ignored.

This is why we propose, as a conceptual founding block of shared responsibility, an approach to international responsibility that is based on more differentiation that better reflects the diversity of interests protected and legal interactions, rather than on the traditional unitary model. More specifically, we call for a more systematic reading of the objectives of international responsibility in light of the public/private dichotomy. While this dichotomy is not watertight, and should be considered as a continuum with shades of grey rather than as a black and white opposition, we believe that it provides for a more relevant framework of analysis for thinking of international (and shared) responsibility. In the same logic, we also call for moving beyond the primary/secondary dichotomy, which does not explain adequately the relationship between obligations and responsibility. This framework provides us for a starting point to discuss issues of shared responsibility in a more subtle and comprehensive way.

In this context, we have suggested a certain number of avenues that can be explored, both in the content of responsibility and in its implementation. In relation to the substantive rules of responsibility, a key proposal is the possible adoption of *joint and several responsibility* in international responsibility, the scope and content of which would depend not only on the “simple” operation of individual attribution, but on a number of other considerations. For one, the relationship of the responsible entities needs to be considered. As was explained, consent to cooperative actions may justify that responsibility flow from consent rather than actual conduct.<sup>356</sup> Second, the nature of the certain obligations, such as those relating to Responsibility to Protect or the environment, might justify in itself that responsibility be shared by a group of states or

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<sup>356</sup> *Supra* section 6.2.1.1.

even the international community as a whole.<sup>357</sup> Finally, the nature of the responsibility (along the public/private line) might justify different rules for i.e apportionment of reparation obligations among a number of responsible entities.

In relation to implementation of responsibility, we have suggested the need to reconsider the fundamentally bilateral dynamic of international dispute settlement which does not allow to address adequately situations of shared responsibility. This requires that procedural rules be devised to address the absence of possible co-responsible entities, both by allowing them to be joined to the proceedings and for preventing that proceedings be stopped due to their continued absence, as illustrated by a possible more restrictive reading of the *Monetary Gold* Principle<sup>358</sup>.

The primary ambition of the intellectual project that underlies this article is to lay the ground for a comprehensive discussion on shared responsibility, based on an examination, critique and development of the practices of shared responsibility. This will need to bring together fragmented discussions on fields of law and disciplines, such as sociology, philosophy and political theory. In this sense, to move this ambition forward, this article serves as a meeting point and a stepping stone for the bringing together of the various communities of international law (both academics and practitioners), the various communities within these communities (in the various regimes considered, such as human rights, military operations, refugee law or environmental law) but also the various communities of other social sciences, without which a conceptual discussion of the issues would remain impossible. Only through

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<sup>357</sup> *Supra* section 5.4.1.1.

<sup>358</sup> *Supra* section 6.3.3.

this intellectual cross-fertilization will the dynamics of shared responsibility be adequately explained, understood and ultimately implemented in the ever evolving international society.