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1. Introduction

It is not particularly controversial to suggest that the International Court of Justice ('ICJ' and 'the Court') (and its predecessor, the Permanent Court of International of Justice ('PCIJ')) have made a considerable contribution to the development of international law, both in general terms¹ and regarding the law of State responsibility in particular.² One might tell almost the whole story of the law of State responsibility simply by invoking famous ICJ and PCIJ cases. The leading pronouncements and authoritative formulations of the law of attribution of conduct, circumstances precluding wrongfulness, reparation and implementation of responsibility have often been elaborated precisely in the judicial setting.³

In recent years, the Court has been increasingly asked to adjudicate upon claims of State responsibility that raise or at least touch upon the possibility of international responsibility of multiple entities. To take only the judgments rendered since 2011 as an example: the Georgian claim against Russia in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* ('*Georgia v Russia*') case also raised questions about the conduct of authorities of South Ossetia (that had been recognised as a State by Russia but by few other States);⁴ the *Application of the Interim Accord of 13 September 1995* ('*FYRM*')

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¹ H Lauterpacht, *The Development of International Law by the International Court of Justice* (Stevens 1958); H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP, 2013).

² H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (1995) 66 *British Ybk Intl L* 1, 39-96; R Higgins, 'Issues of State Responsibility before the International Court of Justice' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004); H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Supplement, 2009: Parts Seven and Eight' (2009) 80 *British Ybk Intl L* 10, 84-180.

³ See *ibid.*; P Daillier, 'The Development of the Law of Responsibility in the Case Law' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010).

⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* (Preliminary Objections) [2011] ICJ Rep paras 16-17, 84.

related to the position that Greece had taken regarding the accession of the claimant State to NATO;⁵ one of the claims in the *Jurisdictional Immunities of the State* ('*Immunities*') case posed the question about the wrongfulness of a domestic enforcement of a foreign judgment granted by a wrongful denial of State immunity of a third State;⁶ and certain of Senegal's arguments in the *Questions Relating to the Obligation to Prosecute or Extradite* ('*Belgium v Senegal*') in the context of its responsibility referred to the conduct of and possible imposition of obligations within regional organisations.⁷

In different substantive contexts, these cases raise the same conceptual question about responsibility incurred not only by the particular respondent State but also by other entities, whether States, international organisations or non-recognised States. Such concerns might be articulated by reference to the concept of 'shared responsibility', that for the present purposes will be taken to refer to responsibility incurred (1) by multiple actors (2) for contribution to a single outcome, (3) with the responsibility distributed separately.⁸

The focus of this article is on procedural matters, and in particular on how the shared responsibility may be implemented in the ICJ.⁹ Of course, the distinction between procedural and substantive rules in international law in general, and the law of State responsibility in particular may be complicated to draw in clear and sharp terms¹⁰ (indeed, the famous debate about the exhaustion of local remedies in State responsibility was conducted precisely in terms of a substantive/procedural

⁵ *Application of the Interim Accord of 13 September 1995 (FYRM v Greece)* [2011] IC Rep paras 39-44.

⁶ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] IC Rep paras 121-133.

⁷ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] IC Rep paras 111-113.

⁸ A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2011) SHARES Research Paper 03 (2001) ACIL 2001-07 (revised May 2012) <www.sharesproject.nl> 12-15.

⁹ Generally see 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, 2011).

¹⁰ Reasonable people might disagree about the possibility and value the distinction between substance and procedure: cf. a sceptical view, A Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 EJIL 769, 772-775, and an argument for the distinction that appreciates the nuanced interrelationship of rules in both categories, S Talmon, 'Jus Cogens after *Germany v Italy*: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden J Intl L 979.

dichotomy).¹¹ Still, in negative terms, one might say that procedural rules are those that do not bear upon the international wrongfulness of an act;¹² in positive terms, procedural rules would include at least those secondary rules that address the implementation of State responsibility¹³ and (tertiary) rules on implementation of responsibility in a judicial or arbitral setting.¹⁴

This article largely skirts the question about the precise boundaries of procedural rules, focusing mainly on the undeniably procedural aspects of the operation and functioning of the ICJ. Still, it may be convenient to briefly consider the manner in which the ICJ has clarified the substantive contours of shared responsibility. The starting point is that shared responsibility, despite its certain peculiar features and challenges, is part of the general law of State responsibility, and traditional secondary rules would apply to most aspects of establishment of the existence of a wrongful act, content of responsibility and its implementation. While claims of shared responsibility have been repeatedly brought before the Court, their substantive aspects have rarely been subject to detailed analysis. Many claims fail to pass the procedural hurdles, for reasons both relating to the general structure of the Court¹⁵ and the particular challenges of multilateral claims.¹⁶ In substantive terms, the formulation of primary rules¹⁷ or their interplay with secondary rules on responsibility in connection with acts of other States may permit a ruling on responsibility of one

¹¹ CF Amerasinghe, *Local Remedies in International Law* (2nd edn CUP, 2004) Chapter 15.

¹² In the *Jurisdictional Immunities* case, the Court suggested that the rules on immunity were not substantive because '[t]hey do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful', (n 6) para 93. If meant as a general proposition, this is excessively narrow: surely, at least attribution of conduct and circumstances precluding wrongfulness are substantive in character (countermeasures are simultaneously substantive and procedural, for the dual purposes of preclusion of wrongfulness and implementation of responsibility, cf. ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II, A/CN.4/SER.A/2001/Add.1*. (Part Two) arts 22, 49-54).

¹³ 2001 ILC Articles (n 12) Part III.

¹⁴ To adopt the terminology of Riphagen, see W Riphagen, 'Fourth Report on the Content, Forms and Degrees of International Responsibility' UN Doc A/CN.4/336 and Add.1 & Add.1/Corr.1 para 33.

¹⁵ See *infra* chapter 2.

¹⁶ See *infra* chapter 4 on the *Monetary Gold* doctrine.

¹⁷ In the *Corfu Channel* case, the primary obligation regarding notification of other States about minefields in one's territory was formulated in terms that permitted the Court to find Albania responsible for its breach, without finding any State responsible for laying of the mines, *Corfu Channel case (UK v Albania)* [1949] ICJ Rep 4, 16-23. In the *Nicaragua* case, rules on the prohibition of the use of force were formulated in such terms that the Court could decide upon the US responsibility for unlawful use of force without addressing the responsibility of States through the territory of which it had acted, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Jurisdiction and Admissibility) [1984] ICJ Rep 14 paras 86-87; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 392 paras 48, 51-54.

State without necessarily analysing the legal implications for co-responsible entities¹⁸ (the possible existence of a special rule on establishment of joint-and-several responsibility tantalizingly suggested by Judge Simma has not been taken up by the Court).¹⁹ If reparations are put on the substantive side of the normative fence,²⁰ due to the settlement of *Certain Phosphate Lands of Nauru* ('Nauru') case, the most specific thing that the Court had the opportunity to say about claims arising out of shared responsibility is that, in fact, their peculiar issues might be dealt with together with the merits.²¹ To some extent, cases suggest that issues of reparations may be resolved either within the limits of traditional rules and principles or by certain limited readjustments.²² Overall, the Court's contribution to elaborating shared responsibility has been markedly more limited than that regarding responsibility in general.²³

¹⁸ In the *Bosnian Genocide* case, the obligation not to be complicit in genocide was formulated so that the Court could address the primary obligation of Serbia not to be complicit in genocide committed by Republika Srpska through the lenses of the secondary rule of aid or assistance of a wrongful act, without deciding on responsibility of the latter entity, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* (Judgment) [2007] ICJ Rep 43 paras 418-424; H Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge 2011) Chapter 5.

¹⁹ *Oil Platforms (Iran v US)* (Judgment) [2003] ICJ Rep 161, Separate Opinion of Judge Simma 324, paras 66-73. There is much in the tenor of the argument that seems to go against the bedrock proposition of Ago's project about responsibility arising solely out of the breach by the State of an obligation binding upon it, and in the absence of specific primary (or indeed secondary) rules on the question one perhaps should not easily translate problems of factual determination into a system that imposes responsibility without certainty about the breach.

²⁰ The character of the secondary rules on the content of responsibility, 2001 ILC Articles (n 12) Part II, may not be necessarily obvious (the tension is reflected in Chester Brown's monograph on international adjudication where he both includes a chapter on remedies and begins it by stating that '[t]he subject of remedies is not one that fits within the concept of 'procedure'', C Brown, *A Common Law of International Adjudication* (OUP, 2007) 185. An intuitively plausible dividing line could be drawn by reference to automatic or elective consequences of a wrongful act, with continued duty of performance, cessation and non-repetition closely linked to the substantive obligation, while the forms of reparation elected by the State claiming responsibility constituting the content of implementation of responsibility.

²¹ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 para 56.

²² If different primary rules have been breached by different responsible parties, the *Corfu Channel* case suggests that reparation could be accorded for each primary rule separately, n 16; 2001 ILC Articles (n 12) art 47 Commentary 8, with the danger of double recovery for effectively the same injury suffered. If the same primary obligation is in question, in a *Nauru Phosphates*-type situation where the alleged breach is alleged to have been committed jointly, it could be possible to claim the whole reparations from the respondent and leave the sharing of the compensation for further claims between responsible parties. Conversely, where a distinction between factual conduct might be drawn in clearer terms (for example, identifiably separate bombings of separate targets in a *Legality of the Use of Force*-type situation), the general principles invoked by Judge Simma in *Oil Platform* might support an appropriate division of compensation, (n 18) para 73. *De lege ferenda*, when equivalent obligations are imposed on States by different rules (see T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011) 5, reparations for the breach of one might fulfil the obligation of reparation regarding the other one, provided that the interests of the beneficiary under the latter one are taken into

The procedural perspective permits some engagement with the reasons behind the seemingly limited impact that the Court has had both in resolving particular disputes and more elaborating more general propositions of shared responsibility. One explanation would draw upon the diverse tendencies of multilateralisation, fragmentation and proliferation in modern international law.²⁴ The increasing complexity of international disputes arising out of these developments, including on shared responsibility, may be complicated to accurately capture by such institutions as the ICJ, created essentially for resolution of bilateral disputes.²⁵

Still, in substantive terms, disputes about shared responsibility do not necessarily relate to recently created or conceptually innovatory rules or international institutions. While the *Belgium v Senegal* case touched upon the arguably recent phenomenon of proliferation,²⁶ many disputes about shared responsibility arise out of much more mundane and long-established juridical pedigree: *Corfu Channel* dealt with law of the sea and use of force, *Military and Paramilitary Activities in and against Nicaragua* ('*Nicaragua*') and *Legality of Use of Force* with the use of force, and *Nauru* and *FYRM* cases with the operation of long-established institutions. These are not, or at least are predominantly not, challenges raised by innovative projects of law-making, even if the greater judicialisation of dispute settlement in recent years may have raised the question in clearer terms. In procedural terms, a sharpened focus suggests that relatively few procedural challenges are peculiar to shared responsibility: some would be relevant to multilateral disputes more broadly – as in *Monetary Gold Removed from Rome in 1943* ('*Monetary Gold*'), where the issue was not about shared responsibility at all but about coordinated enforcement of responsibility for unrelated wrongful acts²⁷ – or indeed flow from basic limitations

account, see probably consistently with this proposition, *Pad and Others v Turkey* (App no 60167/00) (2007) ECHR 28 June 2007 para 65 (the law of State responsibility has recognised the possible relevance of interests of the beneficiary regarding remedies, albeit for the breach of a single primary rule, see 2001 ILC Articles (n 12) art 48(2)(b)).

²³ See nn 2-3.

²⁴ B Simma, 'From Bilateralism to Community Interest' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217; J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325.

²⁵ Nollkaemper and Jacobs (n 8); Nollkaemper (n 9).

²⁶ Reasonable people might disagree whether the challenges of proliferation are in fact innovatory, M Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford 2011) 259-260.

²⁷ *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and US)* (Preliminary Question) [1954] ICJ Rep 19, 31-33.

applying to any case brought before the Court. The argument will be made in three steps, dealing in turn with the manner in which cases concerning shared responsibility could be brought before the Court (2), the way how such cases could be handled (3), and the challenges raised in such cases by absent parties (4).

Before addressing the procedural matters in detail, a few general words may be said about the actors, processes and rules that influence the manner in which shared responsibility is dealt with by the Court. The broadest contours of the architecture within which the ICJ operates are set by the Charter of the United Nations and the ICJ Statute,²⁸ drafted by States and being in principle capable of being amended in accordance with general law of treaties.²⁹ Within the four corners of the Charter and the Statute, the Court has adopted Rules of the Court³⁰ and Practice Directions that spell out the operation of judicial procedure in greater detail.³¹ Certain procedural implications may follow, as it were, incidentally from the way how the particular primary rules have been drafted, both regarding responsibility in general (for example, regarding admissibility of claims for particular breaches)³² and regarding shared responsibility in particular (for example, regarding the possibility of isolating one aspect of shared responsibility).³³ Important procedural rules and principles are often identified by the Court itself in particular cases, whether spelling out the criteria that may be implicit in the textual expression of the rules (for example, on intervention and proof), developing certain principles of procedural law or relying on inherent powers.³⁴ Finally, the conduct of States in the particular cases might also affect the way how procedural rules are applied either directly (for example, by waiving an objection to admissibility) or indirectly (for example, the narrow reading

²⁸ Charter of the United Nations with the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi.

²⁹ The well-known formulation of the rules on amendments make it questionable whether significant amendments could be successfully made, UN Charter *ibid.* art 108.

³⁰ In accordance with the ICJ Statute (n 28) art 30, Rules of Court (1978) (as amended on 14 April 2005) <www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

³¹ Practice Directions (as amended on 20 January 2009), <www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>. On the legal nature of the Practice Directions, with further references see H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Supplement, 2011: Parts Eleven, Twelve and Thirteen' (2011) 82 *British Ybk Intl L* 1, 7-10.

³² *Belgium v Senegal* (n 7) paras 64-69.

³³ See cases at n 17-18.

³⁴ Inherent powers may, in their own turn, be derived from treaty interpretation, general principles or customary law, C Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *British Ybk Intl L* 195, 222-237; M Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' in I Laird and T Weiler (eds), *Investment Treaty Arbitration and International Law* (JurisNet, 2012) 13-17.

of the *Monetary Gold* principle in the *Jurisdictional Immunities* case may be plausibly linked to the lack of objection by parties and the intervening Greece).³⁵ Overall, the identification of legal arguments that may bear on the particular case of shared responsibility goes with the grain of international law-making and dispute settlement more generally.

2. Bringing Cases Concerning Shared Responsibility to the Court

The possibility of bringing cases concerning shared responsibility to the Court may be considered in two steps, dealing in turn with jurisdiction (2.1) and admissibility (2.2), and in the latter instance particularly focusing on standing. Overall, while cases concerning shared responsibility may be complicated to comprehensively bring to the Court and may be technically complicated in substance, the difference from non-shared responsibility cases mainly appears in descriptive terms of greater likelihood of failing the traditional benchmarks, rather than by raising unique legal issues.

2.1 Jurisdiction

The right of the Court to hear the case has to be determined by reference to its general rules of jurisdiction. As is well-known, the Court's jurisdiction is not derived from any compulsory regime but from consent of the parties, capable of being provided in a number of ways in accordance with the Statute.³⁶ In all these instances, the consent to the Court's jurisdiction would operate in precisely the same manner for cases of shared responsibility as it would for any other disputes. Of course, if the consent is limited to bilateral disputes or disputes where all parties to a multilateral rule are parties to the case (as the effect of some of the reservations to the Optional Clause might be), it would exclude cases regarding, among other matters, shared responsibility.³⁷

³⁵ *Jurisdictional Immunities* (n 6) para 127.

³⁶ ICJ Statute (n 28) arts 35-37; UN Charter (n 28) art 93(2); see K Oellers-Frahm, 'Article 93 UN Charter' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn OUP, Oxford 2012); A Zimmermann, 'Article 35' in *ibid*; C Tomuschat, 'Article 36' in *ibid*; B Simma/D Richemond, 'Article 37' in *ibid*.

³⁷ *Nicaragua Merits* (n 17) paras 42-56; JG Merrills, 'The Optional Clause Revisited' (1993) 64 BYBIL 197, 230-232.

In *ratione personae* terms, the Court's jurisdiction is limited to States.³⁸

Consequently, even if an entity has incurred international responsibility, the Court cannot hear claims against international organisations (for example, NATO³⁹ or the European Union),⁴⁰ entities that are not either not States under international law (Republic Srpska, Palestine or Kosovo) or, if they are States, are not party to the ICJ Statute,⁴¹ or indeed against individuals or corporations. In a descriptive sense, in light of all the limitations, there is a greater likelihood that in a complex dispute with multiple defendants some of them would not be subject to the Court's jurisdiction. Still, to the extent that the claim of shared responsibility fails on one of these grounds, it would be a result of application of general rules.

2.2 Admissibility

Even if the Court has jurisdiction, issues of admissibility of the claim need to be considered. Rules of admissibility similarly flow from the structure of the ICJ and international dispute settlement more generally,⁴² and in most cases the shared responsibility perspective would be of particular interest only if the admissibility objection applies to a claim against one but not another respondent. In a diplomatic protection case raising questions of shared responsibility, one might expect that a successful admissibility objection relating to nationality would almost always lead to a complete failure of the claim (because it would indicate a lack of the legal interest by the claimant State).⁴³ In other hypothetical cases, partially successful admissibility

³⁸ ICJ Statute (n 28) art 34(1); see P-M Dupuy, 'Article 34' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn OUP, Oxford 2012)

³⁹ Serbia and Montenegro brought claims against NATO States, since NATO could not be a respondent, *Legality of Use of Force (Serbia and Montenegro)* (Preliminary Objections) [2004] ICJ Rep 279.

⁴⁰ The *Fisheries Jurisdiction* case illustrates the proposition from the opposite perspective, with Spain bringing a claim in a dispute with Canada, in the handling and management of which the European Union was also heavily involved, *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, paras 12, 20-21, 25, 27, 88.

⁴¹ Unless the exception applies, ICJ Statute (n 28) art 34(2).

⁴² Rules of the Court (n 30) art 79; Y Shany, 'Questions of Admissibility before International Courts' in Sir Hersch Lauterpacht Memorial Lectures Part 3 (1 March 2012) <<http://www.lcil.cam.ac.uk/news/article.php?section=26&article=1760#Video>>.

⁴³ A hypothetical counter-example might be imagined where States A and B incur shared responsibility for injuring national C of State D; D's claim against A is found inadmissible on grounds identical to *Nottebohm Case (second phase) (Liechtenstein v Guatemala)* [1955] ICJ Rep 4; and *Nottebohm* is read as limited to claims by a State of nationality with no real and effective links against a respondent State with real and effective links, and therefore not barring a claim against B with which C has no links (in terms of *Nottebohm*, the claim could be brought against the US; indeed, the hypothetical is not that far-fetched since Guatemala's initial position emphasised precisely that the allegedly unlawful "action taken was attributable to the authorities of the United States", *ibid* 18).

objections might be imagined more readily. The requirement of exhaustion of local remedies may be either satisfied or not applicable in one but not another State incurring shared responsibility. The bringing of the claim might be abusive regarding one but not another State.⁴⁴ Under particular circumstances, a claim might be moot regarding one but not another State.⁴⁵ The claimant might have engaged in inappropriate forum-shopping, parallel proceedings or taken advantage of procedural proliferation in an otherwise abusive manner against one but not the other of the co-responsible entities.⁴⁶ Since the assumption is that shared responsibility has been incurred as a matter of law, a legal dispute would necessarily exist regarding co-responsible entities, but it is conceivable that the scope of the dispute and relationship with political questions could be different. The hypothetical situations sketched above illustrate the general and commonsensical point that admissibility challenges may depend on factors that operate differently regarding different respondents. The one admissibility objection that does relate to shared responsibility (and multilateral disputes more broadly) is about the rights of third States and the *Monetary Gold* doctrine, and will be addressed in chapter 4 below.

The permissibility of bringing claims may also be considered from the perspective of invocation of responsibility. Articles 42 and 48 of the 2001 ILC Articles on State responsibility suggest invocation of responsibility by both injured and non-injured States.⁴⁷ Since the right of invocation depends on the formulation of the primary rule and on the nature of the legal right or interest of the claimant, for the purposes of shared responsibility the distinction could be drawn between cases where the co-responsible States have breached the same primary obligation in the same manner, and where either the primary obligations (for example, *Corfu Channel* and

⁴⁴ While not specifically in relation to admissibility, Pakistan argued that abuse could be manifested in the inconsistent attitude taken regarding settlement of disputes by one State with another State, *Arial Incident of 10 August 1999 (Pakistan v India)* Pleadings CR 2000/1, April 3, 2000 <www.icj-cij.org/docket/files/119/4257.pdf> paras 5-12 (Sir Elihu Lauterpacht).

⁴⁵ *Northern Cameroon (Cameroon v UK)* (Preliminary Objections) [1963] ICJ Rep 15, 36-38. An appropriately formulated claim directed against Nigeria perhaps would not have been without object, *ibid.* 32, 33, 34. In the *Fisheries Jurisdiction*, the Court was not asked to decide whether the apparent settlement of the dispute between Canada and the EU made the Spanish claim without object, (n 40) para 88, but it shows how plurality of parties (albeit injured in this case, rather than responsible) may complicate the determination of mootness of separate claims.

⁴⁶ Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, Oxford 2003) Part III, particularly Chapter 6; Brown *Common Law* (n 20) 240-255; C McLachlan, 'Lis Pendens in International Litigation' (2008) 336 *Recueil des Cours* 209, Chapter IV.

⁴⁷ 2001 ILC Articles (n 12) arts 42, 48; see G Gaja, 'The Concept of an Injured State' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010); G Gaja, 'States Having an Interest in Compliance with Obligations Breached' in *ibid.*

Nicaragua) or manner of their breach (for example, commission and failure to prevent genocide, or commission of torture and failure to extradite torturers) is different. In the first case, in the absence of any exceptional rules *vis-à-vis* particular States,⁴⁸ the claimant would be likely to have standing either against none or against all respondents.⁴⁹ If the obligations or the manner of their breach are different, it is perfectly possible that the claimant would have *locus standi* in some cases but not the others. Overall, shared responsibility might lead to greater technical complexity in bringing cases to the Court (with the *Monetary Gold* doctrine adding another layer of problems), but would not otherwise affect the applicability of traditional legal rules.

3. Handling Cases Regarding Shared Responsibility in the Court

When a case regarding shared responsibility of multiple respondents is brought to the Court, certain challenges might arise in handling the case. As with bringing the case to the Court, most solutions follow from the broader structure within which the dispute settlement in the ICJ takes place. Joinder (3.1) and the appointment of *ad hoc* judges (3.2) may raise some issues peculiar to shared responsibility, and will be dealt with in turn.

3.1 Joinder

Italy in the *Monetary Gold* seems to have been the only claimant to have submitted to the Court a single claim against multiple respondents as part of the same proceedings.⁵⁰ The general practice of States in the ICJ has adopted a different approach,⁵¹ and even claims with close legal and factual connections have been submitted in separate judicial proceedings, whether in plausible shared responsibility cases,⁵² when plurality appeared at the level of invocation,⁵³ or the dispute otherwise

⁴⁸ See n 41.

⁴⁹ *Nauru* (n 21) art 48; 2001 ILC Articles (n 12) art 47(1).

⁵⁰ *Monetary Gold* (n 27).

⁵¹ Interestingly, in the practice in the PCIJ multiple claims were routinely submitted and dealt with in single proceedings, see respectively five, six and four claimants in *S.S. Wimbledon* [1923] PCIJ Rep A No 1 16; *Territorial Jurisdiction of the International Commission of the River Oder* [1929] PCIJ Rep A No 23 5; *Interpretation of the Statute of the Memel Territory* [1932] PCIJ Rep A/B No 49 4 (for an even an earlier example of multiplicity of claimants see *The Venezuelan Preferential Case (Germany, Great Britain, Italy v Venezuela)* (1904) 9 RIAA 99).

⁵² See the applications by the US (*Treatment in Hungary of Aircraft of United States of America (US v Hungary)* (Order) [1954] ICJ Rep 99; *Treatment in Hungary of Aircraft of United States of America (US v USSR)* (Order) [1954] ICJ Rep 103); Libyan applications (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK)* (Preliminary Objections) [1998] ICJ Rep 9; *Questions of Interpretation and Application of the*

affected multiple States.⁵⁴ Consequently, the possibility of a joinder of multiple proceedings becomes important. Article 47 of the Rules of the Court provides the Court with the right ‘at any time direct that the proceedings in two or more cases be joined’, and before their adoption in 1978 the general powers under article 48 of the Statute (‘The Court shall make orders for the conduct of the case ...’) provided the basis for handling the joinder.⁵⁵ Article 47 provides the Court with considerable flexibility in handling such cases. Parties might themselves ask for the joinder.⁵⁶

The Court, both before and after the adoption of its Rules, considers in objective terms whether parties are in the same interest,⁵⁷ the way how arguments are presented, but seems to attribute particular importance to the views of the parties regarding the desirability of the joinder.⁵⁸ In the *Aerial Incident of 27 July 1965* and the *Nuclear Tests* cases, the unwillingness of the parties to accept the joinder may have played a role in maintaining the parallelism of proceedings, and in the *Fisheries Jurisdiction* cases⁵⁹ and the *Legality of Use of Force* cases the Court explicitly noted the opposition by parties.⁶⁰ The *Legality on the Use of Force* and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (‘*Lockerbie*’) are examples of cases where shared

1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US) (Preliminary Objections) [1998] ICJ Rep 115); and last but certainly not least, Serbian applications against NATO members (for example *Legality of Use of Force Belgium* (n 39)).

⁵³ See the claims against Bulgaria (*Aerial Incident of July 27th, 1955 (Israel v Bulgaria)* (Preliminary Objections) [1955] ICJ Rep 127; *Aerial Incident of July 27th, 1955 (UK v Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 264; *Aerial Incident of July 27th, 1955 (US v Bulgaria)* (Order) [1960] ICJ Rep 146); France (*Nuclear Tests (Australia v France)* [1974] ICJ Rep 253; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 457); and Iceland (*Fisheries Jurisdiction (UK v Iceland)* (Merits) [1974] ICJ Rep 3; *Fisheries Jurisdiction (Germany v Iceland)* (Merits) [1974] ICJ Rep 175).

⁵⁴ See the UK’s Antarctica claims (*Antarctica case (UK v Argentina)* (Order) [1956] ICJ Rep 12; *Antarctica case (UK v Chile)* (Order) [1956] ICJ Rep 15).

⁵⁵ HWA Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989 (Part Eleven)’ (2000) 71 BYBIL 71, 164.

⁵⁶ *North Sea Continental Shelf (FRG/Denmark; FRG/Netherlands)* [1969] ICJ Rep 3 para 10. In a number of curious cases the Court joined simultaneous claims of the same parties, Thirlway 2011 (n 31) fn 70.

⁵⁷ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 321; *North Sea Continental Shelf* (n 55) para 10.

⁵⁸ In the *Fisheries Jurisdiction* cases, the fact that ‘joinder would be contrary to the wishes of both parties’ was deemed more important than the identical nature of basic legal issues, *Fisheries Jurisdiction UK* (n 53) para 8; *Fisheries Jurisdiction Germany* (n 53) para 8. As Judges Bedjaoui, Guillaume and Ranjeva put it, ‘[w]hen it comes to joinder, ... the Court sets great store by the wishes of the parties’, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK)* (Preliminary Objections) [1998] ICJ Rep 9, Joint Declaration of Judges Bedjaoui, Guillaume and Ranjeva 32, para 18.

⁵⁹ *Lockerbie UK* Bedjaoui, Guillaume and Ranjeva *ibid*.

⁶⁰ *Legality of Use of Force Belgium* (n 39) para 17.

responsibility was at issue but that were litigated in parallel. While there is certainly a delicate balance to be struck in ensuring efficient and fair administration of justice to all parties,⁶¹ the situation where, say, NATO countries are perfectly happy to bomb another country together but are procedurally permitted to raise questioning eyebrows about the commonality of interests if co-bombors are offered as co-respondents, does not strike one as entirely satisfactory. A better reading of the broad procedural powers might place greater emphasis on the objective criteria rather than wishes of the parties, and address shared responsibility claims within a single proceeding by a single judgment. Such a solution could appreciate the complexities of wrongfulness, responsibility and remedies noted in the introduction, and resolve the interrelationships from contribution to the breach to mutual relevance of different forms of reparations.

3.2 Ad Hoc Judge

The law of joinder is often considered in the context of (and in fact in particular cases so far its chief legal relevance has been for) the appointment of *ad hoc* judges. The *Lockerbie* and the *Legality of the Use of Force* cases clearly posed the question about the delicate appointment of *ad hoc* judges in bilaterally litigated shared responsibility cases. The Court in *Fisheries Jurisdiction* had rejected the appropriateness of appointing a German *ad hoc* judge when Germany had ‘a common interest’ with the UK as a claimant in the parallel case that already had a permanent judge;⁶² in *Lockerbie*⁶³ and in *Legality of the Use of Force*, the Court adopted a different approach and appointed *ad hoc* judges of the particular respondents in the particular cases (when no permanent judges were on the Bench).⁶⁴ In legal terms, the latter cases better fit the language of the Statute (where ‘several parties in the same interest’ in article 31(5) do seem to apply to parties in the same case rather than more broadly), and the underlying concerns about balancing *ad hoc* or permanent judges rest on

⁶¹ See the extensive analysis of commonalities and differences of different aspects of the cases when deciding on consolidation of investment treaty claims, *Corn Products International, Inc. v Mexico* and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v Mexico*, NAFTA Arbitration, Order of the Consolidation Tribunal, 20 May 2005, paras 6-20; *Canfor Corporation v US* and *Tembec et al v US* and *Terminal Forest Products Ltd. v US*, NAFTA Arbitration, Order of the Consolidation Tribunal, 7 September 2005, paras 59-226.

⁶² *Fisheries Jurisdiction (Germany v Iceland)* (Jurisdiction) [1973] ICJ Rep 51 para 7.

⁶³ *Lockerbie* UK (n 52) para 9. Three judges disagreed and argued for the application of the *Fisheries Jurisdiction* principle, see *Lockerbie* UK Bedjaoui, Guillaume and Ranjeva (n 58).

⁶⁴ *Legality of Use of Force* Belgium (n 39) paras 6, 17-18.

questionable assumptions about general judicial independence and integrity of judge of any nationality or mode of appointment.⁶⁵ At the same time, this may be said to reflect the insufficient sensitivity of the ICJ Statute to coherent implementation of shared responsibility. If ‘same[ness] of interest’ becomes relevant in evaluating procedural rights only if the proceedings are joined, and the contrary wish to the parties is sufficient to preclude a joinder even in the presence of an objective sameness, the co-responsible States have a vested interest to compartmentalise dispute settlement to maintain their procedural rights (whatever the institutional or actual value of these rights might be). The preference for compartmentalisation may have further implications regarding the handling and evaluation of evidence presented in parallel proceedings and bearing on co-responsible States. Perhaps the procedurally problematic separate handling of shared responsibility claims that have not been joined might provide an additional reason for the Court, in line with what some authors have described as its ‘diminution of deference towards States’, to step back and rethink the value of retaining the subjective unwillingness of States as a criterion in deciding upon the joinder.⁶⁶

4. Cases Regarding Shared Responsibility and Absent Parties

The absence of co-responsible parties has led the ICJ, whether paradoxically or not entirely surprisingly, into clearer and more explicit engagement with procedural challenges than the presence of these parties. This chapter will address the relevant procedural challenges in three parts. The implications of the *Monetary Gold* doctrine for hearing claims of shared responsibility against one party in the absence of other party are of particular importance in the area. Since *East Timor* resulted in the inadmissibility of a shared responsibility claim, and the shared responsibility claim in *Nauru* was permitted to proceed to the merits only against substantial and strong dissent, the procedural effect of protection of rights of absent parties is of crucial importance for shared responsibility and has been elaborated precisely with these concerns in mind. For the Court, the question is whether the absent State’s ‘legal interests would not only be affected by a decision, but would form the very subject-

⁶⁵ H Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989 (Part Eleven) 2000) 79 *British Ybk Intl L* 71, 163-169; Thirlway 2011 (n 31) 14-19.

⁶⁶ I Scobbie, ‘“Une Heresie en Matiere Judiciare”? The Role of the Judge *Ad Hoc* in the International Court’ (2005) 4 *L Practice Intl Courts Tribunals* 421, 426.

matter of the decision’ – as was the case in *Monetary Gold*⁶⁷ and *East Timor*,⁶⁸ and therefore the cases could not proceed – or whether the decision merely ‘might well have implications for the legal situation’⁶⁹ or even can ‘address the issue from a significantly different viewpoint’, with no bar to the case being heard.⁷⁰ The second and third sub-sections will be exclusively devoted to this issue, dealing in turn with implementation of shared responsibility within the four corners of a traditional *Monetary Gold* and its possible re-reading that would make such implementation more feasible. The first part will relatively briefly sketch the law of intervention, handling of evidence and provisional measures from the perspective of shared responsibility.

4.1 Intervention, evidence and provisional measures

With a limited degree of arbitrariness, one might say that an intervention by, evaluation of evidence regarding and indication of provisional measures against a co-responsible party are located along the spectrum of progressively increasing impact against the absent party, against its wishes. Article 62 of the Court’s Statute permits intervention when ‘an interest of legal nature ... may be affected’,⁷¹ the conciseness of the proposition hiding considerable policy tensions between consent, confidentiality and third party rights.⁷² From the perspective of shared responsibility, an unduly narrow reading of the right of intervention might preclude the co-responsible State from protecting its legal interests, particularly if combined with an equally narrow interpretation of the *Monetary Gold* principle that permits the proceedings themselves. These concerns have not materialised in practice. The concern that confidentiality of pleadings might prevent the third party from appreciating that its legal interests might be affected might have less relevance for shared responsibility where States have contributed to single outcome: one would imagine that in *Nauru*, *East Timor*, *Lockerbie*, *Legality of Use of Force* and *Jurisdictional Immunities* the States not parties in the particular case had a fairly good idea about the gist of the

⁶⁷ (n 2) 32.

⁶⁸ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 para 34.

⁶⁹ *Nauru* (n 21) para 55.

⁷⁰ *Jurisdictional Immunities* (n 6) para 127.

⁷¹ C Chinkin, ‘Article 63’ in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn OUP, Oxford 2012).

⁷² For an extensive overview of legal and policy considerations involved in the law of intervention, see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2001] IC Rep 575, Separate Opinion of Judge Weeramantry 630.

claim and its possible legal relevance for them. The concern about the co-responsible State slipping into the cracks between *Monetary Gold* and article 62 does not seem to have materialised. If anything, the *Jurisdictional Immunities* case shows an implicit synchronisation of both rules, with *Monetary Gold* read narrowly so as not to preclude the case from moving forward when the third party had intervened.⁷³ Overall, in this particular context shared responsibility might be precisely the kind of dispute that would face least problems.

In terms of evidence, there are certain elements of fact-finding that are problematic for claims of shared responsibility where the complexity simply expresses in clearer terms the broader problems of fact-finding in the ICJ and international dispute settlement (for example, problems with forcing an uncooperative party to produce evidence). There are also some cases of shared responsibility where the alleged conduct has been engaged in by multiple entities in situations of considerable factual confusion. For example, in the *Armed Activities* case the claim against Uganda was presented against the fairly chaotic background of the Great Lakes conflict, drawing together a number of inter- and intra-State armed conflicts;⁷⁴ the *Bosnian Genocide* case raised questions about international crimes committed by entities and persons supported but -- as the Court concluded -- not controlled by Serbia⁷⁵ (the *Georgia v Russia* case would have raised similar questions had it proceeded to the merits); and a slightly different version of the evidentiary challenges was presented in the *Israeli Wall* advisory opinion where very sensitive questions about involvement of non-State actors and other States in terrorist activities were debated.⁷⁶ In different ways, the Court was faced with the challenge of deciding on factual and legal questions that only partly followed from the conduct of parties or entities before it. In some cases, the Court could draw upon information provided by independent fact-finders⁷⁷ or other international courts.⁷⁸ Still, the existence of such

⁷³ *Jurisdictional Immunities* (n 6) para 127.

⁷⁴ P Okowa, 'Congo's War: The Legal Dimension of a Protracted Conflict' (2006) 77 BYBIL 203.

⁷⁵ *Bosnian Genocide* (n 18) paras 377-415.

⁷⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 138-142.

⁷⁷ In the *Armed Activities* case, the Court particularly relied on the so-called Porter Report by a Judicial Commission set up by Uganda, *Armed Activities on the Territory of Congo (DRC v Uganda)* [2005] ICJ Rep 168 paras 60-61. In the *Israeli Wall* advisory opinion, the Court relied on different reports by UN Special Rapporteurs, (n 74) para 133.

⁷⁸ In the *Bosnian Genocide* case, the Court extensively relied on the case law of the ICTY, (n 18) para 214-224.

evidence in these cases was merely fortuitous and might not be replicated in other disputes of similar legal nature, raising troubling structural questions about the handling of disputes of such factual complexity. Overall, while cases of shared responsibility might illustrate the evidentiary challenges in particularly clear terms, the challenges are those of evidence in the ICJ (and international dispute settlement) more broadly and would have to be dealt with in terms of those debates.

Finally, provisional measures might also be challenging for shared responsibility in both descriptive and normative terms. One of the necessary conditions for the indication of provisional measures is a *prima facie* jurisdiction,⁷⁹ and the limitations of the Court's powers to decide the case outlined in chapter 2 above might lead to the consequences of provisional measures indicated against some but not all of the co-responsible parties. Still, these are inescapable aspects of consensual jurisdiction. More interestingly, primary obligations might be expressed and the claim presented in such a manner that provisional measures require the respondent State to engage in particular conduct *vis-à-vis* the absent co-responsible States or other entities.⁸⁰ Still, even this is an incidental effect of the provisional measures and, while of factual importance, would not impose new legal obligations on absent parties (of course, even in the absence of provisional measures the absent parties would continue to be bound by primary and secondary rules in question).

4.2 Shared responsibility within Monetary Gold

There are at least five ways how claims of shared responsibility may be presented within the most orthodox four corners of *Monetary Gold*, as elaborated in subsequent case law. First, a case may be heard where claims against the respondent and (possible) claims against third States are made under different primary rules that are not substantively conditioned by each other.⁸¹ In *Nicaragua*, the US invoked

⁷⁹ See most recently *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Request for the Indication of Provisional Measures) [2011] ICJ Rep para 49.

⁸⁰ For example, the prohibition of permitting one's territory to be used to harm other States in *Corfu Channel*, or the more recent examples of prevention of genocide, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* (Order) [1993] ICJ Rep 3 para 52; or racial discrimination, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* (Order) [2008] ICJ Rep 353 para 149.

⁸¹ Andre Nollkaemper describes this category as 'concurrent independent wrongful acts', A Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' ASIL Research Paper No 2011-01 (SHARES Series)18-20.

Monetary Gold because States through whose territory it had allegedly used force against Nicaragua were absent from the proceedings. The Court dismissed this objection, apparently accepting the Nicaraguan argument that it had not challenged the right of States to receive assistance from the US.⁸² In *Nicaragua*, primary rules breached by the US and rules possibly breached by the neighbouring States of Nicaragua were different and not dependant on each other. In the *Armed Activities on the Territory of Congo* case, the Court could consider Congo's claims against Uganda despite the hostilities between Uganda and Rwanda forming the background to some allegations because Rwandan interests were neither the subject-matter of the case nor a prerequisite for deciding against Uganda.⁸³ In the *Certain Properties* case, Germany invoked *Monetary Gold*, arguing that Liechtenstein's claim about the breach of its right as a neutral in classifying its property as German for the purposes of settlement of claims with Czechoslovakia necessarily presupposed wrongfulness of Czechoslovakia's conduct. The Court dismissed the claim on another basis but the Judges who did consider the point noted that the claims, while related, were legally distinguishable and could be decided independently.⁸⁴ These cases illustrate the basic point that interrelated conduct by different actors may raise different legal issues, and, to the extent that these issues are not dependent upon one another, *Monetary Gold* does not exclude a claim relating to only one particular issue.

Secondly, primary rules may impose obligations on States to react in a certain manner to the conduct of third States; as the Commentaries to the 2001 ILC Articles put it, 'a State may be required by its own international obligations to prevent certain conduct by another State, or at least or prevent the harm that would flow from such

⁸² *Nicaragua Jurisdiction* (n 17) paras 86-88.

⁸³ *Armed Activities* (n 79) para 204.

⁸⁴ *Certain Property (Liechtenstein v Germany)* (Preliminary Objections) [2005] ICJ Rep 6, Dissenting Opinion of Judge Kooijmans 29 para 34 ('With respect to *this* claim, the Beneš Decrees are mere facts, the legality or illegality of which are *not* the subject-matter of the dispute', emphasis in the original); Dissenting Opinion of Judge Owada 47 para 56 ('In light of the subject-matter of the dispute ... consisting in the question whether, by applying article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that has been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of its obligations it owed to Liechtenstein, it would be seem difficult to argue that the Application in question relates to a case in which the legal interest of a third State constitutes the "very subject-matter" of this dispute'); Dissenting Opinion of Judge *ad hoc* Berman 70 para 26 ('the settlement of that dispute does not in any sense require the Court first to pronounce on whether the Beneš Decrees as such, or particular confiscations undertaken pursuant to any of those Decrees, were or were not lawful (in the particular sense of infringing the rights of Liechtenstein under international law)').

conduct'.⁸⁵ The conduct of third States would be relevant not for the purpose of establishment of wrongfulness of third States but only as one consideration in establishing the degree of compliance with the original primary rule. It is not unusual to formulate obligations in these terms: in the classic international law on the treatment of aliens, States had obligations to protect aliens from attacks by third private parties and to punish the perpetrators.⁸⁶ The same principle applies to cases when the conduct to which the State has to react has been engaged in by a different State. As the Commentary explains, 'responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State'.⁸⁷

The application of the principle may be illustrated by two cases. In the *Corfu Channel* case, Albania had breached its obligations 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.⁸⁸ To the extent that 'acts contrary to the rights of other States' would be committed by other States (and while the Court did not conclusively determine who had engaged in these acts, it was not suggested that the mining could have been done by non-State entities) a 'necessary precondition' of Albanian responsibility was an internationally wrongful act by a third State. At the same time, because responsibility of a third State operated only as a criterion of Albania's primary obligation, the Court could consider the argument. In *Bosnian Genocide*, the Court considered the argument that Serbia had breached its obligation to prevent genocide. The Court noted that 'the Genocide Convention is not the only instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit'.⁸⁹ Had the entity in question also been a State, it is arguable that in line with *Corfu Channel* the Court could have still examined the question: in *Corfu Channel*, the obligation was not to permit State A to injure State B; in the hypothetical case, the obligation would be not to permit State A to commit genocide. In both scenarios, the wrongfulness of the third State would be relevant not *per se* but only as an element of the primary obligation.

Thirdly, the conduct of third States might also become relevant as a matter of secondary rules. One of the UK arguments for Albanian responsibility in the *Corfu*

⁸⁵ 2001 ILC Articles (n 12) 64 para 4.

⁸⁶ E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) Chapter V.

⁸⁷ 2001 ILC Articles (n 12) 64 para 4.

⁸⁸ *Corfu Channel* (n 17) 22.

⁸⁹ *Bosnian Genocide* (n 18) para 429.

Channel case was that there was ‘either ... a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines’. In the *East Timor* case, Judge Shahabuddeen explained why the consideration of this argument was in line with *Monetary Gold*:

By its suggested request or acquiescence, Albania would make Yugoslavia’s acts its own; it would be by making Yugoslavia’s acts its own that it would engage international responsibility. In effect, proof of the mines having been laid by Yugoslavia would be part of the factual material evidencing the commission of acts by Albania which independently engaged its international responsibility.⁹⁰

In terms of the 2001 ILC Articles, Judge Shahabuddeen’s argument might be read in at least three ways. It might fall under the rule of article 6 relating to the conduct of an organ placed at the disposal of a State by another State that is considered an organ only of the former State. If that is the case, *Monetary Gold* does not apply because the organ of the Yugoslav State is *in casu* (only) an organ of Albania. The case against Yugoslavia may be considered because it will lead only to Albanian responsibility. Alternatively, ‘acquiescence’ might fall under article 11 relating to acknowledgment and adoption of the conduct in question. If that is the case, the situation is slightly more complicated because the attribution by acceptance does not necessarily exclude attribution to the original actor. A possible response might be that the adopted conduct would only be relevant for the purpose of attribution, and responsibility of the respondent would be established by examining the binding primary rule. Since the two necessary criteria for establishing responsibility are attribution and breach, the Court would not be ruling on the responsibility of the third State because its breach would not be considered (particularly if the breach would have occurred under a different primary rule). Finally, perhaps ‘the request for assistance’ falls under article 16 that deals with aid and assistance. The Commentaries to the 2001 ILC Articles note possible problems with the *Monetary Gold* in the scenario where a judicial claim is brought against the State aiding or assisting.⁹¹ However, the converse situation – bringing the claim only against the State that has been assisted – does not have the same problem because

⁹⁰ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, Separate Opinion of Judge Shahabuddeen 119 [34].

⁹¹ 2001 ILC Articles (n 12) art 16 [11]. See further discussion of situations where claims against the complicit State might still be considered, Aust (n 18) Chapter 6.

additional criteria have to be satisfied under article 16 and therefore no automatic conclusions about responsibility can be made.

Fourthly, the breach might have been committed jointly with other States. In the *Nauru* case, the claim was brought against Australia and related to the conduct of the Administrative Authority that was jointly formed by Australia, New Zealand and the United Kingdom. The Court rejected the Australian objection that relied on the *Monetary Gold* (arguing that there would a simultaneous determination of responsibility of New Zealand and the UK) because ‘no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia’.⁹² This is fairly narrow application of *Monetary Gold* doctrine to shared responsibility. As the dissenting Judges noted: in terms of primary rules, treaty instruments of Australia, New Zealand and the UK showed ‘the inextricable involvement of the legal interests of those two States in the matter’;⁹³ in terms of attribution, Australia always acted on behalf of New Zealand and the UK in the joint Administrative Authority and therefore ‘its acts engaged or may have engaged not only its responsibility ... but those of its “Partner Governments”’;⁹⁴ and in terms of reparations, any decision of the Court would ‘unavoidably and simultaneously be making a decision in respect of legal interests of those two other States’.⁹⁵ Whether by determining the share of responsibility or requiring Australia to share it, ‘the Court will, *inevitably*, affect the legal situation of the two other States, namely, their rights and obligations’.⁹⁶

The *Nauru* case suggests that a claim may be heard even if the same primary rules in question bind absent States; even if the rules bind them in relation to the same factual and legal matrix; even if attribution of the conduct to the respondent would simultaneously attribute it to third States; even if the decision on the respondent’s conduct will simultaneously establish the wrongfulness of the absent States; even if the decision on reparations will affect the legal rights and obligations of the absent States *vis-à-vis* the claimant and the respondent. It is difficult to imagine a situation

⁹² (n 21) para 55.

⁹³ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, Dissenting Opinion of President Sir Robert Jennings 301, 301-302.

⁹⁴ *Ibid* Dissenting Opinion of Judge Schwebel 329, 342. See similarly H Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989’ (1998) 69 BYBIL 1, 50.

⁹⁵ *Ibid* Dissenting Opinion of President Sir Robert Jennings 301, 301-302.

⁹⁶ *Ibid* Dissenting Opinion of Judge Ago 326 [6] (emphasis in the original).

where legal rights of third States acting together with the respondent might be *more* directly affected. In the *Legality of Use of Force* cases where Yugoslavia sued several NATO States, the objection of indispensable third parties was made by Italy (though not considered by the Court) but seemed to be more directed at the vagueness of particular claims rather than the inevitable determination of responsibility.⁹⁷ As Judge Simma noted in the *Oil Platforms* case, *Nauru* case ‘applies with even greater strength’ ‘where two States contributed to a single, indivisible damage without having acted in concert’.⁹⁸ Where the respondent has directly engaged international responsibility, (almost) no kind of impact of this determination on absent States will preclude the Court from deciding the case.

Finally, in the *East Timor* case, the fall-back argument of Portugal, as summarised by the Court, ‘rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal’.⁹⁹ At this point it is sufficient to note that the Court in principle accepted the argument that in such cases *Monetary Gold* would not apply but rejected it *in casu* because the specific resolutions ‘cannot be considered as “givens” which constitute a sufficient basis for determining the dispute between the parties’.¹⁰⁰

Legal issues could be considered as ‘givens’ in a number of situations: most obviously legal issues might be ‘given’ when they have been determined by *res judicata*. In the *Monetary Gold* case itself, in the second question the Court was asked to decide on the priority of the Italian claim on the basis of confiscation and the UK claim on the basis of Albanian failure to comply with the *Corfu Channel* judgement.¹⁰¹ Neither the parties nor the Court found this aspect of Albanian responsibility problematic, presumably because international responsibility and its remedial implications had been already resolved by an adjudicator to which Albania had consented. The ‘given’ nature of the legal issues might follow from other rules

⁹⁷ *Legality of Use of Force (Serbia and Montenegro v Italy)* Pleadings CR 2004/22, April 22, 2004 <www.icj-cij.org/docket/files/109/4349.pdf> 15 paras 10-25 (Luigi Sico on behalf of Italy) paras 34-35..

⁹⁸ *Oil Platforms* Simma (n 19) 361.

⁹⁹ (n 21) para 31.

¹⁰⁰ *Ibid* para 32.

¹⁰¹ *Monetary Gold* (n 2) 33.

and regimes. In the *East Timor* case itself, the Portuguese argument was based on resolutions of the Security Council and the General Assembly of the United Nations.¹⁰² ‘Givens’ might also apply to an express acknowledgment of the breach by the State itself.¹⁰³ The broader principle underlying this exception would be an existing individual determination of the breach or its remedial consequences that might be discussed regarding its scope and content but not regarding its existence. Finally, some issues may be taken as ‘givens’ when they are part of common knowledge. In the *Oil Platforms* case, Judge Simma noted that ‘any finding by the Court as to Iraq’s behaviour would only rely on common knowledge and there would be no need for additional evidence (ie, proving that, because of the war, Iraq, like Iran, contributed to the deterioration of the shipping conditions in the Gulf)’.¹⁰⁴ Judge Simma’s statement might fall under other exceptions to *Monetary Gold* – factual not legal issues, or legal issues but of peripheral relevance – but may also suggest an additional exception of a broader nature.

4.3 Shared responsibility beyond *Monetary Gold*

While shared responsibility might be implemented within the four corners of *Monetary Gold*, sometimes – as was the case in *East Timor* and was almost the case in *Nauru* – the objection may prove insurmountable. Moving beyond orthodoxy, there might be six plausible avenues to pursue to limit the impact of *Monetary Gold* on shared responsibility.¹⁰⁵ First, *Monetary Gold* may be read not as a separate doctrine of inadmissibility due to absent third States but as a run-of-the-mill application of the traditional doctrine of lack of jurisdiction in the absence of consent by the potential respondent. The multiplicity of present and absent parties and the variety of legal

¹⁰² The *Larsen* Tribunal described this aspect of ‘given’ as ‘an authoritative decision of the Security Council of the point’, *Larsen v Hawaiian Kingdom*, UNCITRAL Arbitration, Award, February 5, 2001, (2002) 119 International Law Reports 566, 588 [11.24]. The qualification ‘authoritative’ is ambiguous and probably includes ‘binding’ but is not limited by it.

¹⁰³ M Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) 79 BYBIL 264, 338-339, giving the example of *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v US) (Mexico v US)* (Request for the Indication of Provisional Measures) [2008] ICJ 311 para 76.

¹⁰⁴ (n 19) para 88.

¹⁰⁵ Replaying the debate about the correctness of *East Timor* is not one of them. Only two Judges (one of them the *ad hoc* Judge) thought that the claim could be heard. The Court’s subsequent case law shows little willingness to explicitly abandon *East Timor*: quite to the contrary, in two of the recent cases to touch upon *Monetary Gold*, *East Timor* is the only other case to be cited, *FYRM* (n 5) para 43; *Jurisdictional Immunities* (n 6) para 127.

issues in the background¹⁰⁶ may obscure the point that the first question asked to the Court was about a claim by Italy against Albania about its international responsibility.¹⁰⁷ The US, France and the UK were parties to the case in light of the broader post-War financial settlements; the UK was also interested in the priority between its claims and the possible Italian claims. If one untangles the legal arguments and leaves aside France, the UK and the US – that were involved only as creators of the broader post-War settlement – and the UK – that was involved as a possible competitor with an *arguendo* successful Italy – the real case was only between Italy and Albania.¹⁰⁸ Indeed, this is precisely how the Court explained its ruling itself, proclaiming nothing innovative but merely relying on the ‘well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent’.¹⁰⁹ In light of this, *Monetary Gold* could be said to be perfectly irrelevant for thinking about third States, instead being just one of many cases decided in 1950s where the Court had no *ratione personae* jurisdiction because of the lack of respondent’s consent.¹¹⁰ The conclusions in subsequent cases (with the exception of *East Timor*) do not contradict this reading. Were one to adopt this approach, it would be sufficient for the

¹⁰⁶ See generally DHN Johnson, ‘The Case of the Monetary Gold Removed from Rome in 1943’ (1955) 4 ICLQ 93, 96-100. Some of the issues of the case related to (1) The status of the gold found in Germany by Allied forces that according to Part III of the 1945 Final Act of the Paris Conference on Reparation was to be pooled together and then distributed to States to which it ‘belonged’; (2) The alleged breach of international law by the Albanian confiscation of the assets of the (Italian-owned) National Bank of Albania; (3) The non-compliance by Albania with its obligation to compensate the UK in accordance with the Court’s judgment in the *Corfu Channel* case, [1949] ICJ Rep 244; (4) The question about the State to which the gold removed from Rome ‘belonged’ submitted to Arbitrator Sauser-Hall who concluded that it belonged to Albania, *Affaire relative à l’or de la Banque Nationale de l’Albanie (US, France, Italy, UK)* (1953) 12 RIAA 13; (5) The priority between the UK and the Italian claims for (a share of) Albanian gold.

¹⁰⁷ Tomaso Perassi explained the Italian position in the final round of pleadings in the following terms: ‘L’objet de la demande italienne est très concret et concerne essentiellement un Etat qui n’est pas présent au procès et qui n’a pas donné, de quelque manière que ce soit, son consentement à ce que la Cour juge s’il a ou non commis le fait illicite dont il s’agit’, *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and US)* ICJ Pleadings 163.

¹⁰⁸ The relative lack of interest by other States is illustrated by the absence of the US from the oral proceedings and the brevity of Gros’ arguments on behalf of France, *ibid* 121-123, as compared to Italian pleadings, *ibid* 106-120, 156-164, and UK pleadings, *ibid* 124-155, 165-174.

¹⁰⁹ (n 27) 32; similarly A Orakhelashvili, ‘The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from *Monetary Gold* to *East Timor* and Beyond’ (2011) 2 J Intl Dispute Settlement 373, 380.

¹¹⁰ *Anglo-Iranian Oil Co. (UK v Iran)* (Jurisdiction) (1952) ICJ Rep 93; *Treatment in Hungary of Aircraft of USA (US v Hungary)* (Order) (1954) ICJ Rep 99; *Treatment in Hungary of Aircraft of USA (US v USSR)* (Order) (1954) ICJ Rep 103; *Ariel Incident of March 10th, 1953* (Order) (1956) ICJ Rep 6; *Aerial Incident of October 7th, 1952 (US v USSR)* (Order) (1956) ICJ Rep 9; *Antarctica (UK v Argentina)* (Order) (1956) ICJ Rep 12; *Antarctica (UK v Chile)* (Order) (1956) ICJ Rep 15; *Aerial Incident of July 27th, 1955 (Israel v Bulgaria)* (1959) ICJ Rep 127.

respondent to be properly subject to the Court's jurisdiction, and the involvement of third States would not be a relevant factor.

Secondly, the submission of the dispute to the Court may be said to have been carried out in an abusive manner. As was suggested above, from the four parties to the case, two (France and the US) had no legal interest at all, and the interest of the UK depended on the success of the Italian claim against Albania. It seems plausible to say that there was no genuine dispute, and parties had tried to create its appearance to gain access to a particular forum.¹¹¹ The US objected to such conduct as an impermissible abuse of process¹¹² in the proceedings relating to the interpretation of the *Avena* judgment.¹¹³ The (particular) relevance of *Monetary Gold* to dismissal of artificial disputes is illustrated by the *Larsen v Hawaiian Kingdom* case where it was applied: in the absence of a genuine dispute *inter se*, parties essentially asked the Tribunal to pronounce on the lawfulness of the US 19th century and subsequent conduct in Hawaii.¹¹⁴ From this perspective, *Monetary Gold* might be read, similarly to the contemporaneous *Nottebohm*,¹¹⁵ as a dismissal of the claim on the implicit basis of abuse of process,¹¹⁶ and therefore not applicable to cases where a genuine dispute exists between the parties. Once again, the subsequent decisions (except *East Timor*) do not contradict this reading. If one were to adopt this position, the proper criterion would be the existence of a genuine dispute between the parties that have consented to the dispute.

A third distinguishing factor of *Monetary Gold* might lie in the inevitable enforcement implications of the claim. The Italian claim was not limited to a

¹¹¹ To put the point in more abstract terms, 'States A and B agree to ask the Court to decide whether some particular conduct of State C is or is not in accordance with international law', Thirlway (n 96) 38.

¹¹² On abuse of process more generally see Brown *Common Law* (n 20) 245-250; C Brown, 'The Relevance of the Doctrine of Abuse of Process in International Adjudication' (2010) 7 *Transnational Dispute Management* 6-12; Paparinskis 'Inherent Powers' (n 34) 27-31.

¹¹³ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v US)* Pleadings CR 2008/15, June 19, 2008 <www.icj-cij.org/docket/files/139/14592.pdf> 48 paras 10-25 (Vaughan Lowe on behalf of the US).

¹¹⁴ *Larsen v Hawaiian Kingdom*, UNCITRAL Arbitration, Award, February 5, 2001, (2002) 119 *International Law Reports* 566, 588 [11.8]-1[1.24]; see also Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 35) 337-338.

¹¹⁵ *Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Rep 4.

¹¹⁶ For a reading of *Nottebohm* along these lines see RD Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 *Harvard J Intl L* 1.

declaratory judgment but asked specifically for compensation.¹¹⁷ Since the Albanian gold could be used to fulfil such an obligation, the determination would inevitably lead to Albanian loss of its gold to Italy (or the UK). Similarly, in Judge Shahabuddeen's reading of *East Timor*, 'Indonesia would be deprived of concrete benefits to which it is entitled under the Treaty, including possible financial benefits, in much the same way as the judgment requested in *Monetary Gold* would have deprived Albania of its right to the property involved in that case'.¹¹⁸ The real rationale of *Monetary Gold* might then be identified by reference to reparations: if deciding upon the claim inescapably leads to determination and enforcement of remedies against the absent State, the case cannot proceed; if determination and application of compensation is not inevitable, the case might proceed to the merits. *Monetary Gold* and *East Timor* represent the first category, while the possibility to reserve reparations to the merits stage permitted *Nauru* to proceed further. In the *Certain Properties* case, Judge Kooijmans seemed to be drawing a similar distinction between a declaratory judgment that did not affect the legal interests of third States and a claim for compensation that might affect them.¹¹⁹ To put the distinction on a more principled basis, a declaratory judgment merely confirms the pre-existing international law rules without adding anything; and enforcement of remedies goes much further than that. From this perspective, *Monetary Gold* could be evaded by presenting the claim in purely declaratory terms that would confirm the existence of primary rules and their possible breach without directly or indirectly drawing compensatory consequences from that.

A fourth and broader question relates to the subjects that might be protected by the *Monetary Gold* doctrine. A narrower reading of *Monetary Gold* would find its rationale in the protection of non-consenting parties: it would apply to situations where subjects that might in principle have consented to the Court's jurisdiction (ie, States) have not in fact consented to it. A broader reading would also consider due process and rights of other subjects of international law: the doctrine would then apply to all entities that are bound by international law and whose international

¹¹⁷ 'L'Italie demande que la Cour déclare : 1^o que la loi albanaise du 13 janvier 1945 constitue un fait internationale illicite; 2^o que la sanction de ce fait illicite est la responsabilité de l'Albanie comportant obligation pour celle-ci de réparer les dommages qui en sont découlés pour l'Italie; et 3^o d'évaluer ces dommages,' *Monetary Gold Pleadings* (n 34) (Perassi on behalf of Italy), see also pleadings cited at n 38.

¹¹⁸ *East Timor Shahabuddeen* (n 20) 124.

¹¹⁹ *Certain Property Kooijmans* (n 14) [34]-[36].

responsibility might be established¹²⁰ (in a manner similar to States).¹²¹ President Schwebel suggested the latter reading in the *Lockerbie* case.¹²² The question about the responsibility of NATO and *Monetary Gold* has been seemingly accepted in principle both by the parties¹²³ and the Court in the *FYRM* case.¹²⁴ The solution is attractive in policy terms: if international organisations can breach international law, incur international responsibility and provide reparations, it would be odd to say that *Monetary Gold* should be decided differently if the third party whose gold is being disposed of by the Court were an international organisation. Still, to approach the issue in positive terms, the lack of any procedural misgivings about the examination of how Republika Srpska and its individuals agents were engaged in genocide in the *Bosnian Genocide* case suggests that the list of protected absent entities should not be expanded beyond the limited extension to international organisations, operating akin to States.

A fifth argument returns to the Portuguese argument in *East Timor* that legal issues taken as ‘givens’ might constitute an exception to *Monetary Gold* noted above.

¹²⁰ Nollkaemper poses the question in similar terms – describing the possible rationales as sovereign equality for the narrower approach and quality of decision-making for the broader approach – and prefers the former reading, (n 83) 24-25.

¹²¹ Criminal responsibility of individuals, responsibility of guerrilla groups and non-recognised States might also interrelate with the application of the law of responsibility, Nollkaemper (n 83) 44-48. The substantive and procedural rights and privileges of these actors raise a whole host of further questions of other fields of international law that would have to be addressed elsewhere. To take the *Bosnian Genocide* case as an example, one way of framing the query might be this: if Bosnia Srpska was sufficiently similar to a State to make the rule on aid or assistance expressed in article 16 of the 2001 ILC Articles applicable by analogy, *Bosnian Genocide* (n 18) [420], is it also sufficiently similar to benefit from *Monetary Gold*?

¹²² *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v US)* (Preliminary Objections) [1998] ICJ Rep 115, Dissenting Opinion of President Schwebel 172. One is tempted to link President Schwebel’s due process concerns about lack of hearing of interested parties to his earlier criticism of the Court’s refusal to grant a hearing to the (unsuccessfully) intervening El Salvador, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Declaration of Intervention) [1984] ICJ Rep 215, Dissenting Opinion of Judge Schwebel 223.

¹²³ Greece argued that to decide on the claim would be to decide on the lawfulness of conduct of other NATO’s members and NATO, *Application of the Interim Accord of 13 September 1995 (FYRM v Greece)* Pleadings CR 2011/9, March 25, 2011 <www.icj-cij.org/docket/files/142/16380.pdf> 15 paras 19-22 (Pellet), CR 2011/12, March 30, 2011 <www.icj-cij.org/docket/files/142/16390.pdf> 22 paras 26-33 (Reisman). Claimants denied it but did not explicitly challenge the proposition that the argument about NATO might fall under the *Monetary Gold* doctrine, responding under the heading that ‘L’exercice par la Cour de sa compétence ne la contraindrait pas à se prononcer sur les droits ou obligations d’Etats ou d’entités tiers à l’instance’, CR 2001/5, March 21, 2011 <www.icj-cij.org/docket/files/142/16362.pdf> 62, also 65 para 17 (Klein); CR 2011/11, March 28, 2011 <www.icj-cij.org/docket/files/142/16386.pdf> 42 paras 12-13 (Klein).

¹²⁴ The Court rejected the *Monetary Gold* objection by noting *inter alia* that ‘the rights and obligations of NATO and its member States other than Greece do not form the subject matter of the decision of the Court on the merits of the case’, (n 5) para 43.

This conflated two issues: the clarity of a particular legal issue on the one hand and the determination of rights, obligations and responsibilities of an absent State on the other hand. It is perfectly possible that the questions of the content of the primary obligation, its breach and remedial implications are clear-cut and already determined by some other entity. However, that does not affect the fact that the subject-matter of the case that has not been submitted to the Court. To accept the doctrine of ‘givens’ as a limitation to *Monetary Gold* seems to introduce a consideration of different qualitative nature, relying on the nature of the substantive issue to exclude procedural safeguards. Judge Shahabuddeen rightly pointed out that ‘the Court would be barred by the *Monetary Gold* principle from acting *even if* Portugal’s interpretation of the resolutions were correct ...’¹²⁵ It is hard to fault the logic of this passage. However, the Court did not follow this root, arguably replacing the formula of procedural safeguards with or at least subjecting it to a rule based on the very different premise of clarity of the substantive issue. From the perspective of shared responsibility, the doctrine of ‘givens’ provides an avenue for reconstructing the procedural safeguards through clarifying the primary rules in general and their applicability to specific instances in particular through different international regimes.

A sixth argument would look at the post-*East Timor* case law to find an implicit but substantively clear overruling. One authority may be sought in the *Jurisdictional Immunities* case. It is very complicated to see how a claim about the wrongfulness of a domestic enforcement of a foreign judgment granted by a wrongful denial of State immunity of a third State can be decided without ruling on the chronologically and logically anterior lawfulness of the foreign judgment.¹²⁶ While it might be important that neither Greece nor Italy made the challenge in these terms, the Court did not treat the lack of objections as a legally relevant factor. At the very least, this is a very narrow re-reading of *East Timor*, rendered precisely in a shared responsibility case.

It is probably the case that the ‘well-established principle of international law’,¹²⁷ that the Court elaborated in *Monetary Gold* goes back to *Eastern Carelia* where the PCIJ refused to give an advisory opinion in the absence of Russia’s

¹²⁵ *East Timor* Shahabuddeen (n 20) 124 (emphasis in the original).

¹²⁶ *Jurisdictional Immunities* (n 6) para 127.

¹²⁷ (n 2) 32.

consent.¹²⁸ Leaving aside the question about the appropriateness of transposing to contentious cases a principle from advisory proceedings where the Court has special discretion,¹²⁹ the more recent developments in advisory proceedings might support a rethinking of *Monetary Gold*. One argument that has often been raised against the application of *Monetary Gold* (and has always been rejected) is that third States would not be bound by the judgment of the Court as a matter of *res judicata*. Perhaps it would be possible to restate the argument in slightly different terms so as to say that the position of absent third States would be identical to that of States whose responsibility is evaluated in answering questions in advisory proceedings. For example, in the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* case, the Court considered in detail the lawfulness of Israeli conduct and the implications of its wrongfulness.¹³⁰ The Court's advisory opinion was not binding on Israel as a matter of *res judicata* but it was certainly important in legal terms to the extent that it explained the content of pre-existing and otherwise binding primary and secondary rules of international law. It would not be implausible to suggest that the legal situation of an absent third State in contentious proceedings is affected in a similar manner: there is no (new) obligation imposed on it to comply with the judgment as a matter of *res judicata*, and to the extent that the Court has elaborated the content of its obligations it does not add anything (assuming that the Court's views are correct) to the scope of the obligations that would otherwise exist. If the Court has considered it appropriate to adopt an extensive view of its right to pronounce on obligations and responsibility of States in advisory proceedings, this practice should *a fortiori* apply to contentious cases where the Court does not have the discretionary powers of refusing to render advisory opinions.

5. Conclusion

Procedural aspects of implementation of shared responsibility in the ICJ raise a number of legal issues that should be evaluated with some nuance. Shared responsibility, with its certain peculiar features and challenges, is part of the general law of State responsibility. Many of the procedural challenges are unremarkable in

¹²⁸ 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement', *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Rep B No 5 27; Johnson (n 108) 105; *Oil Platforms* Simma (n 19) fn 95.

¹²⁹ Johnson (n 108) 105.

¹³⁰ [2004] ICJ Rep 136 [86]-[132].

conceptual terms and reflect the broader judicial architecture of the Court, if often raising descriptively interesting questions because of their factual complexity. Aspects of access to the Court and handling of absent States (apart from the protection from their rights) fall under this rubric. Other challenges have been shown in the case law to be of particular importance for shared responsibility, even though the particular legal issue might be *mutatis mutandis* relevant to other multilateral disputes like plurality of invocation of responsibility. Handling of cases within the Court and protection of rights of absent parties belong to this group. Overall, shared responsibility does raise certain peculiar challenges and one hopes that future developments will display greater sensitivity to these matters. In particular, positive law permits certain improvements, particularly regarding joinders and *Monetary Gold*, and one again hopes that the appreciation of the systemic perspective would lead to gradual reordering of these rules.