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Organizations and their Member States**

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To Share or Not to Share?

The Allocation of Responsibility between International Organizations and their Member States

Christiane Ahlborn*

Abstract:

This paper will discuss the costs and benefits of sharing responsibility between states and international organizations for their own internationally wrongful acts. Rules on shared responsibility are sparse in the existing law of international responsibility as codified by the International Law Commission (ILC). The emphasis of the law of international responsibility lies on exclusive responsibility and, as discussed in chapter 2 of this paper, on the attribution of wrongfulness to states and international organizations, strong reasons speak in favor of emphasizing the independence of the responsible actors. By distinguishing wrongfulness from responsibility, however, it will be argued in chapter 3 that independent wrongful acts will not necessarily lead to exclusive responsibility. A number of recent cases have illustrated that shared responsibility is a frequent outcome of the cooperation between states and international organizations. Nonetheless, such shared responsibility seems to come with more costs than benefits. Injured parties, in particular, are often left without a remedy when potential wrongdoers shift the buck of responsibility between them. In order to reduce the costs caused by shared responsibility of states and international organizations, this paper therefore advocates for the recognition of a principle of joint and several responsibility in international law, which would allow for the balancing of the different interests of injured and responsible parties.

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1. Introduction

Shared responsibility for climate change, shared responsibility for failure to intervene in countries whose populations suffers from massive human rights violations, or shared responsibility for refugee flows.¹ These examples illustrate that shared responsibility is an important topic in international law that has received more and more attention over the past years. The reasons for this increase in situations of shared responsibility in international law are manifold and cannot be discussed in detail here. The most obvious reason is the increasing interdependency between states and other actors in international relations that has changed the face of the international legal order.² This interdependency has resulted from global challenges that can only be solved by means of international cooperation. Shared responsibility might then lead to situations in which different actors cooperate to deal with global problems. Different strategies exist to channel the risks that accompany international cooperation. One frequent strategy is the establishment of international organizations that regulate the internal relations between the cooperating actors, notably states. Most international organizations have more or less sophisticated dispute settlement structures that take care of responsibility-related issues among its members.

Against this background, it is not surprising that international organizations themselves were considered “by their very nature, [to] normally behave in such a manner as not to commit internationally wrongful acts”.³ However, more recent times have seen a surge in cases of wrongful acts by international organizations, which is certainly related to the expansion of activities of international organizations. International organizations such as the EU, UN or various smaller organizations have committed wrongful acts, not under the rules of the

¹ For a broader discussion of issues in international law that might involve shared responsibility see André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, (2012-2013) 34 *Michigan Journal of International Law* 359, at 361-362.

² *Ibid.*, p. 370ff., discussing interdependence, moralization, heterogeneity, and permeability as underlying dynamics for the increase in situations of shared responsibility.

³ ILC Commentary on 13 Article of the ASR on first reading (conduct of organs of an international organizations). UN Doc. A/CN.4/L.528 [and Corr.1] and Add.1-3 [and Add.3/Corr.1] (1996), at 66 (para. 3). See also Shabtai Rosenne, *The International Law Commission’s Draft Articles on State Responsibility* (1991), at 131. See also Jan Klabbbers, ‘The Changing Image of International Organizations’, in Jean-Marc Coicaud and Veijo Heiskanen, *The Legitimacy of International Organizations* (2001), 221-255.

organization, but against third parties.⁴ Such wrongful acts by international organizations raise a number of new questions regarding shared responsibility, in particular whether the corporate veil of an international organization should be lifted so that member states can be held responsible for the acts of the organization. Despite the immediate attractiveness of this argument, however, strong policy considerations speak against a piercing of the corporate veil of international organizations. Although such piercing would provide injured parties with a remedy, the prospect of incurring responsibility for acts of the international organization may represent a disincentive for states to invest into institutional cooperation in the future.⁵ Unsurprisingly, it is difficult to find examples of piercing the corporate veil of an international organizations since the (in)famous *International Tin Council* and *Westland Helicopter* cases.⁶

Instead of discussing the possibility of piercing the corporate veil of an international organization, this paper will focus on shared responsibility between states and international organizations for their own internationally wrongful acts. Of course, shared responsibility is also a notoriously challenging topic because rules on shared responsibility are sparse in the existing law of international responsibility as codified by the International Law Commission (ILC). The emphasis of the law of international responsibility lies on exclusive responsibility and, as discussed in Section 2 of this paper on the attribution of wrongfulness to states and international organizations, strong reasons speak in

⁴ On the rules of the organization see Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', (2011) 8 *International Organizations Law Review* 397-482.

⁵ As Hartman notes with regard to domestic law: "Thus, the courts are torn between two competing policies the necessity of limiting liability to promote growth of the corporate style of doing business and the desire to do justice in a particular case." Patricia Hartman, 'Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough', (1981-1982) 13 *Pacific Law Journal* 1245-1272, at 1248.

⁶ *Maclaine Watson & Co. Ltd v. International Tin Council*, 26 October 1989, United Kingdom House of Lords, 81 ILR 670; *Westland Helicopters Ltd and Arab Organization for Industrialization*, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company, Arbitration, 5 March 1984, 80 ILR 600; *Arab Organization for Industrialization and others v. Westland Helicopters Ltd*, Swiss Federal Supreme Court (First Civil Court), 19 July 1988, 80 ILR 652. For a recent discussion of the piercing of the corporate veil of international organizations see Odette Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organisation', (2011) 8 *International Organizations Law Review* 291, and Cedric Ryngaert and Holly Buchanan, 'Member State Responsibility for Acts of International Organizations', (2011) 7 *Utrecht Law Review* 131-146.

favor of emphasizing the independence of responsible parties. By distinguishing wrongfulness from responsibility, however, it will be argued in Section 3 that independent wrongful acts will not necessarily lead to exclusive responsibility. A number of recent cases have illustrated that shared responsibility is a frequent outcome of the cooperation between states and international organizations. Nonetheless, such shared responsibility seems to come with more costs than benefits. Injured parties, in particular, are often left without a remedy when potential wrongdoers shift the buck of responsibility. In order to reduce the costs caused by shared responsibility of states and international organizations, this paper therefore advocates for the recognition of a principle of joint and several responsibility in international law, which would allow for the balancing of the different interests of injured and responsible parties.

2. Attributing Wrongfulness to States and International Organizations

Responsibility is usually based on wrongful conduct, or wrongfulness, and the law on international responsibility is no exception in this regard. As Article 2 (b) of the Articles on State Responsibility (ASR) and Article 4 (b) of the Articles on the Responsibility of International Organizations (ARIO) prescribe “there is an internationally wrongful act of a State [international organization] when conduct consisting of an action or omission [...] constitutes a breach of an international obligation of the State [international organization]”.⁷ Besides the breach of an international obligation, the law of international responsibility also provides for a second element of the so-called internationally wrongful act: the attribution of conduct.⁸ In fact, while the breach of an international obligation is undoubtedly “the very essence of an internationally wrongful act” as the “source of international responsibility”,⁹ to quote Roberto Ago, the attribution of conduct forms the center piece of most the scholarly discussion and court decisions on the responsibility of states and international organizations. In this context, it has

⁷ *ILC Report, Fifty-Fourth Session*, UN Doc. A/57/10 (2002), 228–236, and *ILC Report, Sixty-Third Session*, UN Doc. A/66/10 (2011), 50–170.

⁸ *Ibid.* Article 2(a) of the ASR and Article 4(a) of the ARIO.

⁹ Third Report of the Special Rapporteur on State Responsibility, Roberto Ago, *ILC Yearbook* (1971), Vol. II (Part 1), at 220 (para. 63).

remained unclear how attribution of conduct and the breach of an international obligations are linked in the process of determining international responsibility.¹⁰

Section 2 will explain that the relationship between attribution and breach is decisive for understanding the prevalence of the principle of exclusive responsibility in international law, which has made it difficult to accommodate notions of shared responsibility. It will be submitted that the principle of exclusive responsibility is essentially due to the essentially independent nature of the attribution of conduct. Attribution essentially serves as a tool to connect conduct with an acting legal person, thus making corporate legal personality effective for purposes of international law (1). While the attribution of conduct thus underlines the autonomous existence of the international organization, it does not exclude that one of the same conduct is also attributed to another subject of international law. Despite this multiple attribution of conduct, the result will still be independent wrongful acts – and not to the same internationally wrongful act – since obligations are owed individually (2).

2.1 Attribution as a Means to Connect Personality and (Wrongful) Conduct

In international legal scholarship, the attribution of conduct is frequently associated with wrongful conduct. However, the role of attribution of conduct is not confined to the law of international responsibility. The necessity of having rules on the attribution of conduct arises from the fact that states and international organizations are corporate actors, and need natural persons (or other corporate entities) to act on their behalf. The state or international organization “as an acting person is not a reality but an auxiliary construction of legal thinking”.¹¹ As such, states and international organizations do not have hands and minds of their own and therefore necessarily depend on natural persons (or other entities) to act on their behalf. To put it differently, the

¹⁰ On the unclear relationship between the two elements of the internationally wrongful act see Brigitte Stern, ‘The Elements of an Internationally Wrongful Act’, in Crawford et al. (eds.), *The Law of International Responsibility* (2010), 193-220, 201-202.

¹¹ Hans Kelsen, *Pure Theory of Law. Translation from the (Enlarged and Revised) German Ed. By Max Knight* (1967), 292.

attribution of the conduct of natural persons to corporate actors is crucial for their very existence.

The determination of the legal personality of corporate entities is evidently not a problem specific to international law. Domestic legal systems have tried to regulate the relationship between corporate legal persons and the entities acting on their behalf in terms of the law of agency (or representation).¹²

Notwithstanding the uses of the concept of agency in other disciplines,¹³ agency in law could be defined as a “consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other”.¹⁴ Agency presupposes that an agent acts on behalf of a principal (the effects of the acts of the agent directly extend to the principal) who remains in control of the agent’s acts.¹⁵ The concept of control thereby refers to consent by the principal given to the acts, including his power of revoking, diminishing and enlarging the powers granted to the agent, and is one of the foremost reasons for responsibility of the principal.¹⁶

Although the rules on the attribution of conduct are generally not portrayed in terms of agency, they are reminiscent of the pertinent domestic law rules on agency in many ways.¹⁷ In the ILC model of international responsibility, for instance, the rules on the attribution of conduct are clearly based on different notions of control. While the text of the ILC Articles only explicitly refers to

¹² It goes without saying that the law of agency is also important in relationships between natural persons.

¹³ See, for instance, Darren G. Hawkins et al. (eds.), *Delegation and Agency in International Organizations* (2006); Mark Pollack, ‘Delegation, Agency and Agenda Setting in the European Community’, (1997) 51 *International Organization* 99-134; Roland Vaubel, ‘Principal-Agent Problems in International Organizations’, (2006) 1 *Review of International Organizations* 125-138; Karen J. Alter, ‘Agents or Trustees? International Courts in their Political Context’, (2008) 14 *European Journal of International Relations* 33-63.

¹⁴ Warren A. Seavey, ‘The Rationale of Agency’, (1920) 29 *Yale Law Journal* 859-895, at 868.

¹⁵ Note that moral philosophy applies the term agent to individual because the natural person has the power to change his legal position.

¹⁶ See Seavey, *supra* note 14, FN 29, arguing that control “is offered merely as a suggestion for practical use. The word ‘control’ may be analytically improper as not falling within recognized categories. It is used here to indicate the legal coercion capable of being exercised by the principal through his power of revoking, diminishing, or enlarging the powers granted the agent, the agent being under the correlative liability of having this power exercised; which distinguishes the relation of agency from that of trustee and cestui and of contractors.”

¹⁷ See James Crawford, *The Creation of States in International Law* (2007), 63 (FN119) explaining that “the ILC Articles on State responsibility avoid the terminology of agency but allow that one State may be responsible for the conduct of another in several contexts”.

“effective control” in several instances (Article 8 of the ASR and Article 7 of the ARIO), legal scholarship has advanced the concept of institutional or normative control that a state exercises over its organs.¹⁸ Accordingly, the concept of institutional or normative control is implied in the general rule on attribution of conduct to the state (Article 4 of the ASR) or international organization (Article 6 of the ARIO) and in all attribution rules concerning the relationship between a state or international organization and its organs.

The main difference between attribution of conduct, generally, and the attribution of conduct in the specific field of international responsibility, is then the element of wrongfulness. In the former case conduct is rightful, whilst in the latter case conduct is wrongful. Accordingly, it is submitted that the attribution of conduct has a broader role to play in connecting conduct with a legal person.¹⁹ Legal personality can be defined as the capacity to be bearer of right and obligations. In turn, obligations are standards of conduct that legal persons must comply with (i.e. what to do and what not to do). The attribution of conduct to a particular entity such as a state or international organization thus underscores the legal personality of that entity. In other words, the attribution of rightful or wrongful conduct plays a crucial role in showing that the state or international organization exists as a constituted legal entity. It is thus at the level of international legal personality that the attribution of conduct connects with the breach of an international obligation. Only if an actor has the obligation to act in a certain way, can that conduct be then attributed to that actor. In a way, the attribution of conduct to an entity effectively illustrates that its legal personality is more than just an empty shell.

¹⁸ See, for instance, Francesco Messineo, ‘Multiple Attribution of Conduct’, (2011) *SHARES Research Paper* 11, at 36, referring to control based on institutional links; Antonios Tzanakopoulos, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions* (2011), 40; Frank Hoffmeister, ‘Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’ (2010) 21 *European Journal of International Law* p. 746, at 727, and Christiane Ahlborn, *supra* note 4, at 450ff., speaking of “normative control”.

¹⁹ As Anzilotti observed: “Et nous prenons ici le mot imputer exclusivement dans son sens général, c’est-à-dire en tant qu’il signifie l’attribution d’un acte à un sujet donné; nous n’avons pour l’instant aucun égard aux motifs, au fondement de l’imputabilité. L’imputabilité, ainsi comprise, exige le concours de deux conditions: a) la capacité de droits et de devoirs juridiques chez l’agent; b) une relation entre l’agent et le fait qu’on veut lui attribuer.” Dionisio Anzilotti, ‘La Responsabilité internationale des états à raison des dommages soufferts par des étrangers’, (1906) 13 *Revue générale de droit international public* 5–29 and 285–309, at 286.

With regard to the legal personality of international organizations (but also states), the importance of the attribution of conduct in the determination of legal personality could nonetheless be challenged. According to a popular view in international legal scholarship, the legal personality of international organizations is attributed by their member states either implicitly or explicitly in the constituent instruments.²⁰ This view has become known as the ‘will theory’, which argues that the attribution of legal personality of an international organization is entirely in the hands of its member states. Despite its popularity, however, the will theory has been countered by what could be called the ‘objective theory’ of the legal personality of international organizations. The objective theory makes the attribution of legal personality dependent on the fulfillment of objective conditions.²¹ In this regard, the most important criterion for legal personality is the existence of an organ with a distinct will that is separate from its constituent parts.²²

It is beyond the scope of this paper to discuss the advantages and disadvantages of the respective approach in detail. In view of the foregoing discussion, however, it must be recognized that the attribution of the international legal personality to an international organization is not entirely in the discretion of its member states. It is primarily third parties that attribute conduct to the international organization and not to other legal persons, in particular not to its member states.²³ Such third parties may include court and tribunals dealing with wrongful acts by the international organization, but also other states or subjects of international law that conclude treaties or enter into diplomatic relations with the international organization. The attribution of conduct thus underlines the separate or autonomous existence of the international organization from its member states. Accordingly, it is not surprising that some international

²⁰ See Jan Klabbbers, *Introduction to International Institutional Law* (2009), 47 on the point that this is the more popular theory.

²¹ The most well-known proponent of this theory is probably Finn Seyersted in *The Common Law of International Organizations* (2008).

²² The point of view that the possession of an organ with autonomous is a condition for the international legal personality of international organizations is well accepted. See Schermers and Blokker, *International Institutional Law* (2011), 44; Klabbbers, *supra* note 20, at 11; Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (2009), 478.

²³ This is not to say that member states cannot act as third parties vis-à-vis the organization in certain circumstances.

organizations such as the EU have asserted their own responsibility in certain dispute settlement such as that of the World Trade Organization.²⁴ As Pellet succinctly notes, “the fact that any given entity can incur responsibility is both a manifestation and the proof of its international legal personality.”²⁵

2.2 Multiple Attribution of (Wrongful) Conduct to States and International Organizations

While the independent attribution of conduct is crucial in establishing legal personality of corporate entities, it seems to be difficult to reconcile with the attribution of the idea that the same conduct can be attributed to different actors. Speaking in terms of the law of agency, can one and the same agent act on behalf of different principals? The traditional law of international responsibility hardly ever had to deal with scenarios of multiple attribution of conduct. It functioned under the assumption that the state acts through its organs that were usually not subject to the control of other states or subjects of international law. Even in situations allowing for multiple attribution of conduct, the ILC envisaged means to identify the specific actor. Article 6 of the ASR, for instance, concerns the attribution of conduct of an organ of one state that is lent to another state. Although Roberto Ago acknowledged the possibility that the lent state organ could be under the control of several entities, he made clear that it could be established that “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.”²⁶ In his view, only one state could exercise “genuine and exclusive authority”.²⁷

²⁴ In *European Communities – Customs Classification of Certain Computer Equipment*, the European Community declared that it was “ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States”. Unpublished document, cited in *ILC Report, Sixty-Third Session*, UN Doc. A/66/10 (2011), 50–170, at 95.

²⁵ Alain Pellet, ‘The Definition of International Responsibility in International Law’, in James Crawford et al. (eds.), *The Law of International Responsibility* (2010), 3 at 4.

²⁶ Third Report of the Special Rapporteur on State Responsibility, Roberto Ago, *ILC Yearbook* (1971), Vol. II (Part 1), at 268 (FN 401).

²⁷ *Ibid.*, (para. 201).

The view of the ILC's Special Rapporteur is consistent with the function of the rules on the attribution of conduct to connect conduct with legal personality. However, it seems to stand in contrast with views expressed on the multiple attribution of conduct in international legal scholarship and case law pertaining to international organizations.²⁸ A case for multiple attribution of conduct has been made with regard to military operations under the auspices of an international organization but also with regard to implementing acts by member states of international organizations. Examples of the former category include the cases of *Behrami and Saramati v. France and Norway*²⁹ and *Al-Jedda v. United Kingdom*³⁰ before the European Court of Human Rights and *Nuhanovic v. the Netherlands*³¹ before Dutch courts. All of these cases concern the question whether the conduct of military personnel acting on behalf of the United Nations was attributable to the UN or to the respective member states sending the personnel. All of the courts concerned opted for attribution of conduct to either the UN or the member states, but some courts even acknowledged, albeit implicitly, the possibility of dual attribution of conduct.³²

While multiple attribution of conduct seems to be compelling in cases of peacekeeping, it is even more compelling in situations in which member states are involved in the decision-making of an international organization. When

²⁸ See also Giorgio Gaja, 'The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations', (2013) SHARES Research Paper 25, explaining at p. 2 that "a shared or divided attribution' is not excluded by the articles on responsibility of international organizations or, for that matter, by the articles on State responsibility".

²⁹ *Behrami and Behrami v. France* (Application No. 71412/01) and *Saramati v. France, Germany and Norway* (No. 78166/01), 2 May 2007, European Court of Human Rights (Grand Chamber).

³⁰ *Al-Jedda v. United Kingdom* (Application no. 27021/08), European Court of Human Rights (Grand Chamber), 7 July 2011.

³¹ *Hasan Nuhanovic v. the Netherlands*, Court of Appeal in The Hague, Civil Law section (5 July 2011), LJN: BR5388; 200.020.174/01; ILDC 1742 (NL 2011), English translation: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388>; and *Mehida Mustafic-Mujic, Damir Mustafic, and Alma Mustafic v. the Netherlands*, Court of Appeal in The Hague, Civil Law section (5 July 2011) LJN: BR5386; 200.020.173/01, English translation: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386>.

³² *Al-Jedda* case, *supra* note 30, at 80 (see Marko Milanovic, 'Al-Jedda and Al-Skeini in Strasbourg', (2012) 23 *European Journal of International Law* 121-139, at 136); *Nuhanovic and Mustafic* case, *supra* note 31, para. 5.9 (as discussed by Bérénice Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanovic* and *Mustafic*: the Continuous Quest for a Tangible Meaning of 'Effective Control' in the Context of Peacekeeping', (2012) 25 *Leiden Journal of International Law* 521-535, at 529).

acting in organs of international organizations, states – or rather their representatives in the form of natural persons – wear different hats. They are decision-makers but they also remain subjects of other legal orders to the extent that they are bound by the respective obligations. As Higgins succinctly noted, “[t]he members of the Security Council are, at one and the same time, both participants and decision-makers”.³³ Since states inevitably use the applicable law differently, depending on the role they play, Article 27 of the UN Charter thus provides that states are to abstain from voting when the Council settles a dispute to which they are a party. Although the provision is hardly ever applied,³⁴ it illustrates awareness for the different roles that states can play in organs of international organizations.

In its recent work on the responsibility of international organizations, the ILC has become more amenable to the concept of multiple attribution of conduct “although it may not occur frequently in practice”.³⁵ However, it remains to be clarified how multiple attribution of conduct is to be brought in line with the role of attribution in establishing autonomous legal personality. It is submitted here that the answer to this question lies in the fact and international organizations are bound by different sets of international obligations. These obligations prescribe when conduct – or more generally, an event – can be attributed to them. The conduct of the legal person only materializes in relation to the respective obligation. In brief, international organizations (member) states are bound by their own obligations, which constitute them as international legal persons. Even if they are bound by the same obligation, they are bound separately because they are autonomous legal persons vis-à-vis each other. Since obligations are owed individually, even multiple attribution of conduct will lead to single internationally wrongful acts. Against this background, the reliance of the ILC model of international responsibility on the “same internationally wrongful act”, as discussed below, is a rather ambiguous. The most cogent interpretation would

³³ See Rosalyn Higgins, ‘The Place of International Law in the Settlement of Disputes by the Security Council’, (1970) 64 *American Journal of International Law* 1-18, at 1-2.

³⁴ Higgins explains that this rare application has two reasons: first, the difficulties in deciding when states are involved in a dispute or not; and second, the deliberate labeling of disputes as “situations” or issues under Chapter VII of the UN Charter to avoid the application of the provision. Higgins, *supra* note 33, at 1-2.

³⁵ *ILC Report, Sixty-Third Session*, UN Doc. A/66/10 (2011), 50–170, at 81 (para. 4).

be that states are bound by the same obligation and by breaching it may commit the same internationally wrongful act (at the same time) but independently.

3. Allocating Responsibility between States and International Organizations

The law of international responsibility has a strong bias towards exclusive responsibility. Article 1 stipulates that “[e]very internationally wrongful act of a State entails the international responsibility of that State”, which has been interpreted as the responsibility of that state for its own conduct.³⁶ As one of the conditions of the internationally wrongful act, the independent attribution of conduct supports this bias towards exclusive responsibility, which makes it difficult to accommodate notions/concepts of shared responsibility.³⁷ Arguably, even the rules on the responsibility of a state/international organization in connection with the act of another state/international organization could be construed in terms of independent attribution of conduct.³⁸ However, while the internationally wrongful act – or wrongfulness – is necessarily an independent phenomenon, the same conclusion cannot be drawn with regard to responsibility. As noted by way of introduction, responsibility frequently involved multiple actors, leading to so-called shared responsibility.

Therefore, it is suggested here to distinguish wrongfulness from responsibility. Although often equated with wrongfulness, responsibility is a distinct concept. Indeed, the ILC defines responsibility as the “new legal relations arising by reason of the internationally wrongful act” between the responsible and the injured parties.³⁹ Responsibility is thus not the internationally wrongful act, but the consequence or result of the internationally wrongful act, in particular the

³⁶ See Nollkaemper and Jacobs, *supra* note 1, at 381.

³⁷ *Ibid.*, at 381ff.

³⁸ A discussion of these rules is beyond the scope of this paper. Its commentary to chapter V of Part I of the ASR, the ILC explains “the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II [on attribution of conduct].” *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, ILC Yearbook 2001, Vol. II (Part 2) [*hereinafter: ASR Commentary*], at 65 (para. 7). For a different view see Nataša Nedeski and André Nollkaemper, ‘Responsibility of International Organizations “in Connection with Acts of States”’, (2012) 9 *International Organizations Law Review* 32-52.

³⁹ *ASR Commentary*, at 32 (para. 1)

duty to repair or reparation. The confusion between wrongfulness and responsibility is at least partly related to the ILC's well-known decision to dismiss damage as a basis for responsibility. In drafting the ASR and DARIO, the ILC departed from the classical private law-oriented model of responsibility, which includes three elements: the wrongful conduct, injury and the causal link between them.⁴⁰ The decision to dismiss damage as a ground for international responsibility was related to the politicized attempts to codify rules on the treatment of aliens under Special-Rapporteur Garcia-Amador, but has since been celebrated as a "revolution" in the law of international responsibility.⁴¹ Responsibility is objective and does not depend on the subjective invocation by the injured party anymore. Whether or not damage is required to establish responsibility is left to the primary rules and not the secondary rules on responsibility.

Leaving aside the problems with the distinction between primary and secondary rules,⁴² the following discussion challenges the dismissal of damage as a ground for international responsibility with specific regard to shared responsibility between member states and international organizations.⁴³ It will be discussed how several independently wrongful acts may result in shared responsibility. Accordingly, independent wrongfulness on the part of different actors does not necessarily lead to exclusive responsibility. For this purpose, it is firstly necessary to understand how damage is connected with wrongful conduct. It is argued that this connection is typically established by means of causation: The internationally wrongful act causes damage, giving rise to responsibility or the duty to repair (1). Unlike wrongfulness, responsibility thereby shifts the focus to

⁴⁰ For a discussion see Stern, *supra* note 10, at 220f.

⁴¹ According to Pellet, 'Ago's revolution' is most evident in Article 1 of the ASR, which simply states "[e]very internationally wrongful act of a State entails the international responsibility of that State", without any reference to injury. See Pellet, *supra* note 25, at 76-77.

⁴² For a general critique of the distinction, see also Alexander Orakhelashvili, *Peremptory Norms in International Law* (2006), pp. 80ff. The limits of the distinction were even acknowledged by Roberto Ago himself in his Statement at the 1519th Meeting of the ILC, ILC Yearbook (1978), Vol. I, at 240 (para. 27).

⁴³ For a broader challenge to the ILC decision to dismiss damages see in particular Brigitte Stern, 'A Plea for 'Reconstruction' of International Responsibility Based on the Notion of Legal Injury', in Maurizio Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 93-106, and Julio Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility', in Maurizio Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 7-21.

the injured party to which this duty is owed. In some situations, several internationally wrongful acts by states and international organizations may cause the same damage to one or more injured parties. However, it is only in a situation in which this damage is indivisible that we can possibly speak of shared responsibility *strictu sensu*. From the perspective of the injured party, shared responsibility *strictu sensu* poses substantial challenges to the allocation of international responsibility between different actors (2).⁴⁴ In situations of indivisible damage, it is therefore suggested that the principle of joint and several responsibility may be useful to allocate responsibility appropriately.

3.1 Causation as a Means to Translate Wrongful Conduct into Damage

Across legal systems, causation plays a crucial role in establishing responsibility.⁴⁵ This crucial role of causation is particularly accentuated when responsibility is understood as the duty to repair damage that results from wrongful conduct. In this context, the wrongdoer is only responsible if and to the extent that he or she has caused the damage. Causation thus functions as a connecting operation between wrongful conduct and damage that justifies the imposition of a duty to repair, i.e. responsibility. While it is controversial whether or not responsibility has a reparative or corrective element across different areas of law,⁴⁶ international responsibility is still generally understood as the duty to repair damage.⁴⁷ Accordingly, it is not surprising that causation serves to establish the “customary requirement of a sufficient link between

⁴⁴ The term ‘shared responsibility *strictu sensu*’ to describe responsibility for indivisible damage is borrowed from Nollkaemper and Jacobs, *supra* note 1, at 367.

⁴⁵ In fact, it has been dubbed to be “a universal mechanism by which the law, as a philosophy and science, determines accountability”. Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006), 288.

⁴⁶ See, for instance, the discussion in David Wood, ‘Retributive and Corrective Justice, Criminal and Private Law’, (2005) 48 *Scandinavian Studies in Law* 542-582. According to the view of the ILC, the law of international responsibility does not fall within any, the law of international responsibility does not distinguish between criminal, contractual, and delictual responsibility anyways. See the ASR Commentary, at 55 (para. 5).

⁴⁷ According to the ILC, even the new remedies provided for in Article 31 of the ASR (cessation and guarantees and assurances of non-repetition), which are not classified under ‘reparation’, “are aspects of the restoration and repair of the legal relationship affected by the breach”. ASR Commentary, at 88 (para. 1).

conduct and harm”, to adopt ILC terminology.⁴⁸ As the basic provision on reparation (Article 31 of the ASR and Article 31 of the ARIO) stipulates: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Article 31 of the ASR prescribes the traditional principle that every state has to make reparation for the injury caused, which was most influentially formulated by the PCIJ in the *Chorzow Factory* case.⁴⁹

However, references to causation in the ILC rules on international responsibility are not confined to the traditional understanding of causation in relation to damage. Causation is referred to in a number of provisions relating to attribution in Part One of the ILC model of responsibility. Particularly chapter IV on the responsibility of a state/international organization in connection with the act of another state/international organization uses causal standards. In its introductory commentaries to this chapter, the ILC explicitly points out that “the articles in this chapter [...] establish a specific causal link between that act and the conduct of the assisting, directing or coercing State.”⁵⁰ Moreover, Article 18 of the ASR and (Article 16 of the ARIO) explicitly provides that a state is internationally responsible for coercing another state to commit an act if “the act would, *but for the coercion*, be an internationally wrongful act of the coerced State”. Although the formulation chosen by the ILC could admittedly simply indicate that coercion is a necessary element of Article 18 of the ASR,⁵¹ it could equally be meant as a reference to the “but-for” test of causation,⁵² which also quite prominently figures in domestic case law.

The references to causation both in the chapters on attribution of conduct and reparation are by no means coincidental. The attribution of conduct and the causation of damage have many structural parallels. Both attribution and causation concern the question whether or not a particular event can be

⁴⁸ ILC Yearbook (2000), Vol. I (Part I) UN Doc. A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1, at 27 (para. 97).

⁴⁹ *Chorzow Factory Case* (Germany v. Poland), Jurisdiction (1927) PCIJ Rep. Series A, No. 9, at 21.

⁵⁰ ASR Commentary, at 65 (para. 9).

⁵¹ I am thankful for this insight to André Nollkaemper and Ilias Plakokefalos.

⁵² See James Crawford, *State Responsibility: The General Part* (2013), 421.

connected with an outcome. Both attribution and causation thereby rely on the available facts but are ultimately normative connecting operations because they assess these facts against the background of legal rules and principles. The applicable standard of attribution or causation thereby depends on the substantive rule of law in question.⁵³ In other words, the standards of attribution and causation are rule-specific, which is not to say that different areas of law do not use similar standards of attribution and causation. These standards help to determine whether or not event can be connected with outcome. All in all, the terms attribution and causation can be – and have been – used interchangeably in practice. It is quite common to speak of the attribution of damage to an actor or, in turn, the causation of wrongful conduct by an event.⁵⁴

Nonetheless, problems arise when causation and attribution are used interchangeably, leading to the omission of one operation in lieu of the other. Considering the general importance of attribution of conduct for the establishment of corporate legal personality, it is often causation that is neglected or omitted in the law of international responsibility.⁵⁵ For this reason, it must be emphasized that attribution and causation take place at different stages in the process of establishing international responsibility and that they fulfill different purposes. The attribution of conduct is concerned with connecting the act of an agent with the principal. The process of the attribution of conduct seeks to establish whether a principal had sufficient control over his agent's actions or omissions to commit an internationally wrongful act. In contrast, causation deals with the question whether that wrongful conduct caused a legally proscribed

⁵³ See ASR Commentary, at 39 (para. 4), explaining “In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.” And Peter Cane, *Responsibility in Law and Morality* (2003), 141: “Thus, the content of the obligation breached by the relevant conduct defines the nature of the relevant causal connection between that conduct and the outcome; and causal principles play an important part in allocating the burden of circumstantial luck.”

⁵⁴ In its commentary on Article 16 on aid and assistance, for instance, the ILC speaks of “a specific causal link between that act and the conduct of the assisting, directing or coercing State”. ASR Commentary, at 65 (para. 8). Arguably, the terminology of ‘attribution of damage’ to an actor is more typical in legal discourse than that of ‘causation of conduct’.

⁵⁵ The exception in this regard is Tal Becker who argues that agency, as the underlying conception of the attribution of conduct, is “merely one category of responsibility for the acts of another that is causally based” and argues that it is “possible to consider alternative responsibility regimes that need not be tied to agency conceptions”. Becker, *supra* note 45, at 286.

outcome.⁵⁶ For purposes of responsibility, this legally proscribed outcome is typically damage. The attribution of conduct thus precedes the inquiry into causation of damage. It is only if the corporate legal person had the capacity to commit the wrongful act in question, based on control over his or her own conduct (i.e. the conduct of his or her agent), that responsibility for the outcome caused may be established.⁵⁷ In order to keep these different stages apart, it is helpful to use different terminology.

In the absence of material damage, however, it could still be argued that a causal analysis following the attribution of wrongful conduct is unnecessary. Material damage manifests itself, for instance, in the form of economic loss or physical harm. In this context, causation serves to link the wrongful conduct with the damage, which is to be addressed in terms of restitution and particularly compensation. In contrast, it is much more problematic to find an appropriate role for causation in cases of non-material damage. Such non-material damage is typically – but not exclusively – addressed by remedies such as restitution or satisfaction. Particularly declaratory judgments, declaring the breach of an international obligation as a form of satisfaction to the injured party, are quite common in international law (much more common than monetary compensation),⁵⁸ which may be related to the lack of strong international law enforcement. Causation does hardly ever explicitly figure in such an analysis, which may explain some of the lack of attention given to causal analysis in the law of international responsibility more generally.⁵⁹ Considering the fact that

⁵⁶ See Cane, *supra* note 53, at 115. See also Jane Stapelton, ‘Choosing what we mean by “Causation” in the Law’, (2008) 73 *Missouri Law Review* 433-480, at 440 explaining: “Here lawyers are at a considerable advantage relative to philosophers because the legal project is always focused and specified: was it A who stabbed B? Did the lie that C told A prompt A to stab B? And so on.”

⁵⁷ See Cane, *supra* note 53, at 116.

⁵⁸ As Gray observes, a “high proportion of the international arbitral tribunals were established to deal with claims for damages for injury to foreign nationals. Indeed this formed the largest single class of claims. [...] the remaining tribunals were, almost exclusively, charged with giving their interpretation of international law rather than awarding remedies for its violation. They gave declaratory judgements stating the law. Of these, 85 tribunals handled boundary disputes or questions of title to territory. Remedies other than damages for breaches of international law are rare.” Christine Gray, *Judicial Remedies in International Law* (1987), 11. For a more recent discussion see Christine Gray, ‘The Different Forms of Reparation: Restitution’, in Crawford et al. (eds.), *The Law of International Responsibility* (2010), 589-597.

⁵⁹ As a matter of fact, causal analysis figures especially in cases that concern material damage, most notably investment arbitration. Stanimir A. Alexandrov and Joshua Robbins, ‘Causation in

non-material damage is/could be considered implicit in the breach,⁶⁰ such lack of causal analysis does certainly not come as a surprise.

Nonetheless, it is submitted here that causation has a role to play in cases of non-material damage. More specifically, it underlines the distinction between wrongfulness from responsibility and shifts the analytical focus from the wrongdoer to the injured party that has suffered an injury and may seek an appropriate remedy.⁶¹ Moreover, the causation of damage is a much more flexible concept than the attribution of wrongful conduct. The latter is essentially a binary standard: either the conduct is attributable to an actor or not. In contrast, causation of non-material and/or material damage may occur in different degrees. Damage must be sufficient to constitute an injury, i.e. an interference with legally protected interests, but can go beyond that minimum threshold.⁶² As a result, responsibility for that damage may exist in different degrees and incumbent on different or multiple wrongdoers, as expressed in different remedies that target the wrongful conduct.

3.2 Concurrent Causation of Damage by States and International Organizations

The main role of causation in the legal context is to allocate responsibility to specific actors. While causation certainly plays an important role in situations involving only one potential wrongdoer, it is particularly relevant in cases of shared responsibility, namely by assigning secondary obligations of reparation to the multiple wrongdoers. In some instances, however, the allocation of

International Investment Disputes', (2008-2009) *Yearbook of International Investment Law & Policy*, 317–345.

⁶⁰ Special Rapporteur Ago himself stated in his second report that it “perfectly legitimate in international law to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of a right”. Second Report of the Special Rapporteur on State Responsibility, Roberto Ago, ILC Yearbook (1970), Vol. II (Part 1), at 192 (para. 46). In fact, Anzilotti had already pointed out: “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 protégé, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l’intérêt appartient”. Anzilotti, *supra* note 19, at 13.

⁶¹ See Cane *supra* note 53, at 196 on this point.

⁶² See also A. M. Honoré, ‘Causation and Remoteness of Damage’, in Andre Tunc (ed.), *International Encyclopedia of Comparative Law* (1983), para. 1, stating that “the damage must amount in law to injury, i.e., it must be of a sort which it is the policy of the legal system to compensate, and must be adequately delimited”.

responsibility to a specific actor is not possible; the damage is literally indivisible.⁶³ The classic scenario of such concurrent causation of conduct is that in which two hunters negligently shoot at a third person at the same time, causing physical harm to his eye. Since both hunters were acting simultaneously, it is not possible to identify the responsible person.⁶⁴ Indivisible damage is also very well-known in environmental law where several wrongdoers contribute to pollution of water or air.

Although such scenarios are also conceivable in international law, situations involving damage caused by an international organization and its member states do not seem to fall into these well-known categories of indivisible damage.⁶⁵ International organizations and their members do not usually act simultaneously and their acts are usually clearly identifiable. For instance, an international organization will make a decision, which is then implemented by one or more of its members. While the member states might act at the same time, the different acts of the international organizations take place successively. In this context, the implementing act can clearly be separated from decision-making. Responsibility will then depend on applicable obligations to both the international organization and its member states. The new rules on the EU accession to the ECHR, for example, provide that an act by a member state remains attributable to that state even if it is implementing EU law.⁶⁶ While the member state would thus be responsible for a violation of the ECHR, this does not exclude that the EU would

⁶³ See Dave R. Prickett, 'Torts-Joint Tortfeasors-Liability and Contribution for Indivisible Injury', (1977-1978) 45 *Tennessee Law Review* 129-141, explaining at 132: "The term "indivisible injury" has caused much confusion in the area of joint and several liability. Generally, the claim of an indivisible injury will arise "where two or more causes combine to produce a single result, incapable of any logical division."

⁶⁴ The well-known hunters scenario is based on the real life incident in *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948).

⁶⁵ On categories of indivisible damage see Prickett, *supra* note 63, at 132: "There are two basic categories of indivisible injuries. First, there is the indivisible injury that is not even theoretically divisible. Examples of this type of injury are death, a single wound, and the sinking of a barge." The second type of indivisible injury is one that is at least theoretically divisible but is single as a practical matter because the plaintiff is "not able to apportion it among the wrongdoers with reasonable certainty, as where a stream is polluted as the result of refuse from several factories."

⁶⁶ Article 1 (4) of the Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)008rev2, Strasbourg, 10 June 2013.

be co-responsible for its own wrongful act.⁶⁷ Although both the EU and its member state might have caused the damage, it is still possible to allocate responsibility independently on the basis of separate internationally wrongful acts.

Nonetheless, from the perspective of the injured party, such clarity is often more than an illusion than reality. The relations between international organizations and their members often depend on complex upward and downward conferrals of powers that may have repercussions on the internal distribution of obligations. Injured parties – and as a result courts that rely on the evidence presented – do often not know about the internal workings within international organizations. Especially military operations are characterized by relatively complex mandates, involving various command and control structures, which are not necessarily disclosed in judicial proceedings. From their perspective, the different successive acts by the international organization and its member states may have cumulatively contributed to the same damage and all represented necessary factors in a sufficient sets of conditions for that damage to occur.⁶⁸ It is ultimately this uncertainty that has allowed remedial mechanisms such as the European Court of Human Court of Human Rights in the *Behrami and Saramati* case to shift the buck of responsibility to the United Nations. As a result of the attribution of conduct to the UN, injured parties were left without a remedy.

To avoid such shifting of the responsibility buck at the expense of the injured party, it is suggested here to hold one actor responsibility for the whole or at least part of the damage. Many domestic legal systems know a version of the principle of the principle of joint and several responsibility.⁶⁹ In a nutshell, this

⁶⁷ See Gaja, *supra* note 28, at 4-5, suggesting that international organizations may have ancillary obligations of prevention when their member states commit internationally wrongful acts.

⁶⁸ It is beyond the scope of this paper to discuss the merits of different tests of causation such as the but-for test or the NESS test (necessary element for the sufficiency of a sufficient set). For a discussion see Jane Stapleton, 'Choosing What We Mean by Causation in the Law?', (2008) 73 *Missouri Law Review* 433-480.

⁶⁹ See generally Prickett, *supra* note 63, at 132, stating: "There are a number of different situations in which joint and several liability has been recognized by at least some authorities. These include instances when: (1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors breach a common duty owed to the plaintiff; (3) there is a special relationship between the actors (for example, master and servant or joint entrepreneurs); and (4)

principle basically allows an injured party to bring a claim against any of the wrongdoers for the whole damage. In some instances, the burden of proof is then shifted to the potential wrongdoers who must show that they were not involved in the causation of the damage.⁷⁰ In this regard, it is noteworthy that the principle of joint and several responsibility protects the interests of both the injured and the responsible party. On the one hand, the injured party has the possibility to invoke the responsibility and possibly receive a remedy. On the other hand, the responsible party can use the judgment as a cause of action against any of the wrongdoers in new proceedings, claiming compensation for the reparation provided to the injured party in the first proceedings.

Interestingly, Article 47 of the ASR and 48 of the ARIO include provisions that could be interpreted in terms of joint and several liability.⁷¹ The ASR on first reading did not envisage the situation of multiple wrongdoing parties, but the ILC included Article 47 of the ASR on second reading. The provision states:

Article 47. Plurality of responsible States

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

although there is no concert of action, the independent acts of several actors nevertheless concur to produce indivisible harmful consequences."

⁷⁰ This was indeed the procedural solution chosen in the hunters scenario case *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). However, domestic law practice is certainly diverse on this point. In the *Vavarin* case, which concerned claims against Germany related to NATO's operation in Kosovo, the German Federal Court of Justice explicitly rejected a reversal of the burden of proof in view of potential joint responsibility. See BGH, Urteil vom 2. November 2006, III ZR 190/05, para. 36.

⁷¹ See the Separate Opinion of Judge Simma in *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, [2003] ICJ Reports 161, at 328ff. (paras. 74ff.). See generally Nollkaemper and Jacobs, *supra* note 1, at 422; and John E. Noyes and Brian D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', (1988) 13 *Yale Journal of International Law* 225-267.

States.⁷²

Nonetheless, although the features of this provision somewhat give the impression of codifying a principle of joint and several responsibility, the corresponding ILC commentary points out that terms derived from domestic legal traditions such as “joint”, “joint and several” and “solidary” responsibility can only be transposed to the international legal system with care.⁷³ In remarkable contrast to the principle of joint and several responsibility as applied by domestic courts, Article 47 of the ASR is also not based on the concept of damage that is indivisible among multiple wrongdoers. This omission may not be surprising in view of the ILC’s generally hesitant attitude towards concepts of injury and damage. Instead Article 47 refers to the same internationally wrongful act, presumably based on the breach of the same obligation. However, this interpretation is problematic in so far as the application of joint and several responsibility may also be warranted where the breach of different obligations leads to indivisible damage.⁷⁴

While international courts and tribunals have occasionally referred to the principle,⁷⁵ its meaning continues to be surrounded by ambiguity as to its scope

⁷² Article 48 of the ARIO (Responsibility of an international organization and one or more States or international organizations) reads:

1. 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.
2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.
3. Paragraphs 1 and 2:
 - (a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;
 - (b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

⁷³ ASR Commentary, at 124 (para. 3).

⁷⁴ On this point see the discussion *supra* on the responsibility of EU member states and EU. See also Simma, *supra* note 71, at 328ff. (paras. 74ff.).

⁷⁵ See, for instance, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area*, Advisory Opinion of 1 January 2011, ITLOS Seabed Disputes Chamber, List of Cases: No. 17, 57 (para. 192); *Eurotunnel Arbitration* (Channel Tunnel Group Ltd and France-Manche SA v. France and UK), Partial Award of 30 January 2007, Permanent Court of Arbitration, at 51ff (paras. 162ff.). See also above-mentioned Separate Opinion of Judge Simma, *supra* note 71, and the Separate Opinion of Judge Shahabuddeen in the

and implementation in the international legal order. Against this background, situations of shared responsibility by states and international organizations might be one way to further develop the principle of joint and several responsibility in international law. More precisely, it is suggested here that the principle of joint and several responsibility may provide a useful remedial tool in situations in which it is not possible to clearly allocate responsibility either to an international organization or its member states. Due to the impermeability of the corporate veil of international organizations, for instance, the internal division of powers between states and international organizations is often not apparent, especially when only one of the responsible actors participates in the judicial proceedings. In one of the few cases that refers to joint and several responsibility in international law, the ECJ therefore stated:

In those circumstances, *in the absence of derogations expressly laid down in the Convention*, the Community and its Member States as partners of the ACP States are *jointly liable* to those latter States as partners of the ACP States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.⁷⁶

The Convention concerned was a so-called mixed agreement to which both the EU (then EC) and its members were parties. Although the ECJ's statement is considered an isolated incidence, it supports the potential usefulness of the principle of joint and several responsibility in protecting the interests of the injured party. The prospect of joint and several responsibility may actually be one of the reasons why the EU has developed a practice of attaching special 'declarations of competence' to international agreements to which both the European Union and/or its member States are parties.⁷⁷ Despite frequently

Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Judgment of 26 June 1992, [1992] ICJ Reports 240, at 283ff. For a discussion on how different international tribunals have handled issues of shared responsibility see the 'Themed Section: Procedural Aspects of Shared Responsibility in International Adjudication', (2013) 4 *Journal of International Dispute Settlement* 277-383.

⁷⁶ *European Parliament v. Council of the European Union*, 2 March 1994, European Court of Justice Report, Case C-316/91, *ECR I-625 (1994)*, pp. I-661-662 [emphasis added].

⁷⁷ In these 'mixed agreements' EU member States thus "remain internationally in the picture", as described by Pieter Jan Kuijper in *Of 'Mixety' and 'Double Hatting' – EU External Relations Law Explained* (2008), 13. On the practice of declarations of competence with regard to the international responsibility of the EU (then EC) see Esa Paasivirta and Pieter Jan Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International

changing divisions of competences within the EU, these declarations could be seen as a suitable means to externalise the internal division of competences within an international organization so that each responsible actor is only held responsible for its share of the damage.

Besides the ECJ, other domestic or international courts have never applied the principle of joint and several responsibility to international organizations.⁷⁸ However, some domestic courts have at least pointed out that the responsibility of the state is without prejudice to the responsibility of the respective international organization. In the case of *Nuhanovic v. the Netherlands*, for instance, the Dutch Court of Appeals in The Hague observed that the finding of effective control by the Netherlands would not exclude the simultaneous exercise of effective control by other actors, *in casu* the United Nations.⁷⁹ And in a recent Germany piracy case, Germany defended itself by arguing that the claims should have been brought against the EU instead, which led the piracy mission EU-NAVAL-Force (EUNAFOR). The German court rejected the argument that the case was brought against the wrong defendant, explaining that Germany had power over the specific act in question while the EU despite the on-going general command of the EU Force.⁸⁰

In order for the principle of joint and several responsibility to be attractive to responsible parties, however, it would also be necessary to develop the second stage of the joint and several proceedings. In other words, it would be necessary to clarify the cause of action which one responsible party could use against its joint wrongdoers to claim contributions. In domestic proceedings involving joint and several responsibility, the responsible party can use the initial judgment to seek compensation from the other responsible party(ies) in separate proceedings. This second step in joint and several proceedings is a decisive characteristic of

Organizations', (2005) 36 *Netherlands Yearbook of International Law* 169-226, at 185-188. On mixed agreements and third parties see generally Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2002).

⁷⁸ But note that the German Federal Court of Justice at least acknowledged the possibility of joint and several responsibility among NATO member states in international law. See BGH, Urteil vom 2. November 2006, III ZR 190/05, paras. 37-38.

⁷⁹ *Nuhanovic and Mustafic* case, *supra* note 31, para. 5.9.

⁸⁰ Verwaltungsgericht Köln, Urteil vom 11 November 2011, 25 K 4280/09, paras. 52-57.

the principle, ensuring that the other co-responsible parties compensate the separately sued wrongdoer.

In the absence of an integrated and centralized judicial system, it seems difficult to allow for a similar procedural sequence in international law.⁸¹ Considering the above-discussed cases before domestic courts, however, it may be conceivable that the decisions of domestic courts and international tribunals provide for a cause of action against co-responsible parties, *in casu* the international organization. Particularly before domestic courts, it is usually only one state that is held responsible for damage potentially caused by multiple wrongdoers. A subsequent procedure on the basis of the domestic legal decision would then allow for a more adequate allocation of responsibility. Indeed, following the annulment of different domestic measures implementing UN counter-terrorism sanctions, for instance, the 1267 regime of the UN Security Council has undergone fundamental reforms so as to allow for better human rights protection. These changes in the 1267 sanctions regime have been characterized by measures of juridical restitution by the United Nations.⁸² Moreover, the Draft Accession Agreement of the EU to the ECHR foresees that the EU and its member states may be “jointly responsible”, suggesting that the allocation of responsibility takes place at a later stage, possibly within the EU legal order.⁸³ It is certainly overly optimistic to speak of the crystallization of a rule of joint and several responsibility pertaining to the joint responsibility of states and international organization against the background of such limited instances. However, the instances certainly show the potential of such a rule to deal with the procedural challenges involved in allocating responsibility to states and international organizations.

⁸¹ On this point see also Nollkaemper and Jacobs, *supra* note 1, at 423. Treaties may give rise to centralized judicial systems in the form of international organizations.

⁸² See Tzanakopoulos, *supra* note 18, at 145 on this point.

⁸³ Article 3(7) of the Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)008rev2, Strasbourg, 10 June 2013. For an interpretation along those lines see Tobias Lock, ‘The End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR’, (2012) 31 *Yearbook of European Law* 162-197, at 168ff.

4. To Share or Not to Share? Weighing the Costs and Benefits of Sharing Responsibility

Although shared responsibility is an increasingly popular topic in international legal scholarship and political rhetoric, the contribution has shown that the law of international responsibility is still very much geared towards exclusive responsibility. International responsibility is based on the two elements of the internationally wrongful act, the attribution of conduct and the breach of an international obligation. Obligations are necessarily owed independently; they prescribe standards of conduct to be complied with by autonomous legal persons. While legal personality is attributed externally, whether by the international legal system or member states, the attribution of conduct to an international organization subsequently serves to underline the effectiveness of that corporate legal personality. As corporate legal persons, states and international organizations necessarily depend on natural persons or other entities as their agents. It is the attribution of conduct to a corporate legal person – and not to its individual agents – that makes clear that the corporate entity has autonomous legal personality, i.e. the capacity to have rights and obligations.

As autonomous legal persons, states and international organizations commit internationally wrongful acts by breaching these obligations. Considering that these obligations are owed independently, it is not surprising that the result is exclusive responsibility. After having established that a state or international organization breached its international obligation, the inquiry focuses on its particular duty to repair the damage caused. Indeed, exclusive responsibility is not without benefits. In fact, both responsible and injured persons arguably have an interest in exclusive responsibility. Their participation in responsibility mechanisms may serve as proof of the effectiveness of their international legal personality. This argument is particularly important for international organizations, which do not have a territory or other means to manifest their more concrete means to manifest their autonomous existence. In addition, both injured parties and responsible parties equally have an interest in exclusive responsibility that can be clearly allocated to one actor. The former because they do not want to be held responsible for damage that they have not caused; and the

latter because they seek an effective remedy that can best be provided by the actual responsible party.⁸⁴

Nonetheless, the focus on exclusive responsibility in the law of international responsibility stems from a time in which international relations were much less complex, with states being the only subjects of international law. The number of subjects of international law has increased and so has the number of potential injured parties of internationally wrongful acts by states and international organizations.⁸⁵ In today's interdependent world, situations of shared responsibility are much more likely to occur. In this context, it was suggested that shared responsibility is not defined by the "same internationally wrongful act" but by the "same damage". More precisely, shared responsibility results when different internationally wrongful acts contribute to the same damage. However, shared responsibility does not mean that it is not possible to allocate responsibility. Even in cases of shared responsibility, it is often still possible to allocate responsibility to different actors on the basis of causation or other allocation principles.

Only in cases of shared responsibility *strictu sensu* is it not possible to attribute responsibility to individual wrongdoers. Such shared responsibility *strictu sensu* is characterized by so-called indivisible damage that is concurrently caused by several wrongdoers but resistant to any kind of logical subdivision. Seen from this angle, shared responsibility may have more costs than benefits for injured and responsible parties. In a situation of indivisible damage, it might be quite costly – not to say impossible – for the injured party to seek to establish who is responsible for the damage. Legal proceedings may have an uncertain outcome as illustrated by the *Behrami and Saramati* case. In contrast, the responsible party may somewhat benefit from a situation of shared responsibility if it succeeds to shift the buck of responsibility to other co-responsible parties. However, by not participating in remedial mechanisms, states and especially

⁸⁴ For a discussion of this point see Pieter Jan Kuijper, 'Attribution – Responsibility – Remedy. Some Comments on the EU in Different International Regimes', (2013) *Revue belge de droit international* [forthcoming].

⁸⁵ On the diversification of persons that may be responsible see Pellet, *supra* note 25, at 6-7. See also Nollkaemper and Jacobs, *supra* note 1, at 374.

international organizations may miss an important opportunity to assert their legal personality. Moreover, they also face the risk of an uncertain outcome of judicial proceedings, even if they are not parties to those proceedings like the UN in the *Behrami and Saramati* case. For the responsible party, the costs of shared responsibility might therefore equally outweigh its benefits.

In order to reduce the costs of shared responsibility *strictu sensu* for injured and responsible parties, it was suggested here to give more prominence to the principle of joint and several responsibility, which offers one way to handle the uncertain allocation of responsibility accompanying indivisible damage. While indivisible damage classically occurs as a result of simultaneous wrongful acts, it was argued that the impermeability of the corporate veil of international organizations could justify the application of joint and several responsibility to states and international organizations. Accordingly the injured party could sue either of the joint wrongdoers, the international organization or its member states, for the whole or at least part of the damage. In such a situation, it could be argued that the burden of proving non-involvement in the causation of the indivisible damage should shift to the responsible party(ies). The principle of joint and several responsibility would thus provide more remedial avenues, allowing for claims against either the international organization or its member states, and also improve the position of injured parties in the judicial proceedings.

And yet, it must be acknowledged that the full adoption of the principle of joint and several responsibility faces considerable challenges in the decentralized international legal system. In particular, it remains an open question on which legal basis the sued wrongdoer could hold the other wrongdoers responsible. As discussed above, the practice of international organizations such as the UN or the EU might point to the possibility that the decisions of domestic courts and international tribunals could provide for a cause of action to seek contributions from co-responsible parties. From the point of view of a cost-benefit analysis, the second stage in the joint and several proceedings is conducive to protecting the interests of the joint wrongdoers. Considering that any of the joint wrongdoers faces the risk of being held responsible individually for the whole damage or part of it, the possibility to hold the other wrongdoers subsequently

responsible for their individual contributions would reduce the costs of shared responsibility for the co-responsible actors. In the ideal case, the principle of joint and several responsibility would thus allow for an allocation responsibility similar to that in the scenario of exclusive responsibility, including the above-discussed benefits of holding an actor responsible individually. Instead of speaking of exclusive responsibility, however, it is suggested to speak of independent responsibility of states and international organizations as determined by means of the principle of joint and several responsibility.