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Reparation, Cessation, Assurances and Guarantees of Non-Repetition

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Chapter 7: Reparation, Cessation, Assurances and Guarantees of Non-Repetition

Pierre d'Argent[*]

1. Introduction

Reparation, cessation, and assurances and guarantees of non-repetition form part of the 'content' of the international responsibility of a state or of an international organisation.[1] All three are commonly envisaged as new, 'secondary',[2] international obligations owed by the responsible international entities to other subject(s) of international law. Although those secondary obligations stem directly from customary rules of international law and do not need to be contractually established,[3] it is important to recall that each of them is not automatically owed by each responsible entity. Indeed, if responsibility (under either the rules on attribution of conduct or under the rules on attribution of responsibility) is a necessary condition for those secondary obligations to arise, it is nevertheless not a sufficient condition: cessation is owed only if the internationally wrongful act is of a continuing character;[4] appropriate assurances and guarantees of non-repetition must only be offered 'if circumstances so require';[5] and the 'obligation to make full reparation' arises under general international law only when an internationally wrongful act has caused an injury.[6] None of the secondary obligations addressed here are thus co-existent with international responsibility, since neither the continuing character of the breach, the need for guarantees and assurances, nor the injury are

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[1] See the titles of Part Two and Part Three of, respectively, the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA) and the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO). Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary); Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary).

[2] The concept of 'secondary obligations' has been used throughout the ILC's work on international responsibility; see e.g., G. Arangio-Ruiz, 'Second Report on State Responsibility', ILC *Yearbook* 1989/II(1), 42, para. 144; ARSIWA Commentary, n. 1, 95, para. 4.

[3] As opposed to the early conception expressed by H. Kelsen, 'Unrecht und Unrechrfolge im Völkerrecht' (1932) 12 ZöR 481–608.

[4] Article 30(a) ARSIWA/ARIO, n. 1.

[5] Article 30(b) ARSIWA/ARIO, n. 1.

[6] Article 31 ARSIWA/ARIO, n. 1.

constitutive elements of responsibility under Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO).[7]

The aim of this Chapter is to enquire into the adequacy of the ARSIWA and the ARIO to address those 'secondary obligations' arising from internationally wrongful acts in situations of shared responsibility under international law. As defined in this volume, international responsibility is said to be 'shared' when multiple actors are responsible for their contribution to a single harmful outcome.[8] For reasons of coherence and available space, this Chapter will assume that the multiple actors at stake are states and international organisations (only), and not (also) individuals or other non-state actors. When the conduct of individuals or other non-state actors results in a harmful outcome – together with the wrongful act(s) for which states or international organisations bear international responsibility – the first issue to address is whether those individuals or non-state actors have breached a rule of international (rather than domestic) law that they are bound to respect, and the second is to know whether the claim relating to their responsibility is made under domestic or international law.[9] The latter issue exists even when the conduct of the individual or non-state actor constitutes a breach of an international obligation, since one can be responsible under domestic law for such breaches. In such a case, the law applicable to the responsibility relationship will, at least in part, be domestic rather than international. Since the complexity stemming from the questions mentioned would merit a separate chapter, they are not going to be addressed here. However, it is hoped that the present Chapter will also help with mapping those issues.

The difficulty of addressing international responsibility when it is shared by states or international organisations results from the fact that documented international practice in that regard, in the form of reported case law or settlements, is extremely scarce, if not non-existent. As a result, the work of the International Law Commission (ILC) relating to the 'plurality of responsible States' has remained rather limited in scope and, as shall be seen, is deliberately inconclusive in certain aspects. One is thus left with trying to elaborate some convincing answers based on legal logic and what can be understood as being the fundamentals of the law

[7] See ARSIWA and ARIO, n. 1.

[8] See Chapter 1 of this volume, P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___; and P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438, especially at 366–368.

[9] See Chapter 2 of this volume, A. Gattini, 'Breach of International Obligations', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), at pp. ___.

of international responsibility. The purpose of this exercise is to try to shed some light on this complex issue and to show how its complexity can be addressed in a rather simple way, provided that the various concepts at stake are correctly grasped.

In order to address the complexity resulting from situations of shared responsibility as defined above, and to determine who owes what to whom in terms of cessation, non-repetition, and reparation, the intrinsic legal and factual reasons for such complexity will first be recalled (section 2), before we turn to situations where a plurality of states or international organisations are responsible for several wrongful acts (section 3), or for the same wrongful act (section 4). Afterwards, the issues of co-perpetration (section 5), and of joint and several responsibility (section 6), will be addressed.

2. Reasons for complexity

Two main sets of reasons explain the complexity of shared responsibility situations in international law. They are intertwined but must nevertheless be distinguished. The first set of reasons stems from the various legal grounds for international responsibility (section 2.1), which directly impact upon the understanding of the facts themselves (section 2.2).

2.1 Two types of attribution

According to the ARSIWA and the ARIO, responsibility is established under international law either as a matter of attribution of conduct, or as a matter of attribution of responsibility.

Under the rules on attribution of conduct, an internationally wrongful act materially committed by a natural person is – by application of those specific rules which make up the gist of the law of international responsibility[10] – attributed to a legal person (a state or an international organisation), which is therefore considered to be internationally responsible for such an act. Under the rules on attribution of responsibility, a state or an international organisation is held responsible 'in connection with' the act of another state or organisation. This 'connection' may result from a situation of aid or assistance, direction and control, coercion, or, in the case of an

[10] Articles 4–11 ARSIWA, n. 1; Articles 6–9 ARIO, n. 1.

international organisation, circumvention of international obligations.[11] It is beyond the scope of this Chapter to review and critically assess the ARSIWA and ARIO rules on attribution of conduct and attribution of responsibility, as other Chapters of this volume are precisely concerned with their meaning and application in situations of shared responsibility.[12] For the purpose of this Chapter, international responsibility is assumed to have been established under (one of) those rules, which are considered to be correct and complete.

2.2 Several wrongful acts or the same wrongful act

It is submitted that an essential distinction between two hypothetical situations must be made in order to understand and 'read' the various instances of shared responsibility. The contribution of multiple actors to a single harmful outcome can either result from separate wrongful acts or from the same wrongful act. The essential *summa divisio*[13] is thus as follows.

First, under the first hypothetical situation ('A-type'), a plurality of subjects is responsible for *several* wrongful acts which result in an injury.[14] This situation is the easiest to imagine and to understand as it is probably the most common, not only in domestic law, but also in international law. For instance, one state abducts a foreign national abroad and transfers that person to a third state where he or she is tortured by the local authorities. In this scenario, several wrongful acts were committed by different states; one state abducted and transferred a person; another state tortured the same person. Each state is clearly responsible for its own conduct, but it remains to be seen to what extent each state's responsibility triggers the secondary obligations of cessation, assurances and guarantees of non-repetition, and reparation, and whether international law provides for some rule according to which one of the states might be responsible for the conduct of the other.

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[11] Articles 16–18 ARSIWA, n. 1; Articles 14–18, and 58–62 ARIO, n. 1.

[12] See Chapter 3 of this volume, F. Messineo, 'Attribution of Conduct', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___; and Chapter 4 of this volume, J.D. Fry, 'Attribution of Responsibility', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

[13] S. Besson, 'La pluralité d'Etats responsables – Vers une solidarité international?' (2007) 17 SZIER/RSDIE 13–38 suggests the division between *le fait conjoint* and *le fait distinct*.

[14] Sometimes, one entity (state or international organisation) is responsible for a plurality of separate wrongful acts resulting in a single harmful outcome. However, such a situation does not raise any issue of shared responsibility as only one entity bears responsibility for all the different wrongful acts. Nor is there a situation of shared responsibility when the (single or) separate wrongful act(s) committed by a single actor injure(s) a plurality of victims. In case of a plurality of injured states or international organisations, each of them may separately invoke the responsibility of the responsible entity; see Article 46 ARSIWA, n. 1 and Article 47 ARIO, n. 1.

Second, under the second hypothetical situation ('B-type'), several subjects are responsible for the *same* wrongful act that results in a single injury. One can, for instance, imagine that two riparian states are responsible for having polluted a river because the body in charge of managing it, and which authorised or failed to supervise harmful discharges – being deprived of a separate international legal personality – is to be considered as their common organ. If each state is responsible for the same wrongful act, it also remains to be seen in such a situation to what extent each state is bound by the same secondary obligations of cessation, assurances and guarantees of non-repetition, and reparation; and again, if one of the two states can be held accountable for the other one.

Of course, reality is sometimes even more complex and cannot be squarely squeezed into those two separate hypothetical situations, so that they must be combined in order to correctly analyse a factual situation. For instance, if the abducting state directs and controls the torturing state in the example used above to illustrate an 'A-type' situation, a 'B-type' situation will arise within the 'A-type' situation as far as torture is concerned by application of the rule enshrined in Article 17 of the ARSIWA. Thus, in such a case, the abducting state will be responsible for its own conduct (abducting and transferring), but it will also be held responsible in connection with the torture committed by the other state, for which that last state will also be held responsible. Despite the complexity resulting from this combination, or superposition of the hypothetical situations of types A and B, it is submitted that distinguishing between them remains crucial in order to conduct a sound legal analysis of the allocation of the secondary obligations at stake. The distinction between situations where the damage results from separate wrongful acts or from the same wrongful act is reflected in the work and Commentaries of the ILC,[15] even if the ARSIWA and the ARIO do not contain any specific provisions relating to shared responsibility situations stemming from a plurality of wrongful acts.

If the difference between the two hypothetical situations is fairly easy to understand, it might seem difficult to classify cases of co-perpetration as pertaining to 'A-type' or 'B-type' situations. For instance, if two states together wage an armed attack against a third state, is it the case that each of them has breached separately Article 2(4) of the United Nations (UN) Charter[16] and that several wrongful acts have occurred, or are they responsible for the same and single wrongful act? Does co-perpetration amount to a plurality of breaches of the same primary obligation ('A-type'), or to the commission by several subjects of the same wrongful

[15] ARSIWA Commentary, n. 1, 125, para. 8.
[16] Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16.

act ('B-type')? As will be argued later (in section 5), situations of co-perpetration should, as a matter of principle, be considered as 'A-type' situations.

3. Several wrongful acts

Under the first, A-type hypothetical situation, a plurality of states and/or international organisations is responsible for several wrongful acts.

3.1 Possibilities

It will most often be the case that the international responsibility of each subject for each wrongful act will be established as a matter of attribution of conduct, as illustrated in the above example relating to abduction and torture. One state is responsible because its organs have abducted a person and handed him or her over to another state, and one state is responsible because its organs have tortured that person.

It is, however, also possible that the responsibility of one of the responsible entities is established 'in connection with the act' of another actor, as a matter of attribution of responsibility, because of the aid or assistance given by the former to the latter. According to Article 16 of the ARSIWA (and Articles 14 and 58 of the ARIO), the state (or organisation) that aids or assists another state (or organisation) in the commission of a wrongful act is not responsible 'for that act', but rather 'for doing so', i.e. for aiding or assisting. Aiding or assisting is thus considered as a wrongful act distinct from the one that has been aided or assisted.[17] In such a situation, two different wrongful acts, for which two different entities bear responsibility, contribute to the harmful outcome. In the abduction and torture example given above, one can for instance imagine that the territorial state where the abduction and torture took place was instrumental in aiding or assisting. The territorial state would bear responsibility for having done so, its wrongful act (and responsibility) adding to the ones of the abducting state and of the other torturing state; three states would bear responsibility for three separate wrongful acts on the basis of different logics of attribution.

[17] ARSIWA Commentary, n. 1 67, para. 10; H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: CUP, 2011), p. 487; see also Chapter 5 of this volume, V. Lanovoy, 'Complicity in an Internationally Wrongful Act', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

Articles 17 and 61 of the ARIO envisage other cases of responsibility 'in connection' with the conduct of another subject. Under Article 17, an international organisation 'incurs international responsibility if it circumvents one of its international obligations' by adopting a decision binding its members (be they states or organisations) to commit an act that would be internationally wrongful if committed by itself, or by authorising its members to commit an act that would be internationally wrongful if committed by the organisation itself 'and the act in question is committed because of that authorization'. Under Article 61 of the ARIO, a state member of an organisation

> incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

In each of these cases, the international organisation (Article 17) or the member state (Article 61) incurs responsibility, irrespective of the wrongfulness of the conduct of the members of the organisation (Article 17) or of the organisation (Article 61) resulting from the circumvention (Article 17(3); Article 61(2)). If the latter bear no responsibility for their own conduct, the situations under Articles 17 and 61 of the ARIO do not give rise to any 'shared' responsibility, as the circumvention will be the only behaviour triggering responsibility. But if the act ordered, authorised, or undertaken as a result of the circumvention is internationally wrongful for its author, a plurality of wrongful acts will exist, since the attribution of responsibility for circumvention is a 'for doing so' responsibility – circumvention is, as such, considered wrongful under Articles 17 and 61. In such a case, a plurality of wrongful acts exists and the situations envisaged by Articles 17 and 61 of the ARIO belong to the 'A-type' category.

3.2 Solution

In all those situations of shared responsibility where several actors are responsible through different and separate wrongful acts for their contribution to a single harmful outcome, the questions are how to allocate to the different responsible states (or organisations) the obligations to cease the respective wrongful acts (section 3.1), how to offer appropriate assurances and guarantees of non-repetition (section 3.2), and how to make reparation (section 3.3).

3.2.1 Cessation

When several subjects bear responsibility on the basis of attribution of conduct for several on-going wrongful acts resulting in a single harmful outcome, it seems quite indisputable that each of those responsible subjects is bound to cease committing their respective wrongful acts. Of course, if one of the wrongful acts is not of a continuing character, cessation will not be required from the entity responsible for that past act. For instance, in the scenario sketched above, if the abduction and transfer are over, cessation will only be binding on the torturing state. But if the organs of that state are torturing in a facility situated in a third state, which would then be separately responsible for an illegal detention (and probably aid or assistance in the torture), that third state must also cease its own wrongful act by freeing the detainee.

When several subjects bear responsibility on the basis of attribution of responsibility, the situation deserves some clarification, because the ARSIWA and the ARIO seem to assume that cessation (together with assurances and guarantees of non-repetition and reparation) are part of the 'content' of international responsibility, irrespective of the nature of the attribution – of conduct or of responsibility – under which responsibility is established. It is, however, certain that it is not for the aiding or assisting state or international organisation[18] to cease committing the wrongful act that it has aided or assisted; in such circumstances, cessation of the continuing breach is solely owed by the state or the organisation responsible for it under the rules of attribution of conduct. This is quite obvious in cases of aid or assistance, as the aiding or assisting state (or organisation) is only responsible for such conduct, and not for the wrongful act that it has aided or assisted.[19] This being said, the assisting or aiding state (or organisation) is also bound by the obligation of cessation and must stop its aid or assistance if it is continuing to render it, simply because such aid or assistance constitutes a separate wrongful act attributable, as a matter of conduct, to that state (or organisation). In such a case, cessation of the aid or assistance is owed to the victim of the wrongful conduct of the aided or assisted subject, and not to the latter.

In a case of circumvention of international obligations by an organisation through a binding decision (or authorisation) that results in member states committing wrongful acts,[20] not only must those members stop their breaches from having a continuing character, but the

[18] Article 16 ARSIWA, n. 1; Article 14 ARIO, n. 1.
[19] See above, n. 14.
[20] Article 17(1)–(2) ARIO, n. 1.

organisation will also have to achieve cessation in relation to its own act, and on that basis eventually rescind its decision that led its members to commit wrongful acts.[21]

3.2.2 Assurances and guarantees of non-repetition

When shared responsibility results from a plurality of wrongful acts, the question of assurances and guarantees of non-repetition is not very different from that of cessation. It will be in light of each separate wrongful act – whether responsibility exists for each of them as a matter of attribution of conduct or attribution of responsibility – that an assessment will have to be made in order to decide whether the 'circumstances' require from each of the responsible subjects such assurances and guarantees, and what kind of assurances and guarantees must be made. Because one can only offer assurances and guarantees for one's own future behaviour, there is indeed no reason to believe that assurances and guarantees of non-repetition would not have to be offered by some of the wrongdoers if one of them has already offered them in relation to its own wrongful act. In certain situations, no assurances and guarantees will be required at all; in others, some will have to be offered by certain subjects bearing responsibility and not by others; and in other cases, all of the responsible entities will be required to offer assurances and guarantees, each in relation to their own responsibility.

The nature of the obligation breached (is it a peremptory norm?) and the character of the breach (is it an egregious or grave breach?) are most likely to influence the understanding of the necessity, under those 'circumstances', to offer assurances and guarantees of non-repetition. For instance, assuming for the sake of argument that the prohibition on abductions is not considered as *jus cogens* while the prohibition on torture is, the abducting state may not be called upon to offer such assurances, whereas the torturing state might well be called upon to do so. Conversely, the *jus cogens* nature of one of the obligations breached might lead to consideration that the entities bearing responsibility for each of the wrongful acts must all offer assurances and guarantees, despite the different character of those acts and/or the difference in the nature of the obligations infringed.

[21] On the use of cessation, rather than restitution, to rescind legal acts and the differences of approaches by the ICJ in the *Arrest Warrant* judgment and *Wall* advisory opinion, see P. d'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion', in P.-M. Dupuy, B. Fassbender, M.N. Shaw and K.-P. Sommermann (eds.), *Völkerrecht als Wertordnung – Common values in International Law, Festschrift für/Essays in Honour of Christian Tomuschat* (Kehl: N.P. Engel Verlag, 2006), pp. 463–477.

3.2.3 Reparation

The ARSIWA and the ARIO only address situations of multiple responsible states or international organisations when those entities bear responsibility 'for the same internationally wrongful act'; the rule provided for by Article 47 of the ARSIWA and Article 48 of the ARIO relates to 'B-type' situations and will be analysed later in this Chapter. It does not concern a situation of shared responsibility stemming from a plurality of separate and different wrongful acts, each triggering the international responsibility of several states or organisations. Nothing is said in the ARSIWA or the ARIO about 'A-type' situations. This silence is best explained by the fact that no specific rule is actually required in such cases and that the question of the allocation of the obligation to make reparation is simply governed by the orderly and reasoned application of the usual rules. Before justifying that statement (section 3.3.2), some fundamental points relating to the obligation to make reparation must be recalled (section 3.3.1).

3.2.3 a) The obligation to make full reparation

The 'obligation to make full reparation' is a positive obligation requiring action that can be classified as an obligation of result. As an obligation, it exists as long as it has not been fully and properly performed, or as long as the legal subject to whom it is owed has not renounced (partly or fully) its benefit. The obligation to make reparation is thus controlled by its debtor through its very performance, and by its creditor through a possible waiver.

The obligation to make full reparation may be owed to one or several 'injured' states and/or international organisations within the meaning of Article 42 of the ARSIWA and Article 43 of the ARIO. Thus, together with 'the character and content of the international obligation' that has been breached, 'the circumstances of the breach' have to be taken into account[22] in order to determine to whom the obligation is owed. It is, however, doubtful that the obligation to make reparation – in contrast to cessation and assurances and guarantees of non-repetition[23] – could be owed 'to the international community as a whole',[24] unless one considers that the breach of

[22] Article 33(1) ARSIWA/ARIO, n. 1.
[23] Article 48(2)(a) ARSIWA, n. 1; Article 49(4)(a) ARIO, n. 1.
[24] Article 33(1) ARSIWA/ARIO, n. 1.

an *erga omnes* obligation entails an injury of a purely legal nature[25] to each subject of the international community. Such a view should logically lead to consideration that reparation in the form of (at least) satisfaction must be offered to every subject of the international community when a breach of an *erga omnes* rule occurs. However, this does not seem to correspond to current international law, as clearly illustrated by the *Belgium v. Senegal* case where the findings of the International Court of Justice (ICJ or Court), according to which Senegal was in breach of several of its obligations, were not made in response to a claim by Belgium for reparation in the form of satisfaction.[26] Although the Court ruled that Belgium had standing to invoke the responsibility of Senegal because of alleged breaches of *erga omnes partes* rules,[27] and considered at the request of Belgium that the breaches by Senegal existed and had to cease,[28] it never suggested that Belgium had suffered an injury that had to be made good. The findings of a continuing violation by Senegal were necessary to order cessation, but did not constitute a form of satisfaction. Thus, the 'character and content of the international obligation' only has a bearing on the enlargement of the category of the non-injured subjects that may invoke the responsibility of the responsible entity in order to claim from it cessation and assurances of non-repetition. If non-injured subjects may not claim reparation for themselves, they may nevertheless claim from the responsible subject the performance of the obligation of reparation 'in the interest of the injured [state(s) or international organisation(s)] or of the beneficiaries of the obligation breached'.[29] The ARSIWA and the ARIO are indeed 'without prejudice to any right, arising from the international responsibility (…), which may accrue directly to any person or entity other than a [state or an international organisation]'.[30] To determine whether the obligation to make reparation could also be owed under general international law to individuals, or whether individuals have a right to reparation under general international law, is however outside the scope of this study.[31]

[25] See B. Stern, 'Et si on utilisait la notion de préjudice juridique ? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) 47 AFDI 3–44.
[26] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422, at paras. 118–122.
[27] Ibid., para. 70.
[28] Ibid., para. 121.
[29] Article 48(2)(b) ARSIWA, n. 1; Article 49(4)(b) ARIO, n. 1.
[30] Article 33(2) ARSIWA/ARIO, n. 1.
[31] See 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN Doc. A/RES/60/147 (2005); P. d'Argent, 'Le droit de la responsabilité internationale complété? Examen des «Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire»' (2005) 51 AFDI 27–55; D'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion', n. 21, pp. 473–477.

It is important to stress that the particular nature of the obligation breached has no bearing on the nature of the secondary obligation to make reparation stemming from that breach when it has caused an injury. The internationally wrongful act may consist of the infringement of a multilateral, *erga omnes* or even *jus cogens* obligation; the secondary obligation to make reparation will only be owed by the entity responsible for that breach to each entity actually injured, and not to the international community as a whole. Moreover, the obligation to make reparation is of a dispositive nature and can always be waived by its beneficiary.[32] Thus, when several states or international organisations have been injured by an internationally wrongful act, each of the injured subjects may 'separately'[33] invoke the responsibility of the subject bearing responsibility for that act and claim reparation. The obligation to make reparation is established on a bilateral basis, between each responsible subject and each of the injured claimants.

The reason, but also the object, of the obligation to make full reparation is the injury. An injury is a legal construct in two respects.[34] First, intrinsically, it must consist of a harm to an interest considered as legitimate by the legal order that governs the obligation to make reparation. In other words, in order for a harm to be an injury capable of being the object of the obligation to make reparation under international law, such harm must concern a legitimate interest under international law. As far as states are concerned, it is generally understood that they have three main categories of legitimate interests under international law: they have a legitimate interest in the protection of their sovereignty, their property, and their nationals.[35] Second, extrinsically, such harm to a legitimate interest must be linked to the wrongful act by a causal relationship: the injury must be the consequence of the wrongful act. In other words, causality triggers the obligation to make reparation regarding certain harms, i.e. those that can be said to be the result of the breach. Causality is therefore of paramount importance when it comes to the obligation to make reparation. Even if a wrongful act has occurred, if the injury cannot be considered as having been caused by that act, the state or organisation bearing responsibility

[32] In cases of breaches relating to rules protecting individuals, a disputed point is to know whether the state can dispose of the rights – assuming they exist; see D'Argent, 'Le droit de la responsabilité internationale complété?', n. 31 – of its nationals and waive or bar claims in that regard; see P. d'Argent, *Les réparations de guerre en droit international public – La responsabilité de l'Etat à l'épreuve de la guerre* (Bruxelles: Bruylant-LGDJ, 2001), pp. 761–774; *contra*: Dissenting Opinion of Judge Cançado Trindade, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, 99, pp. 19–24.
[33] Article 46 ARSIWA, n. 1; Article 47 ARIO, n. 1.
[34] J. Combacau and S. Sur, *Droit international public*, 7th ed. (Paris: Montchrestien, 2006), p. 528.
[35] Ibid., pp. 529–530.

for it will not have to make reparation for that injury.[36] As will be seen below, causality not only governs the existence of the obligation to make reparation, but also the allocation of its performance, since it is on the basis of causality that, notably, apportionment is decided.

According to the obligation to make full reparation, 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[37] To make reparation is thus, as far as possible, to 're-establish the situation which *would*, in all probability, have existed' in the absence of the wrongful act. To make reparation is *not* to re-establish the situation that *existed* just before the breach (*status quo ante*), but to establish the injured subject in the situation in which it would, 'in all probability', be at the time of the performance of the obligation to make reparation. This is why loss of profits can be claimed as part of the injury to be made good[38] and why restitution – which allows for the re-establishment of 'the situation which existed before the wrongful act was committed'[39] – is but one *form* of reparation, and not reparation itself.

Next to restitution, the other forms of reparation are compensation[40] and satisfaction.[41] In order to provide 'full reparation', those various forms of reparation are due 'either singly or in combination'[42] according to their own legal conditions and the nature and extent of the injury suffered that has to be made good. It is entirely possible that no compensation is owed as reparation for material damage following a wrongful act because it is considered that this breach is not causally linked to that damage, whereas satisfaction is owed as reparation for the non-material injury resulting from the same wrongful act. For instance, the ICJ rejected the compensation claim presented to it by Bosnia following the breach by Serbia of the obligation to prevent genocide for lack of a 'sufficiently direct and certain causal nexus'[43] between that

[36] See e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, pp. 233–234, para. 462 (*Bosnian Genocide* case).
[37] *Factory at Chorzów (Germany v. Poland)*, Merits, Claim for Indemnity, Judgment No. 13, 1928 PCIJ Series A - No. 17, at p. 47. See on the notion of reparation D'Argent, *Les réparations de guerre en droit international public*, n. 32, pp. 662–669.
[38] Article 36(2) ARSIWA/ARIO, n. 1.
[39] Article 35 ARSIWA/ARIO, n. 1.
[40] Article 36 ARSIWA/ARIO, n. 1.
[41] Article 37 ARSIWA/ARIO, n. 1.
[42] Article 34 ARSIWA/ARIO, n. 1.
[43] *Bosnian Genocide* case, n. 36, pp. 233–234, para. 462. For critical appraisals of the strict causality test used by the ICJ in relation to the breach of an obligation to prevent, see A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695–713; P. d'Argent, 'Reparation and Compliance', in K. Bannelier, Th. Christakis and S. Heathcote, *The ICJ and the Evolution of International Law – The enduring impact of the Corfu Channel case* (London: Routeledge, 2012), pp. 335–356.

wrongful act and the injury suffered by Bosnia. It ruled that 'it [was] however clear' that Bosnia was 'entitled to reparation in the form of satisfaction'[44] by a declaration of the Court. Moreover, as the ICJ stressed in the *Pulp Mills* case, the forms of reparation (whether restitution, compensation, or satisfaction) 'must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it'.[45] Hence, it is possible to reject a claim for restitution or compensation despite the injury being caused by the wrongful act for the reason that such form of reparation is not appropriate to the actual injury.

Ensuring full reparation by way of compensation may also require the payment of interest on any principal sum due,[46] either because such sum has been evaluated at a moment in time prior to the authoritative determination of the obligation to make reparation (compensatory interest), or because effective payment is posterior to such determination (interest on arrears).

Finally, 'full' reparation can be tempered by the contribution to the injury 'by wilful or negligent action or omission' of the injured state or organisation, or of 'any person or entity in relation to whom reparation is sought'.[47]

3.2.3 b) Allocating the obligation to make reparation

When several states and/or international organisations are responsible for a plurality of separate wrongful acts, the respective causal links between each act and the injury needs to be assessed. It is not the place here to dwell on theories of causality.[48] Assuming one accepted understanding of what 'direct', 'certain', and not too 'remote' causality amounts to, what is important for the purpose of this analysis is to acknowledge that if one of the wrongful acts cannot be said to be in a causal relationship with the injury, the entity responsible for that act will not be bound by the obligation to make reparation for that injury, despite the breach and its responsibility for it. If that is the case, the obligation to make reparation will only concern the other wrongdoer(s). For instance, if one state (or one international organisation) is found to be in breach of the obligation to prevent genocide, while – presumably – another state has actually committed the said genocide through its armed forces, the obligation to make reparation in the

[44] *Bosnian Genocide* case, n. 36, p. 234, para. 463.
[45] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, p. 104, para. 274.
[46] Article 38 ARSIWA/ARIO, n. 1.
[47] Article 39 ARSIWA/ARIO, n. 1.
[48] See Chapter 2 of this volume, Gattini, 'Breach of International Obligations', n. 9. Gattini addresses causation in section 2.2, pp. ___.

form of compensation for the material injury will be owed by the latter state only if the breach of the obligation to prevent is found to lack 'a sufficient direct and certain causal nexus'[49] with the injury at stake. However, this does not mean that the entity responsible for the breach of the obligation to prevent genocide does not bear any responsibility for that breach, nor that it does not owe reparation in the form of satisfaction for the non-material injury resulting from its breach.[50] Causality in law – which is never a natural science appraisal, but always reflects human choices and understanding of what can be required from individuals or collective entities[51] – thus plays a crucial role in the limitation and the distribution of the secondary obligation stemming from the plurality of separate wrongful acts.

Once several separate wrongful acts are each considered to have a causal nexus with the injury that is the object of the reparation claim, which of the various wrongdoers is to make reparation? This question lies at the core of the complexity of shared responsibility as it relates to the issue of the distribution, or apportionment, of the obligation to make reparation. This requires, however, clarification of the various understandings of the relationship between multiple causes.

There are different ways to understand the relationship between multiple wrongful acts that are each considered to be potentially causally linked with the injury. In her seminal book, Brigitte Stern identified four possible situations where an injury seems to result from a plurality of events.[52] The first situation relates to a fake, or only apparent, plurality of causes; while the injury apparently resulted from several causes, it actually stems from one single cause, which is said to be 'exclusive'. The second situation arises when 'parallel', or 'coincidental',[53] causes exist. In such a situation, a wrongful act could by itself have produced the injury, but it actually occurred due to another event (*force majeure* or the – whether lawful or not – act of another subject), independently from the wrongful act. In the third situation, several injuries result from concurring causes and their addition seems to create a single injury. The various causes are then said to be 'complementary' of each other. The fourth situation arises when each cause is by itself insufficient to produce the single harmful outcome as it occurred. In such a situation, the different causes are said to be 'cumulative'.

[49] *Bosnian Genocide* case, n. 36, p. 234, para. 462.
[50] *Bosnian Genocide* case, n. 36, p. 234, para. 463
[51] D'Argent, *Les réparations de guerre en droit international public*, n. 32, pp. 624–626.
[52] B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris: Pedone, 1973), pp. 267 et seq.
[53] According to the terminology of J. Personnaz, *La réparation du préjudice en droit international public* (Paris: Sirey, 1939), p. 142.

The first and second situations – of 'exclusive' and 'parallel' (or 'coincidental') causes – are not shared responsibility situations for several wrongful acts. In the first situation, if the exclusive cause is a wrongful act, its author will have to make reparation alone for the entire injury. Of course, if several entities bear responsibility for that single act, a 'B-type' situation will emerge. In the second situation, the wrongful act is actually indifferent, as the injury occurred in spite of it; as a consequence, the wrongdoer will not be bound to make reparation.

In contrast, the third and fourth situations – of 'complementary' and 'cumulative' causes – are shared responsibility situations for several wrongful acts, and therefore deserve a closer analysis.

3.2.3 b) (i) Complementary causes

The 'complementarity' of causes can be illustrated by the hypothetical situation presented above, relating to the abduction and transfer by one state of a suspect who is then tortured by a third state. In such a situation, the globally harmful outcome of those different wrongful acts is actually made up of an addition of injuries, each produced by one of the acts; the abduction is an injury distinct from the torture. If only the abduction and transfer had taken place, an injury would have existed as such; if only the torture had occurred, another injury would have existed as such. In the sequence of events, the various successive wrongful acts have complemented each other to produce the apparently globally harmful outcome. Such a situation calls for a rather simple solution, based on the fundamental principle according to which each entity must be responsible for the consequences of its own wrongful act (either as a matter of attribution of conduct or attribution of responsibility), but not for the consequences of the acts of another wrongdoer: 'the general principle in case of a plurality of responsible States is that each State is separately responsible for the conduct attributable to it'.[54] Hence, the responsibility of each wrongdoer can be separately invoked, to the extent of the causal importance of its own wrongful act in relation to the global injury. Since the unity of the harmful outcome is only apparent, the contribution of each wrongdoer to the reparation must be proportional to the actual effect that its own wrongful act has had on the injury as a whole. In other words, a situation of 'complementary' causes calls for the apportionment of the obligation to make reparation in due proportion to the causal influence of each wrongful act on the apparently

[54] J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: CUP, 2002), p. 272; ARSIWA Commentary, n. 1, 124, para. 3.

globally harmful outcome. Each wrongdoer will thus be bound to make reparation, but only proportionally to what can be considered as being its own share of the damage.

In his second report, Special Rapporteur Gaetano Arangio-Ruiz qualified as 'concomitant causes' the situation labelled here as 'complementarity', and also called for the apportionment of the obligation to make reparation for reasons of equity and 'a proper application of the causal link criterion'.[55] His suggestion was followed by the ILC as a whole, with the Commentary to (then) draft Article 44 reading as follows:

> The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined on the basis of the criteria of normality and predictability. In view of the diversity of possible situations, the Commission has not attempted to find any rigid criteria applicable to all cases or to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State.[56]

The apportionment solution was later criticised by Special Rapporteur James Crawford in his Third Report when discussing what he called 'cases of concurrent causes'.[57] According to him, the apportionment would not be consistent with international practice and the decisions of courts and tribunals. The Special Rapporteur referred for that purpose to the *Corfu Channel* case[58] and the *Diplomatic and Consular Staff* case.[59] In the first case, Albania had to pay the full amount of compensation claimed by the United Kingdom (UK) for having wrongfully failed to warn passing British warships of the presence of mines, despite the fact that the actual laying of the mines in the Corfu Channel was probably the action of Yugoslavia. In the second case, Iran was solely responsible for the hostage-taking because of its early failure to protect the foreign personnel from revolutionary students. In the opinion of the Special Rapporteur, the fact that, in this last case, the United States (US) had no claim under international law against the captors themselves made little difference, since the breach of the obligation by Iran necessarily triggered its duty to make full reparation.[60]

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[55] Arangio-Ruiz, 'Second Report on State Responsibility', n. 2, p. 14, para. 44.
[56] ILC *Yearbook* 1993/II(2), 70.
[57] J. Crawford, 'Third Report on State Responsibility', ILC *Yearbook* 2000/II(1), 19, paras. 31 and 34.
[58] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Reports 1949, 4 (*Corfu Channel*).
[59] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3. Together with the *Corfu Channel* case, n. 58, this case is also referred to in the ARSIWA Commentary relating to Article 31, n. 1, 93, para. 12.
[60] Crawford, 'Third Report on State Responsibility', n. 57, at 19, para. 34.

However, it is submitted that the *Corfu Channel* case – the only one of the two cases that is relevant for this discussion[61] – does not correspond to the situation of 'complementary' causes, but rather to 'cumulative' and converging causes (the fourth situation, which will be discussed below). Indeed, both the laying of the mines and the absence of warning were necessary to produce the damage suffered by the Royal Navy as it occurred. However, the laying of mines, if considered wrongful as such, was not harmful by itself (in contrast to abduction in the example given which, by itself, is illegal and harmful) in the absence of ships in the Channel. Therefore, it seems that no real contradiction actually exists between the ILC's approaches under Arangio-Ruiz and under Crawford; the differences are more terminological than substantial once concepts and words are bridged. In that regard, it is quite significant that the last Special Rapporteur labelled causes that are 'both efficient causes of the injury, without which it would not have occurred'[62] as 'concurrent'. Such a notion actually corresponds to the concept of 'cumulative' causes in Stern's terminology (the fourth situation, as will be discussed in the next section). Moreover, Crawford had no difficulty with admitting that 'cases can occur where an identifiable element of harm can properly be allocated to one of several concurrently[63] operating causes alone'.[64] This situation corresponds to the 'complementarity' discussed here, because in such a case 'some part of the harm can be shown to be severable in causal terms from that attributed to the responsible State'.[65] Crawford opined also that this state should be held responsible for the consequences of its wrongful act in due proportion to its effects.

As simple as it may seem at first sight, the apportionment of the obligation to make reparation in situations of complementary causal wrongful acts is far from being so. It calls indeed for some rather subjective, and sometimes agonising, evaluation of the respective influence that each wrongful act had on the outcome. In any event, such a solution can only be implemented on a case-by-case basis, as facts – or rather, what can be known about the facts, i.e. proven – are always of paramount importance. The knowledge of the facts will not only influence the

[61] As argued by S. Wittich, 'Joint Tortfeasors in Investment Law', in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (Oxford: OUP, 2009), pp. 712–713, the breach by Iran of the obligation to protect the US Embassy premises necessarily presupposes that some troubling action that had to be prevented actually occurred. In this sense, there must have existed, from a material point of view, an 'inherent concurrent cause'. But this does not mean that a situation of shared responsibility resulted from such occurrence, because the Iranian failure to act was the only internationally wrongful act as such.

[62] Crawford, 'Third Report on State Responsibility', n. 57, at 17, para. 31.

[63] It is unfortunate and confusing to use also the adverb 'concurrently' in this context when the term is elsewhere used with another meaning.

[64] Crawford, 'Third Report on State Responsibility', n. 57, at 19, para. 35.

[65] Ibid., at 20, para. 35. See also ARSIWA Commentary, n. 1, Article 31, 93, para. 13.

apportionment in a situation of 'complementary' causes, but it may also eventually change that qualification into a 'cumulative' causes situation. The abduction and torture example used above could indeed be envisaged as a situation of 'cumulative' causes, if it were established that the abducting state was fully aware[66] and intended that the person it transferred to the detaining state would be tortured by the latter. In such a case, the transfer could be seen as wrongful aid or assistance in the commission of torture without which torture would not have been possible,[67] so as to consider this specific wrongful act of aiding or assisting as a 'cumulative' cause of torture. Yet another situation would exist if the transferring state had directed and controlled the torture by the detaining state. As mentioned above, the two states would then be responsible for the same wrongful act on the basis of Article 17 of the ARSIWA, and a 'B-type' situation would exist as far as torture is concerned.

3.2.3 b) (ii) Cumulative causes

A 'cumulative' intervention of several wrongful acts exists when each of them is causally linked to the injury, but none of them is by itself sufficient to produce the harmful outcome as it occurred. In this rather more exceptional situation, the injury is not severable into different harmful outcomes adding to each other, which can be allocated in causal terms to the separate wrongful acts. The injury cannot be linked, either exclusively (the first and second situations of, respectively, 'exclusive' or 'parallel' causes) or partially (the third situation of 'complementarity', as discussed above), to one or several distinct wrongful acts. The injury is an indivisible totality that results from the addition of the various causal wrongful acts. Apportionment according to the causal effect of each wrongful act –which is possible when several wrongful acts, each having its harmful effect, complement each other so that an apparent global injury results from their accumulation – would be inadequate at the stage of the allocation of the obligation to make reparation, and is to be left until the issue of the eventual right of recourse arises[68] (see below, in section 6). Cumulative situations are therefore quite

[66] By referring to the awareness of the wrongful act, it is not at all suggested that 'the requirement of awareness is to be preferred to the requirement that the aiding or assisting State be bound by the obligation breached by the recipient State'; A. Orakhelashvili, 'Division of Reparation between Responsible Entities', in J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility* (Oxford: OUP, 2010), p. 653. The awareness criteria used here refers to the 'knowledge' mentioned in Article 16 ARSIWA, n. 1, coupled with the intention that the aid or assistance facilitates the wrongful act expected from the recipient state.

[67] ARSIWA Commentary, n. 1, 67, para. 10.

[68] In domestic law, the issue of a right of recourse tailored according the causal influence of the respective wrongful acts has led to questioning the foundation of *in solidum* obligations on the basis of the theory of causality, and to prefer an explanation of such 'solidary responsibility' between debtors on the basis of the

peculiar. For instance, as stated above, if the territorial state where the abduction took place has been instrumental in aiding or assisting the abduction, the separate wrongful act of aiding or assisting can be viewed as being a 'cumulative' cause of the illegal abduction committed by another state. Since the aid or assistance does not produce any harmful outcome severable from the abduction itself, but was necessary for it to happen, those two causes (aid or assistance by one state, actual abduction by another) can be understood as being 'cumulative' rather than 'complementary', at least 'when the assistance is a necessary element of the wrongful act in absence of which it could not have occurred'.[69] Thus, the complexity resulting from this example combines a situation of two cumulative wrongful acts (the aid or assistance and the abduction) complemented by another wrongful act (the torture itself). Now, if the abducting state transfers the abducted person to the torturing state with full knowledge of the forthcoming torture, another situation of 'cumulative' causes could exist as far as torture is concerned, on the basis of that other aiding or assisting wrongful act. Another example of wrongful acts articulated as 'cumulative' causes of a single injury is to be found in the *Corfu Channel* case.[70]

There are two ways to analyse and solve such a shared responsibility situation.[71] First, despite the cumulative effect of the causal wrongful acts, one can decide nevertheless to identify and isolate one of them as being the most important and deciding one, considered to be the 'adequate cause'. The adequate cause will often be the one most timely proximate to the injury, occurring just before it. The entity responsible for the adequate, deciding (or sometimes called 'efficient') cause will then bear alone the obligation to full make reparation *vis-à-vis* the injured party (subject to a possible right of recourse against the other wrongdoers). Such analysis reduces the plurality into a singularity and tends to solve an inherently complex

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protection of the creditor; see in French law, M. Bacache-Gibeili, 'Les obligations – La responsabilité civile extracontractuelle', in C. Larroumet (dir.), *Droit civil* (London: Economica, 2007), vol. V, p. 462 et seq.

[69] ARSIWA Commentary, n. 1, 67, para. 10 (strangely enough, and despite having clearly mentioned the fact that aiding or assisting is a distinct wrongful act from the aided or assisted act, the ILC Commentary refers in footnote 284 to Article 47, which is a situation where several states incur responsibility for one and the same wrongful act (see below)). If the aid or assistance is not of such effect, it would have to be considered as a 'complementary', rather than 'cumulative' cause: 'In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct' (ibid.). Earlier, the same Commentary suggests that 'in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself' (ibid., at 66, para. 1). This would amount to a situation of 'parallel' or 'coincidental' causes.

[70] See section 3.2.3 b) (i), text to n. 61.

[71] The issue is well-known in domestic law. For instance in French law, see generally on the difference between the adequate cause theory and the *équivalence des conditions* theory, G. Viney and P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité*, 3rd ed. (Paris: LGDJ, 2006), p. 187 et al.

situation by making it simple. The 'cumulative' situation is reduced somehow to an 'exclusive' situation.

The second approach tends to take the shared situation of 'cumulative' causes for what it is: all the causal wrongful acts must be put on the same footing because the injury would not have occurred, as it occurred, without each and every one of them. The wrongful acts are said to be 'equivalent' to one another; they are each a *sine qua non* condition of the injury. In French-speaking countries, that approach of causality in 'cumulative' situations is known as the theory of *l'équivalence des conditions* and is derived from the philosophical writings of J.S. Mill.[72] It favours the victim as it considers that any of the wrongdoers is fully responsible for the injury because no causal wrongful act can be considered as more important than another, and that each of them was necessary to produce the injury as it occurred. The obligation to make reparation is therefore borne equally and entirely by each of the wrongdoers,[73] the injured party being free to decide (for reasons of personal convenience or expediency) to present its full reparation claim to any one of them. Of course, double recovery of reparation by way of compensation is prohibited because the right to reparation is limited to full reparation and nothing more. As mentioned above, the object of the obligation to make full reparation is the injury, and nothing but the injury.

It is quite difficult to know which of those two approaches is favoured by international practice in 'cumulative' situations. This is because practice is extremely scarce and, when it exists, it is rarely explicit on the theoretical foundations of the decisions taken. Not only is the difference between 'complementary' and 'cumulative' situations rarely noticed and made, but the choice between the adequate cause and the equivalent causes theories does not appear to be consciously made in practice. In both the reasoning and the operative clauses of the judgment on the merits in the *Corfu Channel* case, the Court found Albania 'responsible under international law for the explosions [of 22 October 1946] and for the damage and loss of human life that resulted from them'.[74] This might be explained by the fact that no state other than Albania was respondent in the case brought before the ICJ. Such finding of responsibility

[72] J.S. Mill, *A system of logic, ratiocinative and inductive, being a connected view of the principles of evidence, and the methods of scientific investigation*, 8th ed. (New York: Harper, 1882), Book III, Chapter V, pp. 396 et seq.; Chapter X, pp. 537 et seq. On the appropriation of Mills' conceptions of logic by lawyers, see A.M. Honoré, 'Causation and remoteness of damage' (1971) 11 IECL, Chapter 7, p. 203, para. 52. On the theory of *l'équivalence des conditions* as distinct from the adequate or efficient cause theories, see R.O. Dalcq, *Traité de la responsabilité civile* (Bruxelles: Larcier, 1962), vol. II, p. 102, paras. 2351 et al.
[73] In French law, the obligation is said to be *in solidum*.
[74] *Corfu Channel*, n. 58, p. 36.

is, however, not so much based on a logic of attribution,[75] but rather on a hidden understanding of causality. Because the Court was not explicit about that understanding, it is difficult to identify precisely the theory of causality it applied. What may however be inferred from the judgment is that all the damage suffered by the United Kingdom was considered to be a normal and foreseeable consequence of Albania's omission, as if that wrongful act was the only cause of the entire damage. This may lead one to think that the Court relied on some form of adequate or efficient causality; among the various possible causes, the most decisive one is selected, and the author of the illegal act constituting that cause must make reparation for all the damage. However, one may also think that the Court considered that the damage suffered by the United Kingdom would not have occurred, as it occurred, if it were not for the unlawful failure to warn of the presence of the mines, despite the fact that their laying was not (proven to be) attributable to Albania. The Court might thus have had in mind something like the theory of *l'équivalence des conditions*,[76] since the failure of Albania to warn the Royal Navy of the presence of the mines was a *sine qua non* condition of the explosions.

Be that as it may, the *équivalence des conditions* theory seems to have to be preferred, so that the obligation to make reparation for the whole injury is equally owed by each of the responsible entities. This is clearly the solution supported by Special Rapporteur Crawford[77] on the basis of, most notably, the *Corfu Channel* case. Since then, it seems to have been followed in some cases.[78] Of course, that solution must only be applied in a situation correctly analysed as relating to 'cumulative' – rather than 'complementary' – causes. However, the choice between the adequate cause theory and the equivalent causes theory in 'cumulative' situations will most likely be done in practice for reasons of expediency or some perceived sense of fairness for the victims. Because often the result considered desirable will somehow dictate the choice between the available theoretical approaches, one should not have too many illusions about the false security that apparent logical classifications provide.[79] This is especially the case since the *a posteriori* analysis of causality always boils down to hypothetical

[75] By definition, a failure to act never raises any question of attribution, not even 'negatively'; pointing out a failure to act requires one to identify who had to act, so that the 'subjective' element at stake in the search for attribution is always satisfied by finding the wrongful omission.
[76] See on this D'Argent, 'Reparation and Compliance', n. 43, pp. 344–345.
[77] See Crawford, 'Third Report on State Responsibility', n. 57, at 19, para. 34.
[78] See *CME Czech Republic BV (The Netherlands v. Czech Republic)*, Partial Award on Merits, (2001) 9 ICSID Reports 113, quoting the ARSIWA Commentary on Article 31, n. 1, and deciding that the responsibility of the respondent state was not diminished by the fact that its conduct was not the sole cause of the injury due to the concurrent acts of an individual. On this point, the award is far from being convincing, as argued by Wittich who considers that the joint responsibility issue has been addressed by the Arbitral Tribunal in a 'sloppy manner': S. Wittich, 'Joint Tortfeasors in Investment Law', n. 61, at p. 722.
[79] J. Verhoeven, *Droit international public* (Bruxelles: Larcier, 2000), p. 630.

reconstructions of past events where their absence is posited in turn, in order to imagine possible different outcomes and gauge their respective influence and articulation. One element that can also be influential in this choice is jurisdictional considerations. Since there is no compulsory court or tribunal in general international law, the adequate cause theory may be overly restrictive in that regard, not to speak of the effects that the *Monetary Gold* doctrine[80] might have if the equivalent conditions approach is rejected. The form of reparation claimed could also be an influential element in that regard. For instance, the adequate cause theory might be preferred just because restitution appears to be the most appropriate form of reparation and only one of the wrongdoers is in a position to make reparation through restitution.

4. The same wrongful act

Under the second hypothetical situation ('B-type'), several states and/or international organisations are responsible for the same wrongful act.

4.1 Possibilities

Such a situation exists when a common organ of several states carries out a wrongful act[81] or when responsibility is attributed to a state or an international organisation because it directed

[80] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, ICJ Reports 1954, 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240, at p. 261, para. 55 (*Nauru*).

[81] ARSIWA Commentary, n. 1, 124, para. 2; Crawford, *The International Law Commission's Articles on State Responsibility*, n. 54, p. 272. In its 1978 Report, following the work of R. Ago, the ILC already considered that the wrongful conduct of an organ common to two states is a case of 'parallel attribution of a single course of conduct to several States' so that such 'conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is'. However, the ILC concluded at that time that such a situation resulted in a plurality of wrongful acts: 'If that conduct [of the common organ] is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts', see ILC *Yearbook* 1978/II(2), 99. It is however suggested that, as only one course of action existed from a material point of view, it is correct to consider that states incur responsibility for *one* same wrongful act when that act is the conduct of a common organ. The *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v. the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française)* offers an example of a 'joint organ' triggering the responsibility of two states, namely France and the UK. In the Partial Award, (2007) 132 ILR 1 (also available at www.pca-cpa.org), the Arbitral Tribunal found that the Intergovernmental Commission (IGC) created by the Canterbury treaty was a 'joint organ' of France and the UK and opined that '[w]hat the IGC failed to do, the Principals [i.e. the two states] in whose name and on whose behalf the IGC acted equally failed to do' (p. 103, para. 317).

and controlled, or coerced,[82] the commission of an internationally wrongful act by another state or international organisation.[83] Breaches of mixed external agreements of the European Union (EU) are mentioned by the ILC's ARIO Commentary as examples of responsibility of the EU and its member states for the same wrongful act when 'such agreements do not provide for the apportionment of the responsibility between the Union and its member States'.[84] 'B-type' situations also include cases of attribution of responsibility to a member (be it a state or an international organisation) of an international organisation for the wrongful act committed by that organisation when the member has accepted responsibility for it[85] or when the injured party was led to rely on its responsibility.[86] In that case (and apparently in that case only), the responsibility of the member is 'presumed to be subsidiary'[87] in the sense that it 'may be invoked insofar as the invocation of the primary responsibility has not led to reparation'[88] since 'the international responsibility of the international organization of which the State [or the other organisation] is a member remains unaffected'.[89]

The ARSIWA Commentary also mentions the situation where 'two or more States (…) combine in carrying out together an internationally wrongful act in circumstances where they

[82] The coerced state could 'plead force majeure as a circumstance precluding the wrongfulness of its conduct', therefore possibly leaving the coercing state as the only responsible entity for that act; see Crawford, 'Third Report on State Responsibility', n. 57, at 73, para. 267.
[83] Articles 17–18 ARSIWA, n. 1; Articles 15–16, and 59–60 ARIO, n. 1.
[84] ARIO Commentary, n. 1, 142, para. 1. Discussing the Third report by Special Rapporteur J. Crawford, members of the ILC raised doubts about the appropriateness of using the EU mixed agreements as an example of a shared responsibility under draft Article 47 ARSIWA, n. 1; ILC *Yearbook* 2000/II(2), 49, para. 274.
Under Article 3(7) of the protocol on the EU accession to the European Convention on Human Rights, the joint responsibility of the EU and member states for the same wrongful act is envisaged under the co-respondent procedure as a default rule: 'If the violation in respect of which a High Contracting Party has become a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless they have jointly requested the Court that only one of them be held responsible and the Court decides that only one of them be held responsible.' Council of Europe, Meeting report, Third Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 7–9 November 2012, 47+1(2012)R03.
[85] An example of such an acceptance can be found in the draft Regulation of the European Parliament and the Council 'establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party' (COM(2012) 335 final). Under Articles 3 and 207 of the Treaty on the Functioning of the European Union (available at http://eur-lex.europa.eu/), the EU has exclusive competence for a common commercial policy, including for foreign direct investment. As a consequence, the future international agreements on trade liberalisation will most likely include investment protection provisions and be concluded by the Union alone. International responsibility for alleged breaches of those agreements lies with the Union and not, as is the case of mixed agreements, together with member states. Under the draft Regulation, a member state shall nevertheless bear 'internal' financial responsibility if the illegal treatment was afforded by it, unless that treatment had been required by EU law (Article 3). If the external agreement provides for such possibility, the member state may act as respondent in the dispute resolution procedure, under certain circumstances (Article 8). Even when the Union is defendant, the member state may 'accept any potential financial responsibility arising from the arbitration' (Article 11).
[86] Articles 62 and 18 ARIO, n. 1.
[87] Article 62(2) ARIO, n. 1.
[88] Article 48(2) ARIO, n. 1.
[89] ARIO Commentary, n. 1, 164, para. 13.

may be regarded as acting jointly in respect of the entire operation'.[90] The section of this Chapter dealing with co-perpetration (section 5) will examine whether such joint operation is indeed to be considered as pertaining to a 'B-type' or, rather, an 'A-type' situation, but the example referred to in the ARSIWA Commentary calls for an immediate clarification of the very notion of 'the same wrongful act'. The question is whether it means that only one wrongful act occurred while two or more states (or organisations) incur responsibility for it on the basis of one of the reasons recalled above, or eventually also that two or more actions by several states (or organisations) are similarly wrongful because they each breached the same international law rule. It is suggested that the singular as used in Articles 47 of the ARSIWA and 48 of the ARIO is to be taken seriously, so as to exclude from the notion of 'the same wrongful act' situations where several subjects incur responsibility for distinct, but similar, wrongful acts. 'The same wrongful act'[91] implies 'a single course of conduct'[92] and is not to be confused with similar (or identical) wrongful acts. When several states or organisations incur responsibility for a plurality of identical wrongful acts, an 'A-type' situation exists.

4.2 Solution

How should the basic principle of independent responsibility, according to which each state is separately responsible for the conduct attributed to it,[93] be applied in a situation 'where a single course of conduct is at the same time attributable to several States [or organisations] and is internationally wrongful for each of them'?[94] The answer given by Article 47 of the ARSIWA and Article 48 of the ARIO is very simple, as it reflects the principle of independent responsibility: 'the responsibility of each State [or organisation] may be invoked in relation to that [same internationally wrongful act]'. In order to justify this rule, the ARSIWA Commentary refers to the *Nauru* case and recalls that the ICJ rejected the Australian argument, according to which its responsibility could not be raised separately from one of the two other states (the United Kingdom and New Zealand) that made up together the Administering Authority under the Trusteeship Agreement, and which were not parties to the case.[95] After having affirmed that 'Australia had obligations under the Trusteeship Agreement', the

[90] ARSIWA Commentary, n. 1, 124, para. 2.
[91] In French: 'du même fait internationalement illicite'.
[92] ARSIWA Commentary, n. 1, 124, para. 3.
[93] Ibid.; Crawford, *The International Law Commission's Articles on State Responsibility*, n. 54, p. 272.
[94] ARSIWA Commentary, n .1, 124, para. 3.
[95] *Nauru*, n. 80, pp. 258–259, para. 48.

judgment on preliminary objections stressed that 'there [was] nothing in the character of that Agreement which debar[red] the Court from considering a claim of a breach of those obligations by Australia'.[96] By referring to the 'character'[97] of the Trusteeship Agreement, the Court was careful enough to avoid any over-generalisation of the solution it came to, by allowing for contractual derogation – even if it was only based on the general economy of a treaty, its 'character', and not its wording as such. This being said, in the absence of such contractual derogation, the responsibility of each state (or organisation) for the same internationally wrongful act may be invoked separately in relation to that act.

The ARSIWA Commentary labelled such principle as being one of 'separate'[98] responsibility of each responsible entity, whereas the ARIO Commentary, ten years later, called it 'joint responsibility'.[99] Beyond the words, it is important to see that under that principle 'responsibility is not diminished or reduced by the fact that one or more other States [organisations] are also responsible for the same act'[100] and that each 'injured State [organisation] can hold each responsible State [organisation] to account for the wrongful conduct as a whole'.[101] But what does this mean in terms of cessation (section 4.2.1), assurances and guarantees of non-repetition (section 4.2.2), and reparation (section 4.2.3)?

4.2.1 Cessation

When several states (or organisations) are responsible for one same wrongful act having a continuing character, it is quite obvious that not every one of them is in a position to cease it. Everything will depend on the legal ground for which each of them incurs responsibility. If the wrongful act is being committed by a common organ, all the responsible entities will be bound by the obligation of cessation through the conduct of the common organ. If responsibility for the wrongful act results from direction and control, or coercion, the directing and controlling, or coercing, state (or organisation) cannot stop by itself the on-going wrongful act. In such a situation, cessation will be owed by the subject that has been directed and controlled, or coerced, and to which the wrongful act is attributable as a matter of conduct. Is the directing and controlling, or coercing, state (or organisation) also bound (*vis-à-vis* the victim of the

[96] Ibid., p. 259.
[97] 'Nature', in the French version of the judgment.
[98] ARSIWA Commentary, n. 1, 125.
[99] Ibid., 142.
[100] Ibid., 124, para. 1.
[101] Ibid., para. 2.

wrongful act) to cease its direction and control, or coercion, if it is on-going? A positive answer would logically require that the direction and control, or coercion, be considered wrongful as such. This is not what the ARSIWA and the ARIO provide for, in contrast to situations of aid or assistance.[102] This being so, it seems however counter-intuitive and legally unsound to consider that the directing and controlling, or coercing, state (or organisation) is under no obligation to cease its 'negative' influence on the wrongdoer while being at the same time responsible, by attribution of responsibility, for the wrongful act resulting from it. On the other hand, it is far from certain that the directing and controlling, or coercing, state (or organisation) is also under the duty to 'virtuously' direct and control, or coerce, the author of the continuing wrongful act to cease committing it – not more at least than any other state (or organisation) is bound to 'cooperate to bring to an end through lawful means any serious breach'[103] of an obligation arising under a peremptory norm of general international law, when such breach exists. In all those situations, cessation of the direction and control, or coercion, is most likely to entail the cessation of the wrongful act itself, without great effort on the part of the directed and controlled, or coerced, wrongdoer, since it would probably not have wrongfully acted in the absence of such outside influence.

4.2.2 Assurances and guarantees of non-repetition

When responsibility is shared 'for the same wrongful act', which of the responsible states (or international organisations) has to offer assurances and guarantees of non-repetition if the circumstances so require? As in 'A-type' situations, where several subjects incur responsibility for a plurality of separate wrongful acts, it is simply not possible to allocate in advance the burden of the assurances and guarantees of non-repetition on some of the responsible subjects in 'B-type' situations, nor to exclude that several such assurances and guarantees ought to be offered by several of the subjects bearing responsibility. Similarly, it is impossible to decide *in abstracto* which type of assurances and guarantees should be offered by each responsible state or organisation. Everything will depend on the circumstances, the nature of the obligation breached, the character of the breach, and the legal ground triggering shared responsibility for the same wrongful act. It cannot be excluded that every responsible state or organisation is individually called upon to offer assurances and guarantees of non-repetition.

[102] See section 3.1, n. 17.
[103] Article 41(1) ARSIWA, n. 1; Article 42(1) ARIO, n. 1.

4.2.3 Reparation

In the *Nauru* judgment on preliminary objections, after having rejected the objection of Australia according to which its responsibility could not have been invoked separately from the responsibility of the United Kingdom and of New Zealand, the ICJ made clear that its ruling did

> not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems (…) and, in particular, the special role played by Australia in the administration of the Territory.[104]

As the case was amicably settled[105] and discontinued,[106] there is no authoritative answer to that question. This led the ILC to consider that the rule of separate invocation of responsibility provided in Article 47 of the ARSIWA

> neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.[107]

Despite a rather obscure beginning,[108] the last sentence of this quote clearly refers to the passage of the *Nauru* judgment introduced by 'regard being had to…'. One must therefore understand that the rule of separate invocation of responsibility when several states or organisations are responsible for the same wrongful act is just what it is: a rule relating to the invocation of responsibility and not a substantive rule of responsibility, let alone a principle governing reparation. Indeed, Article 47 of the ARSIWA and Article 48 of the ARIO are each to be found under the first Chapter ('Invocation of responsibility…') of the respective Part of each set of Articles dealing with 'the implementation of the international responsibility of a [state or international organisation]'. Hence, if an injury – or several injuries – results from the

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[104] *Nauru*, n. 80, p. 262, para. 56.
[105] See the Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning *Certain Phosphate Lands in Nauru*, Nauru, 10 August 1993, in force 20 August 1993, 1770 UNTS 379. Australia agreed to pay the full amount claimed by Nauru by instalments, while the UK and New Zealand later agreed to contribute to the settlement; Crawford, 'Third Report on State Responsibility', n. 57, at 74, para. 271.
[106] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 325.
[107] ARSIWA Commentary, n .1, 125, para. 6.
[108] The sentence says that Article 47 of the ARSIWA does not 'exclude the possibility that two of more States will be responsible for the same internationally wrongful act', while the condition for its application is precisely a situation where several states are responsible for the same wrongful act.

wrongful act for which several states or organisations are responsible, there is no doubt that the responsibility of each of them can be invoked for the purpose of claiming reparation.[109]

It seems difficult to argue that reparation for the whole injury could not be claimed from any of the various states or organisations responsible for the same wrongful act. From a causal point of view, the wrongful act is the only cause of the injury, even if several subjects bear responsibility for it. It is simply impossible to apportion those responsibilities according to the causal influence of the wrongful act on the injury, because that influence has been, by definition, exclusive. Since apportionment cannot be made on the basis of some quantitative appraisal of the causal influence of the wrongful act on the injury – as it presumptively resulted from one breach only – it could only be made by reference to some qualitative evaluation of the legal reasons founding the responsibility of each of the several responsible states or organisations. In other words, it is the influence of each responsible subject in the wrongful act itself that would have to be taken into account and measured in proportional terms, rather than the influence that each wrongful act had on the injury. For instance, depending on the circumstances, one could consider that the coercing state is somehow 'more' responsible for the wrongful act committed by the coerced state, than that state itself. Such appreciation would be made in light of some 'sanctioning' policy reflecting the perceived gravity of the various grounds for responsibility.

However, it is submitted that the apportionment of what can be called the 'legal structure' of the causal wrongful act cannot be opposed to the injured party in order to limit its reparation claim addressed to any of the responsible states or organisations. Any apportionment on the basis of the 'legal structure' of the wrongful act and the grounds of responsibility for it is a matter between the responsible entities only, to be addressed if the issue of the right of recourse arises. After all, those reasons are indifferent as far as the injury is concerned, while the responsibility incurred by each state or organisation is 'not diminished or reduced by the fact that one or more other States [organisations] are also responsible for the same act'.[110] If indeed, as recalled above, each 'injured State [organisation] can hold each responsible State [organisation] to account for the wrongful conduct as a whole',[111] it would be contradictory to suggest that full reparation may not be claimed by the injured party from any of the states or

[109] See Chapter 8 of this volume, A.M.H. Vermeer- Künzli, 'Invocation of Responsibility', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), at pp. ___.
[110] ARSIWA Commentary, n. 1, 124, para. 1.
[111] Ibid., para. 2.

organisations responsible for the same wrongful act. It is only if specific 'international obligations of each of the [entities] concerned'[112] impose a restriction on the right to invoke their respective responsibilities, and that those obligations are opposable to the victim, that a claim for full reparation could not be presented to any of them.[113] Absent such (opposable) obligations, the apportionment is only relevant as far as the right of recourse that the state or organisation which has provided reparation 'may have against the other responsible'[114] entities. The existence and legal basis of such a right of recourse will be addressed when discussing the issue of joint and several responsibility.[115]

This being said, two provisos must be made at this juncture. The first relates to the forms of reparation, and the second to the prohibition of double recovery.

First, if full reparation may be claimed from, and is owed by, any of the states or organisations responsible for the same wrongful act, it might be the case that only one or some of them are in a position to actually perform the obligation to make reparation under the specific form of restitution. If restitution is considered in a specific instance to be the appropriate form of reparation, it could well be impossible for one wrongdoer, while possible for another. In particular, this would be the case if an object has to be returned and is in the possession of one of the wrongdoers, or if an internal act has to be repealed. In such a situation, the nature of the appropriate form of reparation will considerably influence the useful exercise of the right to invoke the responsibility of any of the responsible states or organisations, and will allocate the actual performance of the obligation to make reparation to a specific responsible entity, while discharging to a great extent the others from doing so. Of course, when reparation takes the form of compensation, these particularities do not arise. Also, as far as satisfaction is concerned, there does not seem to be any reason to require it specifically from one of the responsible entities in particular.

The second proviso relates to the prohibition of double recovery. As already mentioned in relation to the *équivalence des conditions* theory, in the case of shared responsibility where multiple wrongful acts are considered to be 'cumulative' causes of the injury, the prohibition of double recovery derives from the fact that the obligation to make reparation, and the right to

[112] Ibid., at 125, para. 6.
[113] This would be the case when an external agreement concluded by the EU and its member states provides for the apportionment of their respective responsibilities.
[114] Article 47(2)(b) ARSIWA, n. 1 and Article 48(3)(b) ARIO, n. 1.
[115] See section 6 below.

get full reparation, 'is limited by the damage suffered'.[116] Article 47(2)(a) of the ARSIWA and Article 48(3)(a) of the ARIO recall the prohibition of double recovery as a proviso to the principle of separate invocation of responsibility when several states or organisations are responsible for the same wrongful act. Such a prohibition is found in many domestic legal systems and can most probably be considered as a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute, or even as an axiological principle inherent to the very notion of reparation. The prohibition is limited, as underlined by Articles 47 of the ARSIWA and 48 of the ARIO, to reparation 'by way of compensation'. Therefore, it cannot be excluded that satisfaction may be ordered from several responsible states or organisations. This is certainly the case when several injuries to different parties have resulted from the same wrongful act for which several entities are responsible, but it might also be the case when there is only one injured party.

The prohibition of double recovery reinforces the argument about the possibility of claiming full reparation from any of the states or organisations responsible for the same wrongful act. Indeed, there would be no need to recall such prohibition if the principle enshrined in Article 47 of the ARSIWA and Article 48 of the ARIO meant that full reparation for the injury could not be claimed from, and were not owed by, each state or organisation responsible for the same wrongful act. If apportionment according to (what has been called above) the 'legal structure' of the wrongful act were the rule in a situation of shared responsibility for the same wrongful act, there could be no risk of double recovery.[117]

5. Co-perpetration

When two or several states or international organisations simultaneously breach the same international rule binding each of them, are they separately responsible for different, though similar, wrongful acts ('A-type' situation), or for one and the same wrongful act ('B-type' situation)?

[116] ARSIWA Commentary, n . 1, 125, para. 9. The report refers in footnote 720 to the *Factory at Chorzów* case, n. 37, where the PCIJ held that it could not grant a remedy sought by Germany because 'the same compensation would be awarded twice over'.
[117] Besson, 'La pluralité d'Etats responsables', n. 13, 21.

Situations of co-perpetration exist in international practice. For instance, it can be argued that through the Berlin Pact of Assistance of 27 September 1940,[118] the Axis Powers proceeded in concert and decided to wage jointly the Second World War. The decision of the US and the UK governments to use force against Iraq in 2003 could also be seen as a wrongful co-perpetration situation, if that use of force is considered illegal.

As these examples suggest, situations of co-perpetration do not raise many difficulties as far as attribution of conduct is concerned. Usually, it will be fairly easy to consider that, despite having proceeded in concert, each state (or organisation) has separately acted through its organs, so that the states (or organisations) concerned are each responsible for their own course of conduct. The fact that the rule breached is identical is actually quite irrelevant, since respect for that rule was separately owed as a binding international obligation by each of the states (or organisation) concerned. What is important is to see that each state (or organisation) has acted by itself, even if they had decided to act together. The common intent of the responsible states (or organisation), or the fact that they acted in concert, does not transform their similar wrongful acts into one single wrongful act. As the ILC wrote in its 1978 Commentaries, '[i]f, for example, State A and State B are allies and proceed in concert to make an armed attack on a third State, each acting through its own military organs, two separate acts of aggression are committed by the two States'.[119] Hence, situations of co-perpetration should, as a matter of principle, be considered under the 'A-type' situation and analysed as such.[120] Any other solution would be quite unfair: if state A commits 100,000 soldiers and state B only 5,000 troops, to consider that they are separately responsible for one same wrongful act would not correspond to any politically and materially sound analysis of the situation.

If co-perpetration is an 'A-type' situation, should the several similar wrongful acts be considered as 'complementary' or 'cumulative' causes of the harmful outcome? It is impossible to give a definite answer to that question *in abstracto*, as it is only in light of the precise factual circumstances that the articulation of the wrongful acts can be adequately qualified, knowing that the default qualification should be 'complementary'. War – to refer again to the most-used illustration of co-perpetration – is indeed a harmful global outcome, made so by the addition of injuries resulting from specific, even if they are similar, wrongful acts. Despite their wilful and concerted co-belligerency, the responsibility of the Axis Powers

[118] Berlin Pact of Assistance, 27 September 1940, Hudson, International Legislation, vol. VIII, no. 591.
[119] ILC *Yearbook* 1978/II(2), 99. Those words are reproduced from R. Ago, 'Seventh Report on State Responsibility' ILC *Yearbook* 1978/II(1), 54, para. 59.
[120] D'Argent, *Les réparations de guerre en droit international public*, n. 32, p. 547.

after the Second World War was established, through peace treaties and other post-war arrangements, on an individual basis. None were held responsible for all the damage resulting from the War.[121] The 'complementary' articulation has thus prevailed. It is only as a matter of expediency and common sense that the former Axis Powers have exceptionally been made responsible for the conduct of one of their co-belligerents, for instance when the defeated territorial state had to make restitution for objects found on its territory and eventually displaced by its war-time ally from foreign occupied countries.[122] In contrast, Germany was made responsible, by Articles 231 and 232 of the Versailles Treaty, for all the damage resulting from the First World War, which was the result of its own military action or the actions of its co-belligerents. Not only did those provisions contractually establish Germany's legal responsibility for the War that did not exist in general international law at the time[123] (except *vis-à-vis* Belgium, whose neutrality had been wrongfully breached by Germany, as it admitted during the War), but they also created a regime of solidary responsibility that somehow reflected a 'cumulative' articulation of *ex post facto* declared aggressions. Such a contractually-established (solidary) responsibility resulted in an enormous debt to be paid by Germany; it soon appeared financially impossible to implement, and economically destructive for the creditors themselves. That *in solidum* regime was definitively abolished by the Young Plan of 1930.[124]

A decisive element – though difficult to establish – in departing from the default qualification of situations of co-perpetration as made up of several 'complementing' wrongful acts would be to assess whether the participation of state B in the war was considered by state A to be a *sine qua non* condition to wage it. If that were the case, the similar wrongful acts could be considered as 'cumulative'. This would be more than a concerted action of the wrongdoers; it requires that one wrongdoer conditions its own conduct on the action of its partner. If that is the case, the two wrongful acts could be seen as 'cumulative' causes of the war, and each of the aggressors could be held responsible on the basis of the *équivalence des conditions* theory. If not, it would be more reasonable and closer to reality to consider those two breaches of Article 2(4) of the UN Charter as 'complementary' causes of the war. Neither the nature of the

[121] I. Brownlie, *System of the Law of Nations, State Responsibility, Part I* (Oxford: Clarendon, 1983), p. 189; D'Argent, *Les reparations de guerre en droit international public*, n. 32, p. 747 and references.
[122] See D'Argent, ibid.
[123] The responsibility established by Article 231 of the Versailles Treaty raised the notoriously contentious *Kriegsschuldfrage* which was not only debated in legal circles; see ibid., pp. 72–81.
[124] On The Hague Agreement of 20 January 1930 constituting the Young Plan, its history, content, articulation with the Dawes Plan, and implementation, see ibid., pp. 95–100 and references.

obligation breached nor the character of the breach should influence the way the articulation of identical causal wrongful acts is qualified.

However, as noted above, the 2001 ILC Commentary illustrated Article 47 of the ARSIWA by referring to a situation where 'two or more States (…) combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation'.[125] According to the ILC, this would amount to several states being responsible for the same wrongful act. It is suggested that this assertion by the ILC does not contradict what has been argued above about co-perpetration as being a situation where several wrongful acts have been committed by a plurality of states or organisations. By referring to the joint action of states 'in respect of the entire operation', the ILC envisaged a very peculiar situation made up of exceptional circumstances that are usually not present in regular situations of co-perpetration. Be that as it may, the rather esoteric debate about one same wrongful act or several identical wrongful acts in such exceptional circumstances does not have much practical implication as far as making reparation is concerned. If the usual plurality of co-perpetration is favoured, the causes should certainly be considered as 'cumulative' when states have acted jointly 'in respect of the entire operation' and the *équivalence des conditions* theory is applied, so that full reparation can be indifferently claimed from any of the wrongdoers, as in a situation where a plurality of entities are responsible for the same wrongful act. In some cases, situations of an 'A-type' or 'B-type' do not make much difference for the injured party.

6. Joint and several responsibility

6.1 The domestic law analogy

As commonly understood, the responsibility of a plurality of subjects is said to be 'joint and several' when each of them is responsible for the acts of the others ('joint') and may be individually asked to make full reparation ('several').[126] In French law, the corresponding notion is *obligation in solidum*, and *Gesamtschuld* in German law. In domestic legal systems, this form of responsibility is usually instituted in order to sanction the responsible entities for having joined in concert in their harmful courses of conduct – as opposed to accidental

[125] ARSIWA Commentary, n. 1, 124, para. 2. Also above, n. 90.
[126] See Crawford, 'Third Report on State Responsibility', n. 57, at 74, para. 272.

concurrent actions – and to protect the injured party by allowing it to claim full reparation from any of them. It is also usually provided by the law that the responsible entity providing full reparation at the request of the injured party has a right of recourse against the other responsible entities for their own contribution to the harmful outcome. Such right of recourse can easily be exercised by resorting to domestic courts and tribunals.

Joint and several responsibility has been debated in legal doctrine, with some authors clearly favouring it,[127] and others being hesitant[128] or even critical[129] about its existence and transposition to international law. Those debates are shaped by a real lack of practice[130] and the usual reference to some specific treaty provisions,[131] which are nevertheless insufficient to give rise to customary rules. In addition to the lack of practice, it is quite indisputable that the policy reasons which usually explain the existence of joint and several responsibility under domestic law are not the same under international law, while the necessary conditions for its fair implementation are absent. In a legal order primarily made up of juridical persons like states and international organisations, most of their concurrent courses of action are usually in concert; bureaucracies, which both states and organisations are, rarely act by accident and certainly not when they act together or at the same time. What explains joint and several responsibility for individuals in domestic law can barely be transposed when it comes to the joint actions of entities like states or organisations in international law. As most concurrent actions by states or organisations are always, in one way or another, in concert, they would

[127] J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 YJIL 225–267 (arguing *de lege ferenda*); A. Orakhelashvili, 'Division of Reparation between Responsible Entities', n. 66, pp. 647–665; Separate Opinion of Judge Simma, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, pp. 353–9, paras. 63–78.

[128] I. Brownlie, *Principles of Public International law*, 6th ed. (Oxford: OUP, 2003), p. 440; S. Besson, 'La pluralité d'Etats responsables', n. 13, at 13–38; B. Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 RBDI 370–380.

[129] Crawford, 'Third Report on State Responsibility', n. 57, at 74, para. 275; Wittich, 'Joint Tortfeasors in Investment Law', n. 61, pp. 712–722; D'Argent, *Les réparations de guerre en droit international public*, n. 32, pp. 746–752.

[130] This was already noted by Brownlie some thirty years ago (*System of the Law of Nations, State Responsibility, Part I*, n. 121, p. 189), but not much has changed since.

[131] The most often-quoted example, including by the ILC and the Special Rapporteurs, relates to the non-fault contractual regime of joint and several liability established by Articles IV and V of the Convention on International Liability for Damage Caused by Space Objects, London, Moscow, and Washington D.C., 29 March 1972, in force 1 September 1972, 961 UNTS 187. Another example of conventional joint and several responsibility can be found in Article VIII(5)(e)(iii) of the Agreement between the Parties to the North Atlantic Treaty Organization regarding the Status of their Forces, London, 19 June 1951, in force 23 August 1953, 199 UNTS 67. Under that provision, the individuals injured in peacetime by the conduct of the armed forces of any of the North Atlantic Treaty Organization members may claim reparation from any of those states (the provision protects civilians in case of harmful joint military exercise when the identity of the army having caused the injury is not possible). That right is to be exercised in accordance with the applicable domestic law provisions, so that the international law source and character of the joint and several regime established between states must be tempered accordingly. On these two references, see D'Argent, *Les réparations de guerre en droit international public*, n. 32, pp. 747–8.

have to be 'sanctioned' by a joint and several responsibility mechanism; but this is clearly not what can be gathered from practice. It must also be recalled that the international law of responsibility is based on the attribution (of conduct or of responsibility) of internationally wrongful acts, rather than on some form of fault or malevolent intention. Moreover, and at least when injured parties are equal sovereign states (or equal autonomous international organisations), the international community has not been very preoccupied with the fate of victims of wrongful acts,[132] so that the need for a protective mechanism by which a full claim of reparation can be addressed to any of the wrongdoers is not as pressing as it has been in domestic legal orders. Finally, while the right of recourse is usually provided under domestic law by explicit statutory provisions and easily implemented in courts, nothing comparable exists under current international law. Any right of recourse is still in search of a solid legal ground in the absence of treaty provisions, while the lack of compulsory jurisdiction renders its exercise uncertain anyway – so much so that the very existence of joint and several responsibility may result in creating real injustices in the pursuit of justice. Therefore, resorting to comparative law in order to affirm the existence of a 'general principle of law'[133] of joint and several responsibility is hasty in light of the specificities of each national tradition, and unconvincing due to the structural differences between the domestic and international legal orders.[134]

6.2 Solutions and problems

Be that as it may, the developments discussed in this Chapter have to a large extent deflated the debate about joint and several responsibility in international law, as they have established that the practical benefit of such a regime, i.e. the possibility for the injured party to claim full reparation from any of the responsible states or organisations, actually exists in two specific situations: when several wrongful acts are considered to be 'cumulative' causes of the injury; or when shared responsibility stems from the same wrongful act. However, this does not mean

[132] Verhoeven, *Droit international public*, n. 79, p. 633.
[133] Within the meaning of Article 38 of the ICJ Statute: see Separate Opinion of Judge Simma, *Oil Platforms*, n. 127, pp. 353–9, paras. 63–78.
[134] ARSIWA Commentary, n. 1, 124, para. 3: 'analogies [with 'joint and several responsibility' or 'solidary responsibility' in domestic law] must be applied with care'. See also Brownlie, *Principles of Public International law* and Besson, 'La pluralité d'Etats responsables', n. 13; Crawford, 'Third Report on State Responsibility', n. 57, and D'Argent *Les réparations de guerre en droit international public*, n. 32.

that those situations should be labelled as 'joint and several responsibility' cases,[135] nor that they prove the existence of such a regime under general international law. This would be misleading for two reasons at least. First, the temptation would then be great to overlook the rather exceptional character of those two situations and extend their specific outcome in the more frequent situations where it would be totally inappropriate to do so, namely when several wrongful acts are considered to be 'complementary' causes of the injury. It simply cannot be the case, under general international law and in the absence of any contrary treaty provision, that a state (or an organisation) should be responsible for the specific harmful consequences of a distinct wrongful act for which it does not bear any responsibility. The basic principle remains that 'each State [or organisation] is separately responsible for the conduct attributable to it'.[136] As shown in the developments discussed above, this principle is not departed from in situations of 'cumulative' wrongful acts or of shared responsibility for the same wrongful act. Second, a joint and several responsibility regime worthy of its name would need to be more sophisticated than what has been concluded in terms of causality and wrongfulness in the two situations referred to above. For instance, what about the effect of a waiver by the injured party in favour of one of the responsible entities? Does it benefit the other ones as it usually does in domestic law, in the absence of a specific provision to the contrary? Would the intrinsic logic of the international legal order not command the opposite conclusion? How is it possible to legitimately decide these kinds of issues in the absence of practice from which customary rules can be positively deduced, or when treaty provisions do not exist?

Another major point of uncertainty relates to the right of recourse, i.e. the contribution of the other responsible entities to the compensation paid by one of them in favour of the injured party. It has already been mentioned that its effective exercise is rendered uncertain by the absence of a system of compulsory jurisdiction in general international law, but, more fundamentally, its existence and legal foundation are also far from being clear. Commenting on Article 47(2)(b) of the ARSIWA, the ILC Commentary considers that this proviso is, as its text makes clear, a 'without prejudice' clause and that 'there may be cases where recourse by one responsible State against another should not be allowed'.[137] With that general statement

[135] Crawford, 'Third Report on State Responsibility', n. 57, at 75, para. 277, noting about Article 47 ARSIWA that 'there is no need to identify this situation with "joint and several liability" as it is understood in certain national legal systems'.
[136] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 54, p. 272; ARSIWA Commentary n. 1, 124, para. 3.
[137] ARSIWA Commentary, n. 1, 125, para. 10.

echoing the views of Special Rapporteur Crawford,[138] the ILC leaves it for future practice to decide what those cases should be, but also what could be the legal ground for the right of recourse outside those cases, and how to apportion the various contributions.

In domestic legal systems, the right of recourse between joint wrongdoers is essentially based on the mechanism of subrogation, by which the entity that has performed reparation in favour of the victim is subrogated in its rights.[139] But in civil law countries, subrogation must usually be established contractually or be provided under statutory provisions and does not similarly exist, as it does in common law, as a principle of equity.[140] In the absence of contractual or statutory provisions, it has been argued in civil law systems that the right of recourse could also be founded, as a last resort, on principles of unjust enrichment.[141] Even if this is not the place to engage in a comparative law exercise,[142] the domestic law analogies could here again prove to be a difficult path that would not meet all expectations. It is therefore submitted that a 'general principle of law' in the sense of Article 38 of the ICJ Statute could only be 'discovered' in that regard with a certain degree of legal creativity and a spirit of progressive development.

Regarding the apportionment of the contributions claimed from the other responsible entities on the basis of some form of subrogation or unjust enrichment, it has already been argued that the situation is different when several wrongful acts are considered to be 'cumulative' causes of the injury or when shared responsibility stems from the same wrongful act. In a situation of cumulative wrongful acts, the apportionment will somehow be based on their respective quantitative causal influence. This might prove impossible to decide, if not contradictory with the causal theory that considers all cumulative wrongful acts as *sine qua non* conditions of the injury, and by holding them to be equivalent, this allows full reparation to be claimed from any

[138] Crawford, 'Third Report on State Responsibility', n. 57, at 76, para. 275: 'there may be cases where as a matter of equity a court disallows any contribution, e.g. on the basis of the maxim *ex turpi causa non oritur actio*. In such cases the victim is compensated, but as between the joint wrongdoers the loss lies where it falls.' Reasons of policy are also advanced by H.P. Aust in order to question the appropriateness of a right of recourse when it could amount to sanctioning a 'pact of unlawfulness': Aust, *Complicity and the Law of State Responsibility*, n. 17, p. 294.

[139] The mechanism is a standard feature in the insurance industry.

[140] During the ILC debate on the Third Report of Crawford, 'it was observed that the requirement for contribution was a common law notion not a civil law one'; ILC *Yearbook* 2000/II(2), 49, para. 280

[141] See in French law, P. Canin, *Les actions récursoires entre coresponsables* (Paris: Litec, 1996), p. 278. On unjust enrichment in general, see J.W. Neyers, M. McInnes and S.G.A. Pitel, *Understanding Unjust Enrichment* (Oxford: Hart, 2004), p. 415; C. Binder and C. Schreuer, 'Unjust Enrichment', in *Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2007) (available at www.mpepil.com).

[142] See D. Friedman and N. Cohen, 'Adjustment Among Multiple Debtors' (1989) *International Encyclopedia of Comparative Law*, Vol. X, Chapter 11, pp. 6–92. On subrogation in English law, see C. Mitchell, *The Law of Subrogation* (Oxford: Clarendon, 1994), p. 192.

of the responsible states or organisations. Therefore, for reasons of equity and logic, a default apportionment at the contribution stage might just be a strictly equal one between wrongdoers. In a situation of shared responsibility for the same wrongful act, any causal apportionment is strictly impossible. Hence, as argued above, it could only be based on some qualitative appraisal of what has been called the 'legal structure' of the wrongful act, i.e. the perceived gravity of the respective legal reasons triggering the responsibility of each entity for the same wrongful act. But here again, in the absence of a sure guide in that regard, equal apportionment could well be the outcome by default.

7. Conclusion

It can be concluded from this analysis that the ARSIWA and the ARIO only partly address the complexity stemming from situations of shared responsibility when it comes to the allocation of the secondary obligations of reparation, cessation, and assurances and guarantees of non-repetition. By limiting the 'plurality of responsible States' (or organisations) to cases where such responsibilities exist 'for the same internationally wrongful act', they fail to consider cases where the harmful outcome is the result of several wrongful acts for which several subjects are responsible. This focus on a single type of situation of shared responsibility can be explained by the specificity of the particular rule governing it. However, it would be a mistake to either ignore other forms of multiple responsibilities, or to apply that particular rule to those other forms. This Chapter has tried to shed light on the various possible outcomes of shared responsibility situations. It remains to be seen whether their intrinsic complexity will be explicitly addressed and answered in practice, or if it will be blurred in settlements, whether agreed by the parties or imposed upon them by a tribunal or a court.