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Invocation of Responsibility

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Chapter 8: Invocation of Responsibility

*Annemarieke Vermeer-Künzli**

1. Introduction

Under the system of the law of international responsibility as codified by the International Law Commission (ILC), the existence of responsibility is determined on the basis of two elements: breach and attribution. This requires an answer to the question of whether conduct of a state or international organisation¹ is attributable to it and contrary to an international obligation binding upon that state or international organisation. The regime thus created is often called an ‘objective regime’ or ‘objective responsibility’.² It is ‘objective’ in the sense that only attribution and wrongfulness are considered in the determination of responsibility – not causality, damage, negligence, culpa, intent, and other issues that relate to questions as to why the responsible state acted the way it did. The notion that international responsibility is important for the effectiveness of international law hardly requires elaboration here.³ Nevertheless, the actual implementation of such responsibility will depend upon its invocation. Without invocation, international responsibility will by and large remain unaddressed. Invocation, therefore, is essential for giving effect to international law in addition to the mere existence of international responsibility.

The rules on invocation were shaped by the traditional situation in which one state or international organisation acted independently from other entities and whose conduct and obligations could be individualised. In such situations, only the responsibility of that state or organisation required invocation to address responsibility for the breach. This context –

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¹ The term ‘international organisation’ and ‘organisation’ is used interchangeably. It is meant to refer to an international organisation to which the ARIO are applicable, hence an international organisation with separate legal personality.

² A. Pellet, ‘The Definition of Responsibility in International Law’, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), pp. 3–16, at p. 9.

³ *Ibid.*, p. 3.

responsibility of a single state or organisation – is also the basis for the rules on invocation as laid down by the ILC.

Situations of shared responsibility, with a plurality of responsible states or organisations,⁴ may involve invocation of the responsibility of more than one state or international organisation. It is, however, by no means clear what the structure and implications of such invocation will be. The ILC demonstrated its awareness of the matter by including Article 47 in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and Article 48 in the Articles on the Responsibility of International Organizations (ARIO),⁵ which will serve as the point of departure for the present analysis. As the ILC recognised, more than one state may be responsible for the same wrongful act, but neither the text of Article 47 of the ARSIWA nor the Commentaries provide any elucidation as to how such a situation will be analysed. The Commentaries stated that ‘[w]hether this is so will depend on the circumstances and on the international obligations of each state concerned’⁶ and ‘where there is more than one responsible state in respect of the same injury, questions of contribution may arise between them (...) paragraph (b) [of Article 47] does not address the question of contribution.’⁷ If the Commentaries to Article 47 of the ARSIWA seem short, the Commentaries to Article 48 of the ARIO are even shorter. They contain several *renvois* to the ARSIWA and their Commentaries, the only difference being the issue of subsidiary responsibility, which does not concern us here. Both provisions maintain the concept of ‘objective responsibility’, as is explained in the Commentary to Article 47 of the ARSIWA: ‘[t]he general rule in international law is that of separate responsibility of a state for its own wrongful conduct’.⁸ In other words, for each member of the plurality, attribution and breach must be determined separately, in line with the general approach in the law on international responsibility as designed by the ILC.⁹

⁴ See for a discussion of the concept of shared responsibility P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2012) 34(2) *MIJIL* 359–438; and 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. ____.

⁵ See Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2), 26, Article 47 (ARSIWA), and 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), Article 48. 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).

⁶ ARSIWA Commentary to Article 47, n. 5; ARIO Commentary to Article 48, n. 5.

⁷ ARSIWA Commentary to Article 47, n. 5, para. 10.

⁸ *Ibid.*, Commentary to Article 47, para. 6.

⁹ See also Chapter 10 of this volume, C.J. Tams, ‘Countermeasures against Multiple Responsible Actors’, in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of*

These provisions of the ARSIWA, as will be demonstrated throughout this Chapter, leave many issues unanswered. This raises two issues that must be borne in mind. With respect to invocation of shared responsibility, the ILC Articles put forward some measure of silence: that is, under-regulation or even absence of regulation, as will be explained in the following sections. This presents us, first, with a methodological problem. The present analysis of invocation of the responsibility of a plurality of states and/or international organisations will necessarily infer conclusions from this silence, but some of the conclusions will be somewhat speculative, even if they are based on well-informed speculation. It is perhaps tempting to criticise the ILC for a failure to formulate principles on this topic, but it is not particularly helpful. Not only is it rather unlikely that the Articles will change anytime soon, but the ILC also had very little to no practice at its disposal upon which to base its principles. Second, and related to the previous issue, it is important to bear in mind that invocation of responsibility of a plurality of responsible states (Article 47) and standing to invoke responsibility *erga omnes* (Article 48) were not dealt with in the Draft ARSIWA adopted on first reading.¹⁰ Articles 47 and 48 of the ARSIWA have not benefitted from the comments of governments, as they were included after the finalisation of the process of consultation, and were only reviewed in the plenary and the drafting committee of the ILC. It also means that the rules on invoking the responsibility of a plurality of states have not been part of the forming debates in the ILC between 1947 and 1996. Subjecting the draft to governments for their comments obviously is no guarantee for improvement. Yet, in combination with the thoughts and efforts of the various Special Rapporteurs in their reports, the discussions in the plenary and drafting sessions that culminated in the adoption on first reading of a set of Articles in 1996, and the scholarly debates that they have triggered, most earlier provisions have gone through substantial fine-tuning and clarification. One of the results is that Articles 47 and 48 remain somewhat disconnected from the rest of the ARSIWA. Many questions of the extent to which other parts of the ARSIWA apply to situations falling within the scope of Articles 47 and 48 remain unaddressed.¹¹

the State of the Art (Cambridge: CUP, 2014), at pp. ____, for more analysis of Article 47 ARSIWA and Article 48 ARIIO, n. 5.

¹⁰ J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: CUP, 2002), p. 45. Obviously, Article 48 ARSIWA came less as a surprise, to replace former Article 19 on crimes of states, and benefitted from more conceptual groundwork, but the fact remains that it was not part of the first set of Draft Articles.

¹¹ The present analysis will focus on invocation of a plurality of states (and/or organisations) and Article 48 will only be discussed in the context of providing standing. However, a clear example of 'disconnection' or under-regulation with respect to Article 48 is the issue of whether Article 44 (nationality of claims and exhaustion of local remedies) is applicable to claims involving injury to individuals under Article 48. For this discussion see

As may have been expected, they were not fundamentally revisited in the ARIO project. This might be taken as a sign that their content was acceptable to states. It is submitted that such an assumption is difficult to justify. The aura of authority attached to the ARSIWA and the perceived necessity to finalise the ARIO quickly have both contributed to some measure of over-enthusiasm for copying provisions of the ARSIWA into the ARIO.¹² While it is not necessarily the case that invocation of shared responsibility should be dealt with differently in the case of international organisations, copying Article 47 of the ARSIWA into the ARIO as Article 48 included copying the under-regulation and the silences. For the sake of clarity and the quality of the ARIO the ILC at least could, and perhaps should, have taken this opportunity to reconsider its rules on invocation of shared responsibility.¹³ In all fairness, we should perhaps be reminded, though, that the ILC was not providing for the most complex of cases, but creating a general framework for the law on responsibility, to be refined and adjusted as required by subsequent practice.

The result is that the Commentaries, statements of the drafting committee, and the parts of relevant reports by the last ILC Special Rapporteur treat the subject rather lightly, without much detail. The particulars of these will be discussed in the course of the analyses below, but the impression is unavoidable that the matter was not one of great doctrinal importance. Articles 47 of the ARSIWA and 48 of the ARIO specify that the general regime applicable to invocation in situations of only one responsible state or organisation also applies to situations involving a plurality of responsible states and/or international organisations. Yet, in suggesting that the ‘normal’ regime is applicable without any adjustment, they fail to provide for the inherent differences that exist between situations with one responsible state or international organisation and situations involving a plurality of responsible states and/or international organisations. While it is perhaps understandable that the ILC did not elaborate on the matter, as noted above, it is thus clear that these provisions leave important questions unanswered. In particular, the fundamental question of the extent to which invocation of the responsibility of a plurality of states and/or organisations is the same as invocation of the responsibility of a single state or international organisation is not addressed.

A.M.H. Vermeer-Künzli, ‘A Matter of Interest, Diplomatic Protection and State Responsibility *Erga Omnes*’ (2007) 56 ICLQ 553–582 and E. Milano, ‘Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition?’ (2004) 35 NYIL 85–142, at 103–108.

¹² For an evaluation of this problem in general see C. Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the “Copy-Paste Approach”’ – (2012) 9(1) IOLR 53–66; see also N. Blokker and R. Wessel, ‘Introduction: First Views at the Articles on The Responsibility of International Organizations’ (2012) 9 (1) IOLR 1–6 and references therein.

¹³ It did ‘fix’ the issue noted above in n. 11; Article 49(5) of the ARIO limits the application of Article 45 (nationality of claims and local remedies) to an injured state.

This Chapter will approach this question in three parts. First, invocation relies on standing, or *locus standi* – that is, the right to invoke responsibility – which evidently may be more complicated to establish in cases of multiple responsible parties (section 2). This section will analyse both standing of injured states or international organisations and standing of non-injured states or international organisations with a legal interest (claims *erg omnes (partes)*).¹⁴ Even if it is possible to establish injury or to derive standing based on the *erga omnes (partes)* nature of the norm, the next issue to be discussed will be that of admissibility of the claim (section 3). This section will address, first, the implications of the traditional requirements for admissibility of indirect claims (the nationality of claims rule and the local remedies rule) in situations of shared responsibility. The traditional rules do not provide for adjustment in case of a plurality of responsible states and/or international organisations, which may lead to rather absurd results that can only be prevented by modifying the rules. Second, it will address the fact that when a claim involves more than one responsible entity, admissibility will become more complicated due to specific requirements of admissibility applicable to the various international tribunals. Finally, section 4 will turn to the question of whether the fact that it may not be possible to actually invoke the responsibility of all parties involved in the breach, which may be due to rules of admissibility, standing, or both, has implications for the very responsibility of the parties whose responsibility is not invoked. This will be followed by some concluding observations (section 5).

2. Standing

Conceptually, invocation is preceded by the notion of standing, or *locus standi*. As will be explained in this section, standing is required for the right to invoke responsibility to materialise. In other words, a state or organisation wishing to invoke international responsibility must have standing to do so. Standing, then, gives the right to invoke responsibility. Between standing and invocation, standing is in this context perhaps the more important term. Once standing is secured, the right to invoke necessarily follows. It should be added that the actual invocation may depend on whether the state or international organisation with standing decides to exercise its right to invoke responsibility, whereas it cannot decide not

¹⁴ For brevity's sake, these will be called injured states or international organisations, and states or international organisations with a legal interest. This is without prejudice to the fact that injured states obviously also have a legal interest in the claim, but the reverse is not the case. Also note that injury is not limited to material injury: legal or non-material injury may also give standing.

to have standing. Whether invocation is successful may further depend on issues of admissibility. Invocation does not necessarily depend on access to a particular court or tribunal, and can be achieved through diplomatic channels. In the context of courts and tribunals, however, there is a further difference between invocation and standing. Standing is not influenced by issues of admissibility and jurisdiction of a particular court or tribunal. In the *East Timor* case, Portugal had standing to invoke the responsibility of Australia, but the claim was inadmissible due to the operation of the *Monetary Gold* rule,¹⁵ thereby denying Portugal the opportunity to invoke Australia's responsibility before the International Court of Justice (ICJ or Court).¹⁶ Before courts and tribunals, standing is a necessary but not a sufficient requirement for bringing a claim. Standing in itself, therefore, does not guarantee admissibility. It is possible to discuss invocation without resort to standing, since one could envisage a direct link between injury and legal interest *erga omnes (partes)* and invocation. Once injury or legal interest is established, the right to invoke follows. However, conceptually, the interjection of standing fulfils the important function of stabilising the legal framework: standing follows when certain conditions are met. These conditions may be the same as those applicable to invocation, but whether invocation also follows depends on whether the relevant state or international organisation chooses to exercise this right. In other words, standing refers to a qualification, whereas invocation is an entitlement.

International law and the ILC's Articles on responsibility of states and international organisations recognise two bases for standing. First, and most importantly, standing is derived from injury: the injured state or international organisation can invoke responsibility.¹⁷ Second, non-injured states or organisations with a legal interest have standing due to the *erga omnes partes* or *erga omnes* nature of the obligation breached.¹⁸ This distinction will be maintained in the present Chapter. Criticism has been raised against the ILC's approach to injured states versus non-injured states with a legal interest.¹⁹ However, this distinction, which is so essential to the ILC's approach, may play a decisive role in the context of invocation of the responsibility of a plurality of states and/or international organisations. At present, the distinction matters additionally because injured states and organisations have more rights with

¹⁵ *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 (*Monetary Gold*).

¹⁶ *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90 (*East Timor*).

¹⁷ Article 42 ARSIWA and Article 43 ARIO, n. 5.

¹⁸ Article 48 ARSIWA and Article 49 ARIO, n. 5.

¹⁹ For a critical note on this distinction, see B. Stern, 'The Obligation to Make Reparation', in Crawford, Pellet and Olleson, n. 2, pp. 563–572, at pp. 567–569. Given the unlikelihood of a complete revision of the ARSIWA and ARIO in this respect, this discussion will not be pursued here.

respect to claiming reparation than non-injured states and organisations.²⁰ Whether standing is based on injury or on a legal interest will largely be determined by the norm breached. When this norm creates a bilateral obligation, and when the breach specially affects the invoking state or creates an interdependent regime, its breach leads to injury.²¹ When it applies *erga omnes* (*partes*), it gives non-injured states a legal interest. Since the primary obligations of the various members of the responsible plurality of states and/or international organisations often differ, in content and kind, the consequence is that in a complex situation involving several responsible states and/or international organisations, a state wishing to invoke the responsibility of more than one state and/or international organisation may have standing on a different basis *vis-à-vis* different members of this plurality. An example may be the situation of the Quartet for the Middle East: its conduct is attributable to the United States, the United Nations, Russia, and the European Union (EU) collectively. Yet, the extent to which, for instance, the ICJ's *Wall* advisory opinion²² or the Geneva Conventions²³ are binding on each of the Quartet's members differs,²⁴ which may give different grounds of standing for the invocation of responsibility for the Quartet's conduct. Grave breaches of the Geneva Conventions may give standing based on legal interest, whereas non-compliance with the *Wall* advisory opinion may lead to injury. This complexity, while perhaps rare, challenges the distinction between standing based on injury and standing based on legal interest in cases involving a plurality of states with diverging primary obligations. What purpose does it serve to maintain a system in which a state or organisation, with respect to the same conduct, can be injured by one part of the plurality and affected in its legal interest by another?

²⁰ See Article 48(2) ARSIWA and Article 49(4) ARIIO, n. 5.

²¹ For the distinction between these different obligations see also section 2.1 below. On the different kinds of obligations see G.G. Fitzmaurice, ILC *Yearbook* 1957/II, 52–54; L-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127–1145; and C.J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2010).

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (*Wall* advisory opinion).

²³ Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287.

²⁴ For a more detailed analysis see J. Dugard and A.M.H. Vermeer-Künzli, 'The Elusive Allocation of Responsibility to Informal Organizations: the Case of the Quartet on the Middle East' in M. Ragazzi (ed.), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013), pp. 261–273.

2.1 Standing based on injury

The structure of the law on responsibility defines three groups of injured states or organisations: the directly injured state or organisation; states or organisations that are specially affected by a breach owed to a group including that state or international organisation; and states or international organisations whose position is radically changed with respect to the further performance of the obligation due to the breach.²⁵ In drafting its provisions on injury, the ILC was clearly thinking of situations involving one responsible state or organisation only. While this does not necessarily disqualify the application of its rules on injury to situations involving more than one state and/or organisation, the fact remains that the two sets of Articles lack clear guidelines for situations involving a plurality of states and/or international organisations. The Commentary to Article 42 of the ARSIWA, for instance, refers exclusively to the invocation of the responsibility of *one* state. It is stated that:

If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.²⁶

The frequent use of ‘one’ in this text suggests, at least, that the examples the ILC had in mind when drafting this Commentary were those involving a bilateral invocation. The Statement of the Chairman of the Drafting Committee in 2001 does not elucidate the matter. The part of the Statement on Article 43 (now Article 42) of the ARSIWA provides no explanation on whether injury can be caused by a wrongful act of more than one state. In the Statement of the Chairman of the Drafting Committee on the ARIO, it is merely mentioned that Article 42 of the ARSIWA served as a model and was used with minor linguistic changes.²⁷ Since Article 43 of the ARIO was not changed on second reading, the Statement on the final version of the ARIO does not discuss the provision.²⁸ Through Articles 47 of the ARSIWA and 48 of the ARIO, this framework then also applies to situations involving a plurality of responsible states

²⁵ Articles 42(a), 42(b)(i) and 42(b)(ii) ARSIWA; and 43(a), 43(b)(i) and 43(b)(ii) ARIO, n. 5, respectively. For the purposes of the present Chapter, these three instances of injury as defined by the ILC will be followed. One could question whether cases falling under Article 42(b)(ii) ARSIWA and 42(b)(ii) ARIO really are instances of injury. As I have explained elsewhere, the distinction between injury under Article 42(b)(ii) and legal interest under 48(1)(b) is not as clear as the ILC presents it to be, which would apply *mutatis mutandis* to the relevant provisions of the ARIO. See A.M.H. Vermeer-Künzli, ‘A Matter of Interest, Diplomatic Protection and State Responsibility *Erga Omnes*’, n. 11, at 573–574.

²⁶ ARSIWA Commentary, n. 5, Article 42, p. 118, para. 7.

²⁷ Statement of the Chairman of the Drafting Committee, Mr. Pedro Comissário Alfonso, 4 June 2008, pp. 3–4, available at http://legal.un.org/ilc/sessions/60/2008_DC_Chairman_RIO.4June2008.pdf.

²⁸ Statement of the Chairman of the Drafting Committee, 3 June 2011, p. 28, available at <http://legal.un.org/ilc/sessions/63/DCResponsibilityofInternationalOrganizations2011.pdf>.

and/or organisations. However, this similitude cannot be too easily presumed. Particular complexities will arise in determining the extent to which a state or organisation is individually injured, specially affected, or brought into a radically changed position due to the individualised conduct of each and every member of the plurality that is responsible for the breach. The ILC's Articles both for states and for organisations contain no indication that the rules on the determination of injury will be applied differently or less stringently in cases of a plurality of responsible states and organisations. This means that, if we assume that these Articles represent the law, standing to invoke responsibility will require a demonstration that the conduct of each and every member of the responsible plurality constitutes injury, providing the invoking state with standing. Or, as the ILC stated, 'the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2'.²⁹

Articles 47 of the ARSIWA and 48 of the ARIIO complement Articles 42 of the ARSIWA and 43 of the ARIIO, which provide for invocation for the injured state or organisation. Within this context, as will be explained below, the invocation of direct injury caused by the conduct involving a plurality of responsible states and/or organisations generates most complexities. The requirements of attribution of conduct and breach of an obligation for each member of the plurality of states and/or international organisations individually create a rather high threshold. Situations involving a plurality of states and/or international organisations are prone to include elements of aid and assistance, coercion, the creation of joint organs, direction and control, and composite acts. It is uncommon for states or organisations to act wrongfully in the context of a plurality without any form of coordination or cooperation. And even if that is the case, the chances of the conduct constituting a composite act are rather high.

Before we turn to the particular complexities of such situation, it should be noted that invoking the responsibility of a plurality of states and/or international organisations may be less complicated in the event of injury based on the status of a specially affected state or organisation, or based on the radical change of the position (Article 42(b)(i) and (ii) of the ARSIWA and 43(b)(i) and (ii) of the ARIIO, respectively). Interdependent regimes usually involve more than two states and/or international organisations, which necessarily increases the likelihood of a plurality of responsible entities. Especially when the regime is created for the protection of a particular area or species, the combination of obligations of prevention and obligations of result may easily lead to a plurality of responsible states and/or organisations. As

²⁹ ARSIWA Commentary, n. 5, Commentary to Article 47, para. 2.

an illustration, consider the following scenario, which will be referred to as scenario A: the activities of upstream states Arcadia and Utopia and possibly an international organisation contribute to pollution in downstream Ruritania. Demonstrating that the joint activities of Arcadia and Utopia in this scenario caused environmental pollution that especially affected Ruritania, because it is the downstream state of the polluted river, may be easier than proving direct injury. An obligation not to pollute rivers obviously causes the downstream state to be specially affected in case of breach, whereas it is less obvious, although not unthinkable, that it is also directly injured because of the bilateral nature of the obligation.

Returning to direct injury, the complexities of implementing responsibility for direct injury in situations involving a plurality of states and/or international organisations will affect, or even deny, standing to invoke the responsibility of all members of the plurality responsible for the breach. Requiring the individualisation of responsibility leads to particular complexities in cases involving aid and assistance, coercion, the creation of joint organs, direction and control, and situations of composite acts – especially when the accumulation of conduct is wrongful, but the separate and individual contributions are not.³⁰ In such cases, it is possible that various actors contribute by various courses of conduct to an outcome that is wrongful, with each member of the plurality being responsible for a piece of the puzzle which in and of itself may or may not be wrongful. Obviously, the conduct of joint organs is attributable to the creators of the organ in question, but the question of breach may still be complex when the joint organ is involved in a composite act. In such situations, it will often not be possible to hold all members involved in the situation equally responsible.

To illustrate the complexity of situations involving aid and assistance, let us consider the following scenario, which we will call scenario B. An international organisation, of which the relevant states are members, has issued a resolution obliging these states to take measures against terrorism, both in the form of prevention and the actual prosecution of terrorist suspects. An individual is captured in the territory of Arcadia and without any form of due process is transferred by Arcadian officials to the territory of Ruritania. Here, she is detained and tortured by officials from Arcadia and Utopia, with the knowledge of Ruritanian officials and in Ruritanian detention facilities. The individual has the nationality of Bellaria. The state aiding or assisting in the wrongful act of another state, as is the case of Ruritania,³¹ can only be

³⁰ Article 15 ARSIWA and Article 16 ARIO, n. 5.

³¹ For the sake of argument, the obvious obligation of due diligence resting on Ruritania with respect to its territory and harmful effects on other states will be left aside, since the focus is on responsibility for the act of torture.

held responsible for its aid and assistance, and not for the conduct of the aided or assisted states. Under the present rules, Bellaria is not injured by a breach of the prohibition on torture by Ruritania. For composite acts, consider scenario A, described above, as one not involving a specially affected state, but one of direct injury. To invoke the responsibility of Arcadia and Utopia for the pollution, Ruritania has two options. It can either demonstrate that this is a case of a composite act, or that each and every act by Arcadia and Utopia in itself is wrongful. It has been argued that a composite act requires intent,³² which, if applied to two or more responsible parties, will present an important hurdle, especially for the purpose of proof. These examples demonstrate the difficulty of invoking the responsibility of all members of a plurality for the situation as a whole. The pertinent question is, of course, whether that is problematic. To the extent that we may know what the ILC considered when it drafted the Articles on Responsibility, its work does not show much concern with this consequence, so perhaps it did not think it was a problem. The consequence logically follows from Article 2 of the ARSIWA, which arguably provides the very foundation of international responsibility.

Even so, it is submitted that the system as designed in the ARSIWA and the ARIO is too crude. Chopping up a claim into its different parts may diminish the weight of the claim as a whole. This is somewhat analogous to composite breaches, where the sum of the conduct is more than each of the parts taken together. In other words, the Bellarian national in scenario B has suffered an extraordinary accumulation of injuries and it would seem somewhat to miss the magnitude of the breach if, due to requirements of standing, admissibility, and jurisdiction, Bellaria could only invoke the responsibility of Ruritania for its aid and assistance. It is admittedly difficult to envisage a system that provides for such scenarios. The solution could be found in changing the rules on invocation, for instance by weakening the requirement of ‘individualisable’ conduct. A stronger version of Article 16 of the ARSIWA would be another solution, lowering the threshold of complicity. Finally, a stricter regime included in primary obligations, lowering the threshold of the breach in the first place, might make it easier to invoke the responsibility of each member of the plurality. All of these solutions, however, are not to be expected to develop soon.

³² J. Salmon, ‘Duration of the Breach’, in Crawford, Pellet and Olleson, n. 2, pp. 383–396, at p. 392.

2.2 Standing *erga omnes* (*partes*)

In addition to standing derived from injury, non-injured states and international organisations with a legal interest have standing to invoke responsibility when the obligation is one owed *erga omnes partes* or *erga omnes*, as provided for in Articles 48 of the ARSIWA and 49 of the ARIO.³³ While the notion of obligations *erga omnes* (*partes*) is firmly established in international law,³⁴ the instances of successful invocation of responsibility by a state or international organisation deriving standing on this basis are few.³⁵ This, however, is not caused by the particular intricacies of the rules on invoking injury based on a breach of an obligation *erga omnes* (*partes*), but rather by disputes on the status of the rule granting standing *erga omnes* (*partes*) as such,³⁶ the fact that most *fora* in which responsibility may be invoked (courts and tribunals) raise procedural obstacles to such invocation,³⁷ and perhaps because of a reluctance of states and international organisations to instigate procedures when they are not (directly) injured. For the purpose of invocation of responsibility of a plurality of states and/or international organisations, standing based on the nature of the obligation breached is, perhaps unexpectedly, less complicated than standing derived from injury. Standing in the former scenario is based on the nature of the norm breached and the membership of the relevant group or the international community, which for all intents and purposes will be easier to establish than injury. Once it has been determined that the relevant primary norm is one that applies *erga omnes* or *erga omnes partes*, all that is left is the determination of whether the state or international organisation invoking responsibility is part of the relevant *omnes*,³⁸ and the complexities will primarily relate to determining the

³³ It should be noted that standing *erga omnes* and *erga omnes partes* for international organisations is governed by the principle of speciality and is thus limited to obligations falling within the function of the international organisation (Article 49(3) ARIO, n. 5). While this may in fact limit the possibilities of an international organisation to invoke responsibility *erga omnes* (*partes*), this issue will not be further discussed.

³⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, 3 (*Barcelona Traction* case); *Questions Relating to the Obligations to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422 (*Belgium v. Senegal* case).

³⁵ This section will not distinguish between obligations *erga omnes* and obligations *erga omnes partes*. For an analysis of this distinction see Tams, *Enforcing Obligations Erga Omnes*, n. 21.

³⁶ While Article 48 ARSIWA and Article 49 ARIO, n. 5, were introduced in an exercise of progressive development, the notion of standing *erga omnes* (*partes*) was hardly new, nor particularly contested. Standing *erga omnes* was confirmed in the *Barcelona Traction* case, n. 34, (para. 3 of the judgment) and the *East Timor*, n. 16 (para. 29 of the judgment). For confirmation of the concept of standing *erga omnes* (*partes*) see the *Belgium v. Senegal* case, n. 34, in which the Court acknowledged the legal interest of all states parties to observance of the relevant obligation (paras. 68–69 of the judgment). See generally Tams, *Enforcing Obligations Erga Omnes*, n. 21.

³⁷ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, ICJ Reports 2006, 6; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3; *East Timor*, n. 16. See also below section 3.2.

³⁸ See on invocation *erga omnes* and *erga omnes partes* generally Vermeer-Künzli, ‘A Matter of Interest, Diplomatic Protection and State Responsibility *Erga Omnes*’, n. 11.

contribution to the breach. Consider the situation in which a military operation organised by an international organisation and Arcadia and/or Utopia causes damage that cannot be justified under international humanitarian law to the civilian population, the cultural heritage, or the natural resources of Bellaria.³⁹ In this scenario, which will be referred to as scenario C, any state will have standing to invoke the responsibility of Arcadia, Utopia, and the international organisation for serious violations of international humanitarian law, if it can be proved that the conduct is attributable to all three of them.

In the ILC Articles on Responsibility, Article 47 of the ARSIWA and 48 of the ARIO on the invocation of shared responsibility precede the provisions on invocation *erga omnes (partes)*. On that basis, the argument could be made that the ILC did not envisage invocation by a non-injured state with a legal interest in responsibility of a plurality of states and/or international organisations. Yet that is an overly enthusiastic exercise on close reading. Bearing in mind that both Article 47 and Article 48 were added after the adoption on first reading, the order in which they appear now in the ARSIWA is probably not intended to express the view that the responsibility of a plurality of states and/or international organisations cannot be invoked on the basis of a legal interest. Another round of revisions would perhaps have changed the order or otherwise have clarified that under Article 48, invocation is also possible against a plurality, for instance by expressly saying so in the Commentaries.

3. Admissibility

Under international law, invocation of responsibility is not limited to judicial procedures. Even though there seems to be some disagreement in the ILC as to what constitutes the presentation of a claim, it is clear that invocation can be done through diplomatic channels.⁴⁰ Thus, for invocation, the establishment of injury or standing based on the *erga omnes (partes)* nature of the norm may be sufficient. In practice, however, state responsibility finds implementation through judicial procedures. In such situations, the rules of courts and tribunals on jurisdiction and admissibility may influence the possibility to invoke responsibility. In addition,

³⁹ Although it is too early to assess the situation, it is possible that the crisis in Mali of 2013 would result in shared responsibility between France, the Economic Community of West African States, and the African Union, if their conduct were to constitute a breach of their international obligations.

⁴⁰ See the discrepancy between the Commentary to Article 42 of the ARSIWA, n. 5, which in paragraph 2 states that 'protest as such is not an invocation of responsibility', and the Commentary to Article 1 of the Draft Articles on Diplomatic Protection, ILC *Yearbook* 2006/II(2), which, in paragraph 8, explicitly includes protest as a way to exercise diplomatic protection, which it defines as the invocation of state responsibility.

international claims are not limited to direct claims, but may involve the invocation of responsibility for injury inflicted upon individuals, which have their own additional rules on admissibility.

The following discussion will be limited to those issues of admissibility that are particularly relevant in the context of shared responsibility. First, international law imposes additional conditions for the admissibility of claims based on indirect injury: the nationality of claims rule and the exhaustion of local remedies rule. Second, particular courts and tribunals may have rules on admissibility that complicate claims against a plurality of respondent states or organisations. In this part, the focus will be on the ICJ and the European Court of Human Rights (ECtHR), and a short section will be on the World Trade Organization (WTO) dispute settlement system.

3.1 Admissibility of indirect claims

In suggesting that the general rules of invocation are applicable also to claims involving a plurality of responsible states and/or international organisations, the ILC in its relevant Articles has not considered the effect of these rules on such claims. This becomes acutely relevant in the case of indirect claims.⁴¹ These are usually presented in the exercise of diplomatic protection by states on behalf of their nationals. This section will therefore be limited to inter-state claims.⁴² Indirect claims must comply with two additional rules that do not apply to direct claims: the nationality of claims rule and the local remedies rule,⁴³ which will be discussed in this order.

⁴¹ In this section, indirect claims will refer to claims made by states against states and/or international organisations for injury inflicted on the former's national.

⁴² International organisations are capable of protecting their 'nationals', i.e. their officials, but this is usually called functional protection (see *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174). In such cases, there cannot be a nationality of claims rule and the local remedies rule is inapplicable due to the immunities available for the officials of international organisations. They cannot commence resorting to local remedies to present their claim. For international organisations, there is in this respect no distinction between direct and indirect claims. On the other hand, states have increasingly attempted to protect their nationals against acts of international organisations, especially in the context of the listing of suspected terrorists. While this is sometimes called diplomatic protection, it is hardly comparable. In these cases, the nationality of claims rule will apply, but not the local remedies rule, since the injured individual cannot present a claim under domestic law against the international organisation, again due to its immunity. In this context, see the *Sayadi & Vinck* cases concerning Belgian nationals on the terrorist lists imposed by the UN Security Council (*Sayadi & Vinck v. l'Etat Belge*, Tribunal de première instance de Bruxelles, decision of 18 February 2005) and the various *Kadi* cases before the European Court of Justice.

⁴³ See Article 44 ARSIWA and Article 44 ARIO, n. 5.

The nationality of claims rule restricts the invocation of responsibility to the state of nationality of the injured individual. While the nationality of claims rule has evolved to increase the number of eligible individuals, particularly with respect to multiple nationals in claims against a state of nationality and *mutatis mutandis* with respect to stateless persons and refugees, some restrictions still apply.⁴⁴ In particular, states may not exercise protection against the predominant state of nationality. Increasing the number of responsible states will increase the likelihood of claims against a state of nationality. This, in turn, may render claims against a plurality of states inadmissible with respect to the state part of the plurality of which the injured individual is a national. Under normal circumstances, however, that should not affect the remainder of the claim and the responsibility of the other members of the plurality. In addition, it also has no effect on the *responsibility* of the state of nationality against which the claim is presented. The nationality of claims rule is not a substantive requirement of responsibility. Although the doctrine of non-responsibility for injury against nationals enjoyed some support in the past, this doctrine has now by and large been abandoned, especially in light of the emergence of human rights law. Torture is prohibited, regardless of against whom it is committed.⁴⁵ Therefore, it will affect the admissibility of the claim, and thus prevent invocation of responsibility, yet will not affect the responsibility as such.

With respect to the local remedies rule, when it is applied strictly, increasing the number of responsible states will increase the number of national remedies to be exhausted in equal measure. In the concrete example of scenario B, the tortured Bellarian national would be required to exhaust local remedies in Ruritania, Arcadia, and Utopia before her state of nationality could espouse the claim. This, however, may be contrary to the notion of reasonableness on which the rule arguably relies and which limits exhaustion to remedies that are reasonably available to the injured individual.⁴⁶ The lack of detail in the ARSIWA and the ARIO⁴⁷ concerning admissibility of indirect claims in the case of a plurality of responsible states is particularly problematic in this regard. There is no obvious solution. Some measure of exhaustion of local remedies must be retained, but to require complete exhaustion *vis-à-vis* all

⁴⁴ See A.M.H. Vermeer-Künzli, 'Nationality and Diplomatic Protection, a reappraisal', in S. Forlati and A. Annoni (eds.), *The Changing Role of Nationality* (London: Routledge, 2013), pp. 76–95.

⁴⁵ *Ibid.*

⁴⁶ See Article 15 of the Draft Articles on Diplomatic Protection and accompanying Commentary, paragraph 3, n. 40. See also J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005), p. 118 and A.M.H. Vermeer-Künzli, 'As If: the Legal Fiction in Diplomatic Protection' (2007) 18 EJIL 37–68, at 52–55.

⁴⁷ Articles 44 and 45 respectively, n. 5. Please note that this discussion will not address the question of whether international organisations can exercise diplomatic protection, or whether that should be termed functional protection (see Draft Articles on Diplomatic Protection, Introduction to the Commentary, paragraph 2, n. 40). Since the issue is not whether they can exercise protection, but what the conditions are for invoking responsibility against a plurality of responsible states, this question is not an essential one to answer.

entities involved would be too demanding. It should be noted here that, contrary to the nationality of claims rule, the ARIIO also contain a requirement regarding exhaustion of remedies. Before a claim against an international organisation is admissible, the injured individual is required to exhaust 'any available and effective remedy provided by that organization'.⁴⁸

If we assume that exhausting all available remedies is too much to ask in the light of some measure of reasonableness in the application of the local remedies rule, there are theoretically two ways in which the number could be brought down. First, some of the states and/or organisations against which the claim was brought could waive the requirement to exhaust local remedies. This would be highly unlikely. The case law of the ICJ and the ECtHR shows that the requirement to exhaust local remedies is not taken lightly, and that respondent states usually try to object to admissibility for failure to comply with this requirement.⁴⁹ The only way to achieve a limiting of the number of instances to be exhausted would be to oblige some states to waive the requirement to exhaust local remedies in cases of invocation of shared responsibility, but it would be challenging to determine which state must waive its right. It is far from clear what criteria should be applied for such determination. One could think of limiting exhaustion of local remedies to the state on the territory of which the injury was inflicted, to the state whose remedies would be most easily accessible to the individual, to the state whose breaches were most serious, and perhaps to states on yet other grounds. Even so, there is no international rule, principle, or even practice to provide a foundation for such limitation. Second, the states and/or organisations involved in an indirect claim could agree to join the cases and submit to the jurisdiction of one of the states. Thus the domestic courts of one of the states included in the plurality would entertain a case also involving the claims against the other states and/or international organisations. This is also a very unlikely scenario, especially in light of the continuing importance attached to immunities.⁵⁰ In scenario B, the conduct of all entities is connected to such an extent that prioritising is difficult, and even if prioritising were possible, all entities would still be entitled to claim immunities.

⁴⁸ Article 44(2) ARIIO, n. 5.

⁴⁹ See *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, ICJ Reports 1959, 6; *Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, 15; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, ICJ Reports 2007, 582. See also *Akdivar and others v. Turkey*, App. No. 21893/93 (ECtHR, 16 September 1996).

⁵⁰ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, 99.

International law does offer some exceptions to the requirement to exhaust local remedies. They are listed in Article 15 of the ILC Draft Articles on Diplomatic Protection (ADP).⁵¹ Apart from the waiver provided for in Article 15(e), the only exception that could possibly be of some avail is the one based on the absence of a relevant connection, Article 15(c) of the ADP. The example given in the Commentaries to this provision is one of transboundary pollution, more specifically the nuclear fallout after the Chernobyl accident. Assuming that the accident constituted a breach of Russia's obligations, it would be unreasonable to require Scottish farmers whose crops were contaminated by the nuclear fallout to exhaust local Russian remedies.⁵² Similarly, in scenario A described above, should the injury be indirect, the injured individuals arguably would not have to exhaust local remedies in Arcadia and Utopia. However, these exceptions provide no solution to the issue of a multiplicity of local judicial systems to which to resort: it will depend on the facts of the case. If the individual in scenario B happened to have some connection to Utopia, Article 15(c) of the ADP would not apply and she would be required to exhaust local remedies there, too. A judge confronted with this issue would have very little choice. The requirement of reasonableness in the application of the local remedies rule is not hierarchically superior to issues such as immunities. The availability of any exception to the local remedies rule will depend on whether the facts allow this.

As this section has demonstrated, the rules on admissibility of indirect claims, particularly the nationality of claims rule and the local remedies rule, have not been adapted to situations involving more than one responsible state and/or international organisation. At the same time, they have the potential of creating high insurmountable hurdles for invoking the responsibility of all members of the plurality of states and/or organisations responsible for the internationally wrongful act(s). The rules and principles on international responsibility of states and international organisations and general principles of international law, however, do not at present offer a clear path towards a lessening of these hurdles.

⁵¹ Draft Articles on Diplomatic Protection, ILC *Yearbook* 2006/II(2).

⁵² Commentary to Draft Articles on Diplomatic Protection, Article 15(c), para. 7, n. 40. This case may to some extent be a mixed claim, in the sense that the United Kingdom could argue direct injury resulting from the environmental damage. In a mixed claim, the part that addressed individual, indirect injury still requires compliance with the local remedies rule and nationality of claims. Article 15(c) was specifically designed to address situations in which the connection between the wrongdoer and the injured individual was absent or very weak, because the law on diplomatic protection does not otherwise recognise exceptions such as one based on the fact that there is a difference here between the place of origin of the injury and the place of the resulting damage.

3.2 Admissibility before international courts and a plurality of respondent states⁵³

The rules of jurisdiction and admissibility applicable to international courts and tribunals may further complicate invocation of responsibility of a plurality of states and/or international organisations. The *Monetary Gold* principle is a clear example of such a rule. While invocation is not limited to judicial settlement and can also be effectuated through diplomatic channels, the obstacles applicable to invoking the responsibility for a plurality of states and/or international organisations in established dispute settlement mechanisms will affect the implementation of state responsibility most obviously.⁵⁴ Although this contribution is not concerned with procedural aspects of shared responsibility,⁵⁵ some discussion on the extent to which these aspects affect invocation as such is necessary.

It will be impossible to discuss all relevant courts and tribunals, and therefore the discussion will be limited to the ICJ and the ECtHR. A few comments will also be made on the WTO dispute settlement system.

3.2.1 The ICJ

At the ICJ, no inherent obstacles exist to invoke the responsibility of more than one state. Yet, the ICJ Statute and rules and procedures contain no special rules for cases involving a plurality of states. States are free to join cases in the sense that they may bring an application against more than one state. The rules do not provide for *ex post* joinder by states, although such joinder will probably be feasible with the consent of all parties involved.⁵⁶ Article 47 of the

⁵³ In this section, the focus will be on respondent states, since the practice of international courts and tribunals of adjudicating claims involving international organisations is almost non-existent. The exception is the WTO dispute settlement system, which will be discussed. The ICJ and the ECtHR have as yet no jurisdiction to entertain claims against international organisations.

⁵⁴ Taken more broadly, the *Monetary Gold* rule (see n. 15) could be applicable to diplomatic settlement as well: in scenario B, Arcadia could raise objections against a diplomatic settlement between Ruritania and Bellaria including a statement on the (il)legality of Arcadia's conduct.

⁵⁵ On this, see the collection of papers in the *Themed Section: Procedural Aspects of Shared Responsibility in International Adjudication* (2013) 4(2) JIDS 277–405.

⁵⁶ Although this is not specifically provided for, this can be derived *a contrario* from the decision of the Court not to join in the face of objections of the parties. See M. Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4(2) JIDS 295–318, at 304.

Rules of the Court does allow the Court to join cases, and gives it some margin of discretion in deciding whether or not to join two or more cases.⁵⁷

The question that concerns us here will involve the application of one state against two or more co-responsible states. Practice until now has actually demonstrated that such an injured state wishing to invoke the responsibility of more than one state can bring multiple applications, rather than one case against a plurality of respondents. An example of this practice is the *Legality of the Use of Force* case, brought by Serbia and Montenegro against ten different states that had all participated in the North Atlantic Treaty Organization (NATO) bombings of the former Yugoslavia. While Serbia and Montenegro mentioned the other applications in each of them, it did not join these applications.⁵⁸ Also, the Democratic Republic of the Congo (DRC) launched three separate cases, against Rwanda, Uganda, and Burundi respectively, concerning the on-going armed hostilities on its territory in the late 1990s; Libya had two cases, against the United States and the United Kingdom, concerning the Lockerbie incident of 21 December 1988; and Nicaragua brought one claim against Honduras and one against Costa Rica for armed activities at its borders in the 1980s. This shows that the relevant applicants apparently felt the need to bring individual cases, whereas they all referred to the same underlying conflict involving a plurality of parties. The Court has approached such issues on a case-by-case basis.

In the *Legality on the Use of Force* cases, the hearings were held together, but the various states involved submitted individual memorials and the Court issued individual decisions, even though these were often identical. Arguably, this is the case that comes closest to a ‘real’ shared responsibility case, because the NATO member states had acted together with a single wrongful outcome. This was actually used as an argument against the jurisdiction of the Court. The Netherlands argued that NATO’s actions were collective, and that any determination on the lawfulness of the Netherlands’ participation ‘will necessarily, unavoidably and logically involve a determination by the Court of the alleged unlawfulness of the action of an international organization or of States which are not present before the Court.’⁵⁹ The ICJ

⁵⁷ Ibid., at 303–305. Serbia and Montenegro could perhaps not have joined all cases, since the alleged basis for jurisdiction differed for some states. The Court could have joined some of the cases as well, but apparently did not see the need.

⁵⁸ E.g. *Legality of the Use of Force (Federal Republic of Yugoslavia v. United States of America)*, Application of the Federal Republic of Yugoslavia, ICJ Reports 1999, p. 1. Serbia and Montenegro could perhaps not have joined all cases, since the alleged basis for jurisdiction differed for some states. The Court could have joined some of the cases as well, but apparently did not see the need.

⁵⁹ *Legality of Use of Force case (Federal Republic of Yugoslavia v. The Netherlands)*, Preliminary Objections of the Kingdom of The Netherlands, ICJ Reports 2000, para. 7.2.13.

eventually declined to exercise its jurisdiction on other grounds and thus did not consider this argument.

In the cases concerning the DRC, the Court issued three separate judgments. This was, amongst other reasons, due to the fact that the bases for jurisdiction of the Court *vis-à-vis* Rwanda, Uganda, and Burundi were not identical. The DRC relied on a number of treaties, including the Genocide Convention,⁶⁰ in its case against Rwanda;⁶¹ it relied on its declaration under Article 36(2) of the Statute of the Court in the case against Uganda; and it invited Burundi to accept the jurisdiction for this case under what is known as *forum prorogatum* where it concerned the use of force, and under the Torture Convention⁶² and the Montreal Convention,⁶³ which include dispute settlement clauses.⁶⁴ The DRC started each of the three applications with a reference to the fact that it was also bringing a claim against the other two states.⁶⁵ However, since Rwanda, Uganda, and Burundi allegedly supported different armed groups engaged in the use of force on the territory of the DRC, the question of whether the acts complained of were attributable to the relevant states required separate analyses. It is difficult to say whether this informed the DRC's decision to submit three different cases. It would perhaps be somewhat of a stretch to prove that the governments of Rwanda, Burundi, and Uganda conspired in an attempt to attack the Congo to add an element of joint wrongful enterprise, and the DRC chose to argue that they independently sought to benefit from the lack of control of the Congolese authorities over the eastern part of this vast country. In the applications, the arguments were limited to the individual states, except for the note on the first page that applications had been brought against the two other states as well. In the memorials on behalf of the DRC, the individuality of the applications was emphasised to avoid the implications of the *Monetary Gold* rule: they presented arguments on the alleged wrongful

⁶⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention).

⁶¹ It should be added that the initial proceedings against Rwanda were identical to those against Burundi, but in light of Rwanda's memorial and the apparent futility of the case, the DRC instituted new proceedings in 2002, this time based on a number of specific treaties, including the Genocide Convention. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, n. 37.

⁶² Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

⁶³ Montreal Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999, in force 4 November 2003, 2242 UNTS 309.

⁶⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)*, Application of the Democratic Republic of the Congo, ICJ Reports 1999, p. 11.

⁶⁵ *Ibid.*, p. 2; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Application of the Democratic Republic of the Congo, ICJ Reports 1999, p. 2; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Application of the Democratic Republic of the Congo, ICJ Reports 1999, p. 2.

conduct of one respondent only.⁶⁶ The wrongful conduct of Rwanda, Uganda, and Burundi was perhaps not shared, and the DRC did not try to make it seem that way.

These examples clearly support the individualised approach to responsibility as found in the work of the ILC. The responsibility of each participant is invoked separately and determined on the basis of an individual analysis of attribution of conduct and breach. In none of these cases did the fact that other parties were involved influence the standing of the applicant. On the basis of this observation, however, the only valid conclusion is that states have not brought cases against more than one state invoking shared responsibility. It does not allow for the conclusion that they cannot do so, nor inform us about any additional rules, such as a different approach to the exhaustion of local remedies, that may apply in such cases. This lack of practice adds to the silence in the Articles of the ILC and emphasises the difficulty in clarifying the implications of ‘shared-ness’ for the invocation of responsibility.

The only case that was brought against a plurality of respondents in fact provided the most important obstacle to the invocation of shared responsibility. In the *Monetary Gold* case, Italy brought a complaint against France, the United Kingdom, and the United States, but not Albania.⁶⁷ The Court considered that Albania’s ‘legal interests would not only be affected by a decision, but would form the very subject-matter of the decision’, and for that reason declined to give judgment.⁶⁸ Without entering into a discussion on the rule itself, some aspects of it must be discussed here.⁶⁹ While highly relevant for the jurisdiction of the ICJ, the importance of the rule outside this context must not be over-estimated, because the application of the *Monetary Gold* rule does not bear on the international responsibility of the members of the plurality. However, in cases of truly shared responsibility, a decision on the merits of the claim will necessarily involve a statement on the legality of the conduct of other members of the plurality. Returning to scenario B, a finding that Ruritania is responsible for violating its due diligence obligation not to allow torture to occur on its territory requires a determination of Arcadia and Utopia’s conduct as being contrary to the prohibition of torture. Given the limited number of states that have accepted the Court’s compulsory jurisdiction, it will usually be the case that an injured state or a state with a legal interest cannot force all members of the plurality to appear at the ICJ. The application of the *Monetary Gold* rule in cases involving

⁶⁶ *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda)*, Mémoire de la République Démocratique du Congo, Vol. I, July 2000, para. 0.29.

⁶⁷ *Monetary Gold*, n. 15.

⁶⁸ *Ibid.*, p. 32.

⁶⁹ See for more details Paparinskis, ‘Procedural Aspects of Shared Responsibility in the International Court of Justice’, n. 56, at 305–317.

shared responsibility, which as stated above will usually necessitate a statement on the wrongfulness of the conduct of other members of the responsible plurality, will then effectively prevent the entire case from proceeding to the merits, as happened in the *East Timor* case.⁷⁰

As the practice before the ICJ also shows, this outcome can only be avoided if the situation can be broken down into smaller parts, as the DRC did in its claims on the war fought on its territory. If a claimant can thus invoke the responsibility of one member of the plurality for one aspect of the situation only, the *Monetary Gold* rule will not constitute a fatal obstacle. Nevertheless, as with the issue of injury described above in section 2.1, if the situation is divided into different smaller claims this may, and often will, fail to do justice to the situation as a whole, especially when some aspects remain beyond the reach of the Court. If, in scenario B, for reasons of consent to jurisdiction, the ICJ could only hear a case against Ruritania, it would be difficult to envisage any meaningful substance brought to the dispute. Any claim not addressing the issue of torture would fail to address the essence of the case. The conclusion is therefore inevitable that the operation of the *Monetary Gold* rule will have serious consequences for the scope of the dispute before the Court *ratione materiae* in cases of shared responsibility and, with that, for the invocation of responsibility more generally. Claims, or parts thereof, may be declared inadmissible and responsibility for the relevant wrongful act cannot be invoked. Unlike in cases before the ECtHR, which will be explained below, the effect of the rule may be that a matter that falls within the jurisdiction of the ICJ *ratione materiae* and *ratione loci* cannot be heard because one member of the plurality of responsible states has not consented to the jurisdiction. Some have expressed more optimism. For instance, Paparinskis wrote in the context of the ICJ's handling of cases involving shared responsibility that 'one hopes that future developments will display greater sensitivity to these matters'.⁷¹ He argued that '[p]ositive law permits certain improvements, particularly regarding joinders and Monetary Gold, and an appreciation of the systemic perspective might lead to gradual reordering of these rules'.⁷² The author is unable to share this optimism. States rarely subject themselves to the jurisdiction of the ICJ if they are not required to⁷³ and they will seize any opportunity to dispute admissibility. At present, plenty of opportunities to do so are available. A joinder of cases will provide no solution when the *Monetary Gold* rule applies and the

⁷⁰ *East Timor*, n. 16, at p. 393.

⁷¹ Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice', n. 56, at 318.

⁷² *Ibid.*

⁷³ Witness the only case relying on *forum prorogatum* being the case between Djibouti and France. See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177.

hesitancy of the Court to join cases does not bode well for the future.⁷⁴ With the Court's continuing emphasis on consent to jurisdiction, this situation is unlikely to change.⁷⁵

3.2.2 The ECtHR

The situation at the ECtHR, though better than at the ICJ, is far from perfect when it comes to appreciating the special nature of cases involving a plurality of responsible states.⁷⁶ The ECtHR's statutes and rules of procedure, like the ICJ, contain no inherent prohibition on claims against more than one state, and in fact it has decided cases against more than one state⁷⁷ and even held one or both states responsible.⁷⁸ However, it has little to no separate provisions for claims involving a plurality of respondent states.⁷⁹ Although some rules of procedure exist to facilitate claims involving a plurality of respondent states – such as the appointment of one judge to represent all instead of multiple judges *ad hoc* and the possibility to join complaints – it has not developed any rules that address the fundamental issues of standing, admissibility, and responsibility. It will usually consider the admissibility, both on the merits and on issues such as the local remedies rule, separately for all respondent states and apply the same standards as in cases against one respondent. In the *Stojkovic* case, which involved a claim against Belgium and France, this resulted in the inadmissibility of the claim against Belgium and the admissibility of the claim against France, which was eventually upheld.⁸⁰ In the *Rantsev* case, the ECtHR also considered the complaints against Russia and Cyprus separately.

⁷⁴ The Court did join two cases relatively recently, but that example is irrelevant for the present purposes: it concerned the joinder of a case brought by Nicaragua against Costa Rica and a case brought by Costa Rica against Nicaragua. These cases could relatively easily be construed as a claim and a counterclaim. This is hardly comparable to joining claims of one applicant against a plurality of states. See International Court of Justice, Press Release no. 2013/10 of 23 April 2013, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) The Court joins the proceedings in the two cases*, available at www.icj-cij.org.

⁷⁵ See e.g. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, n. 37, Separate Opinion Judge *ad hoc* John Dugard, pp. 86–94.

⁷⁶ M. den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights', SHARES Research Paper 17 (2012), ACIL 2012-16, available at www.sharesproject.nl; also published in the *Themed Section: Procedural Aspects of Shared Responsibility in International Adjudication*, (2013) 4(2) JIDS 361–383.

⁷⁷ Most prominently, with respect to the application and the number of respondents, is perhaps the *Bankovic* case: *Bankovic a.o. v. Belgium and 16 other States*, App. No. 52207/99 (ECtHR, 2 May 2007).

⁷⁸ See *Ilașcu a.o. v. Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004); *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR, 21 January 2011); and *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (ECtHR, 7 January 2010).

⁷⁹ This section will not include a discussion on the co-respondent mechanism, which is being developed to address cases involving claims against the EU and its member states. For an analysis see Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights', n. 76.

⁸⁰ *Stojkovic v. France and Belgium*, App. No. 25303/08 (ECtHR, 27 October 2011), para. 40, on the non-admissibility against Belgium, and para. 57, for the finding that France had violated the Convention.

The ECtHR has even joined cases that had some connection, such as the cases of *Behrami* and *Saramati*, but in its consideration dealt with each claim and each respondent separately.⁸¹ Especially in cases involving complex coordination of activities, such as aid and assistance, where one state inflicts the actual injury, but other states significantly contributed by assisting in the wrongful act, the ECtHR will often decline to exercise its jurisdiction against the aiding or assisting state due to its admissibility requirements. Most importantly, such cases will fail on the question of jurisdiction *ratione personae* since the aiding or assisting state will successfully argue that it lacked effective control over the conduct resulting in injury and that it, therefore, did not fall within the ECtHR's jurisdiction under Article 1 of the European Convention on Human Rights (ECHR).⁸²

The jurisdiction of the ECtHR is, like the ICJ's, based on consent. This consent is obtained when states ratify the ECHR and thereby consent to the ECtHR's jurisdiction. Therefore, the indispensable third party rule also applies, because the ECtHR will not exercise its jurisdiction over a state that has not consented to it and thus the rule will also influence the admissibility of cases brought to this Court. However, for our present purposes, it is not particularly significant. This has two causes. First, due to the compulsory jurisdiction of the ECtHR over all contracting parties to the ECHR, complainants can always present their claim against as many of the contracting parties to the Convention as they wish, which will prevent the exclusion of any indispensable third party. To some extent, it is thus up to the applicant to make sure that all relevant states are included in the application. Second, if the claim involves conduct of a non-contracting party, this part of the claim will be inadmissible, because the ECtHR obviously has no jurisdiction.⁸³ While this may in individual cases result in inadmissibility of the entire claim, especially when the contracting party involved was aiding or assisting the non-contracting party, this is inevitable since international law in general does not allow the imposition of treaty obligations on non-parties to the treaty. No responsibility will arise. This is different from preventing a complaint against a state that is bound by the obligation, but has not consented to the relevant dispute settlement mechanism, because such a state is responsible under international law. In this sense, the effect of the rule is perhaps less frustrating. As long as the claimant ensures that it includes all relevant states in the application, the claim will only

⁸¹ *Agim Behrami and Bekir Behrami v. France*, App. No. 71412/01 (ECtHR, 2 May 2007) and *Ruzhdi Saramati v. France, Germany and Norway*, App. No. 78166/01 (ECtHR, 2 May 2007).

⁸² See *Tugar v. Italy*, App. No. 22869/93 (ECtHR, 18 October 1995) and *Aziz v. Cyprus, Greece, Turkey and the United Kingdom*, App. No. 69949/01 (ECtHR, 23 April 2002).

⁸³ See *Tugar v. Italy*, n. 82, concerning a complaint against Italy, which allegedly failed to prevent the sale of mines to Iraq, which subsequently led to injury, in Iraq, of an individual. The conduct of Iraq was obviously beyond the Court's reach and the situation was considered not to fall within the jurisdiction of Italy.

be declared inadmissible because of the *Monetary Gold* rule when entertaining the claim would mean holding a state responsible for breach of an obligation that was not binding upon that state.

In conclusion, the case law of the ECtHR has not provided much guidance on the particular issue of invoking shared responsibility. It is receiving complaints against a plurality of responsible states, but discusses the complaints on an individualised basis and has thereby not developed a special approach, such as a lowering of the number of local remedies to be exhausted, because of the number of respondents. For all intents and purposes, it would have been the same had the applicant brought separate cases.

3.2.3 The WTO

The WTO dispute settlement system is perhaps the least problematic of the three.⁸⁴ Complaints against more than one respondent are not uncommon.⁸⁵ For instance, India brought a complaint against the EU and the Netherlands on the seizure of generic drugs,⁸⁶ and the United States started procedures against the EU and some of its member states on civil aviation.⁸⁷ The WTO system seems to be rather open to such procedures. In fact, in the *Turkey – Textiles* case, the Appellate Body dismissed an appeal to the indispensable third party rule by the European Communities (EC), despite its obvious interest in the case, and narrowed down its decision to Turkey's measures.⁸⁸ One of the arguments of the Appellate Body to reject the argument that the case should be dismissed was that the EC could have joined the case, but chose not to.⁸⁹ Although the WTO's website states that 'countries bring disputes to the WTO if they think

⁸⁴ See generally, Y. Iwasawa, 'WTO Dispute Settlement as Judicial Supervision' (2002) 5 JIEL 287–305.

⁸⁵ It should be noted that the vast majority of cases involving more than one respondent concern the EU. See L. Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) 4(2) JIDS 343–359.

⁸⁶ Complaint by India, DS408, in consultation at the time of writing. Brazil has brought a similar complaint, DS409, also currently in consultation.

⁸⁷ *European Communities – Measures Affecting Trade in Large Civil Aircraft*, Report of the Appellate Body of 18 May 2011, AB-2010-1. In this case, the United States not only objected to distortion of trade between it and the European Union due to subsidies in the EU for its own aircraft industries, but also the potential harm to trade with third countries: see para. 14. Some of these claims were rejected, but only for the failure of the United States to substantiate the claims.

⁸⁸ *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Panel of 31 May 1999, WT/DS34/R. The measures complained of by India were implemented by Turkey following an agreement with the European Community. A determination of their lawfulness arguably required a determination of the lawfulness of the agreement between Turkey and the European Communities.

⁸⁹ *Ibid.*, para. 9.11.

their rights under the agreements are being infringed’,⁹⁰ suggesting that it requires injury for claims to be admissible, cases may in fact also be based on ‘serious prejudice’ to the interests of the member states.⁹¹ The WTO dispute settlement body has admitted complaints by states that were arguably not specially affected by the alleged breach of WTO law – for instance because they did not export the goods subject to unlawful tariffs – on the basis that the measures complained of harmed global trade and therefore also the complainant state. The *locus classicus* here is the *EC – Bananas* case, in which the United States was allowed to join, despite the fact that it scarcely produced or exported bananas.⁹² Complaining against a plurality of responsible states and/or organisations is thus less complicated, since it is not necessary to prove injury *vis-à-vis* all respondents.

In conclusion, in the context of the WTO, invoking the responsibility of a plurality of states and/or international organisations is not subjected to major procedural obstacles raised by the mere fact that there is a plurality of respondents. There are probably various explanations for this, many of them not inherent in principles on invocation and in any event including the defined nature of the primary norms subjected to WTO dispute settlement.

4. The consequences of non-invocation

As the analysis above has demonstrated, the invocation of the responsibility of all the members of a plurality of states and/or organisations when responsibility is shared is fraught with obstacles. In many cases, this will mean that the responsibility of some, the majority, or even the most important members will not be invoked. This raises the question of whether non-invocation of responsibility in cases of shared responsibility affects the very responsibility of the state or organisation whose responsibility is not invoked.

A preliminary answer is that it does not, since responsibility as such does not depend on invocation but only on the existence of a breach of an obligation that is attributable to the relevant state and/or organisation. This answer must be further refined, though, because non-invocation may have effects on the realisation of responsibility. The first, and obvious, effect

⁹⁰ See World Trade Organization, ‘Understanding the WTO: What we do,’ available at http://wto.org/english/thewto_e/whatis_e/what_we_do_e.htm.

⁹¹ See e.g. *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Report of the Panel of 30 June 2010, WT/DS316/R, p. 833, para. 7.1610.

⁹² *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body of 9 September 1997, AB-1997-3.

will be on reparation. The obligation to make reparation is inherent in responsibility, but this obligation is impossible to implement without invocation, if only because the injured state or organisation must indicate the kind and amount of desired reparation. As has been discussed in Chapter 7 of this volume, reparation in situations of shared responsibility has its own complexities. These may constitute a real disadvantage for the member of the plurality of responsible states or organisations whose responsibility is invoked, because it may be liable to provide reparation in full also on behalf of the members whose responsibility is not invoked, without being able to reclaim part of what it paid from its partners in crime.⁹³ As already stated, the objectivity of international responsibility dictates that whether or not responsibility is actually invoked does not affect the very existence of responsibility of the members of the responsible plurality not involved in the process of invocation. Even so, this may not contribute to the perceived fairness of the process.

A further effect of non-invocation is that it may affect the allocation of responsibility. The state or international organisation that is part of the responsible plurality, but not part of the process in which responsibility is invoked, is both at an advantage and a disadvantage. The advantage is that its responsibility, and its contribution to the injury, will not be identified. The disadvantage, though, is that it will be unable to argue its position, or bring additional evidence, and so on, to clear its name without compromising its position as a non-participant in the procedures. Actively participating would trigger the principle of *forum prorogatum*, while it may be entitled to abstain under the principle of consent. Apart from situations in which such abstention renders the entire claim inadmissible due to the *Monetary Gold* rule, absence of one or more of the relevant parties may have implications for the distribution of responsibility. The ICJ has settled disputes and issued advisory opinions without the contribution of an essential party.⁹⁴ While the Court has been criticised in such instances for having proceeded without having at its disposal all the relevant facts and arguments,⁹⁵ it has not subjected a state to its jurisdiction without the consent of that state. There is therefore some validity in the argument that abstaining is at the risk of the abstaining state. In the cases that concern us here, the absence of a participant has serious consequences. The absence of necessary evidence provided

⁹³ For more details, see Chapter 7 of this volume, P. d'Argent, 'Reparation, Cessation, Assurance and Guarantees of Non-Repetition', 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. ____.

⁹⁴ See *United States Diplomatic Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, ICJ Reports 1984, 392, in which the respondent did not appear; and the *Wall* advisory opinion, n. 22, in which Israel refused to participate.

⁹⁵ See e.g. *Wall* advisory opinion, n. 22; Separate Opinion of Judge Higgins, pp. 217–218; and Declaration of Judge Buerghenthal, pp. 240–245.

by the non-participant(s) that could exonerate them or indeed the respondent is to some extent a practical problem that could be solved by finding some of the evidence elsewhere, but if that is impossible, it has more fundamental consequences. The court will be unable to consider the very allocation of responsibility between the members of this plurality or determine causality, complicity, and participation. To illustrate this, let us assume that in scenario A, Arcadia and Utopia dump the prohibited substances x and y in the river. Combined, and due to the chemical reaction that follows, they cause aggravated pollution, seriously damaging downstream Ruritania. Without the participation of Utopia, a court will be unable to determine the extent of responsibility of Arcadia, even without the operation of the *Monetary Gold* rule. It is possible to declare that Arcadia is responsible for dumping one of the substances, but not to consider the aggravated effect due to the combination with the other substance. Similarly, in scenario B, Ruritania's conduct is only wrongful because it facilitated wrongful conduct against the Bellarian national by Arcadia and Utopia, but without the participation of Arcadia and Utopia, a court cannot determine this wrongfulness. Again, in theory this does not affect responsibility, in the sense that its existence does not depend on invocation. In reality, however, it makes meaningful implementation of shared responsibility fiendishly difficult.

5. Concluding observations

This Chapter has used the fictitious states of Arcadia, Utopia, Ruritania, and Bellaria, the names of which remind us perhaps of Elysian Fields or paradise, to illustrate the complexities of invoking shared responsibility. Sadly, we cannot discard these complexities as attached to non-existing fantasy. The above analysis has demonstrated that the invocation of shared responsibility suffers from under-regulation and silences. Standing to invoke responsibility requires injury or legal interest on the basis of individualised and separate responsibility of each of the members of a plurality of responsible states and/or international organisations. This is irrespective of the number of responsible states or organisations, and will often force an injured state or organisation, or a non-injured state or organisation with a legal interest, to fragment its claim into the smaller pieces that fit this mould. Even if there is standing to present a claim against all participants in the wrongful conduct, this claim will still not address the aggravating circumstance that the injured entity suffered breaches caused by a plurality of states and/or international organisations. The claim will only address the individualised responsibility of each member of the plurality. The totality will be lost.

The actual implementation of shared responsibility by means of invocation is further complicated by specific requirements applicable to claims. These range from issues of admissibility of indirect claims (the nationality of claims and local remedies rules) to issues of admissibility before international courts and tribunals (the *Monetary Gold* rule). All of these have sound rationales and are firmly established in international law. However, their unaltered application to situations involving more than one respondent state or international organisation often presents fatal obstacles to the claim. This outcome is undesirable. The chances of success should not depend so much on the number of respondents. The solution is far from obvious. Regimes of strict(er) liability, automatic waivers of criteria of admissibility, compulsory dispute settlement, and more sophisticated primary rules, especially on issues of complicity and causation, would all address parts of the problems of invoking shared responsibility. However, none of these are particularly appealing to states and international organisations, reducing the likelihood of their implementation.

The analysis of invocation of shared responsibility has revealed an important disconnect between the legal regime of invocation of responsibility and the situation to which it should apply. Development and refinement may come from subsequent practice and perhaps a revision of the ILC's work on international responsibility. To avoid the travails of Bellaria and its real-life counterparts, it is to be hoped that regulating the invocation of shared responsibility will be considered more seriously than it has been in past efforts.