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Chapter 4: Attribution of Responsibility

James D. Fry[*]

1. Introduction

Independent responsibility remains the general principle in the law of international responsibility, as established by the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and later confirmed by the 2011 Articles on the Responsibility of International Organizations (ARIO).[1] Independent responsibility prescribes that each state or international organisation is responsible only for its own internationally wrongful conduct.[2]

However, both sets of Articles leave open the possibility of attributing responsibility to party A for internationally wrongful conduct committed by party B, as is often called 'attribution of responsibility',[3] or 'attributed responsibility'. The possibility of attributed responsibility is parallel to the normal situation of responsibility based on attribution of conduct.[4] This is to say that responsibility can be both direct and attributed (or indirect). The combination of attributed responsibility to one state or international organisation, on the one hand, and attribution of responsibility or conduct to another, on the other, might lead to multiple attribution (of responsibility, conduct, or both).

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[1] See Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA); Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary); 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 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). See also 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. __.

[2] J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: CUP, 2002), pp. 91, 145.

[3] See generally ibid.; ARIO Commentary to Article 1, para. 4, n. 1.

[4] Article 2 ARSIWA, n. 1. Attribution of Conduct is discussed in 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. __.

Attribution of responsibility may arise in several types of situations of 'shared responsibility', a concept that refers to the responsibility of multiple actors for their contribution to a single harmful outcome.[5] Attribution of responsibility may arise out of situations where states or international organisations act independently in causing a collective injury to a third party.[6] While state A can be held responsible for the internationally wrongful act committed (according to rules of attribution of conduct), state B may nevertheless also be attributed responsibility for state A's conduct without the conduct being attributed to state B.[7] In this sense, the attribution is multiple. The possibility may even arise that both parties are jointly responsible for the conduct attributable solely to another.[8] For example, under the mixed agreements between the European Union (EU) and its member states that fail to provide a clear division of power, both parties will be jointly responsible for a breach, without determining the attribution of conduct.[9] This indicates that the EU or the member states shall be responsible even if the breach can be attributed to the other.

It may seem that attribution of responsibility also may occur where multiple wrongdoers acted together in causing the harm. However, this is not necessarily true. By participating in the common enterprise, a state or international organisation already is involved in the wrongful conduct, and responsibility in such situations may be direct rather than attributed.

While in both the ARSIWA and the ARIO attributed responsibility would seem to provide for determinations of shared responsibility, the question of how the existing rules on attribution of responsibility indeed successfully allow for multiple attribution calls for further analysis. This Chapter develops the notion of attribution of responsibility within the context of shared responsibility.[10]

No significant practice has been observed in relation to attribution of responsibility, and therefore the points made here are somewhat theoretical and speculative, just as many of the significant parts of the ARSIWA and the ARIO are theoretical and speculative. Nevertheless,

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[5] Nollkaemper, 'Introduction', n. 1, Chapter 1 of this volume, at p. ___.

[6] Ibid., at pp. ___; also P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438, at 368–369.

[7] ARIO Commentary to Chapter II, 'Attribution of conduct to an international organization', at para. 2, n. 1.

[8] G. Gaja, 'Second Report on the Responsibility of International Organizations', UN DOC. A/CN.4/541 (2004), para. 8.

[9] *Parliament v. Council*, European Court of Justice, case C-316/91, (1994) ECR I-653, at I-661-662. See also the oral pleadings to the World Trade Organization panel on *European Communities – Customs Classification of Certain Computer Equipment*, Report of the Panel of 5 February 1998, WT/DS62/R, WT/DS67/R, WT/DS68/R, where the EC asserted responsibility for infringements.

[10] For the basic tenets of shared responsibility, see Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 6.

the analysis may still be useful inasmuch as the ARSIWA and the ARIO can influence the progressive development of international law in this area, supported by the tremendous attention that the international legal community has given to these instruments.

This Chapter will examine in which situations responsibility may be attributed to a state or international organisation and how this may support a determination of shared responsibility. For the convenience of description, occasionally this Chapter refers to parties bearing shared responsibility as 'jointly responsible'. To avoid confusion with its domestic counterpart, joint responsibility is defined to occur where responsibility arises out of the acts of multiple actors that result in a single injury, and is distributed to them separately rather than collectively.[11] 'Joint' in this context is purely descriptive, and does not aim to be given any particular legal consequence.[12] Whenever 'joint responsibility' or 'jointly responsible' are mentioned below, the terms should be assumed to be in accordance with the above definition.

This Chapter first analyses the concept of 'attribution of responsibility' and whether it leaves open the possibility of multiple attribution (section 2), and then analyses the ARSIWA and the ARIO concerning the plurality of responsible states and/or international organisations (section 3). The Chapter then moves on to a discussion of the relevant Articles under the ARSIWA and the ARIO on attributed responsibility (aid or assistance, direction and control, coercion and circumvention), and identifies potential contributing and restraining factors with regard to a determination of shared responsibility (section 4).

2. The concept of attribution of responsibility

2.1 The concept of attribution

Attribution is a legal mechanism for handling the collectivity of subjects of international law. It sets out the conditions that have to be satisfied in order to determine that a state or another subject of international law has performed a particular act.[13] According to the International Law Commission (ILC) Commentary to the ARSIWA, attribution of conduct should be

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[11] See Nollkaemper, 'Introduction', n. 1, at ___, and further Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 6, at 368.

[12] Ibid.

[13] L. Conforelli and C. Kress, 'The Rules of Attribution: General Considerations', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), p. 221. 'Attribution of Conduct' is discussed in Chapter 3 of this volume: see n. 4.

determined by international law rather than by causality, making it a normative operation.[14] This view is not without objections from commentators who believe that attribution should be a factual operation.[15] A better view might be that the two ideas are perfectly consistent with each other. Adopting a normative approach simply imposes legal sense on the factual link between the conduct and the state, and it does not in any way deny the latter. To put it plainly, we can take the concept of attribution to mean a probe into the question of 'who did it'. It aims to identify the state to which the internationally wrongful act is attached for the purpose of responsibility,[16] even though it says nothing about whether responsibility should actually attach or not – there is still the issue of breach to consider.[17]

The ILC clearly deems causation irrelevant to the determination of international responsibility, as can be seen from the absence of causation from the constitutive elements of internationally wrongful conduct.[18] As the rules currently stand, causation in the law of international responsibility is limited to the determination of reparations.[19] In this sense, the role of causation is to supply the link between the internationally wrongful conduct and the damage caused. Since the ILC excluded damage from the constitutive element of responsibility, causation is of limited utility in determining responsibility. However, D'Aspremont argues that causation can possibly exist in other stages, implicit in attribution of conduct, which arises as the causal link between the conduct and the breach, substituting the traditional causation between breach and injury.[20] However, this is not real 'causation'. Intuitively, if one says 'A causes B', B has to be something different from A. It is hard to assert that a state's conduct 'causes' an 'internationally wrongful conduct', because the latter actually is a conceptualisation of the former by the ILC, which means both are the same thing. This would be the same as saying that 'the killing causes the murder', which does not make sense. Therefore, it is unlikely

[14] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 91.
[15] G. Arangio-Ruiz, 'Second Report on State Responsibility', ILC *Yearbook* 1989/II(1), 48–53. See also Chapter 2 in 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), pp. ___.
[16] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 92. See also Conforelli and Kress, 'The Rules of Attribution: General Considerations', n. 13, at p. 221.
[17] It should also be noted that the role of attribution is not limited to the international responsibility context, but rather acts as the foundation for the international legal system as a whole. See Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at pp. 222–223; see also J. Crawford, 'First Report on State Responsibility', ILC *Yearbook* 1998/II(1), 33.
[18] For a detailed analysis of the reason for such absence of causation in international responsibility, see L. Castellanos-Jankiewicz, 'Causation and International State Responsibility', SHARES Research Paper 07 (2012), ACIL 2012-07, available at www.sharesproject.nl. Compare Gattini, 'Breach of International Obligations', n. 15, at p. __.
[19] Ibid., Castellanos-Jankiewicz, 'Causation and International State Responsibility', at 5.
[20] J. d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9(1) IOLR 15, at 21.

that, in the ILC's framework, causation will ever play a role in determining responsibility.[21] However, such potential confusion with causation can only possibly occur for attribution of conduct. As shown below, attribution of responsibility does not arise as a link between the conduct and the perpetrator, but provides a nexus between different perpetrators. This critical point also excludes causation from the realm of attribution of responsibility.

2.2 Attribution of responsibility as distinct from attribution of conduct

In both attribution of responsibility and attribution of conduct, attribution serves to identify a party who is either potentially responsible (attribution of conduct)[22] or responsible (attribution of responsibility). In fact, the ILC has indicated that 'the idea of the implication of one state in the conduct of another is analogous to problems of attribution (of conduct)'.[23] The ILC did not elaborate on how they are 'analogous', but it seems that attribution of responsibility and attribution of conduct are functionally equivalent, in that both are a pathway towards responsibility. However, attribution of responsibility differs greatly from attribution of conduct. Attribution of conduct and attribution of responsibility apply to different factual patterns, function independently of each other, and possess distinct theoretical bases.

The literature hardly discusses the concept of attribution of responsibility. One line of thought equates attribution of responsibility to the concept of derived responsibility, stating that attribution of responsibility occurs where one state is responsible for the conduct of another state, while the latter state is simultaneously responsible for its own conduct.[24] The idea of derived responsibility can be traced to sole arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco 1923–1925*. The arbitration involved the dependency relationship of a protectorate, and the arbitrator held that since the protected state did not act independently in the international domain and any measures taken by third states concerning the protected state necessarily would affect the rights of the protector state, the protector state should take up the responsibility for the protected state.[25] This Chapter accepts such a concept of attribution of responsibility, except that this latter state might not always bear responsibility for its own

[21] Causation may be relevant for the determination of breach, but this falls outside the scope of this Chapter. For more on causation and breach, see Gattini, 'Breach of International Obligations', n. 15, pp. __.
[22] The point with 'potentially' is that breach still has to be proven.
[23] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 147.
[24] D. Amoroso, 'Moving Towards Complicity As A Criteria of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24 LJIL 989–1007.
[25] *British Claims in the Spanish Zone of Morocco (Great Britain/ Spain)*, (1924) 2 RIAA 615, at 648.

conduct – for example, in the situation of circumvention of international obligations under Article 17 of the ARIO.

Before elaborating on these differences in detail, it is necessary to emphasise one basic characteristic of attribution of responsibility. For the state or international organisation bearing attributed responsibility, there should be 'conduct', as it is used in the general sense. However, two points should be made. First, the conduct need not be internationally wrongful conduct. Attribution of responsibility is independent from internationally wrongful conduct. Second, while there should be conduct, this is not necessarily conduct by the actor to whom responsibility is attributed. Given that attribution of responsibility concerns the relationship, factual or legal, between the party who commits the wrong and the party to which responsibility is attributed, there can be some doubt over whether the latter party actually committed a course of 'conduct'. This is a critical issue, because it in essence delimits the scope of attributed responsibility. For example, the provision of aid or assistance would not be considered a proper case for attribution of responsibility, since the state or international organisation providing such aid actually committed an internationally wrongful act of its own.

2.2.1 Different factual contexts

Attribution of responsibility necessarily involves more than one party, since if there is only one wrongdoer, direct reference to attribution of conduct would be sufficient for responsibility purposes. Such a multi-party model of attributed responsibility is confirmed by the ILC. Even though there is no explicit mention of 'attribution of responsibility' in the ARSIWA, arguably it is implicit in its Chapter IV, entitled 'Responsibility of a state in connection with the conduct of another state',[26] where a state bears responsibility for the internationally wrongful act not committed by itself. Moreover, the fact that both the ARSIWA and the ARIO provide separate Chapters on attribution of conduct and attribution of responsibility suggests that they constitute distinct rules, functioning within their respective domains. In other words, attribution of responsibility involves independent acts of multiple parties causing a collective injury, whereas attribution of conduct often, but not necessarily, will involve the situation of a single

[26] It is also called 'indirect responsibility' or 'responsibility for the act of another' by Roberto Ago; see R. Ago, 'Eighth Report on State Responsibility', ILC *Yearbook* 1979/II(1), p. 4, para. 2.

wrongdoer.[27]

2.2.2 Different sphere of operation

The above conceptualisation of attribution of responsibility is not built upon attribution of conduct, and presumably also is without prejudice to attribution of conduct. The ILC designed the concept of attribution of conduct as one of the constitutive elements of an internationally wrongful act, which entails international responsibility. However, attribution of responsibility provides a different route to determining responsibility, which is independent of the determination of whether there is an internationally wrongful act. This is compatible with the opinion of Giorgio Gaja that responsibility does not always need to be based upon attribution of conduct:

> There is no need to devise special rules on attribution in order to assert the organization's responsibility (...) Responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization. It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States.[28]

Even though this observation addresses responsibility of international organisations, state responsibility runs parallel to this. For any particular state, attribution of responsibility also does not depend on attribution of the conduct to that state.[29]

An example of the independence of attribution of responsibility from attribution of conduct can be found in Article 6(1) of Annex IX to the 1982 United Nations (UN) Convention on the Law of the Sea (UNCLOS or Convention),[30] which provides that '[p]arties which have competence under Article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.' No reference to attribution of conduct is made here. Neither is it likely that attribution of conduct is implicitly presumed, because what matters for responsibility is competence, rather than conduct. The inclusion of the word 'competence' in UNCLOS is essential. Given that competence over particular

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[27] The possibility of multiple attribution of conduct is explained by Messineo, 'Attribution of Conduct', n. 4, at p. ___.

[28] Gaja, 'Second Report', n. 8, para. 11. See also C. Yamada, 'Revisiting the International Law Commission's Draft Articles on State Responsibility', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden: Martinus Nijhoff, 2005), p. 121.

[29] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 145.

[30] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

conduct is not always clearly divided between a state party and an international organisation that is a party to the Convention, either the state party or the international organisation could be held responsible for the breach not committed by itself, as long as the matter falls within its competence. This is further supported by paragraph 2 of the same Article, which provides that failure by the organisation or its member states to provide information, or the provision of contradictory information, concerning who has responsibility in respect of any specific matter, shall result in joint and several liability. Therefore, it does not matter who actually committed the wrongful conduct.

Mixed agreements between the European Union and its member states also represent a typical example.[31] Responsibility can be attributed without attribution of conduct to the same subject, because the European Union or member states can be held responsible for the conduct of the other. As the European Court of Justice stated in *Parliament v. Council*, which concerned a mixed cooperation agreement, 'in those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken.'[32]

Of course, it cannot be denied that responsibility and conduct both can be attributed to one party. Nevertheless, attribution of responsibility and attribution of conduct do not necessarily correspond to each other, in that the effective functioning of each does not depend on the other.

2.2.3 Distinct theoretical bases

As described above, attribution of conduct is a legal operation, addressing the factual link between the conduct and the state or international organisation through a normative approach. Such an instrumental approach, though widely accepted by ILC members, is not free from objections. For example, Brownlie not only labeled the concept of imputability (attribution) 'superfluous',[33] but also pointed out that 'imputability (attribution) implies a fiction where

[31] For more information on mixed agreements, see e.g., C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (Oxford: Hart Publishing, 2010); and J. Heliskoski, *Mixed Agreements As A Technique For Organizing the International Relations of the European Community and Its Member States* (Leiden: Kluwer Law International, 2001).
[32] *Parliament v. Council*, n. 9, at I-660-661, recital 29.
[33] I. Brownlie, *System of the Law of Nations, State Responsibility, Part I* (Oxford: Clarendon Press, 1983), p. 36.

there is none, and conjures up the idea of vicarious liability where it cannot apply'.[34] For Brownlie, what truly matters is whether there is a breach of an international obligation, depending on which the content of attribution will vary.[35] It seems that Brownlie views attribution of conduct as an artificial tool, the content of which may change as the relevant obligation changes. The same cannot be said of attribution of responsibility, because attributed responsibility is based upon solid grounds of its own. Asking the question why responsibility can be attributed to a particular party is, in a theoretical way, asking why states or other international law subjects can bear responsibility. The answer, as this Chapter demonstrates below, lies with the theory of control. This is a significant difference between attribution of responsibility and attribution of conduct.

2.3 Basis of attribution of responsibility[36]

2.3.1 States

The earliest theory of attribution of responsibility is the 'representation theory' of Anzilotti. Anzilotti argued that an injured state could not claim responsibility against a represented state because the latter state did not carry out international relations by itself. Rather, it was the representing state that bore the responsibility indirectly.[37] This theory was later replaced by the 'control theory', which holds that for indirect responsibility to attach, it is necessary that the unlawful act is within the freedom of decision of the controlling state.[38] According to Eagleton's idea that power breeds responsibility, states are only willing to accept responsibility for actions if they have authority over such actions.[39] Such authority assumes that the responsible state has the power to prevent unlawful acts within its own territory.[40] The degree of such responsibility is proportional to the scope of the authority exercised.[41] If one seeks the origin for such authority, it should be the necessary corollary of the sovereignty and autonomy

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[34] Ibid.
[35] Ibid.
[36] By 'basis', this sub-section only deals with the responsibility that can be attributed to another entity. However, for attribution of responsibility to apply, there are additional requirements still, such as the breach of an international obligation. The issue of the source of illegality is addressed in the initial paragraph of section 4 below.
[37] Ago, 'Eighth Report on State Responsibility', n. 26, at 5.
[38] Ibid., at 17.
[39] C. Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928), p. 152.
[40] Ibid. This ability to prevent unlawful acts is inherent in Articles 29 and 30 of both the ARSIWA and the ARIO concerning the duty of performance and non-repetition.
[41] Eagleton, *The Responsibility of States in International Law*, n. 39, at p. 152.

of states.[42] What is inherent within this power to prevent is actually the authority over the conduct taking place within its territory, for which responsibility is incurred, and such authority is manifested in the form of control.[43] In this sense, control over conduct can provide a basis for attribution of responsibility for states.

Upon closer analysis, Eagleton's notion of control is limited to the influence exercised over conduct. To put it differently, Eagleton argues for control as the basis for attribution of conduct. Accordingly, if he were to claim control as the basis for responsibility, he also must be assuming a connection between wrongful conduct and responsibility. However, since attributed responsibility can be responsibility without wrongful conduct, it seems that Eagleton's control theory is not directly applicable.

However, this does not mean that control cannot serve as a basis for responsibility. It is important to note that 'responsibility without wrongful conduct' does not mean there is no wrongful conduct at all; otherwise there would be no responsibility. What it actually means is that a state can be attributed responsibility for the conduct of another. In other words, there was no wrongful conduct of the state or international organisation on its own. In order to attribute responsibility for the wrongful conduct of another, it is possible that control is directly established between states rather than between the state and the conduct. If such control necessarily affects the autonomy of the state, then it is possible to argue that what Eagleton called 'authority over actions', rather than the actions *per se*, is transferred. Therefore, a link can be established between the controlling state and the conduct of the actual perpetrating state, whereby the former state bears responsibility. In this sense, control and autonomy of states are two sides of the same coin: namely, who bears authority over the conduct. The control theory provides the rationale for Chapter IV of the ARSIWA.[44]

2.3.2 International organisations

Given that control can constitute the basis for state responsibility, is it correct to say the same for international organisations, simply because they, like states, have acquired international

[42] Ibid.
[43] The 'control' is used in the general sense, and should not be confused with 'effective control'.
[44] J.D. Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) 40 Vand J Transnat L 611, at 617.

legal personality?[45] Generally, it is believed that since international organisations have the necessary powers transferred to them by their member states, they can accordingly be attributed responsibility just like states.[46] However, a word of caution must be provided here. States and international organisations are not equivalent. While states are considered identical and equal sovereigns regardless of their domestic political institutions and cultures, for example, international organisations are not necessarily created equal, and show great diversity depending on these same factors.[47] Therefore, it might be argued that for different international organisations, control is derived from different sources, and it is reasonable to question whether there can be a uniform source of control as a basis for responsibility for all international organisations. Indeed, it has been observed that for some international organisations, control can be derived from the transfer of power by member states, such as the European Union, although it is difficult to claim so for others.[48] This largely exposes the inadequacy of the ARIO, and is addressed later in this Chapter.

2.4 A further distinction

A necessary question at this point is the following: how is control as the basis of attribution of responsibility different from control in attribution of conduct? It is clear that control also has a role to play in attribution of conduct. The most typical is that 'effective control' is the test for attribution of conduct in cases of secondment of organs: for example, in peacekeeping operations.[49] However, even though attribution of conduct and attribution of responsibility both rely on control, this does not necessarily negate the distinction between them, because in these two scenarios, control actually aims at different objects. In attribution of conduct, control is exercised over the conduct committed, while in attribution of responsibility, control is over the state or international organisation. Attribution of conduct is symbolised by a transfer of conduct. Once an act is committed, it is transferred from the actual committer to the state or organisation to which the conduct is attributed. By exercising effective control, the seconding party actually makes the conduct its own, even though the organ that commits the wrong already is seconded

[45] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174.
[46] 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, at 63.
[47] J. Wouters and J. Odermatt, 'Are All International Organizations Created Equal?' (2012) 9(1) IOLR 7, at 12.
[48] N. Nedeski and P.A. Nollkaemper, 'Responsibility of International Organizations "in connection with acts of States"' (2012) 9(1) IOLR 33, at 38–9.
[49] Gaja, 'Second Report ', n. 8, at 19.

to another state or international organisation. In other words, the conduct is transferred from the seconded party to the seconding party. However, in attribution of responsibility, control exercised by one party over another does not affect the fact that the perpetrator still is the seconding party. In essence, attributed responsibility represents an effort to substitute transfer of conduct with transfer of authority. In the former case, the controlling party will be regarded as the perpetrator of the conduct, but the same is not true in the latter case. This particularity of attributed responsibility can be explained by the fact that it proposes to address relationships, either legal or factual, between states, rather than conduct. Such a relationship does not affect attribution of conduct, but it can influence the authority over the conduct, which originally is retained by the influenced party, but is transferred due to the relationship between the two parties.

This distinction is well reflected in the analysis of the conduct of peacekeeping operations. Some argue that in this case the element of control actually has made the conduct 'collective', meaning it is attributable to both parties.[50] The choice of the ILC to prescribe the effective control test in determination of the attribution of conduct[51] has been attacked, particularly for its ignorance of the legal institutional link between the peacekeeping operation and the United Nations itself, which would render the conduct attributable to the United Nations instead.[52] Such a conflict between alternative ways of attributing conduct would be avoided if effective control were to become a legal basis for attribution of responsibility to the contributing member states, avoiding the question of whether the conduct is attributable as well.[53]

2.5 The possibility of multiple attribution

2.5.1. The view of the ILC

For shared responsibility – which would involve responsibility of each of the multiple parties – to stand, it is necessary that the possibility of multiple attribution is left fully open, so that each

[50] J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2008) 4 IOLR 91, at 115.
[51] Gaja, 'Second Report', n. 8, at 19. See also Messineo, 'Attribution of Conduct', Chapter 3 of this volume, n. 4, at pp. __–___, where he argues that Article 7 of the ARIO should be interpreted as saying that the effective control test would only require that a factual link be established whenever there is a transfer of an organ between a state and an international organisation, thereby eliminating the necessity to create any institutional link.
[52] A. Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9(1) IOLR 77, at 82.
[53] See Messineo, 'Attribution of Conduct', n. 4, at p. __, where he argues that in the case of transfer of an organ from a state to an international organisation, there is good reason for the conduct of the organ to be attributed to the state.

party can either be attributed responsibility or bear responsibility based on attribution of conduct. The question, therefore, is whether attribution of responsibility to one state or international organisation necessarily precludes the responsibility of another state or international organisation.

An answer comes from the Committee on Accountability of International Organizations (IO) of the International Law Association: 'The responsibility of an IO does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act'.[54] The Committee does not say whether the same holds true for the responsibility of a state.

The ILC does not explicitly state its view on this particular point, so it requires more analysis to say whether the ILC supports multiple attribution of responsibility. Paragraph 1 of Article 47 of the ARSIWA, entitled 'Plurality of Responsible States', stipulates that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'[55] Similarly, paragraph 1 of Article 48 of the ARIO provides as follows: 'Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.'[56] Both Articles provide for the right of the injured state or international organisation to invoke responsibility against each one of the responsible states or international organisations individually. This might leave open the possibility of multiple attribution of responsibility, but the ILC does not say so explicitly.

Such a possibility of multiple attribution of responsibility is supported by the *Nauru* case, where the International Court of Justice (ICJ or Court) rejected Australia's argument that it could not be sued individually by Nauru, but could only be sued jointly with the other two states that also were in charge of administering the trust territory.[57] The situation involving

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[54] International Law Association Committee on Accountability of International Organisations, Report of the Seventieth Conference held in New Delhi, 2–6 April 2002, at 16.
[55] Article 47(1) ARSIWA, n. 1.
[56] Article 48(1) ARIO, n. 1. See on these Articles also Chapter 8 of this volume, A.M.H. Vermeer-Künzli, 'Invocation 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. ___, at ___, and Chapter 9, E.A. Wyler & L.A. Castellanos-Jankiewicz 'Serious Breaches of Peremptory Norms' 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. ____, at ____.
[57] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240, pp. 255–62 (*Nauru*).

international organisations is more complicated by the possibility that a state or international organisation bears only subsidiary responsibility, in which case such subsidiary responsibility can only be invoked if the primarily responsible state or international organisation has not provided reparation.[58] Article 48(2) of the ARIO does not distinguish expressly between a state that is a member of the international organisation involved and one that is not. The former is a perfectly clear situation, as is confirmed by Article 62 of the ARIO, which provides that where a member state is responsible, such responsibility is presumed to be subsidiary.[59] This is largely due to the fact that international organisations should bear responsibility on their own and member states cannot be held responsible simply because of their membership.[60] However, the ARIO do not provide any examples of non-member states bearing subsidiary responsibility.

Given that Article 47 of the ARSIWA and Article 48 of the ARIO address the invocation of responsibility, which is the consequence of responsibility rather than the establishment of responsibility *per se*, what the two Articles provide cannot be directly used for analysis of a rule of multiple attribution of responsibility. However, their significance lies in the fact that they do not exclude, and therefore indirectly recognise, the possibility of two or more states or international organisations being responsible for the same internationally wrongful act. The 'sameness' in this context emphasises that it is only one internationally wrongful act that is being addressed, as opposed to separate internationally wrongful acts. It should not be forgotten that in this case both attributed responsibility and responsibility based on attribution of conduct can be built upon this single wrongful conduct. Therefore, shared responsibility possibly could be built upon this by investigating under what conditions one party may incur responsibility for its involvement in the internationally wrongful conduct of another party. That is a necessary starting point for further analysis of multiple attribution of responsibility and shared responsibility. The consequence of such multiple attribution of responsibility is thus a 'joint responsibility'.[61] It is the aim of this Chapter only to address the relationship between the injured parties and the responsible parties, rather than the relationship between the multiple responsible parties.

It is necessary to recall that the definition of attribution of responsibility, as responsibility for the conduct of another, means that there cannot be situations where all of the parties bear

[58] Article 48(2) ARIO, n. 1.
[59] Ibid., Article 62(2).
[60] ARIO Commentary to Article 62 at para. 2, n. 1.
[61] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 6, at 366–370.

attributed responsibility, because the conduct must at least be attributed to one party. For that particular party, responsibility can hold if the two requirements of breach and attribution of conduct are satisfied. Accordingly, there is no reason to deny the possibility that responsibility can be attached to parties other than the one bearing attributed responsibility.

2.5.2. Limitations on multiple attribution

There exist certain limitations on the responsibility of the parties other than those to which responsibility is attributed: for example, coercion, where the coerced party bears at most a limited degree of responsibility,[62] or circumvention, through which responsibility is inapplicable to the party carrying out the circumvention because its international legal personality is being abused.[63] Moreover, in cases where an organisation bears primary responsibility, the subsidiary responsibility only can be invoked to the extent that the primary responsibility does not lead to reparation.[64]

3. Default rules of attribution of responsibility

This section explores the various grounds of attributed responsibility to see if they promote or hamper shared responsibility. Although 'control' explains how the authority over conduct is transferred, it is in itself not sufficient for responsibility to be attributed, because it does not address the source of illegality. If attributed responsibility is responsibility without wrongful conduct, where does the wrongfulness come from? If a state does nothing wrong, why attribute responsibility to it? In other words, attribution of responsibility may seem reasonable because a state or international organisation cannot be held responsible without first incurring an obligation.[65] Since attributed responsibility is the responsibility for the wrongful conduct of another, the reasonable corollary should be that the 'wrongful conduct of another' also is wrongful for the party attributed responsibility. Indeed, the ILC has prescribed that in all of the scenarios incurring attributed responsibility, both parties should bear the same international

[62] See section 3.3.
[63] See section 3.5.2.
[64] Article 48(2) ARIO, n. 1.
[65] This idea is developed from Article 34 of the Vienna Convention on the Law of Treaties, which stipulates that a treaty 'does not create either obligations or rights for a third State without its consent'. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 34.

obligations, except in the case of coercion.[66] Coercion constitutes an exception simply because it is so powerful as an 'extreme' case of attributed responsibility that the ILC deems it appropriate to attach responsibility even when the coercing party does not bear the same international obligation.[67]

Even though the ILC only lists coercion as an exception, it is not necessarily true that both parties can bear the same obligation.[68] Although both states and international organisations are international legal persons, they do not necessarily have an equal scope of competence. For example, international organisations generally are not able to participate in most treaties in which states participate. Accordingly, the international obligation of a state can be broader than that of an international organisation. Therefore, in the case of an international organisation providing assistance or exercising control over another international organisation or state in committing an internationally wrongful act, it may be difficult to attribute responsibility to the controlling international organisation. A fairly practical solution would be to rely on the rule of circumvention as is stipulated in Articles 17 and 61 of the ARIO.

Another essential element for attribution of responsibility – control over the state or international organisation – must be established through an analysis of the legal or factual relationship. However, the notion of a legal or factual relationship is so broad that it is hard to understand what it actually means. Indeed, the only thing that is known is that such a relationship would encroach on the autonomy of the state or international organisation affected. The ILC did provide specific manifestations of such a relationship in the ARSIWA and the ARIO, including aid or assistance, direction and control, coercion and, in the case of international organisations, circumvention of obligations. It is not clear why the ILC listed only these scenarios, and whether or not this list is exhaustive. In light of this, by simply analysing these Articles, the conclusions that can be drawn concerning whether attribution of responsibility provides for the possibility of shared responsibility are incomplete. There might well be other situations of attribution of responsibility yet to be formulated. This Chapter mainly focuses on the rules as they currently exist. However, section 2 already has explained that attribution of responsibility does not hamper multiple attribution, although it does provide certain limitations. With the potential scenarios of attributed responsibility listed by the ILC, it is possible to at least get a sense of how attribution of responsibility works towards shared

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[66] Article 17(b) ARSIWA, n. 1; Articles 15(b) and 58(b) ARIO, n. 1.
[67] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 147.
[68] Compare Gattini, 'Breach of International Obligations', Chapter 2 in this volume, n. 15, at p. ___.

responsibility in these specific situations, thus enabling a search for clues that could lead to a more coherent analysis.

The following section first addresses scenarios common to both the ARSIWA and the ARIO, such as aid or assistance, direction and control, and coercion, ending with a discussion of the common elements, such as knowledge and breach of an identical obligation.[69] It then moves on to look at the special scenario in the case of international organisations, namely circumvention. It is important to note that the title of the respective Chapters in the Articles all contain 'in connection with'. What is needed for the purpose of attributed responsibility, then, is to know to what extent they also provide for responsibility 'for' the conduct of another entity. In all of the following scenarios, it is assumed that the conduct is attributable to only one party,[70] and it is the responsibility of the other party that is at issue. Since control is established as the basis for attribution of responsibility, the sub-sections that follow test whether control can be identified for the purpose of attributing responsibility.

3.1 Aid or assistance

The first scenario is aid or assistance.[71] Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO provide for responsibility where one state or international organisation assists another state or international organisation in committing an internationally wrongful act. Two requirements for responsibility have been stipulated: first, that the state or international organisation has knowledge of the circumstances of the internationally wrongful act; and second, that the assisted act would be internationally wrongful if committed by the assisting state or international organisation.[72] What constitutes aid or assistance is not defined. Given that a separate Chapter of this book deals with aid or assistance,[73] only a few issues potentially relevant to attribution of responsibility are addressed here.

This Chapter asserts that aid or assistance is not related to attributed responsibility. The

[69] 'Coercion' does not require that the coercing state or international organisation are bound by the same obligation with the coerced party. However, it is worth including it for the purpose of comparison.
[70] ARIO Commentary, n. 1, at p. 158.
[71] For a critical analysis on whether aid or assistance fits shared responsibility, see Chapter 5 in 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), at pp. ___.
[72] Article 16 ARSIWA, n. 1; Articles 14 and 58 ARIO, n. 1.
[73] See Lanovoy, 'Complicity in an Internationally Wrongful Act', n. 71, p. ___.

difficulty with it being so categorised is that aid or assistance is formulated to provide for a separate wrong itself, rather than responsibility in connection with the conduct of the assisted party.[74] If so, then the responsibility will be direct rather than attributed. As early as 1978, the ILC produced what was then Article 27 concerning aid or assistance:

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.[75]

This view has been passed down to the current Articles. Article 16 of the ARSIWA and Articles 13 and 58 of the ARIO all provide that the assisting party is responsible 'for doing so',[76] such as the act of assisting or aiding. This view has also gained further support among scholars.[77] In light of this view, the assisting party bears responsibility for its own conduct, rather than the conduct of the assisted state. Accordingly, the paradigm situation is that both the assisting and assisted parties each are responsible for their own distinct acts.

Moreover, aid or assistance does not provide for a satisfactory tool for (multiple) attribution of responsibility. The content of aid or assistance does not indicate an element of control which, as noted earlier, is an essential condition of attribution of responsibility. Since the assisted party bears primary responsibility while the assisting state has merely a supporting role,[78] the latter will only be responsible to the extent that its own conduct has contributed to the internationally wrongful act.[79] Provision of aid does not necessarily entail control over the assisted party, though such assistance can be conditional on the receiving party not performing certain acts. However, promises to that effect simply are the 'consideration' for rendering assistance, and they do not signify control over the receiving party that will lead to a transfer of authority.

It has been argued that aid or assistance is rather flexible and inclusive, so it can be interpreted either to indicate subsidiary complicity or co-perpetrator status.[80] This view finds support in the Commentary to Article 16 of the ARSIWA, where the ILC explained that it is not necessary

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[74] E.g., B. Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 RBDI 370, at 371.
[75] ILC *Yearbook* 1978/II(2), p. 99.
[76] Article 16 ARSIWA, n. 1; Articles 14 and 58 ARIO, n. 1.
[77] D'Aspremont, 'Abuse of the Legal Personality of International Organizations', n. 50, at 98. See also S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (Oxford: Hart Publishing, 2008), pp. 185, 218.
[78] Ibid.
[79] Ibid.
[80] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 50.

that the aid or assistance makes an 'essential contribution' to the commission of an internationally wrongful act. Rather, it is simply sufficient that the conduct 'contributed significantly'.[81] This means that providing aid or assistance is a matter of degree of involvement. However, even if it reaches the extent that it becomes 'a veritable co-author of the principal internationally wrongful act',[82] without which the harm would not have been incurred,[83] the greater role it plays in the causal link still does not change the fact that the assisting party has no control over the assisted party.[84]

3.2 Direction and control

Article 17 of the ARSIWA provides that a state that directs and controls another in the commission of an internationally wrongful act is responsible for the act itself. Article 15 of the ARIO largely is modelled upon this, except that the controlled or directed entity could be a state as well as another international organisation. There is no clear definition for direction and control. According to the ILC, 'control' refers to the 'domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern',[85] and 'directs' connotes more than mere incitement or suggestion, but rather 'actual direction of an operative kind'.[86] Moreover, it is necessary that direction and control are actually exercised over the internationally wrongful act,[87] with mere possession of power to direct and control being insufficient.[88] Therefore, what is required is not only normative control in general, but also factual control and direction over the particular act. The principle of direction and control fits well into the idea of 'control' as a basis for attribution of responsibility. It is the controlled party that commits the internationally wrongful act, but the responsibility of the controlling party can be incurred. This would seem to fit this Chapter's own control argument. However, there are issues that need further clarification for such a principle to involve shared responsibility.

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[81] Ibid.
[82] ILC *Yearbook* 1978/II(2), p. 104, para. 18.
[83] This seems to imply a 'but-for' test. For a critique of the but-for test in determining the link between the potentially responsible state and the harm caused, see Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility', n. 44, at 634–37. See also Gattini, 'Breach of International Obligations', n. 15, at p. ___.
[84] It also has been argued that joint responsibility would apply in this context: see J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 BYIL 77, at 120.
[85] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 154.
[86] Ibid.
[87] Ibid.
[88] Ibid.

3.2.1 Potential ambiguities

First, there seems to be ambiguity as to whether direction and control provides derived or direct responsibility. It has been assumed that direction and control concerns derived responsibility.[89] However, could it also be simply direct responsibility for the directing and controlling party, with the internationally wrongful conduct attributed to it?[90] Since the conduct of a state or international organisation only can be committed through its organs, what is the difference between controlling a state or international organisation and controlling its organs?[91] Such ambiguity is further emphasised by the ILC's statement that 'a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act *itself*, since it controlled and directed the act *in its entirety*'.[92] This casts some doubt on the possibility of responsibility being shared. The question, then, is as follows: does the controlling and directing party take over the whole conduct and become solely responsible? As discussed above, the difference between the two concerns the transfer of conduct. Is the unlawful conduct that is transferred to the directing and controlling party of a nature such that the influenced party can retreat with clean hands? This is not entirely clear. However, it is possible to find some hints by looking at the responsibility of the directed and controlled party. As the ILC stated, the mere fact of being under someone's direction and control does not exempt the influenced party of its responsibility,[93] because, in contrast with coercion, the directed and controlled party is not completely deprived of any freedom to decline.[94] Such responsibility can well arise directly with the unlawful conduct actually attributed to it. Moreover, the directed or controlled party cannot use the defence of 'superior orders',[95] for otherwise it would be like using 'internal law' between the two parties to avoid international obligations, which generally is not accepted. Therefore, direction and control does not provide an all-or-nothing solution to responsibility. It has been argued that such ambiguity is 'insignificant' in practice,[96] possibly because the injured party may choose between the two as a basis for claiming damages.

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[89] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 147.
[90] Attribution of conduct to the directing and controlling state or international organisation possibly can be established through Article 6 of the ARSIWA or Article 7 of the ARIO.
[91] A. Reinisch, 'Aid or Assistance and Direction and Control Between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63, at 77.
[92] ARSIWA Commentary to Article 17, para. 1, n. 1 (emphasis added).
[93] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 155.
[94] Ibid.
[95] ARSIWA Commentary to Article 17, para. 9, n. 1.
[96] Reinisch, 'Aid or Assistance and Direction and Control Between States and International Organizations', n. 91, at pp. 63, 77.

3.2.2 Difficulties in the case of the international organisation-state relationship

In the context of an international organisation, the only form of direction and control that an international organisation can exercise over its member states is through binding decisions upon its member states.[97] It is assumed that member states have no choice but to comply with the decision. This would lead to a certain overlap with Article 17 of the ARIO concerning circumvention of obligations. The ILC has argued that such an overlap would be partial and would not cause any inconsistency, because that Article has wider coverage to include cases where a binding decision requires a state to carry out a lawful act.[98] However, given that a decision of an international organisation is normative rather than factual, an international organisation cannot exercise factual direction and control as stipulated by the ILC's Commentaries, which require that there is more than simply the power to direct and control, but also factual direction and control. Therefore, it is doubtful whether direction and control is applicable for holding an international organisation responsible for the conduct of its member states.

On the other hand, direction and control exercised by a member state over its international organisation also creates ambiguity. It has been acknowledged under Article 59(2) of the ARIO that 'an act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article'. This may not affect non-member states, but it is somewhat ambiguous for member states. What is the distinction between a member state acting in accordance with the rules of the organisation and the member state exercising control? It can be hard to determine whether direction and control has been exercised in borderline cases. Unless the criteria concerning the situations giving rise to direction and control are further clarified, the utility of this rule is severely limited.

3.3 Coercion

Article 18 of the ARSIWA provides that a state that coerces another state to commit an internationally wrongful act shall bear responsibility for the act. Articles 16 and 60 of the ARIO

[97] ARIO Commentary to Article 15, para. 4, n. 1.
[98] Ibid., para. 5.

extend the principle to international organisations. Coercion is not defined, but it is insufficient to establish coercion simply when 'compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct'.[99] Instead, coercion must satisfy an even higher threshold, which the ILC even equated to *force majeure*, giving the coerced state no choice but to submit to the coercion.[100] This means that the coerced party is completely under the control of the coercing party, leading to the responsibility of the latter.

As has been confirmed by the ILC, the responsibility of the coercing party towards the victim does not derive from the act of coercion itself, but rather from the wrongful conduct by the coerced state.[101] However, it is difficult to say that responsibility can be shared between the coercing and the coerced party, because the coerced party may lose the ability to bear responsibility as a result of the coercion.[102] If coercion reaches the degree of *force majeure*, the responsibility of the coerced state or international organisation *vis-à-vis* the injured victim will be precluded.[103] Indeed, the ILC has described the coerced state as being 'deprived of its sovereign capacity of decision'.[104] By analogy, it also might be said that a coerced international organisation similarly will lose its international legal personality. Therefore, only the coercing state or international organisation will be left even capable of responsibility, creating a scenario of indirect responsibility. The obstacle lies with the extremely high threshold of coercion. Moreover, in practice, in contrast with aid or assistance and direction and control, coercion of a member state by an international organisation is difficult to establish from the fact that the state is complying with the rules of the latter, because it is deemed highly unlikely by the ILC that coercion can arise out of such compliance.[105] For non-member states, the possibility is simply 'theoretical' because it is difficult to exercise coercion outside the headquarters of an international organisation.[106]

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[99] ARSIWA Commentary to Article 18, para. 2, n. 1.
[100] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 156.
[101] ARSIWA Commentary to Article 18, para. 1, n. 1.
[102] Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility', n. 44, at 629.
[103] Article 23 ARSIWA, n. 1; Article 23 ARIO, n. 1.
[104] ILC *Yearbook* 1979/II(2), p. 102, para. 25. The author of this Chapter has critiqued this idea as being contradictory because the coerced state cannot retain the necessary sovereignty to commit an internationally wrongful act for indirect responsibility to apply and at the same time be deprived of sovereignty so that responsibility falls completely on the part of the coercing state: see Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility', n. 44, at 629.
[105] ARIO Commentary to Article 60, para. 3, n. 1.
[106] P.J. Kuijper, 'Introduction: Attributed or Direct Responsibility or Both?', Symposium on Responsibility Organizations and of (Member) States (2010) 7 IOLR 9, at 25.

3.4 Common requirement of knowledge

In both the ARSIWA and the ARIO, the requirement of knowledge is common to all three 'traditional' scenarios of attributed responsibility. This may be seen as problematic, because incorporating subjective elements like knowledge into the constitutive elements of responsibility is a deviation from the basic premise of objective responsibility underlying both the ARSIWA and the ARIO, as Article 2 of the ARSIWA does not prescribe any subjective constitutive element for an internationally wrongful act. Indeed, it has been argued that the whole concept of internationally wrongful acts as developed by the ILC aims to eradicate subjective elements entirely.[107]

However, the ILC is not taking such an absolute position. Instead, it recognises that sometimes a breach of an international obligation may depend on knowledge or intent of the state.[108] For example, Article II of the Genocide Convention prescribes that 'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[109] The inclusion of subjective elements in the Articles of Chapter IV signifies some inconsistency among the different Articles of the ARSIWA itself. A possible reason for the ILC to include in Chapter IV such a requirement of knowledge could be the desire to introduce one more element for responsibility, so as to prevent overly broad determinations of responsibility. It would be unfair for the party providing aid or assistance to assume the risk that such aid or assistance will be used for unlawful purposes,[110] particularly if it does not even know of the circumstances that would lead to such unlawful conduct. However, does the party exercising direction and control, or coercion, suffer the same unfairness if no requirement of knowledge was included? Perhaps not. It is difficult to direct, control, or coerce without knowledge of the circumstances, rendering the requirement with no practical significance in these two scenarios.

Even if one accepts the appropriateness of the subjective element being inserted, there still remains the question of the degree of knowledge required for attributed responsibility to apply. This issue is important because the degree of knowledge is related to the scope of

[107] D'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures', n. 20.
[108] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 81.
[109] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277, Article II.
[110] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 147.

responsibility to be attributed.

Knowledge is a matter of fact and needs proof from evidence produced, and arguably it is not easy to prove. However, in practice it is not always necessary to prove actual knowledge. Two judicial decisions have accepted a less rigorous standard of knowledge. In the *Corfu Channel* case, the responsibility of Albania was based on the obligation to notify of the mines, which in turn depended on the knowledge of the mine-laying. Having examined the indirect evidence, the International Court of Justice said that the mine-laying activity could not have occurred without Albania's knowledge.[111] Therefore, the Court did not directly find knowledge on the part of Albania, but inferred such knowledge. Moreover, there is also some support for an even less exacting requirement. In *Ilascu v. Moldova and Russia*, the European Court of Human Rights held Russia responsible for all of the conduct, including the applicants' transfer to the *Transdniestria* regime, and the subsequent ill-treatment by the police where 'the agents of the Russian government knew, or at least should have known, that fate which awaited them'.[112] Including constructive knowledge would seemingly curtail the effects of inserting the subjective element in the first place, but it is important to note that the subjective requirement should not always be considered absolute. Indeed, the ILC has proceeded on the assumption that different primary rules can provide for different standards of knowledge for responsibility purposes.[113] The two cases mentioned here are examples where the knowledge is specifically discussed. However, it is still not clear whether they apply universally regardless of which of the three scenarios is relevant.

3.5 Circumvention

While parallel rules between the ARSIWA and the ARIO can be assumed concerning direction, control, and coercion, this does not cover all of the situations where shared responsibility might occur between an international organisation and its member states. The relationship between an international organisation and its member states cannot be completely modelled on inter-state relations. While states generally are considered equal sovereigns, there is a normative and vertical relationship between an international organisation and its member states, since the

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[111] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Reports 1949, 4, p. 22.
[112] *Ilaşcu v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), paras. 384–5.
[113] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 13. For a detailed survey of areas where the subjective requirement can be loosened, see H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: CUP, 2011), pp. 244–8.

former can exert binding or non-binding decisions on the latter.[114] Equally true is the influence that a member state is able to exercise over its international organisation.[115] The ARIO address this situation. Articles 17 and 61 of the ARIO provide for responsibility of an international organisation or its member states for circumventing its own obligations through the other. For the international organisation, responsibility can be attributed via either binding decisions or non-binding recommendations and authorisations.[116] For member states, responsibility can be attributed via taking advantage of the independent legal personality of the international organisation.[117] Circumvention literally means 'to get around'. An international organisation or member state may try to rely on the other to perform certain activities that are in breach of its own international obligation. This is what Articles 17 and 61 of the ARIO aim to prevent. The rationale is that an international organisation or member state cannot do via another entity what it cannot do itself.[118] Accordingly, the Articles do not require that the act is internationally wrongful for the influenced member states or international organisation.[119]

3.5.1 Responsibility of international organisations

In the case of binding decisions made by an international organisation, member states generally will obey the obligation to comply with such decisions. The member states can thus be said to be under the normative control of the international organisation in carrying out wrongful acts, giving rise to attributed responsibility for the latter. The ILC has noticed that a binding decision can possibly overlap with 'direction and control', and in extreme cases can reach the extent of coercion.[120] This section assumes that compliance with the binding decision of the international organisation necessarily leads to circumvention.[121] However, that would result in circumvention in every situation where a binding decision is made. The key is whether the act is a breach of an international obligation for the international organisation. When member states themselves act as agents of the organisation and do not enjoy any discretion in the

[114] ARIO, Commentary to Chapter IV, 'Responsibility of an international organization in connection with the act of a State or another international organization', para. 3, n. 1.
[115] This part should in essence be classified as state responsibility, yet it is not covered by the ARSIWA. Part V of the ARIO aims to fill such a responsibility gap.
[116] Articles 17(1) and (2) ARIO, n. 1.
[117] Ibid., Article 61(1).
[118] N. Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' (2010) 7 IOLR 35, at 39.
[119] Articles 17(c) and 61(b) ARIO, n. 1.
[120] ILC Report on the work of its sixty-first session, UN Doc. A/64/10 (2009), at 85-86 para 3 and 87 para. 2. See section 4.2.2.
[121] ARIO Commentary to Article 17, para. 7, n. 1.

implementation of a binding wrongful measure of the organisation, it is widely recognised that the organisation concerned can be held responsible if a wrongful act is committed. There is no reason why a state cannot be similarly held responsible if an international organisation acts upon the agency of the state.[122]

However, the responsibility is not always shared. First, the responsibility of the international organisation can be established even before any act is actually committed by its member states, without even the possibility of incurring responsibility for the state. Second, as is stipulated by the ARIO, even when that act is actually committed by the member state, responsibility can be attributed to the international organisation regardless of whether the act committed actually is internationally wrongful for the member state. Therefore, the member state may or may not be held responsible for its act. If the member state that executes the binding decision also is committing a wrong, then shared responsibility can be said to occur where both the international organisation and the member state can be held responsible. Otherwise, only the international organisation will be responsible.

In the case of non-binding decisions (for example, authorisations and recommendations), it is additionally required that the act is actually committed, and that there is a causal link between the authorisation or recommendation and the act. It is true that Article 17(b) of the ARIO stipulates that in such cases responsibility can be attributed to the international organisation. However, the responsibility does not rest on a solid basis because it can be questioned in the first place why an international organisation should be responsible for its non-binding decision. To what extent is circumvention possible if member states retain the freedom to choose whether to commit the authorised or recommended act? There is no sufficient 'control' on the side of the organisation to lead to its responsibility. However, the ILC explains that the freedom of member states is only theoretical, because 'an authorization often implies the conferral by an organization of certain functions to the member or members concerned so that they would exercise these functions instead of the organization'.[123] The ILC also tried to limit the responsibility that an international organisation might shoulder by introducing another requirement of a causal link between the authorisation or recommendation and the actual committal of the wrong, but even such a link cannot be at the same level of control as binding decisions.

[122] D'Aspremont, 'Abuse of the Legal Personality of International Organizations', n. 50, at 105.
[123] ARIO Commentary to Article 17, para. 8, n. 1.

3.5.2 Responsibility of states

The idea of holding states responsible for the acts of the international organisation seems to be 'against a historical trend' of states transferring power to an international organisation and making the latter bear responsibility independently.[124] However, where the member states make use of the separate legal personality of the international organisation to achieve what they cannot do themselves, it is hard to argue that the member states can hide behind the veil of the international organisation. Such an abuse of legal personality of international organisations is analogous to the doctrine of 'piercing the corporate veil'. As explained in the ILC's Commentary, three requirements must be satisfied in such a situation: first, the international organisation has competence regarding the relevant subject matter;[125] second, there is a significant link between the conduct of the circumventing member state and the conduct of the international organisation; and third, the act committed must also constitute a breach of an international obligation for the member state.[126]

As is pointed out by the ILC, the rationale behind circumvention is taking advantage of the legal personality of the international organisation.[127] However, arguably 'taking advantage of' is not strong enough to indicate control over the state or international organisation for the purpose of attributed responsibility. 'Taking advantage of' can occur in two different stages. A distinction should be drawn between the provision of competence at the point of the establishment of the international organisation and abusing such competence during the decision-making process. In the former case, it can well be argued that the international organisation simply is an instrument for the member states for the purpose of the circumvention of obligations. Although the international organisation is a *prima facie* independent person, it is in the control of its member states. Therefore, even normal decision-making processes can manifest such control exercised by the member states towards their goal of circumventing obligations. In contrast, during the decision-making stage, merely taking advantage seems insufficient because the distinction between a member state's normal participation and abusing legal personality is not clear-cut. D'Aspremont argues that the criteria should be 'effective and overwhelming control',[128] which deprives the international

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[124] E. Paasivirta, 'Responsibility of A Member State of An International Organization: Where Will It End? Comments on Article 60 of the ILC Draft Articles on the Responsibility of International Organizations' (2010) 7 IOLR 49, at 51.
[125] ARIO Commentary to Article 61, paras. 6–8, n. 1.
[126] Ibid.
[127] Ibid.
[128] D'Aspremont, 'Abuse of the Legal Personality of International Organizations', n. 50, at 100.

organisation of autonomy of expressing a distinct will of its own.[129] Only if the rule moves towards such a higher threshold can it provide attributed responsibility for the member states, but the responsibility is not shared, since the legal personality of the controlled organisation is abused.

4. Conclusion

To conclude, the above analysis should be put into the shared responsibility context. It follows from the above that the concept of attributed responsibility may allow for a determination of shared responsibility.

The criteria for responsibility based on attribution of conduct and attribution of responsibility are different. Under shared responsibility, due to the fact that responsibility essentially is shared between multiple wrongdoers, a court will have to decide the responsibility of each individual entity, given, of course, that there are no established rules on joint and several responsibility. The court will determine the responsibility of the actual perpetrator according to the general rules applicable to situations of single wrongdoers under the ARSIWA and the ARIO, with both attribution of conduct and breach of an international obligation required. However, the party bearing attributed responsibility will be assessed according to a different set of criteria, including knowledge of the circumstances and the special link – based on control – between the influenced party and itself, such as aid, direction, coercion, or circumvention. It is doubtful whether these criteria provide an equally rigorous threshold for establishing responsibility. If they do not, and intuitively it would seem not, then it might create unfairness favouring one responsible party over another because of the different levels required for establishing responsibility. This problem does not exist with cases where there is a single wrongdoer, because determinations of responsibility there require an all-or-nothing approach, and the responsibility will be placed on only one party.

Attributed responsibility presumes control, and thereby enables shared responsibility between the controlling and the controlled entity. However, at one level of control, responsibility ceases to be shared. Generally, the categories of attributed responsibility indicate different degrees of control between the parties, which is manifest by the legal or factual relationship between the parties. The degree ranges within a continuum, with aid or assistance, direction and control,

[129] Ibid., at 105.

coercion, and circumvention in order, from weak to strong. If such a nexus is taken to the extreme, such as with coercion, the influenced party may even lose its international legal personality, thereby removing a prerequisite for responsibility on the international level. This is supported by the ILC's recognition of the coerced state as being 'deprived of its sovereign capacity of decision'.[130] Given that one party would be prevented from bearing responsibility, responsibility could not be shared between the parties.

The possibility of shared responsibility triggered by attributed responsibility raises a major problem in terms of quantification of responsibility. This is of particular interest for third parties. Under shared responsibility, the injured party may claim against any of the wrongdoers involved on the basis of Article 47 of the ARSIWA and Article 48 of the ARIO. This was accepted in the *Nauru* case, where the ICJ ruled that the mere fact that Australia was not alone in exercising the administrative authority did not render the claim against Australia inadmissible *in limine litis*.[131] However, it should be noted that the Court's decision on this issue, like the Articles on plural responsible parties, was more qualitative than quantitative in determining responsibility. For example, the ICJ could decide whether Australia was responsible, but it would have been difficult for the Court to decide to *what extent* it was responsible. In the *Nauru* case, the ICJ was able to get away from the quantification issue because the parties finally agreed to withdraw the case. However, if the parties had requested the Court to decide on this, there supposedly were no rules for the ICJ to rely on so as to allow an apportionment. Therefore, if an injured party brings a claim against only part of the multiple wrongdoers, it would appear that a court might only be able to decide on responsibility qualitatively rather than quantitatively, again, unless there is a well-recognised principle of joint and several responsibility. As previously mentioned, this already is an issue outside of the shared responsibility context. Nevertheless, in the context of shared responsibility, the difficulty will appear more in a quantitative sense. In other words, it is not the question of whether or not any of the wrongdoers can be held responsible. Rather, the issue is what proportion of responsibility each party will bear.

The issue of quantification thus provides an obstacle to the determination of shared responsibility in cases of attribution of responsibility. The difficulty of determining allocation between responsible parties is that attribution of responsibility essentially provides only the nexus between parties associated with an internationally wrongful act, and a nexus can be

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[130] ILC *Yearbook* 1979/II(2), p. 102, para. 25.
[131] *Nauru*, n. 57, at 259.

difficult to quantify. To be clear, both parties are not the actual perpetrators of the internationally wrongful act. For example, the internationally wrongful act may be committed by the directed party, but the directed party is under the direction of the directing party. It is the *direction* that created the nexus between the parties, but such a nexus is difficult, if not impossible, to quantify. In order to quantify whether the directing party's influence was eighty percent or twenty percent, for example, an outside indicator needs to be introduced that is applicable to all parties – an indicator such as intention, similar to determining fault within the context of tort law. Among the indirect responsibility scenarios, aid or assistance probably is different from the other categories because it essentially is a scenario where both parties actually commit some act towards the ultimate harm, and an analytical approach that focuses on intent or causation in relation to each may be a useful tool for appropriately distributing responsibility. For the other forms of indirect responsibility, it might be a little more difficult to come up with a means for distributing responsibility. There currently are not any readily available approaches for such a purpose.

This also means that this conception of attribution of responsibility does not lend itself easily to a distribution of responsibility among multiple wrongdoers. One possible route is to assess each party's contribution to the damage, which resembles a causal analysis. However, this will encounter significant difficulties. The ILC deems causation irrelevant to the determination of international responsibility, as can be seen from the absence of causation from the constitutive elements of internationally wrongful conduct.[132] Rather, causation in the law of international responsibility is limited to the determination of reparations.[133] Therefore, it is unlikely that causation will ever play a role in determining the distribution of responsibility, unless it is a factor that is part of particular primary obligations.

If one were to try to create better rules to provide a way for apportionment in the context of shared responsibility, the effort probably would start with clarifying 'several' responsibility, not just 'joint and several' responsibility, even though it is somewhat difficult to talk about one without the other. As this Chapter does not deal with damages, the apportionment referred to here is limited to apportionment of responsibility, which is an assessment on the contribution of each actor towards the ultimate single harm.[134] It is even questionable whether a general principle of 'joint and several' responsibility exists in international law, and therefore focusing

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[132] For a detailed analysis of the reason for such absence of causation in international responsibility, see Castellanos-Jankiewicz, 'Causation and International State Responsibility', n. 18.
[133] Ibid., at 5.
[134] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 6, at 367.

just on 'several' responsibility seems premature. A few thoughts are shared here concerning joint and several responsibility, inasmuch as making progress on that front is directly related to making progress with multiple attribution of responsibility.

The conditions for the application of joint and several responsibility are not entirely clear in either the ARSIWA or the ARIO. On the contrary, the Commentary to Article 47 of the ARSIWA, which relates to the 'Plurality of responsible States', says:

> The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary 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.[135]

Therefore, it is necessary to emphasise several aspects of attributed responsibility that will provide some support for the establishment of joint and several responsibility.

Two ICJ cases seem to support the existence of joint and several responsibility. First, there is the *Oil Platforms* case, where the Iran-Iraq War was hampering the United States' commerce in the Gulf, and it was seen as being difficult to assess the individual impact of Iran and Iraq on that commerce. In a Separate Opinion, ICJ Judge Bruno Simma conducted a comparative analysis of the tort law of various states in relation to joint and several liability, and he concluded that the principle rises to the level of a general principle of law within the meaning of Article 38(1) of the ICJ Statute.[136] The essence of joint and several responsibility is that each of the wrongdoers may have a claim brought against them alone for the full amount of the injury, leaving questions of percentages of contribution to the injury to be sorted out between the wrongdoers,[137] just as with joint and several liability in the context of domestic tort law. Some hint of apportionment also can be found in cases of reduced responsibility, where the injured state has contributed to its own injury. For example, as ICJ Judge Philadelpho Azevedo noted in his dissent in the *Corfu Channel* case, when the injured state contributes to the occurrence of its own injury, 'the conduct of the victim can be taken into account by reducing the degree of responsibility (amount of responsibility) [of the offending state] and consequently

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[135] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at pp. 272–273.

[136] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, pp. 354–358 (Separate Opinion Judge Simma).

[137] See e.g. *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)*, Partial Award, (2007) 132 ILR 1, at 60.

apportioning the damages'.[138] If apportionment can be achieved between the wrongful party and the injured party, there presumably is no reason why the same cannot apply between different wrongful parties.

Concerning the different aspects of attributed responsibility to be emphasised to support the existence of joint and several responsibility, it is first important to note how attribution of conduct is not necessarily at issue, because attribution of responsibility does not depend on attribution of conduct. A scenario of attributed responsibility can be contrasted with the *Oil Platforms* case, where it could only be determined that the conduct was attributable either to Iran or Iraq. In that case, even though Judge Simma proposed a joint and several responsibility doctrine, the Court still could not circumvent an exact finding on attribution of conduct, especially without a clearly established rule on multiple attribution of conduct. This is because both Iran and Iraq were committing the internationally wrongful act, and therefore the Court had no reason to deviate from an analysis on attribution of conduct.

The second aspect of attributed responsibility to be highlighted here is that both parties necessarily have some share (though not necessarily in the form of actually committing the international wrongful act) in the harmful results. On the one hand, the influencing party will not bear any responsibility without the conduct being committed by the influenced party. On the other hand, the internationally wrongful act will not be committed without the influence exerted by the influencing party. This creates a close nexus between the parties, with each playing a necessary part towards the final harm caused. Therefore, it is not reasonable to diminish the responsibility of either party to zero and to burden the other with the full amount of responsibility.

The third aspect of attributed responsibility has practical significance. If no rule of apportionment is provided, one of the multiple wrongdoers runs the risk of bearing more responsibility for its contribution to the final harm than what is fair. This problem is particularly acute in the case of attributed responsibility. For all the categories of attributed responsibility mentioned in the ARSIWA and the ARIO, it is the controlled party that actually commits the wrongful act, and the influence exercised by the controlling party is operating in the background. It will be more difficult for the injured state or an international organisation to see the nexus between the parties. What is more convenient is to claim directly against the party who actually committed the internationally wrongful act. Therefore, a lack of several

[138] *Corfu Channel*, n. 111, at pp. 4, 95.

responsibility, where the party paying the reparation can claim against the other wrongdoers, will worsen the situation of the controlled party, leading to unfairness towards the controlled party.

It follows from the above that the rules on attributed responsibility should be further clarified by placing greater emphasis on treating the parties bearing direct responsibility and the parties bearing attributed responsibility together. As presently constituted, the ARSIWA and the ARIO rules in relation to attributed responsibility envisage only one-way influence, with the basic model of one dominant powerful party 'controlling' the other, except for perhaps aid or assistance. If the flow of influence actually is uni-directional, then it seems quite natural that only the dominant party will bear the responsibility.[139] However, if it can be shown that the influenced party also has had some role in the commission of the internationally wrongful act, it can be easier to argue for a shared responsibility among the parties. The mixed agreements mentioned earlier in this Chapter are an excellent example of shared responsibility involving attributed responsibility, with the possibility that the responsibility for the conduct of either the European Union or its member states can be attributed to the other, although the EU might try to claim exclusive responsibility of its own. The basis for attribution of responsibility there is the mutual consent to the agreement, without too much dominance by one over the other, although this characterisation of the relationship likely is to be contested.

In sum, for attribution of responsibility without the conduct also being attributed, the rules are readily available in the ARSIWA and the ARIO, even though it is possible to question the reasonableness of a part of them as belonging to the attributed responsibility family – for example, aid or assistance, in terms of control as the basis of responsibility. Indeed, as the ILC stated, '[t]he assisting state will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.'[140] This implies that the assisting state bears responsibility only for its own conduct. Moreover, even where attributed responsibility is possible, multiple attribution is not necessarily feasible, given that the party bearing attributed responsibility may take over the whole responsibility – for example, with

[139] E.g. C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), at pp. 284, 288 (arguing for independent responsibility concerning direction and control, with only the controlling state being responsible, 'for it is either that the state is responsible for the act of another carried out under its direction or control, or the dependent state maintains a certain degree of freedom, in which case it is responsible for its own conduct'). See also Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility', n. 44, at 639 (arguing that in the case of coercion, only the coercing state would be responsible, even though it may still be argued that even a coerced state has some degree of freedom that one could say justifies the consideration of the coerced state's responsibility).

[140] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 2, at p. 148.

coercion and circumvention. It is not difficult to see the dilemma inherent in multiple attribution of responsibility. On the one hand, sufficient control is required as the basis for attributed responsibility. On the other hand, control cannot be so thorough that the controlled party is completely deprived of its autonomy. Among all of the scenarios involving attributed responsibility that are analysed in this Chapter, the one on 'direction and control' is the most likely scenario for multiple attribution and, in turn, for shared responsibility, even though this Chapter has been quite critical of 'direction and control'.