Amsterdam Center for International Law
University of Amsterdam

SHARES
RESEARCH PROJECT ON
SHARED RESPONSIBILITY IN INTERNATIONAL LAW

RESEARCH PAPER SERIES

SHARES Research Paper 39 (2014)

Serious Breaches of Peremptory Norms

Eric A. Wyler and León A. Castellanos-Jankiewicz
Graduate Institute of International and Development Studies

Cite as: SHARES Research Paper 39 (2014)
available at www.sharesproject.nl

Forthcoming in: André Nollkaemper & Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014)

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499.

Chapter 9: Serious Breaches of Peremptory Norms

Eric Wyler[*] and *León Castellanos-Jankiewicz*[**]

1. Introduction

The law of international responsibility attaches special consequences to serious breaches of obligations arising under peremptory norms of general international law.[1] This aggravated regime was introduced to respond to internationally wrongful acts breaching the right to self-determination of peoples, the prohibitions of aggression, genocide, apartheid, torture, the slave trade and racial discrimination, war crimes, and crimes against humanity.[2] Like other obligations, these norms are susceptible to being breached by multiple actors resulting in a single harmful outcome through joint or cumulative action.[3]

Serious breaches require a high threshold of gravity to engage the international responsibility of wrongdoers and are more likely to involve multiple actors in their commission than other violations of international law. The indeterminacy of this gravity threshold is especially problematic when the conduct of several actors produces serious breaches.[4] The tragic events in Syria make this painfully clear in light of the war crimes and crimes against humanity committed by government forces and anti-government armed groups.[5] Within Syria, no less than three entities have been exercising varying degrees of control over extensive swathes of

[*] Lecturer, Graduate Institute of International and Development Studies, Geneva, and Visiting Professor, Université Paris 2 Panthéon - Assas. The authors would like to thank Francesca Scalco for her valuable research assistance and the members of the SHARES Research Project at the Amsterdam Center for International Law (ACIL) for insightful comments. The research leading to this Chapter has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the ACIL of the University of Amsterdam.

[**] PhD Candidate and Teaching Assistant, Graduate Institute of International and Development Studies (Geneva). Former member of the SHARES Research Project (2010-2011).

[1] Hereinafter 'serious breaches' or 'serious breaches of peremptory norms'.

[2] See Roberto Ago, 'Fifth Report on State Responsibility', ILC *Yearbook* 1976/II(1), p. 32.

[3] See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359-438.

[4] See J. Salmon, 'Les métamorphoses de la gravité' in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflish* (Leiden: Nijhoff, 2007), pp. 1175-1193. Salmon demonstrates that the degree of required gravity varies across primary rules. The plot thickens when the law of international responsibility requires a 'gross and systematic failure by the responsible State to fulfil the obligation' to engage responsibility for serious breaches. See Article 40(2) ARSIWA, n. 10.

[5] 'Report of the independent international commission of inquiry on the Syrian Arab Republic', UN Human Rights Council, UN Doc. A/HRC/24/46 (2013), p. 23, paras. 192-194.

the territory where the violations occurred.[6] Beyond Syrian borders, regional actors have continuously provided military and financial support to the parties involved.[7] But taken individually, these contributions may not meet the required gravity threshold to trigger their international responsibility for serious breaches.[8] An important objective of this Chapter is to provide solutions for these sub-threshold situations, which are a major challenge for the grave breaches regime in the context of shared responsibility.[9]

This Chapter will proceed as follows. It first considers the extent to which the aggravated regime of international responsibility accommodates the scenario of several entities involved in the commission of serious breaches. We explore this question by examining issues of shared responsibility in light of structural, substantive, and procedural aspects of the serious breaches regime (section 2). Section 3 outlines the shared obligations of cooperation, non-recognition, and non-assistance aimed at ending serious breaches and wiping out their effects. We enquire whether third parties and principal wrongdoers can be jointly responsible when breaching these communitarian obligations. Finally, we suggest that the *erga omnes* dimension of such norms entails a shared duty to invoke serious breaches in diplomatic relations and international dispute settlement (section 4).

2. Serious breaches of peremptory norms and shared responsibility

This section describes the relationships between the serious breaches regime and forms of shared responsibility. Section 2.1 briefly outlines the special character of peremptory norms, the interests they protect, and how this is relevant for instances of multiple wrongdoers. It then asks whether the grave breaches regime as it stands today can generate shared forms of responsibility, and concludes that the system allows this, as shown in the cases of aggression

[6] These are the government, the Syrian National Coalition, and the Kurdish Supreme Council. See 'Report of the independent international commission of inquiry on the Syrian Arab Republic', ibid., p. 4, paras. 15-17.

[7] Hizbullah and Iraqi Shiites fight alongside the government, which recently secured a USD 3.6 billion credit line from Iran and is negotiating a loan from Russia. In turn, influential Sunni clerics from Arab states have declared a jihad against the Syrian Government. See 'Report of the independent international commission of inquiry on the Syrian Arab Republic', n. 5, p. 5, paras. 18-22.

[8] Lack of political will also explains the gap in accountability, as shown by the failed attempts in the Security Council to refer the violations in Syria to the International Criminal Court. See the press release of the Swiss Federal Department of Foreign Affairs, 'Switzerland asks UN Security Council to refer the serious crimes committed in Syria to the International Criminal Court', 14 January 2013.

[9] See Chapter 1 of this volume, P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), p. ___: 'even though the current international law of responsibility may not address sub-standard causal contributions, they may well be relevant in regulatory schemes that seek to prevent that questions of shared responsibility *ex post facto* arise in the first place.'

and genocide (section 2.2). But it becomes evident that most problems of shared responsibility for serious breaches are procedural, and section 2.3 is devoted to describing the challenges and exploring solutions.

2.1 The scope and content of peremptory norms

Peremptory norms of general international law include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity, and the right to self-determination.[10] The proscription of crimes against humanity and war crimes are also considered as peremptory.[11] More recently, the International Court of Justice (ICJ or Court) has elevated the prohibition of torture to the category of a peremptory norm, which is presumably binding on states and international organisations.[12] This is a significant development since the affirmation of torture as an international crime attracting individual criminal liability,[13] and may result in joint responsibility between states and individuals.[14] To a lesser extent, it has been argued that terrorism constitutes a discreet international crime, although scant state practice supports this contention, and scholars have has not arrived at a definite conclusion.[15]

The prohibition of serious breaches of peremptory norms is the normative response to protect and safeguard the most essential values of the international community. These values were enshrined in the United Nations (UN) Charter in 1945[16] and have evolved ever since by

[10] 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), Commentary to Article 26, para. 5.

[11] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, p. 257, para. 79: 'these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.

[12] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment, ICJ Reports 2012, 422, p. 457, para. 99: 'the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*.'

[13] *Prosecutor v. Furundžija*, Judgement, ICTY Case No. IT-95-17/1-T, 10 December 1998, paras. 139-42. See E. de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) 15 EJIL 97-121.

[14] On the alleged responsibility of individual agents of the United States government for torture in Guantánamo Bay see P. Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London: Allen Lane, 2008).

[15] The US Court of Appeals of the Second Circuit held in *US v. Yousef* that, given the absence of an agreed-upon definition of terrorism as an international crime, it does not attract universal jurisdiction for prosecution in domestic courts: *US v. Yousef and Others*, 327 F 3d 56 (2d Cir. 2003). See A. Cassese, 'Terrorism as an International Crime' in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart, 2004), p. 213 and A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 J Int Crim Just 1. See also C. Damgaard, *Individual Criminal Responsibility for Core Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008), p. 359.

[16] Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).

attaining greater legal protection than other norms in international law. Rules prohibiting the breach of peremptory norms form part of *jus cogens*, a higher body of law of overriding importance from which no derogation is permitted. The concept of *jus cogens* was first embodied in Article 53 of the 1969 Vienna Convention on the Law of Treaties, which provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law recognised by the international community of states as a whole.[17] Few norms are recognised as such, but peremptory norms have all attained *jus cogens* status.

Peremptory norms bind states, international organisations, and individuals alike. States are held responsible under the law of international state responsibility, and individuals are accountable under the law of individual criminal liability. For their part, the growing body of rules governing the responsibility of international organisations is applicable to intergovernmental bodies and the acts of their member states in their institutional framework. In addition, rules proscribing the commission of peremptory norms are called to operate in different bodies of law: international humanitarian law, international criminal law, and human rights law. States, international organisations, and individuals have positive obligations to respect and ensure compliance with these international norms.[18]

States cannot be held criminally liable under the law of international state responsibility, although an attempt was made within the International Law Commission (ILC) to create an aggravated responsibility regime for the commission of so-called state crimes.[19] Roberto Ago, the second Special Rapporteur on state responsibility, introduced this proposal in 1976.[20] Despite the advantage of recognising a higher level of protection for the most important norms within the international community, state crimes were discarded from the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[21] and the 'crime of state' was substituted with an aggravated regime whereby states may be held responsible for serious breaches of obligations under peremptory norms of general international law.[22] As will

[17] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.
[18] P.A. Nollkaemper, 'Introduction' in P.A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: CUP, 2009), p. 12.
[19] R. Ago, 'Fifth Report on State Responsibility', ILC *Yearbook* 1976/II(2), p. 95.
[20] Ibid. According to Ago's proposal, crimes of state constituted a serious breach of an international obligation of essential importance for safeguarding any of the following: the maintenance of international peace and security, such as the prohibition of aggression; the right to self-determination of peoples, such as the prohibition of the establishment or maintenance by force of colonial domination; the prohibition of slavery, genocide, and *apartheid*; and the preservation of the human environment, such as norms prohibiting massive pollution of the atmosphere or of the seas.
[21] See n. 10; J. Crawford, 'First Report on State Responsibility', ILC *Yearbook* 1999/II(1), p. 1.
[22] E. Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147-1160, at 1158. For a pertinent account of the

be seen below, special consequences attach to the breach of these rules, with important legal ramifications involving injured and responsible entities, but also the international community as a whole.

2.2 Shared responsibility for serious breaches of peremptory norms

It is increasingly acknowledged that international responsibility is shared when the consequences of harm can be distributed among wrongdoers.[23] This means that responsibility for joint wrongful conduct – whether cooperative or cumulative – resulting in a single harmful outcome should be apportioned in a manner facilitating recovery by injured parties.[24] This hypothesis envisages the commission of an internationally wrongful act by more than one state.[25]

As it stands today, international law accepts the possibility of attributing the same wrongful conduct to several responsible entities: this much is noted in the context of state responsibility and that of international organisations.[26] Multiple states or international organisations are concurrently responsible when a joint operation results in wrongful conduct committed via their own agencies or common organs.[27] The same applies when one state or international organisation has directed or controlled another in the commission of an internationally wrongful act,[28] or when concurrent responsibility is engaged on the basis of aid and

---

legislative history of crimes of state and different opinions, see J.H.H. Weiler *et al.* (eds.), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter: Berlin and New York, 1989).

[23] P.A. Nollkaemper, 'Aspects of Shared Responsibility in International Adjudication', (2013) 4 JIDS 280-281.

[24] In *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), Preliminary Objections, ICJ Reports 1992, 240, pp. 258-59, the International Court of Justice found that Australia alone could be sued on the basis of the Mandate Agreement for Nauru undertaken jointly with the United Kingdom and New Zealand: 'The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States.'

[25] J. Crawford, *State Responsibility: The General Part* (Cambridge: CUP, 2013), p. 333.

[26] The latter body of law covers the joint responsibility of states and international organisations for the same internationally wrongful act. See Article 47 ARSIWA, n. 10, entitled 'plurality of responsible states', and Article 48 of 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) on 'responsibility of an international organization and one or more States or international organizations'.

[27] See Article 47 ARSIWA, n. 10, and 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), p. ___:

[28] ARSIWA Commentary, n. 10, Commentary to Article 17, para. 9: 'As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse (…) The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under Chapter V, but

assistance.[29] Similarly, the law of international responsibility envisages holding a plurality of entities responsible for the same internationally wrongful act. Although it does not transpose the legal principles of joint and several liability that are common in domestic legal systems, the law of international responsibility does not exclude the possibility 'that two or more States will be responsible for the same internationally wrongful act.'[30]

Breaches of peremptory norms carry special consequences for responsible states, but also entail a series of joint obligations addressed to the international community as a whole that do not otherwise arise. When confronted with serious breaches, the law of international responsibility operates on three levels. First, responsible states must comply with the obligations of cessation, non-repetition, and reparation in accordance with the general rules applicable to every internationally wrongful act.[31] Second, all states must cooperate to bring the serious breach to an end, while refraining from recognising its lawfulness and providing aid and assistance in maintaining the situation.[32] This has been called the aggravated regime of international responsibility. Finally, because of their communitarian character and *erga omnes* dimension, every state has the right to invoke a violation of serious breaches because they are owed to the international community as a whole.[33] We discuss the extent of these obligations for third states in section 3 below, where we enquire whether their violation entails the joint responsibility between the principal wrongdoer and the entity that fails to align itself within the aggravated regime.

For a breach to be serious, it must transgress a peremptory norm and be carried out in a gross or systematic way. That is, the violation must be 'of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule (…) carried out in an organised and

---

this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*.' See also Chapter 4 of this volume, J.D. Fry, 'Attribution of Responsibility' in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), p. ___.

[29] Article 16 ARSIWA, n. 10. See also Chapter 5 of this volume, V. Lanovoy, 'Complicity in an Internationally Wrongful Act' in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), p. ___:

[30] See ARSIWA Commentary, n. 10, Commentary to Article 47, para. 6, and Article 48 ARIO, n. 26. See also 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), p. ___.

[31] As outlined in Articles 28-33 ARSIWA, n. 10.

[32] See Articles 40-41 ARSIWA, n. 10, and our discussion in section 3.1: 'The aggravated regime of responsibility and shared obligations'.

[33] See Article 48 ARSIWA, n. 10: 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (b) the obligation breached is owed to the international community as a whole.' See our discussion in section 3.2: 'A shared duty to invoke serious breaches?'

deliberate way'.[34] An important question to be determined is how and when this required threshold of gravity is met through the conduct of multiple entities causing damage together or cumulatively.

The required parameters of seriousness restrict the scope of the aggravated regime to the most blatant violations, and may represent an obstacle for the application of the aggravated regime when a multiplicity of actors is involved at different levels. For instance, in situations of cumulative responsibility,[35] each independent wrong must arguably present a gross or systematic character in order to trigger the aggravated regime. Therefore, joint acts of torture and serious violations of international humanitarian law that cumulatively reach the required threshold of gravity cannot attract responsibility for serious breaches if each individual violation does not present a gross and systematic character. Consequently, these acts will not enjoin the international community as a whole to react against the wrongdoers. This is problematic, because serious breaches are hardly ever committed single-handedly, and often involve a host of actors to plan and execute or stand idly by.[36] Varying degrees of involvement can be envisaged that will not reach the required threshold, and minor violations cannot in principle be assimilated to the conduct of the principal wrongdoer for the purposes of responsibility.

The fact that multiple actors cannot be held jointly and severally liable for the harmful outcomes they collectively cause is due to the principle of individual attribution, which is the dominant approach for the determination of international responsibility predicated on the notion that each entity is responsible for the wrongful acts it commits, regardless of whether multiple actors are involved in a single injury. This leads to the observation that the secondary rules of responsibility are too narrow in scope to cover serious breaches reached by multiple actors cumulatively. A possible solution is to attribute conduct for serious breaches in light of harmful outcomes.[37] In this sense, shared responsibility can be considered as a parameter to assess the gravity of the breach outside the traditional formula of individual attribution.

[34] ARSIWA Commentary, n. 10, Commentary to Article 40, para. 8.
[35] Cumulative shared responsibility originates when there is no formalised concerted action between the wrongdoers: Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework, n. 3, p. 368.
[36] P.A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', (2011) 9 J Int Crim Just 1143-1157.
[37] On the notion of harmful outcome, see Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 3, p. 367. To these authors, the notion of injury in state responsibility as an element of the internationally wrongful act 'is not easily combined with a concept of injury that captures acts by multiple actors contributing to outcomes that affect many states or the international community as a whole.'

Instead, causation can play a major role in the context of joint breaches involving peremptory norms.[38]

In light of the preceding remarks, we will consider discrete breaches activating the aggravated regime and their implications for shared responsibility. In what follows, we deal with the specific examples of aggression and genocide.[39]

2.2.1 Aggression

The uncertain world order emerging from the 1919 peace saw the outlawing of aggressive war in a string of instruments, inaugurated by the Briand-Kellogg Pact and Article 10 of the League Covenant in 1928 and 1929, respectively.[40] After war ravaged Europe twice over, this culminated in the adoption of Article 2(4) of the UN Charter, which categorically proscribed the use of force. The ICJ qualified the provision as a 'fundamental or cardinal principle' of customary international law in the *Nicaragua* case.[41] More recently, in the *Wall* advisory opinion, the Court concluded that the illegality of territorial acquisition resulting from the threat or use of force reflected customary international law.[42]

Shared responsibility in this context is exemplified by joint military action amounting to aggression by a coalition of states against a third state in violation of Article 2(4) of the UN Charter. This was argued by Yugoslavia in the *Legality of the Use of Force* cases against the

[38] See our discussion at section 2.3.2: 'The irrelevance of damage and causal analysis in the determination of responsibility'.

[39] The present Chapter does not cover war crimes and crimes against humanity as distinct categories owing to lack of space, but it should be mentioned that pursuant to Common Article 1 of the Geneva Conventions of 1949, all states parties are bound to the shared obligation to guarantee their observance: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31, Article 1. According to the ICJ in *Nicaragua*, this provision is a general principle of humanitarian law to which the Conventions merely give specific expression. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, ICJ Reports 1986, 14, p. 114, para. 220. It follows that several states, whether or not parties to a conflict, can take action to ensure compliance with principles of international humanitarian law, and may also react against breaches of this law.

[40] General Treaty for the Renounciation of War as an Instrument of National Policy (Briand-Kellogg Pact), Paris, 1928; Covenant of the League of Nations, 28 June 1919, 225 Parry 195. See also United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974.

[41] *Military and Paramilitary Activities in and against Nicaragua*, n. 39, p. 100, para. 190. See also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) of 24 October 1970, Annex, para. 1.

[42] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, p. 171, para. 87 (*Wall* advisory opinion).

North Atlantic Treaty Organization (NATO) coalition, when it stated that '[a]cts of NATO are imputable to the Respondents'. The argument was pleaded under the assumption that 'NATO acts under the political and military guidance and control of its Member States, each separately and all together.'[43] With this, Yugoslavia argued that the acts of NATO were imputable to each respondent state, admitting the possibility of multiple attribution for the same internationally wrongful act. It is of course unnecessary for each wrongdoing state to perform the wrongful act in its entirety, and the extent of responsibility will depend on the degree of participation, such as co-authorship or mere assistance.[44] Another possible example of joint attribution is the invasion of Iraq by the United States and the United Kingdom in 2003,[45] although the role of the United Kingdom has been described as an instance of assistance by some.[46]

Pursuant to the Rome Statute of the International Criminal Court (ICC),[47] an individual may be responsible for aggression in conjunction with the state. Article 8 *bis* of the Rome Statute, adopted by the Assembly of States Parties in 2010, defines aggression as

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

This definition covers situations where multiple states are involved in proscribing the 'action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State'.[48] This opens the door to situations of shared responsibility between states and individuals for the crime of aggression under the ordinary rules of attribution codified in Article 4 of the ARSIWA.[49] In

[43] *Legality of the Use of Force* (*Serbia and Montenegro v. Belgium*), Preliminary Objections, ICJ Reports 2004, 279. See the Memorial of the Applicant, 'Law Related to the Issue of Imputability' at p. 327. The Memorial outlines the relevant rules laid down in the NATO Handbook of 1998: 'All nations opting to be members of the military part of NATO contribute forces which together constitute the integrated military structure of the Alliance (…) the integrated military structure remains under political control and guidance at the highest level at all times'. On this basis, Serbia argued that any NATO military plan 'has to be endorsed by each Member State participating in it.'

[44] C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility* (Oxford: OUP, 2010), pp. 281-9 at p. 282.

[45] H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: CUP, 2011), pp. 229-220.

[46] The Anglo-American invasion has been discussed as an instance of aid and assistance and not outright co-authorship. See *Edward Horgan v. An Taoiseach* (2003) 132 ILR 407, 429-31.

[47] Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3 (Rome Statute).

[48] Rome Statute, ibid., Articles 8 *bis* (1) and 2(f). The amendments to Article 8 are contained in depositary notification C.N.651.2010 Treaties-6, dated 29 November 2010.

[49] Pursuant to Article 4(1) ARSIWA, n. 10: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions,

sum, the prohibition of aggression is an obligation that must be observed by states and its individual organs. It is proscribed under treaty law and customary international law. The recent criminalisation of aggression by the ICC will potentially give rise to state responsibility and individual criminal liability for the same factual complex, albeit within different regimes of law.

2.2.2 Genocide

The prohibition of genocide is a peremptory norm of general international law.[50] Article III of the Genocide Convention[51] prohibits several forms of shared conduct in relation to genocide. These are conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. At first glance, the Genocide Convention seems to be an instrument whose primary objective is to hold private individuals liable for the commission of genocide, while obliging states to cooperate in punishing and preventing the crime.[52] However, the Convention's dispute settlement clause obliges states to abide by all of the Convention's provisions. Article IX reads as follows:

> Disputes between the Contracting Parties relating to interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[53]

It is unusual for a dispute settlement clause to determine the scope of application of a treaty. However, the ICJ interpreted this disposition as widening the Convention's scope of application to states in the preliminary objections phase of the *Bosnian Genocide* case, where it found that Article IX 'does not exclude any form of State responsibility.'[54] In its judgment on

---

whatever the position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.'

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports 2007, 43, pp. 110-111, para. 161 (*Genocide* case); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325 (Separate Opinion Judge Lauterpacht, p. 440).

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

[52] P. Gaeta (ed.), *The UN Genocide Convention – A Commentary* (Oxford: OUP, 2009), Part III: Individual Criminal Responsibility for Genocide.

[53] Article IX, Genocide Convention, n. 51.

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Preliminary Objections, ICJ Reports 1996, 595, p. 616, para. 32.

the merits, the Court stated that 'it would be paradoxical if States were thus under an obligation to prevent (…) but were not forbidden to commit such acts through their own organs or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.'[55] The Court concluded that the contracting parties 'may be responsible for genocide and other acts enumerated in Article III of the Convention.'[56] This gives way to the possibility of invoking state responsibility for genocide under the Convention, whereas individuals will be held liable through international criminal law.

The ICJ has recognised that the principles underlying the Genocide Convention are binding on states, even without any conventional obligation.[57] Customary international law prohibits the commission of genocide on the part of states and distinguishes itself in content from the norms primarily oriented towards establishing individual criminal liability in the Genocide Convention. This customary rule for states is evidenced by the work of the ILC on state responsibility, which provides that nothing precludes the wrongfulness of a state's obligation arising under peremptory norms of general international law.[58] Moreover, the ICJ recognised that the prohibition of genocide is a peremptory norm of general international law having a *jus cogens* character in the *Armed Activities on the Territory of the Congo* case.[59]

State responsibility may therefore be concurrent with individual criminal liability for genocide. The ICJ noted that this duality of responsibility was a 'constant feature of international law'[60] when responding to the Federal Republic of Yugoslavia (FRY)'s arguments to the effect that the Convention dealt exclusively with individual criminal conduct. It went on to recall Article 25(4) of the Statute of the ICC, whereby '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law', and Article 58 of the ARSIWA, which provides that the Articles are 'without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State'. Thus understood, conclusive criminal responsibility of an individual organ is not a necessary requirement to engage state responsibility for genocide. The respondent in the *Bosnian Genocide* case argued that such a finding was a condition *sine qua non* for

[55] *Genocide* case, n. 50, p. 113, para. 166.
[56] Ibid., para. 169.
[57] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, p. 23.
[58] ILC *Yearbook* 2001/II(2), p. 84.
[59] *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, ICJ Reports 2006, 6, para. 64. See also the Individual Opinion of Judge *ad hoc* Dugard expounding on the notion of *jus cogens* in international litigation, ICJ Reports 2006, at 86.
[60] *Genocide* case, n. 50, p. 116, para. 173.

establishing state responsibility, but the Court found no legal bar under this heading to refrain it from exercising its jurisdiction, and added that the absence of a prior conviction had little to do with whether or not an act of genocide has actually been committed.[61]

Another important issue of shared responsibility arose in the *Bosnian Genocide* case in the context of complicity between states and non-state actors. Bosnia argued that the FRY[62] was complicit in the commission of genocidal acts perpetrated by the Republika Srpska, an armed group that was a party to the internal armed conflict that dismembered Yugoslavia during the 1990s. Although complicity is not a category recognised by the law of international responsibility, the Court saw no reason 'to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph (e), of the [Genocide] Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of Article 16 [ARSIWA]', and focused on 'the provision of means to enable or facilitate the commission of the crime'[63] in assessing the required threshold. It should be recalled that Article 16 of the ARSIWA establishes that responsibility for aid and assistance is engaged when the assisting state is aware of the circumstances of the internationally wrongful act.[64] The ARSIWA Commentary elaborates on this point: 'If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.'[65] The Court reasoned that the FRY's responsibility could only be engaged had it been aware of the perpetrators' specific intent (*dolus specialis*) to commit genocide,[66] and concluded that the condition had not been met because 'it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken'.[67] This was despite the

[61] *Genocide* case, n. 50, p. 119, para. 181. At para. 182, the Court described possible reasons why such a conviction may not exist: 'genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal to exercise jurisdiction over the alleged crimes'.

[62] This was the name of Serbia and Montenegro between 27 April 1992 and 3 February 2003. *Genocide* case, n. 50, p. 46.

[63] *Genocide* case, n. 50, p. 217, para. 420: 'The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph (e), of the [Genocide] Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16.'

[64] Article 16 ARSIWA, n. 10. The second requirement is that the act would be internationally wrongful if committed by the assisting state.

[65] ARSIWA Commentary, n. 10, Commentary to Article 16, para. 4.

[66] *Genocide* case, n. 50, p. 218, para. 421: 'If that condition is not fulfilled, that is sufficient to exclude categorization as complicity.'

[67] Ibid., p. 218, para. 423.

Court acknowledging that there was 'little doubt' that the atrocities were committed with resources facilitated by the FRY.[68] Had the Court determined that this requirement was fulfilled, it would have doubtless found the FRY responsible for aiding and assisting the Republika Srpska in the commission of genocide.

2.3 Limits to multiparty adjudication for serious breaches

2.3.1 Procedural issues

The main problems that lie along the road towards shared responsibility for serious breaches are procedural, and arise in the adjudicative phase. Although peremptory norms are also *erga omnes* and are owed to the international community as a whole, tribunals cannot adjudicate their breach without a jurisdictional link between the parties to a dispute.[69] Indeed, having the relevant entitlements does not suffice: they must also extend the procedural right to institute proceedings.[70] This is paradoxical, because international law gives all states a legal interest to claim against breaches of peremptory norms regardless of whether they are parties to the relevant instruments.[71] This feature is exclusive to peremptory norms, but it does not follow that such a dispute is justiciable in international adjudication. Absent a dispute settlement clause, enforcement of these obligations is problematic, and this holds especially true for multiparty proceedings.

In the *Armed Activities* case, the ICJ recalled that 'the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties'.[72] In effect, the ICJ confined its evaluation of legal interests within

[68] Ibid., para. 422.
[69] J. Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts' in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: OUP, 2011) pp. 224-240 at p. 239: 'A corresponding procedural framework for the invocation of responsibility for breaches of communitarian norms remains to be developed, for example, one permitting the invocation by more than one member of the international community in multiparty proceedings, instead of the traditional approach of joining related proceedings.'
[70] F. Matscher, 'Standing before International Courts and Tribunals' in R. Benhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV (Amsterdam: Elsevier, 2000) pp. 594-600 at 594.
[71] See C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2005) and S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États* (Paris: PUF, 2005).
[72] *Armed Activities on the Territory of the Congo (New Application: 2002)*, n. 59, p. 52, para. 125. See also in respect to obligations *erga omnes* the judgment in *East Timor*: 'the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations

its jurisdictional competence. In the *Genocide* case, it constrained its findings to the limits of the Genocide Convention, upon which its jurisdiction was founded:

> The jurisdiction of the Court in this case is based solely on Article IX of the Convention. It follows that the Court may rule only on the disputes between the Parties to which that provision refers (…) It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly to those protecting human rights in armed conflict. That is so even in if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.[73]

What transpires from these passages is that grave breaches may give rise to many independent legal interests, but these are not a substitute for standing and jurisdiction. To prove standing, an applicant must first fall within the definition of those who are entitled to appear before the tribunal.[74] Second, it must demonstrate a jurisdictional link with the respondents in regard to the dispute. Inevitably, the principle of consent to jurisdiction plays a major role as to whether responsibility can be distributed among multiple wrongdoing actors in the adjudicative phase.

It is problematic that breaches of communitarian obligations can be invoked by any state interested in their compliance, whereas their enforcement remains a different matter. Invocation has its *sedes materiae* on entitlements, but enforcement is predicated on procedure. The possibility of invoking serious breaches has widened the spectrum of states entitled to respond to violations, but the procedural requirements to protect these rights have not responded in kind.

A related difficulty is the high standard of proof that is required in international proceedings to establish the commission of serious breaches. Further, obtaining conclusive evidence demonstrating shared responsibility for serious breaches can be challenging when wrongful conduct has been cumulative. The standard of proof for serious breaches was restated by the ICJ in the *Bosnian Genocide* case when it required 'that it be fully convinced that the allegations [of genocide] made in the proceedings (…) have been clearly established. The same standard applies to the proof of attribution for such acts'.[75] To the Court, therefore, there

---

invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.' *East Timor* (*Portugal v. Australia*), Judgment, ICJ Reports 1995, 90, p. 102, para. 29.

[73] *Genocide* case, n. 50, p. 104, para. 147

[74] C.F. Amerasinghe, *Jurisdiction of Specific International Tribunals* (The Hague: Kluwer, 2009), p. 318.

[75] *Genocide* case, n. 50, p. 129, para. 209. Similarly, the Eritrea-Ethiopia Claims Commission 'required clear and convincing proof of liability (…) because the Parties' claims frequently involved allegations of serious – indeed sometimes grave – misconduct by a State. A finding of such misconduct is a significant matter with serious implications for the interests and reputation of the affected State. Accordingly, any such finding must rest upon

should be no room for doubt as regards the factual accuracy of the allegations. Interestingly, the Court will apply the same test for the process of attribution, although no such requirement exists in the ARSIWA, thereby leaving little room for the determination of shared forms of responsibility that do not conform to the general principle stated in Article 1 of the ARSIWA.[76] One could ask whether this high threshold of proof is called for when multiple actors are involved in the commission of serious breaches.

The reluctance of states to spell out the consequences of joint breaches in conventional law has prompted states to develop procedures allowing for multiparty adjudication. This is true for arbitral procedures, provided the required provisions are specified in the special agreement,[77] and for the World Trade Organization.[78] The imminent accession of the European Union (EU) to the European Convention of Human Rights will allow EU member states and the Union to appear as co-respondents before the European Court of Human Rights.[79] However, serious breaches of peremptory norms face a procedural gap in this regard. The overwhelming majority of inter-state claims for serious breaches are brought to the ICJ, where proceedings are eminently adversary and bilateral.[80] An exception is the Eritrea-Ethiopia Claims Commission, which worked under the aegis of the Permanent Court of Arbitration and decided claims for loss, damage, or injury by one government against the other resulting from violations of international humanitarian law.[81]

---

substantial and convincing evidence.' Eritrea-Ethiopia Claims Commission, Final Award of 17 August 2009, Eritrea's Damages Claims, p. 10, para. 35.

[76] As stated in Article 1 ARSIWA, n. 10: 'Every internationally wrongful act of a State entails the international responsibility of that State.'

[77] F. Baetens, 'Procedural Issues Relating to Shared Responsibility in Arbitral Tribunals' (2013) 4 JIDS 319-341.

[78] L. Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) 4 JIDS 343-359.

[79] Council of Europe, Report to the Steering Committee for Human Rights of 10 June 2013, 47+1(2013)008rev2, Commentary to draft Article 3 on the co-respondent mechanism, p. 7, para. 7: 'If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.'

[80] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), Preliminary Objections, ICJ Reports 2011, 70; *Jurisdictional Immunities of the State* (*Germany v. Italy*: *Greece intervening*), Judgment, ICJ Reports 2012, 99; *Genocide* case, n. 50; *Armed Activities on the Territory of the Congo (New Application: 2002)*, n. 59; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168; *Legality of the Use of Force*, n. 43; *East Timor*, n. 72; *Military and Paramilitary Activities in and against Nicaragua*, n. 39.

[81] *Guidance Regarding Jus ad Bellum Liability*, Eritrea-Ethiopia Claims Commission, Decision No. 7, (2007) RIAA 1.

Although the ICJ Rules of Court envisage joint proceedings[82] and some cases have been joined in the past, experience shows that states are averse to multiparty dispute settlement in high-profile cases where responsibility for serious breaches is at stake. In the *Legality of the Use of Force* cases, the Presidency of the Court suggested joining the proceedings instituted by Serbia and Montenegro against several states that used force under the mandate of NATO.[83] Serbia and Montenegro noted that it had brought the cases on the basis of the same factual complex and was in favour of the joinder, but Belgium opposed this.[84] The judgment on preliminary objections notes that the Agents were 'informed that the Court had decided that a joinder of the proceedings would not be appropriate'.[85] Although the ICJ Rules do not require the Court to obtain the consent of the parties to join cases, it can be presumed that Belgium's objection played a major role.

2.3.2 The irrelevance of damage and causal analysis in the determination of responsibility

As noted above, international law does not exclude the establishment of shared responsibility when a plurality of wrongdoers has contributed to damage. But the law falls short of providing the procedural guarantees to enable injured parties to recover from responsible entities, since international responsibility is not based on the concept of damage, but relies instead on wrongfulness to attribute the relevant conduct.[86] This means that causal analysis linking conduct to wrongdoers is not required by international law in determining the extent of responsibility, because the process of attribution subsumes causation.[87] This reduces complex

[82] Article 47 of the Rules of the Court (as amended in 2005) provides: 'The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects.'
[83] These included Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom.
[84] *Legality of the Use of Force*, n. 43, p. 286, para. 17.
[85] Ibid., p. 287, para. 18.
[86] For a critique on this point see B. Stern, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in M. Ragazzi (ed.), *International Responsibility Today: Essays in memory of Oscar Schachter* (Leiden: Brill, 2005), pp. 93-106 and B. Stern, 'Et si on utilisait le concept de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des Etats' (2001) 47 AFDI 3-44.
[87] For a discussion of how attribution subsumes causation see L. Castellanos-Jankiewicz, 'Causation in International State Responsibility', SHARES Research Paper 07 (2012) ACIL 2012-07, pp. 11-37 (available at www.sharesproject.nl).

liabilities involving multiple actors to bundles of bilateral relationships that do not always satisfy the jurisdictional requirements for adjudication.[88]

If causation were an element of international responsibility – indeed, if the starting point of responsibility were the outcome of damage, whether material or non-material – a jurisdictional link between the injured state and a single wrongdoer would suffice for the purpose of recovering the whole, because the conduct of other entities could be factored into the damage caused by the principal. But the paradigmatic structure of bilateral dispute settlement effectively prevents this from happening by ascribing responsibility individually,[89] which leads international tribunals to rely on the indispensable third party rule and related doctrines of judicial restraint to isolate the conduct of the principal wrongdoer from a broader factual complex.[90]

The absence of causal analysis from the determination of an internationally wrongful act inhibits the shared responsibility of multiple actors acting collectively or cumulatively in bilateral proceedings. The law of international responsibility places little reliance on primary norms to attribute wrongful conduct, focusing on agency and attribution instead. But the process of attribution is individual, making actors liable for their own wrong. Damage, on the other hand, allows for the consideration of causal analysis and the material damage sustained, which may or may not be inflicted by multiple wrongdoers.

The absence of damage in the determination of responsibility has a long history. Already in 1973, Roberto Ago considered that damage was not a necessary requirement for a finding of international responsibility. In his view, there were internationally wrongful acts that did not result in injury, and while it was true that every failure to fulfil an obligation entailed injury, then the element of injury was already covered by the failure to fulfil the obligation.[91]

---

[88] Simma treats the notion of a multilateral treaties as 'bundles of bilateral rights and obligations'. See B. Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Y. Dinstein and M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (Dordrecht: Nijhoff, 1989), pp. 821-44 at 821-2.

[89] In *Corfu Channel*, the ICJ treated Albania's knowledge of the presence of mines that resulted in the destruction of a British vessel as separate from the responsibility for actually laying down the minefield, although both wrongful acts resulted in a single harmful outcome. *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Merits, ICJ Reports 1949, 4, p. 17: 'In light of the information now available to the Court, the authors of the minelaying remain unknown. In any case, the task of the Court, as defined by the Special Agreement, is to decide whether Albania is responsible, under international law, for the explosions which occurred'.

[90] *Monetary Gold Removed from Rome* (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), Preliminary Question, ICJ Reports 1954, 19; *East Timor*, n. 72.

[91] ILC *Yearbook* 1973/I at 20.

In private law, any act causing damage involves the responsibility of the person committing the act, and requires reparation to be made. In international law, a wrongful act entails the responsibility of the state, but reparation does not automatically follow. As noted by Ian Brownlie, 'the idea of reparation (…) tends to give too restrictive a view of the legal interests protected [by the law of state responsibility]. The duty to pay compensation is a normal consequence of responsibility, but is not conterminous with it.'[92] This is due to the public law overtones given by Roberto Ago to the content of responsibility, as expounded by Bilge, who stated that it was impossible to dissociate the internationally wrongful act from injury, thus concluding that damage could not be regarded as the third element of responsibility. As a corollary, causation plays no part in the determination of responsibility.[93]

In the ILC's public law view, the consequences of international responsibility give priority to the new legal relationships arising between the wrongdoing state and the international community, among which reparation to the injured state is but a single aspect. A wider consideration of the implications for injured states would render the aggravated regime for breaches more amenable to obtaining reparation for damage. Using causal analysis in the determination of an internationally wrongful act is a possible solution. This would imply taking higher account of material damage to establish responsibility. Currently, the role of primary rules in this process is residual, overshadowed by the notion of objective legal injury. This excludes the causal relationships linking the damage as a whole to multiple wrongdoers because the internationally wrongful act – not damage – gives an injured state the legal interest to institute proceedings.

Therefore, a state's responsibility is primarily circumscribed to its wrongful conduct. Moreover, the internationally wrongful act of a state must be the cause of the damage for which reparation is sought. The inevitable consequence is that serious breaches arising from aggregated conduct of multiple wrongdoers have little chance of becoming justiciable because the required jurisdictional link between an applicant and several wrongdoers is harder to assert. A broader consideration of causation would take the harm inflicted on the injured party as the point of departure to determine responsibility. Under the current system, determinations of wrongfulness and the process of attribution revolve around the wrongdoer and define the conditions upon which an injured party may claim reparations. The serious breaches regime

[92] I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: OUP, 2003) p. 421.
[93] ILC *Yearbook* 1973/I at 25, para. 19.

would ensure more accountability if the interests of injured parties were taken into consideration in the determination of an internationally wrongful act and its attribution.

3. Consequences arising from a serious breach of peremptory norms: are they shared?

Serious breaches entail particular consequences for third states, in addition to the obligations set out for responsible states. First, third states must not provide aid or assistance that maintains the illegal situation, and must refrain from recognising the breach as lawful. These measures are designed to bring the breach to an end through cooperation. Second, any state can invoke responsibility for breaches of obligations owed to the international community as a whole.

3.1 The aggravated regime of responsibility and shared obligations

3.1.1 Cooperation

Pursuant to Article 41 of the ARSIWA, states must cooperate to bring grave breaches to an end through lawful means. A failure to do so will entail the international responsibility of the concerned entities. Whether this responsibility is shared will mainly depend on the extent of the breach, the means available to end it, and the degree of cooperation undertaken to restore legality. It is clear from the Commentary to Article 41 that the obligation to cooperate 'applies to States whether or not they are individually affected by the serious breach' and that this calls for 'a joint and coordinated effort by all States to counteract the effects of these breaches.'[94] Although this provision was acknowledged as a progressive development of international law by the ILC, it is clear that an international undertaking to counter serious breaches involving several actors can attract responsibility in case of default, especially if the breach is a continuing one.

The legal status of the duty of cooperation enshrined in Article 41(1) of the ARSIWA is rather indeterminate. On the one hand, the Declaration of Principles on Friendly Relations and Cooperation of States, adopted by the UN General Assembly in 1969,[95] describes this principle

[94] ARSIWA Commentary, n. 10, Commentary to Article 41, para. 3.
[95] Although UN General Assembly resolutions do not have a binding character, the unanimous consent of states to their adoption, as occurred in the case of the Declaration of Principles on Friendly Relations and Cooperation of

as one of the main pillars for the maintenance of international peace and security, and for the respect of human rights. On the other hand, 'it might be open to question whether general international law at present prescribes a positive duty of cooperation'.[96] Be that as it may, we can infer the presence of an obligation to cooperate within the institutional framework of the UN (particularly through the action of the Security Council) in Article 49 of the Charter, whereby Member States shall afford mutual assistance in carrying out the measures decided upon by the Security Council. The recent pronouncement of the ICJ in the *Wall* advisory opinion clarifies matters further and reinforces the normative content of the obligation to cooperate. In that advisory opinion, the Court held that the UN should 'consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime'.[97] The views of the Court and of the ILC appear to be the same. The latter, in the Commentary to Article 41(1) of the ARSIWA, refers to cooperation, especially in the framework of a competent international organization: 'what is called for in the face of a serious breach' is 'a joint and coordinated effort by all States to counteract the effects of these breaches'.[98]

When a serious breach is non-continuing, the obligation of non-cooperation becomes redundant. When the illegal act does not extend in time, the serious breach can neither be strengthened nor brought to an end by the conduct of third states. In any event, the latter remain bound by the obligation of non-recognition for the purpose of contrasting the continuing effects that may be produced by the violation, as discussed in what follows.

3.1.2 Non-recognition

The principle of non-opposability of the consequences of unlawful acts finds its contemporary expression in the obligation not to recognise as lawful a situation created by a serious breach of international law.[99] After taking note of the Universal Declaration of Human Rights, alongside the binding Mandate for South West Africa and the UN Charter, the ICJ declared that South Africa's presence in Namibia was illegal and 'opposable to all States in the sense of barring

States, may be understood as a general acceptance of the validity of the rules declared therein. See *Military and Paramilitary Activities in and against Nicaragua*, n. 39, para. 188.
[96] ARSIWA Commentary, n. 10, Commentary to Article 41, para. 3.
[97] *Wall* advisory opinion, n. 42, p. 200, para. 160.
[98] ARSIWA Commentary, n. 10, Commentary to Article 41(1), para. 3.
[99] Article 41(2) ARSIWA, n. 10.

erga omnes the legality of a situation which is maintained in violation of international law',[100] signaling that the principle of non-discrimination had become universal. The Court's finding was exceptionally far-reaching because it involved legal consequences for *all* states that relied on South Africa's discriminatory policy. In the *Wall* advisory opinion, the Court reaffirmed the obligation of non-recognition in light of 'the character and the importance of the rights and obligations involved'.[101] Having determined that Israel was in violation of the Palestinian peoples' right to self-determination and of certain rules of international humanitarian law, the Court decided that 'all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall'.[102] Any subsequent conduct of other states validating the wall's construction would have engaged the responsibility of the recognising state. The same might be said in the context of Iraq's annexation of Kuwait in 1991: any state recognising the sovereignty of Iraq over the occupied territory of Kuwait would have incurred responsibility on the basis of consecutive obligations stemming from the aggravated regime. Whether this responsibility would have been shared with Iraq is doubtful, because any resulting damage would have been non-material and too remotely related to the initial act of aggression.

A clearer case for shared responsibility between principal wrongdoers and third states for breaching the non-recognition obligation would involve an international organisation that validated the consequences of serious breaches through the conclusion of further agreements binding its members. In these cases, the conduct of the member states can be engaged independently from the responsibility of the organisation.[103] It is, of course, also possible that the joint responsibility of the organisation and its member states are engaged.[104]

3.1.3 Non-assistance

The third consequence of peremptory breaches is the obligation of third states not to provide assistance in the commission of the internationally wrongful act. When states assist the

[100] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at 57, para. 126. The Court also qualified this principle by saying that 'the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation and other official acts.' Ibid., at 56, para. 125.
[101] *Wall* advisory opinion, n. 42, p. 200, para. 159.
[102] Ibid.
[103] Articles 17 and 62 ARIO, n. 26.
[104] Article 48 ARIO, n. 26.

principal wrongdoer in strengthening the illegal situation created by the serious breach, they may be held responsible for a violation of the obligation of non-assistance. This situation could give rise to a cumulative shared responsibility between the primary and the secondary wrongdoers.

This possibility arose when the Security Council condemned *apartheid* in South Africa in 1977. A decade earlier, equality and non-discrimination had reached the status of international human rights norms recognised under international conventions, international custom, and general principles of law.[105] In Resolution 418 (1977), acting under Chapter VII of the UN Charter, the Security Council condemned the 'massive violence and killings' used by the South African government against civilians opposing *apartheid*, and determined that the acquisition of arms by South Africa constituted a threat to international peace and security. It instructed all states to cease providing it with weaponry and further enjoined them to refrain from any cooperation with South Africa in the manufacture and development of nuclear weapons.[106] The Council also called upon states that were non-members of the United Nations to comply with the aforementioned measures, suggesting that these obligations were owed to the international community as a whole, and that international responsibility attached to their violation.

In the context of the right to self-determination, the Council made similar pronouncements involving African territories under Portuguese administration. Its Resolution 218 (1965) condemned Portugal's failure 'to recognize the right of the peoples under its administration to self-determination and independence' on the basis of previous Council and General Assembly Resolutions, and requested all states to refrain from offering the Portuguese government any assistance 'which would enable it to continue its repression'.[107] The question remains whether a violation of these rules would constitute a discreet breach of the non-assistance obligation, or if it would result in some form of shared responsibility. In most cases this will be a matter of degree: if the aid and assistance is substantial enough and satisfies the standards of Article 16 of the ARSIWA, the responsibility of two or more entities can be engaged.

[105] *South West Africa* cases (*Ethiopia v. South Africa*; *Liberia v. South Africa*), Second Phase, ICJ Reports 1966, 4, p. 300 (Dissenting Opinion Judge Tanaka).
[106] UN Doc. S/RES/418 (1977).
[107] UN Doc. S/RES/218 (1965).

3.1.4 Additional consequences

In this sub-section we briefly discuss the additional consequences following the commission of a serious breach provided by the savings clause in Article 41 of the ARSIWA. This provision recognises that international law may provide for further consequences flowing from the commission of a serious breach. In this way, it opens up to the simultaneous application of other international legal regimes and to any future developments of the international legal order. In fact, other international treaties may establish subject-specific provisions stemming from the breach of a particular peremptory norm.

For example, additional legal consequences flowing from the commission of the serious breach are applicable to all states under the regime of collective security when Chapter VII of the UN Charter binds them. The UN Security Council has a primary role in handling the consequences of threats to peace and security. It may offer solutions similar to those of the law of responsibility to bring to an end the serious breach and to neutralise its illegal effects,[108] and it represents the major institutional channel through which the international community can take action to stop the continuation of wrongful conduct. An eminent example is UN Security Council Resolution 687 (1991), adopted in the aftermath of Iraq's invasion of Kuwait and which created the UN Compensation Commission.[109] This body was established to deal with claims arising from loss, damage, or injury to foreign governments, nationals, and corporations resulting from the unlawful invasion and occupation of Kuwait.[110] Resolution 687 held that Iraq was 'liable under international law' for all damage caused, although controversially, it stopped short of qualifying Iraq's invasion as an act of aggression.[111] In light of its lack of judicial character, the Security Council's attribution of liability to Iraq is altogether questionable. But the scope of its Chapter VII powers are wide, and could possibly be used to hold several states responsible for the same wrongful act.

3.2 A shared duty to invoke serious breaches?

The inherent gravity of peremptory norms calls for concerted action to bring them to an end, as we have seen in the section above. It also gives standing to all states to invoke their breach in

[108] The practice of the Security Council constitutes the main legal basis for upholding the customary status of both obligations under Article 41(2) ARSIWA, n. 10.
[109] UN Doc. S/RES/687 (1991).
[110] Ibid., para. 18.
[111] Ibid., para. 16.

international adjudicative bodies, provided the necessary jurisdictional requirements are met.[112] Under its current formulation, the invocation of serious breaches by non-injured states is formulated as an entitlement to be exercised in a facultative manner. But we argue that the regime of responsibility for serious breaches would be much more effective if this constituted a shared obligation in view of the communitarian interest involved. This proposition is not a new one. In his Separate Opinion appended to the ICJ's judgment in the *Armed Activities* case, Judge Simma mentioned that Uganda had standing – and the duty – to invoke the violations of international humanitarian law and human rights law suffered by certain individuals in Ndjili International Airport in the hands of Congolese military personnel. This was regardless of whether the victims had Ugandan nationality.[113] The underlying rationality of this pronouncement, continued Judge Simma, is to eliminate gaps in the law where they can be avoided, especially when a positive rule provides for remedial action. We subscribe to this view as regards the serious breaches regime, while noting that the enforcement of the international rule of law can only gain from prospects such as this one.

4. Conclusion

Shared responsibility for crimes that destabilise the public order is an ancient notion, common to many traditions and cultures. The concept was well entrenched in the Western traditions of bygone times, when law and religion were hardly distinguishable from one another.[114] The Greek myths speak of maledictions attaching to criminals and their descendants, as revealed by the Atreidae's tragic destiny. The murder of Thyestes's three newborns in the hands of his brother Atreus was perpetrated throughout generations. It influenced the fate of Agamemnon – Atreus's son – who was moved to sacrifice his daughter Iphigenia to ensure his successful Trojan expedition, only to be assassinated by his wife Clytemnestra, aided by Aegisthus (fathered by Thyestes and his daughter Pelopia, whom he raped!). Thereafter, Orestes committed matricide to avenge his father, killing Clytemnestra. It was the goddess Athena who ended the curse by creating the Aeropagus, a tribunal composed of Athenian citizens called

[112] Article 48 ARSIWA, n. 10: 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (b) the obligation breached is owed to the international community as a whole.'
[113] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), n. 80, p. 338 (Separate Opinion Judge Simma).
[114] Some have dubbed these notions as pre-legal. L. Gernet, *Droit et institutions en Grèce antique* (Paris: Flammarion, 1968), especially Part I.

upon to pass judgment on Orestes. The votes being equally divided, the goddess decided to acquit him.[115]

History has also displayed the collective dimension of crime, as evidenced by the complex evolution of the customary right to vengeance. It suffices to recall that grave crimes, such as murder and rape, evoke communitarian dimensions from the perpetrator's standpoint and that of the victim.[116] The crime attaches to the guilty man, his family, and his descendants – 'until the 7th generation', biblically put – and authorises vengeance against his community. In turn, the victim's entourage, city, and allies are called to re-establish equilibrium through the legitimate exercise of violence.[117]

In this context, we may interpret the move from 'private' vengeance towards the exercise of the state's institutionalised right to punish as evidence of the prejudice borne by every member of society when grave crimes are committed. In other words, the law invests the public authority with the power to react against crimes in the name of every member of society.

This notion is translated in the international legal plane through Articles 48 and 41 of the ARSIWA: the former authorises every non-injured state to invoke the responsibility of the wrongdoer, whereas the latter requires that all states cooperate towards the re-establishment of the international public order.

Indeed, shared responsibility for grave breaches of peremptory norms, having translated an ancestral practice into the realm of international law, provides a restorative legitimacy that we are still surprisingly reluctant to recognise.

[115] See Aeschylus, *Les Eumenides* (Paris: Gallimard, 1967) p. 377.
[116] Gernet, n. 114, p. 87. This tradition continued until the age of the modern state, as shown by literature dating back to the seventeenth and eighteenth centuries: in *the Cid* by Corneille, Rodrigue must avenge the affront against his father to avoid dishonor, and in Molière's *Don Juan*, Doña Elvire's brother hunts down the man who seduced, married, and abandoned his sister.
[117] The Iliad reminds us that the dishonor inflicted on Menelaus by the abduction of queen Helena, his wife, attracts the sympathy of Greek kings to his cause. The expedition mounted against Troy thus has an indisputable dimension of collective vengeance being exercised by a plurality of communities against the main wrongdoer – Paris – but also against his family and his entire city.