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Power and Responsibility

André Nollkaemper^{*}

1. Introduction

Clyde Eagleton famously claimed that ‘power breeds responsibility’.¹ The phrase is frequently quoted with apparent approval in international legal scholarship.² The notion is also framed in other terms but with the same underlying idea, for instance in the argument that responsibility originates in control.³ There is also a strand of literature that transforms the idea into a normative proposition, for instance to the effect that that responsibility should reflect power (or capacity, which is a, but related concept).⁴

Assigning responsibility to states on the basis of power makes sense.⁵ Power refers to the ability of a state to influence or control other actors, and thereby get another actor to do what it wants, if needed even against its will.⁶ In this sense power is essentially a relational phenomenon.⁷ In the

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¹ C Eagleton, *The Responsibility of States in International Law* (New York University Press 1928) 206.

² E Paasivirta, ‘Responsibility of a Member State of an International Organization: Where Will It End?’ (2010) 7 IOLR 49, 51; 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 IOLR 53, 63; L Clarke, ‘Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships’ (2012) 12 Chi J Int’l L 55, 65.

³ C Eagleton, *International organization and the law of responsibility* (Recueil des Cours 1950) 385-386; W Friedman, ‘The Growth of State Control over the Individual and Its Effect upon the Rules of International State Responsibility’ (1938) 19 Brit YB Int’l L 118, 149.

⁴ J Pattison, ‘Jus Post Bellum and the Responsibility to Rebuild’ (2013) Brit J Pol Sci 1, 20, 22-23; D Miller, ‘Distributing Responsibilities’ (2001) 9(4) J Pol Phil 453-471.

⁵ For present purposes, I limit myself primarily to the responsibility of states.

⁶ M Weber, *Economy and Society* (University of California Press 1978) 53. See also M S McDougal, ‘Law and Power’ (1952) 46 Am J Int’l L 102, 107-108; C Taylor, ‘Foucault on freedom and truth’ (1984) 12 Pol Theory 152, 158 (the notion of power or domination ‘requires some notion of constraint imposed on someone’). Of course, power can be conceptualized in different ways. See eg A Ballesteros, S Nakhooda, J Werksman and K Hurlburt, ‘Power, responsibility, and accountability: Rethinking the

context of responsibility, a state can exercise power in relation to another person, by making that author to engage in a particular wrongful act. If so, it can be said that it then should be this state that should bear responsibility for the harm, rather than (only) the author of an act. Tracing responsibility to the actor that wields power also is justified on the basis of remedial considerations. If harm is to be prevented, those wielding the power in relation to harmful conduct, should be addressed, rather than those that execute commands. For only the former actors can terminate the wrong or ensure that it is not repeated.⁸

The proposition that power breeds responsibility is particularly relevant in situations where responsibility rests with multiple actors and is thus shared.⁹ Such situations increasingly occur as boundaries and territory grow less relevant. As states and other actors engage more and more in concerted action to address global problems across borders, it becomes more difficult to assign responsibility when such concerted action results in harmful outcomes. On what basis do we determine who, out of a multiplicity of involved actors, is to be held responsible, for instance, for harm caused by peace-keeping missions, the global financial crisis, or global environmental problems? While the law of international responsibility provides some answers,¹⁰ it is not well adjusted to situations of shared rather than individual responsibility.¹¹ The power-breeds-responsibility proposition suggest that power should be a relevant, perhaps even decisive, consideration in allocating responsibility in situations where multiple actors contribute to harm.

legitimacy of institutions for climate finance' (2010) 1 Climate Law 261, 265 (referring to power as the capacity to determine outcomes).

⁷ D A Lake, 'Authority, Coercion and Power in International Relations' in M Finnemore and J Goldstein (eds), *Back to Basics: State Power in a Contemporary World* (OUP 2013); D A Baldwin, 'Power and International Relations' in W Carlsnaes, T Risse and BA Simmons (eds), *Handbook of International Relations* (Sage 2013) 285-286; S Strange, 'International Economics and International Relations: A Case of Mutual Neglect' (1970) 46(2) Int'l Affairs 304.

⁸ Miller, 'Distributing Responsibilities' (n 4); PJ Kuijper and E Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).

⁹ A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MJIL 359.

¹⁰ Articles on the Responsibility of State for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA); Articles on the Responsibility of International Organizations, ILC *Yearbook* 2011/II(2) (ARIO). See for a comprehensive discussion of the answers provided by the existing law of responsibility, A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014 forthcoming).

¹¹ Nollkaemper and Jacobs (n 9).

The concept of power is well suited for application in multi-party settings. Power can even be conceptualized as ‘a complex form of organization in which we are all involved.’¹² To be useful for analytical (and legal) purposes, it still needs to be connected to human agency. Taylor rightly notes that the notion of power or domination ‘requires some notion of constraint imposed on someone by a process in some way related to human agency. Otherwise the term loses all meaning.’¹³ However, this certainly need not imply that power is only located in *one* actor; power can, and often is, exercised by multiple actors at the same time. In legal practice, this is illustrated by a string of cases adjudicated before the European Court of Human Rights (ECtHR), such as *Ilascu and others v. Moldova and Russia*,¹⁴ *Al-Jedda v UK*,¹⁵ and *Jaloud v the Netherlands*.¹⁶

However, despite its apparent allure, it is not immediately obvious that the proposition that power breeds (shared) responsibility is helpful for understanding, let alone solving questions of shared responsibility. Saying that power informs or triggers responsibility is begging the question what type of power trigger what type of responsibility in what way.

Moreover, we need not only distinguish between particular forms of power, but also between particular dimensions of responsibility. The relationship between power and responsibility may appear in different forms if we focus on particular conditions or aspects of responsibility, such as jurisdiction, wrongfulness, and attribution. It will appear that rather than talking about power in relationship to responsibility as a generic concept, it may be helpful to break that concept down in more specific concepts, each having a particular relationship with power.

It is the aim of this paper to refine our understanding of the proposition that power breeds responsibility in the particular context of shared responsibility. After first detailing how power indeed can ‘breed responsibility’ (section 2), this paper will highlight three dimensions in which refinement and qualification are necessary.

First, the paper highlights the ambiguity of the concept of ‘power’. The concept has a variety of possible dimensions and meanings that may or may not point in the same direction. This paper

¹² Taylor (n 6) 158.

¹³ *ibid* 172.

¹⁴ *Ilascu and others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004).

¹⁵ *Al-Jedda v UK* App no 27021/08 (ECtHR, 7 July 2011).

¹⁶ *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 6 October 2008).

will use a broad concept of power, that covers such notions as control and coercion and possibly, though more controversially, even influence.¹⁷ But it is obvious that such terms as control, coercion and influence differ,¹⁸ and that this difference can matter in relation to the law of responsibility. There are also forms of power that seem to lack legal significance in the context of responsibility, though they surely may have legal relevance in other contexts, such as ‘soft’ power¹⁹ or the power to shape the development of international rules (I will refer to this below as productive power). Moreover, there are relevant distinctions between legal and factual forms of power. For instance, the legal power of the United Nations (UN) seems a relevant consideration in determining responsibility for an act of a person formally acting under UN command; this power may coexist with factual power exercised by another person. Understanding when and how power does or does not breed responsibility requires, first of all, that we recognize the multiple meanings of power and their different implications (section 3).

Second, in situations of (potentially) shared responsibility, where multiple actors contribute to harmful outcomes, the power of one actor needs to be understood in relation to the power of the other actors involved. In certain cases, the power of one actor can co-exist with the power of others, while in other cases it may override it. In the latter case, responsibility should only be assigned to the former actor. In other words, the power of one actor may render irrelevant, for legal purposes, the power of another actor in relation to the author of a wrongful act. If so, the power of the latter actor does not breed responsibility at all. Understanding when and how power does or does not breed responsibility, requires that we acknowledge the relational and relative nature of power (section 4).

Third, power itself may be constituted or influenced by the law of responsibility. The relationship between power and responsibility is characterized by a fundamental duality.²⁰ While the law of responsibility seeks to curtail power, it also is an instrument by which states exercise

¹⁷ Baldwin (n 7). It seems that it was also in this broad sense that Eagleton used the concept, see Eagleton, *International organization and the law of responsibility* (n 3) 385-386.

¹⁸ See P Morris, *Power: A Philosophical Analysis* (Manchester University Press 1987) 8, who argues against collapsing such terms.

¹⁹ J Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs 2005).

²⁰ C Reus Smit, ‘The Politics of International Law’ in C Reus Smit (ed), *The Politics of International Law* (CUP 2004); see also C Reus Smit, ‘Politics and International Legal Obligation’ (2003) 9(4) *Eur J Int’l Relations* 591.

power and that protects power.²¹ The law of responsibility may help a state in getting other actors to do what it wants.²² It also may legitimize such efforts. For instance, the law of responsibility leaves states much space to exercise power without engaging their international responsibility, thereby legitimizing such exercise of power.²³ One example of many is that it allows states to exercise power in the decision-making process of international organisations without engaging their international responsibility.²⁴ In this respect, not only can power be used to allocate responsibility to all actors that actually contribute to the harmful outcomes, but it can also lead to, and justify, blame-shifting (section 5).

Section 6 concludes that while generally speaking power indeed is highly relevant in explaining the allocation of responsibility between multiple parties, the proposition that ‘power breeds responsibility’ hides many nuances and complexities. Power is best considered as a compound concept that can take different forms, which may pull in different directions, depending on the perspective from which power is analysed and the context in which it is applied. Occasionally, it also may shield actors from responsibility rather than subject them to such responsibility, and thereby impede rather than enables the determination of shared responsibility. In this sense, the proposition that power breeds (shared) responsibility is somewhat question-begging, as the real question is what type of power triggers what type of responsibility in what situations.

2. The general proposition: power breeds responsibility

²¹ This is the standard realist account of the relation between international politics and law. See O A Hathaway, ‘Between Power and Principle: An Integrated Theory of International Law’ (2005) 72 U Chi L Rev 469, 478 and the sources cited there. See further on the relationship between power and international law, D Kennedy, ‘Speaking Law to Power: International Law and Foreign Policy’ (2005) 23 Wis Int’l L J 173; P W Kahn, ‘American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order’ (2000) 1 Chi J Int’l L 1; N Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16(3) EJIL 369; O Schachter, ‘The Role of Power in International Law’ (1999) 93 ASIL Proc 200.

²² See (n 6).

²³ P Allott, ‘State Responsibility and the Unmaking of International Law’ (1988) 29(1) Harv Int’l L J 1. See for an illustration of how international law may shield powerful actors (in this case the World Bank) from responsibility, J Hanlon, ‘Power without responsibility: the World Bank & Mozambican cashew nuts’ (2000) 27(83) Rev of African Pol Econ 29.

²⁴ See for a critical assessment S Yee, ‘Member Responsibility and the ILC Articles on the Responsibility of International Organizations: Some Observations’ in M Raggazi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 325-336.

The connection between power and responsibility is essentially a moral statement which can be transposed to the legal sphere. The moral proposition is that when someone has power, responsibility should be assigned to that person for bringing (or failing to bring) about certain outcomes.²⁵

The proposition that power breeds (or should breed) responsibility seems to underlie much of international law. According to the dominant perspective, international law seeks to curb the unrestrained exercise of power. This idea is inherent in the notion of the international rule of law.²⁶ In the law of responsibility, this idea is reflected in the fact that a state that effectively controls, directs, or coerces another actor, in principle can be held responsible for harm caused by other such actors.²⁷

To understand the power-breeds-responsibility proposition in the context of international law, power needs to be conceptualized as a relational concept.²⁸ The concept of power then refers to the ability of a state to get another actor to do what it wants, if needed even against its will.²⁹ This conceptualization, shared in a large body of social and political science theory,³⁰ obviously is only one of many ways to understand power.³¹ However, in situations of shared responsibility reliance on this relational concept seems particularly justified.

State responsibility in international law by definition presumes a relationship between a state and an actual author of an act, which necessarily is a natural person. It then can be said that the state that exercises power in relation to that author, makes that author to commit the wrong. It is on

²⁵ T Ball, 'Review of S Lukes, Power and J Nagel, The Descriptive Analysis of Power' (1976) 4 Pol Theory 246-249; Morriss (n 18) 38. See also M Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (University of Chicago Press 1992).

²⁶ Eg A Watts, 'The International Rule of Law' (1993) 36 GYIL 15; S Chesterman, 'An International Rule of Law?' (2008) 56 Am J Comp L 331-361. Also see on the ambition of law to overcome the world of politics based on power, Kahn (n 21) 9.

²⁷ See ARSIWA (n 10) arts 8, 17, 18.

²⁸ Lake (n 7); Baldwin (n 7) 285-286; Strange (n 7).

²⁹ See n 6 above.

³⁰ M Barnett and R Duvall, 'Power in global governance' in M Barnett and R Duvall (eds), *Power in Global Governance* (CUP 2005) 3, 8; B Barry (ed), *Power and Political Theory: Some European Perspectives* (Wiley 1976) 41-43, 58-59, 103, 143, 176-177, 250-254; L Hagstrom, *Japan's China Policy: A Relational Power Analysis* (Routledge 2005) 19-21; S Lukes, *Power: A Radical View* (2nd edn, Palgrave Macmillan 1974); M Weber, *The Theory of Social and Economic Organization* (Free Press 1947); Lake (n 7); Baldwin (n 7) 285-286; Strange (n 7).

³¹ See for a comprehensive overview Baldwin (n 7) and Morriss (n 18).

that ground that the state should then bear the responsibility for the harm, rather than (only) the author of the act. It can be observed in this context that there is a close connection between the power-causation connection, on the one hand,³² and the responsibility-causation connection, on the other.³³ Through the exercise of power, an actor can cause another person to act in a particular way. It is precisely that causal relationship that underlies much of the law of responsibility, even though nowadays causation has mostly been incorporated into the normative notion of attribution.³⁴

The relational nature of power takes a different form in situations of shared responsibility, at least in those cases where such responsibility arises out of concerted action.³⁵ What matters in such cases is not only the relation between a state and the author of an act, but also the relation between one state and another state (or international organization, as the case may be), that also stands in a relation to the author of a wrongful act. In this sense, we can speak of a doubling of power relationships that underlie the assignment of responsibility. The complications that derive therefrom will be further examined in section 4.

In this relational perspective, a key ground for assigning responsibility is that one actor may reduce the freedom to act of another actor. Here the concepts of power and responsibility converge. While the social and political science literature on power as a relational concept, on the one hand, the legal literature on responsibility, on the other, have developed along seemingly unconnected, this idea is strikingly common to both strands of literature. For instance, in his discussion of power, Weber refers to ‘the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance’³⁶ There is a direct connection to the well-established idea that freedom is a basis for responsibility.³⁷ This is also quite close to Ago’s idea that responsibility is directly related to the (loss of) freedom of a state to determine its

³² See on the relationship power-causation R A Dahl, ‘The Concept of Power’ (1957) 2 Behavioral Sci 201; Baldwin (n 7) 501.

³³ See generally H L A Hart and A M Honoré, ‘Causation and Responsibility’ in L May and J Brown (eds), *Philosophy of law: classic and contemporary readings* (Wiley-Blackwell 2010) 307.

³⁴ See for a general discussion L Castellanos-Jankiewicz, ‘Causation and International State Responsibility’, SHARES Research Paper 07 (2012), ACIL 2012-07.

³⁵ Nollkaemper and Jacobs (n 9) 368.

³⁶ Weber, *The Theory of Social and Economic Organization* (n 30) 152.

³⁷ See eg D K Nelkin, *Making Sense of Freedom and Responsibility* (OUP 2011).

own course of action. If a state would remove such freedom of another state, the former state's responsibility would remove the responsibility of the latter.³⁸

The general proposition that power breeds responsibility is reflected in several dimension in which the concept of responsibility can be 'de-bundled': jurisdiction, wrongfulness and attribution. Jurisdiction is relevant to responsibility since it can be 'a threshold criterion' in relation to the applicability of obligations and responsibility.³⁹ If so, power is critical for determining whether or not that threshold is passed, in particular when a state acts extra-territorially.⁴⁰ This has been a constant in the practice of the ECtHR⁴¹ and to a lesser extent the Human Rights Committee (HRC).⁴² For instance, a state exercises jurisdiction if State's agents use force against particular individuals outside its territory⁴³ or if it exercises effective control (and thus power) over a particular territory.⁴⁴ The ECtHR's holding that human rights obligations abroad can be 'divided and tailored' to reflect the nature of the state's control⁴⁵

³⁸ R Ago, Special Rapporteur, *Eighth Report on State Responsibility*, 31st session (1979) UN Doc A/CN.4/318 and Add. 1-4 (F), para 45. See also 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* (OUP 2010) 284-288.

³⁹ *Issa and others v Turkey* App no 31821/96 (ECtHR, 16 November 2004) para 66.

⁴⁰ M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) Hum Rts L Rev 411, 423. Note that the requirement of jurisdiction does not apply to all human rights regimes, nor is it upheld as a general proposition by the ICJ. See R Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 Chinese JIL 639, 663-666.

⁴¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, art 1 (ECHR); S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) Leiden J Int'l L 857; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); O De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic YB Int'l L 185, 198.

⁴² Human Rights Committee, Eightieth Session 29 March 2004 'General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies', 12 May 2004 (HRI/GEN/1/Rev.7) para 10. This was also true for *Lopez Burgos v Uruguay*, Communication No R.12/52, UN Doc Supp No 40 (A/36/40) (1981).

⁴³ *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011).

⁴⁴ *ibid* para 138. This principle echoes the statement of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 54, para 118, that physical control of territory is the basis of state liability.

⁴⁵ *Al-Skeini* (n 43) para 137.

indicates that the degree of relational power is key to the applicability and scope of obligations, and thereby potentially for responsibility.⁴⁶

Power also can be relevant for determining whether and how states fail to perform a (due diligence) obligation in relation to other actors, whether private persons or other states. Power informs what a state should do or not do in order to perform an international obligation. What can be required from a state in a particular situation will depend on the power of a state in that situation - in particular on its capabilities.⁴⁷ Thus, the ICJ held that the Democratic Republic of the Congo (DRC) lacked control over the relevant territory and was for those reasons excused from engaging in significant preventive action.⁴⁸ It should immediately be observed, though, that here power plays quite a different role – it involves a potential control over other actors rather than an actual control (see further section 3).

The power-breeds-responsibility connection can also be seen in the context of attribution. One aspect is that since the state as a collective body cannot act by itself, but can act only through human beings,⁴⁹ the responsibility of the state by definition presumes a relationship between the state and the persons through which it acts. For state organs this relationship now is doctrinally hidden in and replaced by the formal concept of attribution of state organs.⁵⁰ It is hardly useful for legal purposes to rely here on notions of power or causation. However, it is certainly possible to construe this relationship in terms of a relationship between a state that (from the perspective of international law) through factual means makes a person act in a particular way.⁵¹ This is in any case clear in situations of complete dependence, which transforms non-state actors into state organs.⁵² This is even clearer for acts by private persons, which may be attributed to the state if

⁴⁶ See also Y Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) L & Ethics of Hum Rts 47.

⁴⁷ See eg P-M Dupuy, 'Due Diligence in the International Law of Liability' in Organisation for Economic Co-operation and Development (OECD) (ed), *Legal Aspects of Transfrontier Pollution* (OECD 1977) 369-379; R P Barnidge, 'The Due Diligence Principle under International Law' (2006) 8 ICLR 81.

⁴⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, paras 301-304.

⁴⁹ *Settlers of German Origin in Poland* (Advisory Opinion) [1923] PCIJ (ser B) No 6 (10 September) 22.

⁵⁰ 'Third Report on State Responsibility', ILC *Yearbook* 1971/II(1), 218.

⁵¹ G Arangio-Ruiz, Special Rapporteur, 'Second Report on State Responsibility', ILC *Yearbook* 1989/II(1), paras 169, 170-172. See further references in note 409. See also, critically, J Crawford, *State Responsibility* (CUP 2013) 114.

⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 400.

the state exercises factual (effective) control in relation to that other person.⁵³ Relational power may, for instance, be relevant when a state exercises authority in relation to secessionist entities in the state concerned.⁵⁴

Finally, it is quite clear that the prime forms of attribution of responsibility as these apply both to states and international organizations, such as direction and control, coercion and circumvention, depend, in some form, on power.⁵⁵ It is precisely the power relationship that justifies attributing responsibility not (only) to the author of an act, but to the state or organization exercising power.

It appears from the above that the power-responsibility interface has multiple dimensions. In the subsequent sections I will explore this diversity further, by focussing on the ambiguity of the concept of power (section 3), on the relational nature of power (section 4), and on the mutually constitutive relation between power and responsibility (section 5).

3. The ambiguities of power

Any quick reading of international relations literature reveals that the discipline lacks a common conception of power.⁵⁶ This is bound to affect the understanding and application of the power-breeds-responsibility proposition. Even if we have made a choice for a relational concept of power, excluding rivaling concepts, within this relational concept there is a wide diversity of meanings.

For instance, we can differentiate between the *sources* of power. Power may stem from material resources and economic wealth, as highlighted in the traditional ‘elements of national power’ approach,⁵⁷ but also from information, norms, the law (e.g. the right to make laws)⁵⁸ decision

⁵³ ARSIWA (n 10) art 8.

⁵⁴ S Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 ICLQ 493.

⁵⁵ J D Fry, ‘Attribution of Responsibility’ in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014 forthcoming).

⁵⁶ Baldwin (n 7); S Guzzini, ‘The Concept of Power: a Constructivist Analysis’ (2005) 33 Millennium - J Int’l Stud 495, 503.

⁵⁷ H J Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (3rd edn, Alfred A Knopf 1960).

⁵⁸ R A Dahl, *Modern Political Analysis* (5th edn, Prentice Hall 1991) 35.

making rules,⁵⁹ institutional positions,⁶⁰ and so on. We also can differentiate between the *means* of power, such as economic coercion, sanctions, provision of information, and the adoption of rules.⁶¹

Relying on a typology developed by Barnett and Duvall, I will systematize the diverse forms of power that are relevant to responsibility along two dimensions.⁶² Other typologies are of course possible, but for present purposes this typology suffices to illustrate the diversity of power in its relationship to legal responsibility.

The first distinction concerns the different ways in which power is expressed. Here we can distinguish between, on the one hand, power expressed in the relations between actors (power of one actor vis-à-vis another actor), and, on the other hand, power of actors to do something, which is grounded, for instance, in capability. This latter form can be labelled constitutive power. Analytically, the latter form precedes the former, since the power expressed in relations between actors presumes, and is based on, a constitutive power to do something. However, it will appear that power as expressed in interactions is more directly relevant to the operation of the law of responsibility than constitutive power.

The second distinction concerns degrees of specificity in which power is exercised. Here we can distinguish between, on the one hand, the exercise of specific power in a particular instance (for instance, direction of a particular conduct) and, on the other hand, more general and diffuse power (for instance overall control over a particular actor). International law has tended to attribute more weight to the former exercise of power,⁶³ but that may have come with the neglect of underlying, more general and diffuse dimensions of power.

Incorporating both dimensions in a matrix, we can identify four forms of power.

		<i>Degree of specificity</i>	
		<i>Direct</i>	<i>Diffuse</i>

⁵⁹ R A Dahl, 'Power' in *International Encyclopedia of the Social Sciences* (Free Press 1968) vol 12, 412.

⁶⁰ P Bachrach and M S Baratz, 'Two Faces of Power' (1962) 56 Am Pol Sci Rev 947.

⁶¹ Baldwin (n 7).

⁶² Barnett and Duvall (n 30) 12. The following typology is largely based on this work, but applies to the specific context of international responsibility.

⁶³ *Bosnian Genocide* (n 52) paras 402-412.

<i>How power works</i>	<i>In interactions</i>	Compulsory power	Institutional power
	<i>Constitutive</i>	Structural power	Productive power

Applied to the context of responsibility and more generally international law, the four resulting forms of power can be described as follows.

Compulsory power allows one actor to determine in a concrete situation the conduct of another.⁶⁴ In the law of responsibility, effective control, direction and control and coercion are examples.⁶⁵ These exercises of power are recognized in international law, but they need not be grounded in international law. Indeed, the exercise of for instance coercion may be in violation of international law. The ECtHR has said many times that a State's responsibility for conduct abroad may be engaged as a consequence of military action abroad 'whether lawful or unlawful'.⁶⁶ However, in particular cases legality may be a relevant component of the exercise of such power.⁶⁷

Institutional power relates to the more diffuse forms by which one actor can exercise power over another actor.⁶⁸ In the law of responsibility, examples are the notion of overall control⁶⁹ and the complete dependence of one actor in relation to another actor.⁷⁰ These forms of power do not see to control in a particular instance. Another possible example is the somewhat controversial concept of power to prevent as a basis for attribution. In the *Srebrenica* case, the Netherlands Supreme Court accepted that for determining whether the state had effective control over an act it was relevant whether 'the UN or the State had the power to prevent the conduct concerned'.⁷¹ Thus, the removal of Nuhanović and Mustafić from the compound could be attributed to the Netherlands, if the Netherlands *was able to*

⁶⁴ Barnett and Duvall (n 30) 13.

⁶⁵ ARSIWA (n 10) arts 8, 17, 18.

⁶⁶ *Ilascu* (n 14) para 314. See also *Issa* (n 39) para 69.

⁶⁷ In *Al-Skeini*, the Court observed that whether a state lawfully engages in conduct in another state can be relevant to the applicability of exceptions of territorial jurisdiction, *Al-Skeini* (n 43) para 135.

⁶⁸ Barnett and Duvall (n 30) 15.

⁶⁹ *Prosecutor v Tadic* (Judgment) ICTY-94-1 (26 January 2000).

⁷⁰ *Bosnian Genocide* (n 52) para 400.

⁷¹ *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanovic*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6 September 2013, Supreme Court.

prevent that removal.⁷² This could be construed as a form for institutional power in relation to another actor, which may, in particular case, be transformed into compulsory power.

Structural power entails the constitutive relations that defines what particular actors can do.⁷³ This power generally will be both of a factual and a legal nature. From the perspective of international law, we can place in this category jurisdiction (or 'legal power'). Indeed, in international law, the normal meaning of jurisdiction relates precisely to legal power: the 'lawful power to act'.⁷⁴ Legal power may help a state to get others to do what it wants,⁷⁵ but, in principle, in itself does not trigger its responsibility (even though it may be relevant for determining the obligations of a state and may carry a presumption of control).⁷⁶ However, legal power will be only one dimension of structural power, and generally factual constellations will be more important. This already follows from the fact that the jurisdiction of the state emanates from, and is a manifestation of, statehood that in turn will rest on some form of effective, and thus factual, power over territory.⁷⁷ Also in this category belongs the notion of capability, as that is relevant for the performance of (due diligence) obligations.⁷⁸

⁷² See also T Dannenbaum, 'With Power Comes Responsibility – Joint Ventures, Attribution, and Morality in International Law' in P A Nollkaemper and D Jacobs (eds), *Distribution of Responsibility in International Law* (CUP 2014 forthcoming).

⁷³ Barnett and Duvall (n 30) 20.

⁷⁴ B H Oxman, 'Jurisdiction of States', MPEPIL 1436. F A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 RdC 1-162. W M Reisman, *Jurisdiction in International Law* (Ashgate Aldershot 1999). V Lowe, 'Jurisdiction' in M D Evans (ed), *International Law* (OUP 2006) 335-360; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 41) 26.

⁷⁵ See eg D Bodansky, 'Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 AJIL 596.

⁷⁶ De Schutter (n 41) 218.

⁷⁷ *Al-Skeini* (n 43) para 138. This principle echoes the statement of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 44) 54, para 118, that physical control of territory is the basis of state liability.

⁷⁸ See on in capacity as a foundation for an actor's role in protection (and thus also as a normative basis for condemnation for failures to protect): A Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 16; J Pattison, 'Assigning Humanitarian Intervention and the Responsibility to Protect' in J Hoffmann and A Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press 2012) 176; J M Welsh and M Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 Global Responsibility to Protect 213, 218-219; D Miller 'The Responsibility to Protect Human Rights' (May 2007) Working Paper Series SJ006, Department of Politics and International Relations, Oxford University, 2-13.

Finally, productive power, closely related to structural power, relates to the bases on which a state can exercise longer term and more diffuse forms of control in relation to others.⁷⁹ In international law, one could think of the power of states over international lawmaking or over particular international institutions, that more generally impact on other actors. This form of power is in particular relevant, as it may shape the specific legal rules that determine whether or not the exercise of a particular type of power in a concrete instance (coercion, soft power, influence) does or does not engage the responsibility of a state. In this sense, structural and productive power underlie the principles that link compulsory and diffuse power to responsibility.

Distinguishing between these different forms of power is more than a purely analytical exercise. The distinctions matter, in the sense that different forms of power may lead to different relationships with responsibility. Distinguishing between them yields analytic clarity on the conditions for each form of power, how these form relate to responsibility, and on how multiple forms can operate in complementary ways.⁸⁰

This latter point (complementarity) is key to shared responsibility. It follows from the above distinction, that multiple forms of power may apply in, or be relevant to, any particular situation. That is certainly the case when multiple actors are involved. For instance, effective control of territory (that to a certain degree may be a facet of structural power) by one state,⁸¹ may co-exist with use of force against a particular victim (compulsory power) by another.⁸² Likewise, attribution based on institutional power may coexist with attribution based on compulsory power. There is ground for accepting that, in such cases, dual attribution is possible,⁸³ but the apportionment may well be influenced by the different forms of power.

⁷⁹ Barnett and Duvall (n 30) 18.

⁸⁰ Compare Baldwin (n 7).

⁸¹ *Al-Skeini* (n 43) para 138. This principle echoes the statement of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 44) 54, para 118, that physical control of territory is the basis of state liability.

⁸² *Al-Skeini* (n 43).

⁸³ F Messineo, 'Attribution of Conduct' in P A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014). B Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping' (2012) 25 LJIL

The distinction between the boxes are not watertight, however, and some cases can be seen from two perspectives. The *Bosnian Genocide* case is an example.⁸⁴ In the Court's interpretation, the existence and application of states' obligations to prevent genocidal acts by other actors depended in part on the power of the state in relation to the relevant actors.⁸⁵ To some extent this may be a reflection of the structural power of a state 'to do something'.⁸⁶ But it also can be considered in terms of a diffuse power in relation to another actor (institutional power). The same can be said for comparable international obligations relating to other actors, as accepted by the ICJ,⁸⁷ the Inter-American Court of Human Rights (IACtHR)⁸⁸ and the ECtHR.⁸⁹

The picture that emerges is that between different dimensions of responsibility, considerable differences exist in terms of the nature of the power-responsibility relationship, and that these distinctions matter for determining and apportioning shared responsibilities. None of this refutes that power breeds responsibility, but it does suggest that a refinement of the proposition is useful. In any particular context, it will be needed to inquire into the nature of power, the possible interactions between different forms of power, and the combined impact on responsibility.

4. The relational nature of power

A second aspect in which the power-breeds-responsibility needs to be refined, concerns situations in which multiple states exercise power in relation to a particular person. In such cases we should inquire not only into the relation between a state and the author of an act, but also into

521–535; P A Nollkaemper, 'Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica' (2011) 9 J Int Crim Just 1143–1157; *Nuhanović* (n 71) para 3.11.2; see also para 3.9.4.

⁸⁴ *Bosnian Genocide* (n 52).

⁸⁵ That also holds for the Court's statement that the Genocide Convention imposes an obligation upon all states party 'to employ all means reasonably available to them, so as to prevent genocide so far as possible', *ibid* para 461 (emphasis added).

⁸⁶ *ibid* para 430.

⁸⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159; *Armed Activities* (n 48) paras 178–80, 219–229, 248–250.

⁸⁸ *The Mapiripán Massacre v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005) para 114.

⁸⁹ *Loizidou v Turkey* App no 15318/89 (ECtHR 23 March 1995).

the relation between one state and another state (or international organization), that both exercise power in relation to one or more authors of a wrongful act.

In these situations, it becomes clear that power is a relative phenomenon, The question is not so much whether a particular state holds power, but what the scope of its power is in relation to another actor. For instance, does the power of one actor in relation to the author of a wrongful act renders irrelevant, for legal purposes, the power of another actor in relation to that act? If so, the power of the latter actor does not breed responsibility at all as it is overruled by the power of the former actor. This perspective may enrich the rather simple power-breeds-responsibility proposition.

How power of multiple actors interacts, may differ between the different forms of power identified in the previous section. For instance, the exercise of institutional power or productive power by one state vis-à-vis another state is less likely to generate responsibility of the former state than compulsory power. Also, structural power of one state in relation to another state in itself may be unlikely to serve as a basis for attribution, but surely will underlie and help to understand compulsory power, and moreover is relevant in terms of jurisdiction and the performance of obligations.

A few examples illustrate the diversity of situations that may arise. In relation to jurisdiction, multiple states can exercise jurisdiction over a victim of a wrongful act. This holds for a situation where multiple states exercise extra-territorial jurisdiction, such as in the case *Jaloud v the Netherlands* where both the Netherlands and the United Kingdom exercised jurisdiction in Iraq, and the question of assignment of responsibility was contingent on the relative power between these states. The extraterritorial jurisdiction by one state also may coexist with the jurisdiction by the territorial state. Whether shared jurisdiction and shared responsibility result, depends on the relative power of the two states. In some cases, the exercise of power by the former state is such that the state that has territorial jurisdiction cannot exercise its jurisdiction. In *Ilascu and others v. Moldova and Russia*⁹⁰ the Court held that ‘a State not in effective control of part of its territory could not really exercise territorial jurisdiction and sovereignty.’⁹¹ In that case, there would be no shared jurisdiction, let alone shared responsibility. Whether or not this is the case, in

⁹⁰ *Ilascu* (n 14).

⁹¹ *ibid* para 300.

the final analysis is a factual question, that depends on ‘whether, at the time of the conduct complained of, the State authorities did or did not exercise effective control over the alleged victims.’⁹²

As to wrongfulness, the notion of relative power seems less relevant. In situation where multiple states have an obligation to perform a due diligence obligation in relation to private actors or other states, both states could be responsible, quite irrespective of the distribution of power. This can be illustrated by the Judgment of the ICJ in the *Bosnian Genocide* case.⁹³ In the Court’s interpretation, all states can have an obligation to prevent, and potentially can be responsible for failing to prevent, genocidal acts committed by other actors. The Genocide Convention imposes an obligation upon *all states party* ‘to employ all means reasonably available to them, so as to prevent genocide so far as possible.’⁹⁴ In this approach, the capacity of states to influence effectively the action of persons likely to commit, or already committing, genocide⁹⁵ will differ between states, but, in principle, the power of one state need not affect the power of another.

However, in situations where the jurisdiction of two states overlaps, the question whether they can perform obligations may depend on an assessment of relative power. The ECtHR in *Ilascu and others v. Moldova and Russia*⁹⁶ appeared to adopt a relative concept of jurisdiction, in which jurisdiction would be a matter of degree determining the scope of the obligations of the State concerned.⁹⁷ This seems problematic, since either a state exercises jurisdiction or it does not.⁹⁸ But what could be said is that different degrees of power, in relationship to each other, determine what in any case can be required from a state. The fact that Moldova (only) had to ‘endeavor, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention’⁹⁹ surely was based on assessment of relative power.

⁹² *ibid.*

⁹³ *Bosnian Genocide* (n 52).

⁹⁴ *ibid* para 430.

⁹⁵ See on in capacity as a foundation for an actor’s role in protection: Orford (n 78)16; Pattison, ‘Assigning Humanitarian Intervention and the Responsibility to Protect’ (n 78) 176; Welsh and Banda (n 78) 218-219; Miller ‘The Responsibility to Protect Human Rights’ (n 78) 2-13.

⁹⁶ *Ilascu* (n 14).

⁹⁷ De Schutter (n 41) 222.

⁹⁸ Besson (n 41) 878.

⁹⁹ *Ilascu* (n 14) para 300.

Finally, power also has an essentially relative nature in relation to attribution. In cases where a state is not responsible for its own acts, but can be responsible in connection with the wrongful act of another state,¹⁰⁰ responsibility of the former state may or may not exclude responsibility of the latter state. Whether or not this is the case, essentially turns on the form and scope of power vis-à-vis that actor. For instance, in case of a state directing or controlling another state (compulsory power),¹⁰¹ the question may arise of whether the directing state is solely responsible, or whether this responsibility is shared with the dependent state. The question was answered in the former way by Ago¹⁰² and later Dominicé, who argued that it is only the controlling state that is 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'.¹⁰³ The ILC seems to have decided otherwise,¹⁰⁴ But in the case of coercion, it found that only the coercing state would be responsible,¹⁰⁵ even though it may well be argued that even a coerced state has a degree of freedom that would justify the consideration of its international responsibility.¹⁰⁶

None of this leads to the conclusion that the power-breeds-responsibility proposition is wrong. It does mean, however, that in the context of shared responsibility the proposition needs to be refined. Within this context the question is not so much whether power counts, but whose power counts, and how the power of one actor relates to, and is influenced by, the power of another actor. Just like responsibility, power is a relational phenomenon which, precisely as a result of its relational nature, has to be understood in relative terms.

5. The mutual influences of power and responsibility

¹⁰⁰ ARSIWA (n 10) arts 16-18.

¹⁰¹ ARSIWA (n 10) art 18.

¹⁰² Ago (n 38) para 45.

¹⁰³ Dominicé (n 38) 284-288.

¹⁰⁴ ARSIWA (n 10) art 19.

¹⁰⁵ This is at least suggested by the fact that coercion is a circumstance precluding wrongfulness under article 18 of ARSIWA.

¹⁰⁶ J D Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) 40(3) *Vand J Transnat'l L* 611, 639.

The proposition that power breeds responsibility presumes a one-way relationship. In this respect too, the proposition needs to be refined to take account of a more complex, dialectical situation. This involves two aspects. The first is that power does not only breed responsibility, but also shapes the law that determines when exactly the exercise of power in any particular case triggers responsibility. The second aspect is that (the law of) responsibility feed back on, and influence of power of relevant actors.

On the one hand, the assessment so far has focussed on how and on what grounds the exercise of power can lead to responsibility. But there is another dimension to this relationship. Power also shapes the underlying law that determines in which situations, which forms of power trigger responsibility. This relates to what in the matrix in section 3 was labelled 'productive power'. The question whether a state accepts an obligation, or a particular principle of responsibility, in the first place, and what that obligation or principle entails, depends in part on such productive power. The general point then is that responsibility in any given society is structured by the power relations that exist within that society.¹⁰⁷ This certainly also holds for the international society.

On the other hand, responsibility, and the law in which it is embedded, feed back and may co-constitute power in the first place. As a general proposition, politics does not only underlie (and operate outside) the law, but also operates within, and is itself partially constituted by the law.¹⁰⁸ This holds direct relevance for the power-responsibility relationship. We need to recall that power may stem not only from material resources such as military means or wealth, but also from an institutional position as well as from the normative framework in which a state is embedded.¹⁰⁹ Such institutions and norms may feed back on power itself. Power then may be partially constituted by law. This would in particular seem relevant for what in the matrix was labelled 'constitutive power'.

Here there are two points to make. First, the very assignment of responsibility to an actor may influence the distribution of roles and power between actors. The idea is that judgments on the responsibility of a particular actor for harmful conduct can lead these actors in the future to take

¹⁰⁷ Smiley (n 25) 96.

¹⁰⁸ Reus Smit, 'The Politics of International Law' (n 20)14; Reus Smit, 'Politics and International Legal Obligation' (n 20).

¹⁰⁹ Bachrach and Baratz (n 60).

into account the interests and actors that were affected, and alter its future role vis-à-vis such actors.¹¹⁰ A related point is that the distribution of responsibility underlies and can inspire political action and thereby the exercise of power.¹¹¹ Of course, in international law this proposition rests on more than a few presumptions, and surely will not hold in each and every case, but the premise that responsibility can shape future conduct, roles and relations seem fundamental to the very existence and justification of this body of law.

The second point is that the law of responsibility, itself the product of power, feeds back to constitute and legitimize particular exercises of power. We have to recall that particular obligations do not only prohibit but also legitimize doing what is not prohibited.¹¹² This applies equally to rules of responsibility. The prohibition on aid and assistance with regards to the commission of a wrongful act may, for instance, legitimize more than it prohibits.¹¹³

The point also can be illustrated by the principles of jurisdiction in relation to extra-territorial conduct. The concept of jurisdiction is not an innocent intermediate variable between power and particular obligations that just renders these obligations applicable. Seen from another angle, jurisdiction functions as a hurdle that can break the otherwise applicable link between power and obligations, and that can have the effect of making it lawful for a state to engage in conduct abroad, infringing individual rights, when such conduct would be prohibited if the state were to act within its own territory. When the jurisdiction threshold is not met, the requirement of jurisdiction may shield the relevant actors from responsibility. Such a territorial distinction may be justified in relation to positive obligations, but it is problematic to introduce it to negative obligations.¹¹⁴ The ECtHR itself confirmed as much when it said that ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own

¹¹⁰ See Smiley (n 25) 96.

¹¹¹ This idea is developed in A Lang, ‘Shared Political Responsibility’ in P A Nollkaemper and D Jacobs (eds), *Distribution of Responsibility in International Law* (CUP 2014 forthcoming).

¹¹² D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005).

¹¹³ V Lanovoy, ‘Complicity in an Internationally Wrongful Act’ in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014 forthcoming).

¹¹⁴ De Schutter (n 41) 203; Talmon (n 54) (noting that there is no cogent reason to impose the jurisdiction threshold on a negative state obligation to refrain from doing harm). See also J Cerone, ‘Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context’ (2007) 40 Isr L Rev 396, 416.

territory.¹¹⁵ Yet, in other judgements, the Court construed requirements of jurisdiction in a way that had precisely the effect of shielding states from a responsibility that they would otherwise incur. *Bankovic* remains a noteworthy example.¹¹⁶

Another example of the legitimizing and constitutive effect of the principles of responsibility is the state-agent exception in the context of extra-territorial jurisdiction (that is: extra-territorial conduct need not be sufficient to bring a victim within the jurisdiction of a state, but that may be different in case of state-agent conduct vis-à-vis a victim). The cases brought to the ECtHR led the Court to articulate the State agent exception in the rather peculiar context of use of force. But surely the example of a State agent using force against a civilian is only one of many forms of power, and it is not at all obvious why this particular form of power rather than other forms would be required.¹¹⁷ In effect, the narrow category defined by the Court legitimizes other forms.

Where the threshold is not met, a state exercising power (that falls short of what is required for the exercise of jurisdiction) may in effect shift responsibility to one or more other states. In this respect the notion of jurisdiction can both enable determinations of shared responsibility, and justify the practice of blame-shifting.

Finally, also in the context of attribution we can observe that power may not only breed responsibility, but that a reverse relationship applies. The relatively high threshold that needs to be met before power actually engages responsibility in effect shields a wide diversity of exercises of power which impact on authors of wrongful acts. This surely holds for the exercise of soft power, defined as the ability to affect others ‘through the effective means of framing the agenda, persuading, and eliciting positive attraction in order to obtain preferred outcomes’.¹¹⁸ Also positive sanctions can surely represent an effective means to shape the conduct of others,¹¹⁹ yet do not lead to responsibility. The same holds for more diffuse forms of power, such as overall control. It was precisely the concern over the range of power not covered by effective control that prompted the International Criminal Tribunal for Yugoslavia (ICTY) to opt for the

¹¹⁵ *Issa* (n 39) para 6.

¹¹⁶ *Bankovic and others v Belgium and others* App no 52207/99 (ECtHR, 12 December 2001).

¹¹⁷ See for a critical reflection on the scope of this criterion, Cerone (n 114) 435-436.

¹¹⁸ J S Nye, *The Future of Power* (Public Affairs 2011) 20-21.

¹¹⁹ M Ninic, ‘Getting What You Want: Positive Inducements in International Relations’ (2010) 35(1) Int’l Sec 138.

less demanding standard of overall control in *Tadic*.¹²⁰ The fact that the ICJ in the *Bosnian Genocide* reconfirmed effective control as the appropriate standard,¹²¹ confirms the shielding function of the standard of attribution, working against the proposition that power breeds responsibility. The high thresholds set by the ARSIWA and the ARIO make it perfectly possible that a state exercises (soft) power to influence private actors or other states, without this leading to attribution of such acts to the state and thus without leading to (shared) responsibility.¹²²

All of this will affect the application of the proposition that power breeds responsibility in the context of shared responsibility. International law has formulated the standards for jurisdiction, wrongfulness and attribution in such a way that power may be trigger, but that power also may be legitimized. In a multiparty setting, this may well mean that the power of some states may be legitimized, even though they contribute to the harmful outcome. The result may be that responsibility is shifted to other actors.

6. Conclusion

Generally speaking power is an important concept in explaining the allocation of responsibility between multiple parties. The concepts of jurisdiction, wrongfulness and attribution, all enable the possibility that multiple states may exercise power in relation to the author of wrongful act and that, via these concepts, the responsibility of these multiple states is engaged.

However, the proposition that 'power breeds responsibility' hides many nuances and complexities. Power can have multiple meanings, and these meanings may moreover differ for different dimensions of responsibility, such as jurisdiction, wrongfulness, and attribution. Differentiation is necessary and indeed can be helpful in articulating grounds for the distribution of responsibility among multiple actors.

It also was noted that the relational nature of power means that, in any case, in a shared responsibility setting, we need to understand power, in relative terms. Where one state exercises

¹²⁰ *Tadic* (n 69) paras 120, 122, 131, 145.

¹²¹ *Bosnian Genocide* (n 52) paras 402-406.

¹²² C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) EJIL 387.

significant power, this may preclude the possibility that another state exercises jurisdiction, that that state can perform its obligations, or that conduct can be attributed to the latter state. Even though that latter state may still exercise some power, that power will not breed responsibility since it is trumped by the superior power of another state. The question is not so much whether power breeds responsibility, but whose responsibility, and how the power of multiple states interact.

Finally, while power may influence determinations of shared responsibility, we have observed that power can also work the other way. Power functions at two quite different levels (one, labelled here as productive power, pertaining to the establishment of the regimes of primary and secondary norms and one, for instance compulsory power, pertaining to the exercise of power within such regimes). Power may not only enable shared responsibility, but may also be constituted and legitimized by international law, thus shielding actors from responsibility, and thereby justifying blame-shifting.

It follows that power is best considered as a compound concept whose various dimensions may pull in different directions, and may differ in its meaning in relation to particular aspects of responsibility. In this respect, the proposition that power breeds responsibility may be valuable as both an explanatory and normative proposition, but needs to be refined if it is to be relevant for understanding the principles of international law pertaining to shared responsibility.