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The problem of many hands in international law

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THE PROBLEM OF MANY HANDS IN INTERNATIONAL LAW

ANDRÉ NOLLKAEMPER

I. Introduction

This Chapter examines the phenomenon of diffusion of responsibility from a Political Economy (PE) perspective. It is argued that concerted actions that lead to harmful outcomes may trigger a diffusion of responsibility between States, International Organisations (IOs) and other actors involved in the concerted action. Such diffusion may bring both costs and benefits for relevant actors. The Chapter construes diffusion as a political process, of which international law is an integral part, and exposes the costs and benefits involved.

Up front, we have to define what we mean with the concept 'diffusion'. In sociology, diffusion refers to the spread of ideas, policies and practices.[1] This concept can also be applied to legal phenomena. For instance, we can say that the notion of the 'rule of law' is diffused across levels of governance. A notion that originally was connected to national legal orders, spreads to international institutions and more generally the international legal order.[2] Likewise, we can say that responsibility is diffused, if, rather than resting on one person, it is spread over a multitude of persons.

Diffusion of responsibility occurs in particular in the context of concerted action. It is clear that diffusion also may occur in situations where multiple actors do not act in concert, yet where parallel actions cause a single harmful outcome. However, it is submitted that in situations of concerted action, diffusion of responsibility is especially likely to occur and, where it does, it has particular manifestations that differ from non-concerted action. This is in particular due to the relations between the actors. A key characteristic of the type of concerted action in which I am interested is that the concerted action involves interaction or coordination of conduct between the participating actors. This means that outcomes cannot be explained by individual conduct of individual actors. By engaging in cooperation, States bring about results that they could not have brought about on their own.

[1] Frank Dobbin, Beth Simmons and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (CUP 2008); Katharina Holzinger, Helge Jörgens and Christoph Knill, *Transfer, Diffusion und Konvergenz: Konzepte und Kausalmechanismen* (Springer 2007).

[2] Michael Zurn, André Nollkaemper and Randy Peerenboom (eds), *The Rule of Law Dynamics in Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2014).

Diffusion of responsibility in situations of concerted action may (but need not) imply that the actual share of responsibility of each person involved becomes smaller.[3] This dimension of diffusion is well captured in Mark Bovens' observation that '[a]s the responsibility for any given instance of conduct is scattered among more people, the discrete responsibility of every individual diminishes proportionately'.[4] Moreover, the plurality of contributions, and their interrelationship, may make it difficult, and sometimes impossible, to determine individual causes and thus to determine who is responsible for what.[5]

This dimension of the diffusion of responsibility in cases of concerted action is a manifestation of the so-called ´problem of many hands´. This problem (TPMH) is commonly attributed to a 1980 article by Dennis Thompson; *Moral Responsibility of Public Officials: The Problem of Many Hands*.[6] Thompson argued that assigning responsibility in the framework of governmental organizations becomes more difficult when more persons – ´many hands´- are involved in the process that caused harm. Though TPMH has been applied in a variety of different theoretical contexts, such as agency theory,[7] the collective responsibility,[8] and public goods,[9] its prime application is in the sphere of responsibility. TPMH can help to explain and understand the difficulty of determining and implementing responsibility in collective settings. It may allow us to identify the conditions and processes that explain when diffusion of responsibility occurs and to assess its benefits and costs.

While the notion of TPMH mostly has been applied in a domestic context, it is highly relevant in the international sphere. Examples of cases of diffusion of responsibility are the *Legality of the Use of Force cases* in the ICJ[10] or the *Sadam Hussein* case before the ECtHR,[11] in which plaintiffs did not succeed in successfully bringing claims against a

[3] Andrew Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (CUP 2011) 57, 225.
[4] Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (CUP 1998), 46.
[5] In this respect the problem of many hands is closely related to the concept of shared responsibility as used for instance by Larry May, who argues that shared responsibility arises when there is no effective possibility to determine causal contributions. See Larry May, *Sharing Responsibility* (University of Chicago Press 1996).
[6] Dennis F. Thompson. 'Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74 Am Pol Sci Rev 905.
[7] Kathleen M Eisenhardt, 'Agency Theory: An Assessment and Review'(1989) 14 Academy of Management Rev 57.
[8] David Miller. 'National Responsibility and Global Justice' (2008) 11 Critical Review of International Social and Political Philosophy 383.
[9] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1971); Thomas C Schelling, *Micromotives and Macrobehavior* (WW Norton & Company 1978).
[10] *Legality of Use of Force (Yugoslavia v United States)* (Provisional Measures: Order) [1999] ICJ Rep 916 (9 similar cases were brought by Yugoslavia against other NATO Member States).
[11] *Hussein v Albania* App no 23276/04 (ECtHR, 14 March 2006), para 1.

multitude of (allegedly) responsible parties. Further examples can be drawn from other issue-areas. If States cooperate to conserve fish stocks beyond their Exclusive Economic Zone but fail to realize agreed objectives, distribution of responsibility among the States and institutions involved likewise will be difficult.[12] If States or IOs fail to live up to the collective "responsibility to protect" human populations from mass atrocities[13] —a responsibility that rests in part on obligations that are binding on a plurality of States or organizations[14] —it likewise may be difficult to determine which of the actors is responsible.[15]

In all such situations, contributions are spread over several actors, so that it may become difficult to determine that the conditions of responsibility are satisfied; sometimes that will be impossible, with the result that no responsibility can be determined.

In this Chapter I will first set out the dynamics of cooperation that help to understand the situations in which diffusion occurs (paragraph 2). In paragraph 3, I will zoom in on situations in which diffusion may lead to responsibility gaps. I then will discuss what I will call the politics of diffusion. Diffusion is not an autonomous effect of wider changes in global governance, but may be an intended consequence of strategic choices by actors participating in a concerted action (par 4). Finally, I will discuss the benefits and costs of diffusion and argue that while such gaps in particular cases may be inevitable and may even be preconditions for getting relevant actors to agree on action, they raise fundamental normative and institutional challenges for the organization and implementation of concerted action (par 5).

[12] See e.g. 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (New York 24 July-4 August 1995) (Sept. 8, 1995) UN Doc A/CONF. 164/37. In 2013, the Sub-Regional Fisheries Commission asked an Advisory Opinion to ITLOS, with an aim to clarifying the responsibilities of multiple actors engaged in illegal fisheries, see *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) Case No. 21* (Request to Render an Advisory Opinion, Order of 24 May 2013) ITLOS Reports 2013, 2.

[13] Report of the Secretary-General 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677 [hereinafter R2P Report].

[14] Monica Hakimi. 'State Bystander Responsibility' (2010) 21 EJIL 342-43, 342 n. 5; Arne J. Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander' (2000) 37 J Peace Res 529.

[15] This question has been considered to some extent by the International Court of Justice (ICJ). *Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v Serbia & Montenegro)* (Judgment) [2007] ICJ Rep 43, 379. See also James Pattison, 'Assigning Humanitarian Intervention and the Responsibility to Protect', in Julia Hoffman & André Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press 2012) 173.

II. Underlying Dynamics

This paragraph will explain that the trend towards concerted action is of a structural nature (1.1) that is reinforced by acceptance of 'shared responsibilities' (1.2).

II.1. Dynamics

Concerted action is not an incidental phenomenon in international affairs that can be expected to give way to the traditional pattern of individualism. It rather reflects fundamental developments in international society and the international legal order that are bound to persist. Three trends that contextualize the phenomenon of shared responsibility are here identified: interdependence, moralization and heterogeneity.[16] These trends influence each other in an intertwined way.

The *first trend* that drives concerted action is interdependence, underlying the passage from a 'society' mainly characterized by coexistence to one also characterized by cooperation.[17] This trend is easily overstated, and in many situations, in particular relating to territory, boundaries, use of force and (non-)intervention the prime function of international law continues to be secure coexistence between States.[18] Nonetheless, it seems incontrovertible that in many areas, States have become dependent on each other to pursue common goods, and indeed have felt compelled to address them jointly.

The interdependencies are both of an objective and a subjective nature. As to the former, in certain areas, factual effects extend across borders, creating interdependencies when States wish to address such effects. Transboundary environmental effects, depletion of natural resources, trade in endangered species, piracy, refugee flows, human trafficking, arms trade, and transboundary crime are examples.

In other areas it is merely the perception that has changed, rather than a reality. The recognition that it is no longer acceptable that genocide or mass killings within a particular

[16] See for earlier discussion André Nollkaemper and Dov Jacobs. 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MJIL 359, 370-372.
[17] See W. Friedman. 'General Course in Public International Law' (1969) 47 Recueil des Cours de l'Académie de Droit International 127. Specifically on interdependence, see e.g. EU Petersmann, 'International Economic Law, 'Public Reason', and Multilevel Governance of Interdependent Public Goods' (2011) 14 Journal of International Economic Law 23.
[18] G. Abi-Saab. 'Whither the International Community?' (1998) 9 EJIL 248; Pierre-Marie Dupuy. 'International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions' ibid, 278.

State be committed is an example.[19] The interdependence here does not necessarily arise from a physical cross border dimension, but rather from a shared perception that there is a problem to be solved, combined with the fact that individual actors will not be able to effectively prevent genocide or effectively respond to it when it occurs.

Responding to situations of interdependence by concerted action primarily seeks to enhance the efficiency and effectiveness of such action. In the areas indicated above – environmental cooperation, transborder criminal cooperation, and responding to genocide and mass killings -, individual States often will be powerless to make a fundamental difference. However, interdependence may also stem from the perceived need to enhancing legitimacy of policies. While multilateralism surely does not guarantee legitimacy,[20] when the legality of State action may be contested, acting together may help build an argument that the action is legitimate and perhaps even be legal. A State acting on its own will more easily be open to the criticism of acting for its own interests.[21] This seems to underlie, for instance, the concerted action in relation to ISIL in Iraq and Syria in 2014-2015.

Interdependence in any of the above ways can drive a variety of forms of cooperation – from loose agreement on objectives to action through a common organ of an IO. But in a sizeable number of cases, it has led to cooperation that would fall in the category of concerted action, where States and other actors closely coordinate their policies in pursuit of a common aim. Examples are the concerted action in relation to ISIL, through 'coalitions of the willing' in Libya, [22] in AU peacekeeping operations, [23] in relation to piracy in the horn of Africa, [24] and in international fisheries policy.[25]

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[19] See generally Yuval Shany, 'The Road to the Genocide Convention and Beyond' in Paola Gaeta (ed), *The Genocide Conevention - A Commentary* (OUP 2009) 3.
[20] J Alverez 'Multilateralism and its Discontents' (2000) 11(2) EJIL 393.
[21] P. Buhler, 'Military Intervention and Sources of Legitimacy ' in G. Andréani and P. Hassner (eds), *Justifying war? From Humanitarian Intervention to Counterterrorism* (Pallgrave McMillan, 2008) 167; Nicholas Tsagourias, 'Cosmopolitan Legitimacy and UN Collective Security' in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP, 2010) 129.
[22] See Jeffery H. Michaels, 'Able but not willing: a critical assessment of NATO's Libya intervention' in K. Engelbrekt, M. Mohlin and C. Wagnsonn (eds), *The NATO Intervention in Libya: Lessons learned from the campaign* (Routledge, 2014) 17.
[23] See e.g. Paul D. Williams and Arthur Boutellis. 'Partnership peacekeeping: Challenges and opportunities in the United Nations–African Union Relationship' (2014) 113(451) African Affairs 254.
[24]Laurie R. Blank. "Rules of Engagement and Legal Framework for Multinational Counter-Piracy Operations" (2013) 46 Case Western Reserve Journal of International Law 397. See also James Kraska and Brian Wilson. 'Combating pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard' (2009) 45 Stanford Journal of International Law 243.
[25] Oran R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Cornell University Press, 1989).

The *second trend*, directly related to the above noted subjective dimension of interdependence, is 'moralization'. Seeking to distance themselves from the realist view of international relations in which States seek the protection of their own interests, a variety of actors (including notably European, States, IOs, NGOs and scholars) have construed the international legal order in the direction of an increased "moralization". They thereby contribute to a paradigm shift from State sovereignty as the cornerstone of the legal order, to a paradigm based on rights of the individual,[26] on the one hand, and the values and interest of international community, on the other. [27] This trend of moralization is far from being universally accepted[28] and can be critiqued on the ground that it in fact amounts to an effort of a limited number of actors impose their understanding of community interests on others.[29] Nonetheless, the trend is pervasive and has propelled concerted action in a wide variety of situations.

IL incorporates and reflects this trend, as it highlights community interests over individual action and individual interests. This is reflected in a hierarchy of norms;[30] and affects the operation of particular rules of interpretation,[31] and the law of responsibility. [32]

According to one argument, the moral weight of this set of norms (notably the protection of individuals and individual rights) would not only require and justify the action of single

[26] And, by extension, the "peoples", see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, separate opinion of Judge AA Cancado Trinidade. Other authors have referred to this trend as 'humanisation' of international law: T. Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006); Anne Peters. 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) EJIL 513.

[27] Cançado AA Trinidade, *International Law for Human Kind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers, 2013); Sienho Yee. 'Towards a Harmonious World: The Roles of the International Law of Co-progressiveness and Leader States' (2008) 7 Chinese Journal of International Law 99, 102.

[28] See e.g. Jean d'Aspremont. 'The Foundations of the International Legal Order' (2007) 18 Finnish Yearbook of International Law 219; Y. Onuma. 'In Quest of Intercivilizational Human Rights: "Universal" vs. "Relative"' (2000) 1 Asia-Pacific Journal of International Law 53.

[29] See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

[30] Alain Pellet. 'Can a State commit a Crime? Definitely, yes!' (1999) 10 EJIL 425; D. Shelton. 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833, 841; E. Wyler. 'From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law" (2002) 13 EJIL 1147; Pierre Klein. 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13 EJIL 1241.

[31] Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflicts, Harmony or Reconciliation* (Martinus Nijhof Publishers, 2004).

[32] For an overview of the historical evolution towards the taking into account of community interests in the law of state responsibility, see G. Nolte. 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations' (2002) 13 EJIL 1083. See also SM Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (PUF, Paris 2005).

States to try to protect such rights, but would require States to act together.[33] Such normative claims may be contested. While it may be relatively easy to articulate the negative implications of hierarchically higher values (eg in terms of the invalidity of treaties that deviate from them), it is less easy to explain why they would call for concerted action. However, it is precisely in relation to ius cogens norms, that the ILC has accepted an obligation to cooperate.[34] In any case, as an empirical matter it can be observed that concerted action frequently arises in areas that carry heavy moral undertones, such as responsibility to protect, protection of civilians during armed conflict, protection of populations from climate change, and so forth. Similar to the trend of interdependence, this dimension of moralization thus propels the number of situations where ex post facto questions of shared responsibility may arise.

The *third trend* relevant to concerted action is the multiplication of actors that participate in international society.[35] In some situations actors other than States are a relevant factor because they themselves contribute to harmful outcomes, and their cooperation thus is relevant for addressing such harm. In other cases they may not at such be a cause of harm, but they are a relevant in terms of their ability to contribute to a solution.

This is most immediately obvious for IOs. The fact that States now regularly defer to IOs to ´legislate´ on a wide-ranging array of topics, from cultural heritage to health and environmental law, can, given the continuing role of States in the development and implementation of decision of IOs, result in concerted action between multiple organizations and/or between organizations and States. The layered nature of IOs, which are legal persons but at the same time consist of sovereign States and members facilitates the construction of responsibility for wrongdoing as a shared responsibility between the organization and member States.[36] The 2011 Draft Articles on the Responsibility of International Organizations (ARIO) indeed envisage that an organization can be responsible in connection with the wrongful acts of States, for instance on the ground that an organization is responsible

[33] Toni Erskine, "Coalitions of the Willing' and the Shared Responsibility to Protect' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP, 2015, forthcoming).
[34] Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), ILC Yb 2001/II(2), art 41; ARIO, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess, Supp No 10, UN Doc A/66/10 (2011) (ARIO), art 42.
[35] Generally: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP, 1995) ch 3; Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate, 2009); Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011).
[36] See generally on the layered nature of IOs Catherine Brölmann, *The International Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Hart Publishing 2007).

for adopting decisions that require States to commit acts that contravene international obligations.[37] Significantly, these Articles acknowledge that in such situations both the organization and the State can be responsible, resulting in a situation of shared responsibility.[38]

In addition to international institutions, the increased role of private actors in international relations can lead to situations of concerted action. The practice of States of delegating powers to private entities (the use of private military contractors by States is an obvious example) leads to forms of concerted action.[39] The same holds for international institutions that rely on public – private partnerships.[40]

The combined effect of these three trends is that States, international institutions and increasingly other actors increasingly cooperate in response to perceived common problems, thus proportionately increasing the situations where harmful outcomes may result from such cooperation.

II.2 The multiplier effect of 'shared responsibilities'

The practice of States and other actors to engage in concerted action is further strengthened by recognition of moral, political and legal responsibilities to do so. In relation to many of the areas identified above, States and other actors that engage in concerted action do so in recognition of a 'shared responsibility' that they would have in relation to that particular issue. For instance, in December 2014, the Security Council adopted a resolution prompted by the ties between cross-border crime and terrorism and stressed the importance of strengthening trans-regional and international cooperation on a basis of 'a common and shared responsibility to counter the world drug problem and related criminal activities'.[41]

Speaking of 'shared responsibilities' in this sense means something different than international lawyers generally mean when they speak of responsibility for internationally

[37] ARIO (n 34), art 17.
[38] ARIO (n 34), art 19.
[39] E.g. Nigel D. White and Sorscha MacLeod. 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19 EJIL 965.
[40] Lisa Clarke. 'Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships' (2011) 12 Chi J Int L 55; Laurence Boisson de Chazournes, 'United in Joy and Sorrow: Some Considerations on Responsibility Issues Under Partnerships Among International Financial Institutions' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (OUP 2013) 211. See also to the Chapter of Wessel-Kica, in this volume
[41] UNSC Res 2195 (19 December 2014) UN Doc S/RES/2195.

wrongful acts. In the examples given above, saying that two persons share a responsibility in relation to a particular situation then may mean that these persons both have to take care of that situation. It then concerns an ex ante rather than an ex post responsibility. Responsibility in this sense is essentially forward looking, rather than relating to a sharing of harm that already has been caused.

The recognition of shared responsibilities in this ex ante sense is highly relevant for our topic. They provide a normative underpinning that sustains and propels concerted action. They transform concerted action from ad hoc cooperation, depending on the will and perceived interests of the actors involved, in a cooperation that is expected or required.

We can identify three different strands of these ' ex ante' shared responsibilities: moral, political and legal. The moral, or philosophical, strand has been articulated in the scholarship of such authors as Larry May, [42] David Miller, [43] Seumus Millar[44] and Samantha Besson. [45] In this body of literature, speaking of a shared responsibility for say, HR, refers to moral requirements of individuals, States or organizations to act for the protection of HR.[46] The political dimension of shared responsibility refers to situations where actors at a political level agree that they share a responsibility to act in relation to a common interests. Examples are the sharing of responsibility between the US and European partners in NATO,[47] or the sharing of responsibility between European States in regard to refugee flows from Northern-Africa,[48] In addition to the moral and the political dimension of shared responsibility, there also is a distinct legal dimension. An examples is Principle 21 of the 1972 Stockholm Declaration that confirms the responsibility of all States to prevent transboundary environmental harm.[49]

[42] Larry May, *'Sharing Responsibility'* (University of Chicago Press, Chicago 1996).
[43] David Miller, *National Responsibility and Global Justice* (OUP, 2007).
[44] Seumas Miller, 'Collective Responsibility' (2001) 15(1) Public Affairs Quarterly 65.
[45] Samantha Besson. 'La pluralité d'Etats responsables: Vers une solidarité internationale?' (2007) 17 Revue suisse de droit international et the droit europeen / Schweizerische zeitschrift fur internationales und europaischees recht 13.
[46] Samantha Besson, 'The Allocation of Anti-Poverty Rights Duties: Our Rights, But Whose Duties?' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (CUP, Cambridge 2013) 408, 424. See also ibid 426 on the shared nature of such responsibility.
[47] Peter K Foster and Stephen J Cimbala, *The NATO, US and Military Burden Sharing* (Routledge, 2005).
[48] Steve Scherer and Ilaria Polleschi, 'Italy in talks with EU to share responsibility for boat migrants' (*Reuters*, 8 July 2014) <http://www.reuters.com/article/2014/07/08/us-eu-italy-migrants-idUSKBN0FD1YL20140708> accessed 17 March 2015.
[49] United Nations Environment Programme, 'Declaration on the United Nations Conference on the Human Environment' (1972), principle 21.

The moral, political and legal dimensions of shared responsibility will often intertwine, and the same shared responsibility that in scholarship may be advanced on moral grounds, may be accepted by actors and be transformed into a political and/or a legal principle. The 'responsibility to protect' is an example of this cooperation-propelling potential of a mixed moral-political-legal concept of shared responsibility.[50]

III. Responsibility Gaps

Diffusion of responsibility, which means that in situations of concerted action responsibility is spread over this multiplicity of actors, need does not adversely affect the possibility to determine responsibility. Individual actors retain their individual obligation, even when they act in concert. Moreover, the fact that more than one actor is engaged in a particular wrongful act, does not release each individual actor from its responsibilities. This was recognized in the *Corfu Channel* case, where the Court was apparently faced with a harm caused by two parties, but only one appeared before it as a defendant, and it decided to neglect the other party and put all responsibility and all compensation on Albania.[51]

However, in particular situations, diffusion may lead to the undermining of responsibility. This paragraph will identify three reasons that help explain why this can be the case: the normative problem of determination of obligations and attribution in collective settings (3.1), institutional gaps in situations of concerted action (3.2) and informational gaps (3.3).

III.1 The normative gap

In its original formulation, TMPH was framed as a normative problem. Thompson developed his theory of TPMH from the viewpoint of moral responsibility.[52] TPMH arose from the fact that it is morally problematic to attribute responsibility to individuals where that could not be justified on moral grounds.[53] This normative condition of diffusion of responsibility can be transposed to the legal domain. Diffusion of responsibility arises when responsibility cannot be assigned or determined because the *legal* conditions for responsibility (in particular breach

[50] Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press, 2013).
[51] *Corfu Channel Case* (n 69).
[52] Thompson, 'Moral Responsibility of Public Officials' (n 6).
[53] Thompson, 'Designing Responsibility: The Problem of Many Hands in Complex Organizations; in The Design Turn in Applied Ethics, ed by Jeroen van den Hoven, Seumas Miller, and Thomas Pogge.(New York and Cambridge UK: Cambridge University Press) (forthcoming): Ibo Van de Poel and others. 'The Problem of Many Hands: Climate Change as an Example' (2012) 18 Sci Eng Ethics 64.

of an international obligation and attribution of the conduct in question) have not been (fully) met.[54]

This will in particular be the case when it cannot be determined who is responsible for what and/or because the conditions for such responsibility are not satisfied. Another way of saying this is that the conditions that have been specified are not attuned to the specific nature of concerted action. In this respect relevant to recall that in several other systems of law, such as tort law[55] and international criminal law, [56] specific conditions have been developed seeing the multiple wrongdoers. If these sets of principles would not exist, clearly a gap would arise, that would feed back on the nature of the obligation themselves. In IL such principles are virtually absent,[57] making it less likely that the existing principles are well attuned to the determination of responsibility in situations of concerted action.

The difficulty of identifying who is responsible for a harmful outcome in a collective setting then may be due to the fact that individual contributions may be too small or otherwise be insufficient to meet criteria for responsibility. The principle of independent responsibility dictates that responsibility is only assigned to actors whose individual contributions to the harm are sufficiently significant to pass the threshold that is required for responsibility. However, in situations of many hands, tasks may be chopped up, so that multiple actors perform small tasks which combine to larger (harmful) outcomes.[58] Individual actors then may not meet the conditions for responsibility.

Three situations in particular can be identified where a normative gap may arise that leads to diffusion of responsibility. A first situation in which diffusion may lead to a responsibility gap arises when not all actors involved are bound by primary obligations. This is in particular relevant for concerted action involving IOs, which may not in a similar degree as States be bound by treaty or customary obligations. It is precisely this feature that has given rise to the idea of circumvention: the possibility that States circumvent their own obligations by acting through an international organization, as a result of which their own responsibility may be

[54] ARSIWA (n 34), art 1-2; ARIO (n 34), art 1-2.
[55] European Group on Tort Law, 'Principles of European Tort Law' (2005) available at <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf>.
[56] HG van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility' 2009 7 J Int Criminal Justice 307; Koi Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 J Int Criminal Justice 159; Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5(1) J Int Criminal Justice 184.
[57] Roger P Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 Pepperdine Law Review 233.
[58] Larry May, *Sharing Responsibility* (Un of Chicago Press,1996), 7, 8 and 73.

mitigated or precluded. Article 61 of the ARIO, which seeks to assign (shared) responsibility to States that so seek to circumvent their responsibility, is a somewhat ill-conceived attempt to preclude such diffusion of responsibility.[59]

Similar normative gaps may occur when States act with or through other non-State actors that may not at all be bound by international obligations, for instance paramilitary groups, private military contractors or security firms that are hired to protect ships against piracy.[60] While the fact that these actors are not similarly bound by international obligations need not be the motive for States to engage in such concerted action, the result of such 'acting through others' may well be a diffusion of responsibility. This indeed appears to be fundamental feature of partnerships among international institutions, such as UN Aids, where not all partners in the partnership will be bound by the same obligations.[61]

The second cause of a normative gap is when secondary obligations are unassigned. Diffusion of responsibility can undermine the forward looking potential of the law of responsibility by making it unclear who is to respond to a breach. This is in particular relevant for obligations to prevent[62] and obligations of result which may be structured in a way that makes it difficult to determine who is responsible for what, and may allow States to escape their responsibility by pointing to the non-performance of obligations by others.[63] David Miller's observation that, "an undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way",[64] is relevant for diffused responsibility. In effect, this may lead to a bystander effect.[65]

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[59] See e.g. Ana Sofia Barros and Cedric Ryngaert. 'The Position of Member States in (Autonomous) Institutional Decision-Making: Implications for the Establishment of Responsibility' (2014) 11 IOLR 53; Jean d'Aspremont. 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 IOLR 91.

[60] Jessica NM Schechinger, 'Responsibility for human rights violations arising from the use of privately contracted armed security personnel against piracy: Re-emphasizing the primary role and obligations of flag states' (2014) Amsterdam Center for International Law SHARES Research Paper No 58, < http://www.sharesproject.nl/wp-content/uploads/2014/11/ACIL-2014-30-Responsibility-for-Human-Rights-Violations-JS.pdf> accessed 2 August 2015.

[61] Boisson de Chazournes (n 40); Davinia Aziz. 'Global Public-Private Partnerships in International Law' (2012) 3 Asian Journal of International Law 339.

[62] Orna Ben Naftali, 'The Obligation to Prevent and to Punish Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 27.

[63] More generally; responsibility as obligations may directly influence ´responsibility-as-blameworthiness, see Van de Poel (n 53), 52.

[64] David Miller, 'National Responsibility and Global Justice' in (OUP, 2007), 99-100.

[65] See John M Darley and Bibb Latané, 'Group Inhibition of Bystander Intervention in Emergencies' (1968) 10(3) Journal of Personality and Social Psychology 215, 215.

The third situation arises when the conditions for responsibility cannot be met, because tasks and conduct is chopped up. While harmful outcomes may occur, no single actor may be held responsible. Partners can then together produce a result that would have been wrongful if it would have been produced by one of them. An example is the ECtHR's judgment in *Sari v Turkey and Denmark*. The case concerned the length of criminal proceedings which were consecutively instituted in Denmark and Turkey against a Turkish national for crimes committed in Denmark. Mr. Sari complained that the criminal proceedings were not settled within reasonable time: eight years, seven months and twenty-two days had lasted between the indictment by a Danish Court and the sentence delivered by the Turkish Court. Although the Court held the length of the proceedings to fall under the 'joint responsibility' of Denmark and Turkey, the Court did not find a violation of Article 6 on the part of either State. The Court reasoned that the delays could not be attributed to either State, because they resulted, rather, from "a system of mutual assistance under which the requesting State is dependent on the co-operation of the other State".[66]

It is relevant to recall that under the principle of independent responsibility, the State, or international organization, as the case may be, is responsible for its *own* conduct and its *own* wrongs.[67] It is not responsible for the conduct of someone else. The principle of independent responsibility is firmly established in the ARSIWA[68] and in the relatively scarce case-law, such as the *Corfu Channel,*[69] the *Certain Phosphate Lands in Nauru* case, [70] *M.S.S. v. Belgium and Greece*[71] and the *Eurotunnel* case.[72] While independent responsibility certainly can be relevant in situations of concerted action, reducing complex relationships to the responsibility of an individual State may be unlikely to result in a satisfactory outcome. In combination with the procedural limitations of dispute settlement, the concept of individual responsibility of States have led courts to reduce complex cooperative schemes to binary categories, without resulting in principled discussions of the shared nature of responsibility.[73]

[66] *Sari v Turkey and Denmark* App no 21889/93 (ECtHR, 8 November 2001), para 92.
[67] See ARSIWA Commentary, ILC *Yb* 2001/II(2), commentary to art 47, para 8.
[68] The basic principle embodied in articles 1 and 2 ASR ("every internationally wrongful act of a State entails the international responsibility of that State" and "There is an internationally wrongful act of a State when conduct consisting of an action or omission" is attributable to the State and constitutes a breach of an obligation of the State) underlies the ARSIWA as a whole. ARSIWA (n 34), art 16-18 to some extent form an exception.
[69] *Corfu Channel Case (United Kingdom v Albania)* (Judgment) [1949] ICJ Rep 244.
[70] *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections, Judgment) [1992] ICJ Rep 240.
[71] *M.S.S. v Belgium and Greece* [GC] App no 30696/09 (ECtHR 21 January 2011).
[72] Channel Tunnel Grp. Ltd. v. United Kingdom, Partial Award (Perm. Ct. Arb. 2007), para 187.
[73] Corfu Channe (n 69); Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Judgment, I.C.J. Reports 1986, 14; Nauru (n 70); East Timor (*Portugal v Australia*),

This becomes in particular problematic when conduct is attributed to one actor only. Dual attribution is very rare. Although a few scholars have defended the possibility of dual attribution, in particular in the context of peacekeeping operations,[74] practice remains rare.[75] Illustrative is the *Sadam Hussein* case before the ECtHR,[76] in which Saddam Hussein brought a case against twenty-one States that were allegedly implicated in the invasion of Iraq and that were responsible for his arrest, detention and ongoing trial.[77] The ECtHR considered that the responsibility of any of the respondent States could not be invoked "on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US."[78] Another noteworthy example is the decision of the ECtHR in *Behrami*. The Court attributed all acts and omissions relating to the failed demining operations in Kosovo exclusively to the UNUN, and not to its member States, without considering the possibility of a more nuanced solution in which responsibility would be shared.[79] Also in relation to the role of UNMIK in Kosovo, responsibility was channeled to the UN rather than (also) Kosovo, effectively undermining a role of Kosovo in the eventual rebuilding process.[80]

Judgment, I. C.J. Reports 1995, 90; and Legality of Use of Force (*Serbia and Montenegro v United Kingdom*), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 826.

[74] L. Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire' (1995) 78 *Rivista di diritto internazionale* 881 and L. Condorelli, 'Le statut des forces des Nations Unies et le droit international humanitaire' in C Emmanuelli (ed) *Les casques bleus: policiers ou combatants?* (Wilson and Lafleur 1997) 87; N. Tsagourias, 'The Responsibility of International Organisations for Military Missions' in M. Odello and R. Piotrowisz (eds), *International Military Missions and International Law* (Martinus Nijhoff Publishers) 245; T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard International Law Journal* 113; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 *Human Rights Law Review* 151.

[75] See e.g. *HN v Netherlands* (Ministry of Defence and Ministry of Foreign Affairs), First instance judgment of 10 December 2008, District Court of the Hague, ILDC 1092 (NL 2008), par 47-49. However, the Court of Appeal departed from this holding, and found that one act could both be attributed to the Netherlands and the UN. See *Nuhanović v Netherlands,* Gerechtshof, 5 July 2011, LJN BR 0133; and A. Nollkaemper, 'Dual attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 Journal of International Criminal Justice 1143.

[76] *Hussein v Albania* App (n 11), para 1.

[77] *Hussein v Albania* (n 11), para 1.

[78] *Hussein v Albania* (n 11), para 1. See Maarten den Heijer, 'Issues of Shared Responsibility Before the European Court of Human Rights' (2013) 60 Netherlands International Law Revue 411.

[79] *Behrami v France* App nos 71412/01 & 78166/01 (ECtHR, 2 May 2007).

[80] Matthew W Saul, 'Internationally Administered Territories in PA Nollkaemper (ed), *The Practice of Shared Responsibility in International Law* (CUP 2015, forthcoming).

The common element of the above examples is that IL structures its primary and secondary rules in a way that makes it relatively easy for each of multiple parties to contribute to a wrong, yet remain below the threshold where its responsibility would be engaged.

III.2 The institutional gap

A second cause that may contribute to diffusion of responsibility is the institutional setting in which concerted action is embedded. Particular institutional structures may not be attuned to a diffusion of responsibility, and may sustain responsibility gaps by making it difficult to identify who did what and who was responsible for what.

One problem relates to the set-up of international adjudication. Though questions of responsibility are not typically brought in international courts (but rather are settled in negotiations), there is a not insignificant body of case law on questions of international responsibility involving multiple responsible parties, in particular in the ICJ [81] and the ECtHR. [82] However, the present system of international dispute settlement is not well designed to deal with multilateral disputes.[83] This has relevance for adjudication of questions of harm arising out of concerted action. For instance, given that international dispute settlement mechanisms are based on the consent of States, the mere fact that one responsible State has not consented to the judicial process may suffice to exclude a case of harm arising from concerted action from judicial scrutiny. Likewise, if one of the wrongdoing actors is an IO other than the EU or the Seabed Authority, questions of shared responsibility may be deemed inadmissible before the ICJ, the WTO DSU, the LOSC DSP and the ECtHR, which do not have jurisdiction over (other) international organisations.

Perhaps the most visible barrier to adjudication of claims arising out of concerted action is that a court may not be able to proceed against one actor, if the other actors involved in the concerted action are not part of the litigation. A court may be required to protect the interests of co-responsible parties who are not party to the dispute, by deciding that it has no jurisdiction over the claim against the actor over which it otherwise would have jurisdiction.

[81] See M Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4 Journal of International Dispute Settlement 295; A Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', in E Rieter and H de Waele (eds), *Evolving Principles of International Law, Studies in Honour of Karel C. Wellens* (Martinus Nijhoff Publishers, 2011) 199.
[82] See M den Heijer, **'**Procedural Aspects of Shared Responsibility in the European Court of Human Rights**'** (2013) 4 Journal of International Dispute Settlement 363.
[83] Lori Damrosch F., 'Multilateral Disputes' in *The International Court of Justice at a Crossroads* (ASIL, Dobbs Ferry, New York 1987) 376.

The *Monetary Gold* principle, as it operates in the practice of the ICJ is the prime manifestation of this rule.[84]

Institutional limitations may also apply in respect of supervisory mechanisms, outside the sphere of international adjudication. Problems of many hands may be counteracted by monitoring and supervision arrangements that make it possible to identify the contribution of each actor. An example are the detailed reports compiled within the framework of the Convention on International Trade in Endangered Species (CITES) on the roles and infractions by individual parties who, collectively, contribute to the extinction of particular species.[85] However, there are considerable differences in the existence of such mechanisms and their ability to obtain the relevant information, with direct consequences for diffusion of responsibility. In situations where no institutional mechanisms have been set up to determine relevant fact and to identify who did what, this will increase the possibility of diffusion of responsibility.

III.3 The information gap

A directly related third cause of diffusion of responsibility is that 'many hands' make it difficult to identify who did what. For outsiders, 'it is usually very difficult, if not impossible, to know who contributed to, or could have prevented, a certain action, who knew or could have known what.' [86] It even 'may not be clear 'even to the members of the collective itself who is accountable´.'[87] So conceived, the problem of many hands is an epistemological problem: the problem of identifying who is responsible for what arises from a lack of knowledge, or information.[88]

The practical problem arose clearly in *Legality of the use of force cases*[89] and in the *Saddam Hussein case*[90] where it was next to impossible for the plaintiffs to identify who did what. It

[84] Alexander Orakhelashvili. 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from Monetary Gold to East Timor and Beyond' (2011) 2 Journal of International Dispute Settlement 373.
[85] 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora , 993 UNTS 243 (CITES).
[86] Ibo Van de Poel and others (n 53) 61.
[87] Helen Nissenbaum, 'Accountability in a Computerized Society' (1996) 2 Science and Engineering Ethics 25, 29.
[88] Van De Poel (n 53), 61.
[89] *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Judgment) [2004] ICJ Rep 279.
[90] *Hussein v Albania* (n 11), para 1.

also is well illustrated by the fact that painstaking research made clear that 54 States participated in the US rendition policy.[91]

This problem is increased by the informal nature of arrangements in collaborative action. Informality leads to responsibility gaps. Examples abound, including transborder police cooperation,[92] financial arrangements within the Basel committee,[93] the rules of the nuclear suppliers group, and command and control structures in military operations.[94] Information gaps also may exists in relation to joint action on piracy, where rules of engagement usually will be beyond the reach of plaintiffs and cross border joint policy operations.

IV The Politics of Diffusion

Diffusion, and its possible effects on responsibility gaps, is not a phenomenon that is 'out-there', but rather a manifestation of conduct and strategies of relevant actors.

This paragraph will first identify the essential political nature of the law of responsibility (and of particular choices on the assignment of responsibility) (4.1) and then identify particular strategies for diffusing responsibility (4.2).

IV.1 The political nature of responsibility-design

The form and content of any scheme of responsibility does not automatically follow on the substantive law but are a matter of conscious design, mostly by States or international organisations but also by international courts. Indeed, rules on responsibility are as much a result of a political choice, as primary rules of conduct pertaining to, say, environmental law, trade law or military matters. The normative and institutional choices reflect 'productive

[91] Open Society Justice Initiative, 'Globalizing Torture: CIA Secret Detention and Extraordinary Rendition' (Open Society Foundation, 2013) <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> accessed 24 February 2015. Dick Marty report 'Secret Detentions and Illegal Transfers of detainees involving Council of Europe Member States', Doc. 11302 rev., 11 June 2007 'CoE Rendition Report (2007)'.

[92] Saskia Hufnagel, *Policing cooperation across borders: comparative perspectives on law enforcement within the EU and Australia* (Ashgate Publishing, 2013).

[93] David Zaring. 'Informal procedure, hard and soft, in international administration' (2004) 5 Chi.J.Int'l L. 547.

[94] Matteo Tondini, 'The "Italian Job": How to Make International Organizations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States' in Jan Wouters, Eva Brems and Stefaan Smis (ed), *Accountability for Human Rights Violations of International Organizations* (2010) 169.

power' of relevant actors over others.[95] States exercise power over IL making or over particular international institutions, in a way that serves their interests. Thereby, they can influence the rules of responsibility that determine whether or not a particular type of conduct (including participation in concerted action) does or does not engage the responsibility of a State.

Power, from this perspective, may not only breed responsibility, but may also shield actors from responsibility. The law of responsibility, and the institutions and processes in which it is embedded, in itself is the result of choices and practices of States. The ineptitude of IL for dealing with harmful consequences of concerted action serves States and other actors well, by allowing them to engage in blame-avoidance and blame-shifting, thus shielding themselves from responsibility.

IL is for instance agnostic in regard to the exercise of soft power, by which States can affect others 'through the effective means of framing the agenda, persuading, and eliciting positive attraction in order to obtain preferred outcomes'.[96] The same holds when States exercise 'overall control' over other actors. 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 less demanding standard of overall control in *Tadic*.[97] The fact that the ICJ in the *Bosnian Genocide* reconfirmed effective control as the appropriate standard,[98] 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, in a concerted action, private actors or other States, without this leading to attribution of such acts to the State and thus without leading to (shared) responsibility.[99] The result may be that responsibility is shifted to other actors.

A related point is that the law of responsibility, itself the product of power, feeds back to constitute and legitimize particular exercises of power. International obligations do not only

[95] M Barnett and R Duvall, 'Power in global governance', in M Barnett and R Duvall (eds), *Power in Global Governance* (CUP 2005) 18.
[96] J S Nye, *The Future of Power* (Public Affairs 2011) 20-21.
[97] *Prosecutor v Tadic* (Judgment) ICTY-94-1 (26 January 2000).
[98] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, paras 402-406.
[99] Christine Chinkin. 'A Critique of the Public/Private Dimension' (1999) 10 EJIL 387.

prohibit but also legitimize doing what is not prohibited.[100] 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.[101]

IV.2 Diffusion strategies

To some extent, concerted action in itself can be considered as a diffusion strategy. From the perspective of the participants in a particular concerted action, adding more 'hands' to the concerted action, can be necessary as drawing in outside actors may increase the chances of success of cooperation (for instance in the case of climate change). However, adding more partners also may increase the possibility of diffusion, and thus may shield participants from responsibility. Partnerships between international institutions and other actors are an example. Partnerships engaged by the WHO or the World Bank involve a great many different actors. When no clear arrangements have been made on the assignment of responsibility, it becomes difficult to determine who is responsible for what.[102]

International practice shows a variety of other strategies by which States can diffuse (or shift) responsibility to other actors. In relation to IOs, the concept of 'circumvention', represents a strategy by which IOs can work through States,[103] or, conversely, by which States can act, in a concerted action, through IOs.[104]

Yet another alternative concept is orchestration – a term that has been conceptualized as referring to indirect and soft ways in which international institutions act through intermediaries.[105] Orchestration need not be (and commonly will not be) a strategy expressly aimed to achieve diffusion, but this may well be the result. In particular cases, the result may well be intended.

Delegation presents another strategy. By delegation States and international institutions can act with and through others, with potential limiting effects on the scope of their own

[100] This is the argument in A Abghie, Imperialism, Sovereignty and the Making of International Law (Cambridge, U.K.: Cambridge University Press, 2005).
[101] V Lanovoy, 'Complicity in an Internationally Wrongful Act' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 134.
[102] Boisson de Chazournes (n 40) 215-216.
[103] ARIO (n 34), art 17.
[104] ARIO (n 34), art 61.
[105] E.g. Kenneth W Abbott and others, "Orchestration: Global Governance Through Intermediaries" in Kenneth W. Abbott and others (ed), *International Organizations as Orchestrators* (CUP 2014) 3.

responsibility.[106] A variant is the phenomenon of 'outsourcing' of tasks, possibility with accompanying responsibility, to other actors, such as private security corporations.[107]

The strategies identified above need not be designed to evade responsibility or shift it to other actors. However, in some cases it may be the intention of actors that seek to diffuse responsibility to ensure that they themselves are protected from claims. Diffusion strategies then may take the form of blame games, a term referring to situations 'where multiple players are trying to pin the responsibility on one another for some adverse event, acting as blamers to avoid being blamees'.[108]

Two main blame game strategies can be distinguished. A first strategy is to 'blunt' responsibility by collectivizing it.[109] The relevant actor structure powers and tasks in such a way, that they are spread over multiple actors, as a result of which in the outside actors cannot easily identify who is to blame for any particular event. Partnerships between international institutions and other actors may have this effect. It may be unclear whether diffusion of responsibility, and deflection of blame is an intended aim of such partnerships, or simply an unintended consequence. However, if no clear arrangements have been made on the assignment of responsibility, responsibility rests on all, and as a result perhaps on no one. Such strategies do not make the call for responsibility (or 'blaming') in situations of harmful outcomes disappear, but they do make it unclear who did what 'and leave potential blamers nonplussed by the complexity of the organizational arrangements.' [110]

An alternative strategy is individualizing blame.[111] Rather than collectivizing blame (and extending it all), blame is then shifted to one or a few actors, in effect shielding the blamers. As noted by Hood, this strategy 'is about shifting rather than reducing or preventing blame.' [112] In the Srebrenica cases, which sought to hold the Netherlands and the UN responsible in relation to the eviction of persons from the UN compound in Srebrenica, both

[106] See e.g. D Sarooshi, 'Conferrals by States of Powers on International Organizations: The Case of Agency' (2004) 74 The British Year Book of International Law 291.
[107] Corinna Seiberth, *Private Military and Security Companies in International Law*(Intersentia 2013); Simon Chesterman and Angelina Fisher, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (OUP 2009).
[108] Christopher Hood, *The Blame Game. Spin, Bureaucracy and Self-Preservation in Government* (Princeton University Press 2011) 7.
[109] Hood (n 108), 100.
[110] Hood (n 108), 83
[111] Hood (n 108), 100.
[112] Hood (n 108). See also Christopher Hood, 'The Risk Game and the Blame Game' (2002) 31 Gov't & Opposition 15.

defendants denied responsibility; they thus effectively placed the blame on each other, and they both attempted to shift blame onto the Bosnian Serbs and the FRY.[113]

In international affairs blame shifting is not a regularly practice, at least not between allies. Blame avoidance may be politically more attractive.[114] This may be different, however when there are alternative actors to whom blame can be shifted without the accompanying risk that this practice may at one point backfire.

V. Benefits and Costs of Diffusion

Having set out the factors that contribute to diffusion of responsibility, the question now can be addressed how we normatively should assess this phenomenon. Is diffusion of responsibility a problem we should care about, and that would call for a reconsideration of the role and contents of responsivity in situations of concerted action? Or is it a regular part of responsibility processes that simply reflects the nature and loci of international governance? In other words: is 'the problem of many hands' really a problem?

Diffusion in itself is a neutral term that frames and describes the spread of ideas, institutions or, as in the case of responsibility, legal principles and processes. Even the fact that responsibility gaps may occur in principle does not strip diffusion of its neutral nature. Whether diffusion with its resulting gaps is a good development depends on several questions: is responsibility in itself a positive value; does it fit in the variety of other contexts to which it is diffused; [115] if not, are there proper alternatives, and so on. Saying that 'responsibility' is diffused in itself is just a way of framing and describing processes of governance that may or may not be evaluated in positive terms.

I will separately identify a number of benefits (5.1) and costs (5.2) of diffusion and related responsibility gaps. Articulating the benefits and costs also helps us understand better the strategic choices of relevant actors to engage in politics of diffusion, as discussed in the previous section.

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[113] See generally André Nollkaemper, 'Multilevel accountability in international law: a case study of the aftermath of Srebrenica' in Yuval Shany, Broude and Tomer (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing, 2008).

[114] This is also the conclusion in Sara B. Hobolt and James Tilley, *Blaming Europe? Responsibility Without Accountability in the European Union* (OUP, 2014) 101. See also Kent R. Weaver. 'The Politics of Blame Avoidance' (1986) 6 Journal of Public Policy 371.

[115] Compare for the international rule of law: Jeremy Waldron, 'The Rule of International Law' (2006) 30 Harvard Journal of Law & Public Policy 15.

V.1 Benefits

Responsibility fulfills important, positive functions – both in domestic societies and in IL. If responsibility indeed is a positive value, it follows that diffusion of responsibility in principle is a positive development. It allows responsibility to be better attuned to processes of governance which have become diffused or, as coined by Nico Krisch, become 'liquid'.[116] The fact that responsibility also become diffuse may match better the places where decisions are actually made.

Perhaps somewhat counterintuitively, also when diffusion leads to responsibility gaps, this may serve positive functions. This is in particular due to the fact that responsibility can have a chilling effect. If so, a designed problem of many hands, that leads to such absence of responsibility, may well have benefits. The willingness of States to accept obligations, may be dependent on their ability to prevent responsibility. One option for doing so is diffusion. If they are unable to do so, they may be unwilling to engage in cooperation in the first place. Cole notes with reference to climate change that using liability to promote mitigation of greenhouse gas emissions could prove counterproductive; rather that inducing cooperation, it might reduce incentives for States to participate in international regimes, i.e., to share responsibility.[117]

In terms of costs-benefit assessment, diffusion of responsibility then may be beneficial: action without, or with 'diluted' responsibility may produce better outcomes then no action at all. [118]

Whether States indeed would make their willingness to engage in cooperation conditional on their ability to escape responsibility is easier raised then answered. In many of the examples where diffusion occurs, it remains somewhat speculative whether or not such diffusion actually matters in terms of the incentives of relevant actors to agree to ambitions international obligations. Do we know whether States now set ambitious targets (eg in fisheries, pollution control etc) that they would not normally do if there would be a risk

[116] Nico Kirsch, 'The Structure of Postnational Authority' (2015) SSRN Working Paper available at < http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2564579> .
[117] Daniel H Cole, 'The Problem of Shared Responsibility in International Climate Law' in André Nollkaemper and Dov Jacobs, *Distribution of Responsibility in International Law* (CUP 2015, forthcoming).
[118] Obviously, this potential benefit of diffusion only applies in relation to situations in which states and other actors engage in concerted action for beneficial purposes. It does not apply to situations where actors intentionally cause harm.

responsibility upon breach? To answer this question affirmatively it would not only need to be demonstrated that the risk of responsibility is a consideration that is relevant to State conduct at all, but also that the prospect of diffusion of responsibility is a relevant consideration for States to engage in cooperative action, in which they would not engage without such diffusion. The point is not entirely implausible. There are ample of indications that suggest that States care about preventing responsibility (and partly for that reason opt for modes of governance and substantive obligations that reduce the change of being held responsible), and it is plausible that the higher the risk of responsibility in case of non-performance, the more cautious they will be in accepting obligations. If so, we should be cautious in adopting a one-dimensional critique on diffusion, and not uncritically resort to antidotes (such as joint and several responsibility) that may improve responsibility in situations of concerted action, yet undermine such action in the first place.

V.2 Costs

Benefits of diffusion of responsibility and in particular of responsibility may be partially or wholly outweighed by costs of diffusion. Two such costs are particularly relevant: identified: costs in terms of the performance of obligations and in terms of injured parties.

Impact on performance of obligations

A first angle for assessing the impact of diffusion is that responsibility is a central element of international obligations and their performance. Diffusion of responsibility can undermine the assignment and performance of obligations and thereby the achievement of objectives. The objectives may relate to specific interests of the actors involved, but may also represent broader public goods.

It is a plausible proposition that diffusion of responsibility can undermine incentives for action. If no one can be meaningfully called to account after the event ´no one need feel responsible beforehand'.[119] This may reduce the possibility that individual actors perform obligations and that the interests that the law seeks to protect are actually protected.

[119] Mark Bovens, The Quest for Responsibility: Accountability and Citizenship in Complex Organisations 49 (1998). M.A.Wallach, N. Kogan & D.J. Bem, *Group influence on individual risk taking*, (1962) 65 J. of Abnormal & Social Psychology 75; M.A.Wallach, N. Kogan & D.J. Bem, *Dilution of responsibility and level of risk taking in groups*, (1964) 68 J. of Abnormal & Social Psychology 263.

Whether diffusion indeed will undermine the incentives of actors to perform their obligations presumes, as a first step, that that obligations matter at all for the conduct of relevant actors[120] and, as an extension, that the perspective of being held responsible is a relevant factor in changing the conduct of States and international institutions. Thus, while responsibility presumes the existence of obligations, it also is more than that, and its incentives-effects may go beyond those of obligations.

Three more specific reasons can be identified that would support such an impact. One is that responsibility may strengthen the internalization of obligations – one of the main factors that supports compliance with international obligations.[121] A second factor is that responsibility may impact on the reputational impact of IL. [122] State may care about the reputational effects of non-compliance, but may do so even more when such non-compliance may trigger their international responsibility. A third factor is that reparation, notably obligations of restitution and compensation provide incentives for compliance. [123] The two last mechanisms may be supported by scholarship that is premised on theories of rationality which somehow seems to presume that States, make calculating decisions in their own self-interest.[124]

This impact of diffusion on incentives may have wider ramification in the form of collective action problems. If actors do not individually feel the consequences in terms of being held responsible, they may be tempted to look for others to do the job. This will be particularly relevant when the participation of multiple States is necessary for addressing a perceived problem and for producing a common goods, for instance in situations involving transborder effects in areas such as global health, financial markets, the environment, or organized crime, where any single State is quite powerless to provide answers. Because obligations and responsibilities are not specifically assigned, and responsibility is not likely to be forthcoming, actors may be inclined to wait for each other, with the result that nothing happens. One can recall Olson´s argument, developed the theory in the economic context of public goods, that as members of a large group generally hold the assumption that someone

[120] Eric A Posner & Alan O Sykes, *The Economic Foundations of International Law* (Harvard University Press 2013); Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008).
[121] Eg Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke Law Journal 622.
[122] Andrew T. Guzman, 'Reputation and International Law', 34 Ga. J. Int'l & Comp. L. 379 (2005).
[123] Eric A Posner and Alan O Sykes, 'An Economic Analysis of State and Individual Responsibility Under International Law' (February 2006) U Chicago Law & Economics Olin Working Paper No. 279 available at <http://ssrn.com/abstract=885197>.
[124] Eric A Posner & Alan O Sykes, *The Economic Foundations of International Law* (Harvard University Press 2013); Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008).

else in the group can and will provide the public good, the incentives for these members to provide for it themselves are weakened.[125] This will in particular affect 'aggregate-effort' goods, which require action by all actors involved.[126] In these areas, 'the outcome that each agent desires cannot be achieved unless everyone performs his or her contributory action. Here the action of each agent is directly causally necessary for realization of the desired outcome, so the outcome is of necessity aimed at qua collective end.'[127] Diffusion then may undermine the actual realization of the common aims.

Private costs

Diffusion can undermine a key function of attributing responsibility: to ensure justice to victims.[128] This holds both for injured States and injured individuals. If harm is caused, yet the conditions for individual responsibility are not satisfied or responsibility cannot be determined for other reasons, and it also is not possible to bring an effective claim against the collectivity as such, injured parties will be without redress.[129] In effect, the loss will then be left were it falls – with the victim, rather than being transferred back to one or more responsible actors.[130]

One reason why the position of victims tend to be weaker in situations of concerted action is that it may be more difficult for private parties to determine which actors play which role in a particular concerted action. This in in particular the case where information is spread over many actors and moreover of an informal nature – for instance in the case of partnerships between international institutions and private parties.[131]

The effect on injured parties has both a procedural and a substantive dimension. As to the former, diffusion of responsibility over multiple parties will limit access of injured parties to courts in relation of all or the main actors involved in a concerted action. There often is a mismatch between the concerted nature of action, on the one hand, and the available remedies against the actors involved in that action, on the other. The principles of individual

[125] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1968) 44.
[126] Hirshleifer, 'From Weakest-link to Best-shot: The Voluntary Provision of Public Goods', 41 Public Choice (1983) 371, 372; S. Barrett, Why Cooperate? The Incentive to Supply Global Public Goods (2007) 74.
[127] Seumas Miller, 'Collective Responsibility' in 15 Public Affairs Quarterly (2001) 65, 73.
[128] Ibo Van De Poel et al., *The Problem of Many Hands: Climate Change as an Example*, (2004) 18 Science and Engineering Ethics 49, 64; Mark Bovens, *The Quest for Responsibility* (n 4) 49.
[129] See eg P. Stöckle, ''Victims Caught Between a Rock and a Hard Place: Individual Compensation Claims against Troop-Contributing States'' (2013) 88 Journal of International Peace and Organization 19.
[130] James Crawford and Jeremy Watkins, 'International Responsibility' in Besson, Samantha and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 286
[131] Boisson de Chazournes (n 40) 211.

responsibility are accompanied by processes for implementation and enforcement that match the characteristics of individual rather than shared responsibility.[132] However, in the increasingly complex character of international relations, 'legal disputes between States are rarely purely bilateral'.[133] The present system of international dispute settlement is hardly designed to deal with multilateral disputes.[134] Procedures may not be able to capture all parties involved and may not do justice to the complexity of a context consisting of multiple responsible actors. For instance, given that international dispute settlement mechanisms are based on the consent of States, the mere fact that one State involved has not consented to the judicial process may suffice to exclude any case of shared responsibility from judicial scrutiny. Likewise, if one of the wrongdoing actors happens to be an IO, questions of shared responsibility will be deemed inadmissible before most international judicial bodies given that acts of IOs are not judiciable before them.

Diffusion of responsibility also may affect substantive entitlements. If contributions are spread over multiple actors, relative contributions of individual actors will be relatively small. In the absence of a principle of joint and several responsibility, individual actors may not be able, or may not be required, to provide a full remedy. When reparation consist of restitution or specific performance, individual responsible actors may not be able to provide the remedy that is required.

VI. Conclusion

This Chapter has demonstrated that diffusion of responsibility may result in responsibility gaps and that such gaps in part are explained by the dominant paradigm of individual responsibility. This process of diffusion should be understood as a political process, that is sustained and driven by IL, which in itself is a reflection of that political process. Diffusion may bring both benefits and costs, in terms of the accountability of the exercise of public authority, in terms of performance of international obligations, and in particular in terms of the protection of the rights of injured parties. How these benefits and costs will be evaluated depends on a contextual analysis and cannot be answered in the abstract. What can be concluded at a general level, though, is that while diffusion as such may help connect

[132] See on the connection between substance and procedure Martinez, 'Process and Substance in the "War on Terror"', 108 *Columbia Law Review* (2008) 1013: Benzing, 'Community Interests in the Procedure of International Courts and Tribunals', 5 *The Law and Practice of International Courts and Tribunals* (2006) 369.
[133] Separate Opinion Judge Shahabuddeen in Nauru (n 70), 270.
[134] L. Fisler-Damrosch, 'Multilateral Disputes' in L. Fisler-Damrosch (ed), *The International Court of Justice at a Crossroads* (Hotei Publishing 1987) 376-400.

responsibility to a diversity of actors, it also may lead to responsibility gaps that undermine the value and role of responsibility in the international legal order.