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The Practice of Shared Responsibility in relation to Liability for Transboundary Harm

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1. Introduction

The legal regime relating to liability for transboundary harm involves a multiplicity of actors engaged in the process of offering compensation for harmful effects. These actors include states that must ensure that they have legal arrangements in place so that the victims may receive compensation; private operators that have to provide compensation; and in some cases, industry-wide funds that manage compensation claims. From the perspective of shared responsibility, this multiplicity of actors renders the regime highly relevant.

Liability in the context of this chapter refers to the obligation of an actor (state or non-state) to provide compensation in cases where damage is caused without a breach of an international obligation.

While the topic of liability for transboundary harm has received extensive attention in international law scholarship and by the International Law Commission (ILC),[1] there have not been any instances where liability claims have been brought before international courts and tribunals.[2] In this sense, most of the 'practice' reviewed in this chapter primarily involves the making of regimes, rather than the application thereof in concrete cases.

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[1] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, ILC *Yearbook* 2001/II(2) (Articles on Prevention); Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with Commentaries, ILC *Yearbook* 2006/II(2) (ILC Principles, or Principles).

[2] Liability rules were indeed applied by the United Nations Compensation Commission (UNCC) in relation to environmental damage caused by the invasion of Iraq in Kuwait. The UNCC was called upon to evaluate claims after the UN Security Council had already found Iraq responsible for the invasion, see UN Doc. S/RES/687 (8 April 1991), para. 16. Therefore the application of liability rules fell under the rubric of secondary rules after a determination of responsibility had taken place.

The main factual scenarios that pertain to shared responsibility[3] can be divided into two broad categories. First, there is the category of 'horizontal' shared responsibility: situations in which a plurality of states causes transboundary harm without the states breaching their primary obligations. The general rule on prevention of transboundary harm dictates that states are under an obligation to make sure that activities within their jurisdiction or control will not cause harm to another state.[4] The International Court of Justice (ICJ) has held that this is a due diligence obligation.[5] In other words, it is an obligation of conduct.[6] This means that if a state complies with its prevention duties and damage nevertheless occurs, the rules of international responsibility do not apply; the state has not breached an international obligation.[7] One can imagine a scenario like this materialising in the context of shared utilisation of a transboundary watercourse.[8] For example, two upstream states, while complying with their primary obligations as they appear in custom or in a particular convention, may undertake in common the construction of a plant along the river. Then an accident sends pollutants to a downstream state. Similarly, two or more states might operate plants in their territories while complying with their prevention obligations. The collective presence of the plants might, however, have adverse effects upon a third state. There appears to be no rule of international law in relation to such situations that supports the obligation of

[3] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 366-369.

[4] It must also be noted that this formula was adopted in Principle 21 of the Stockholm Declaration: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. See Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, (1972) 11 ILM 1416 (Stockholm Declaration). See also Principle 2 of the Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, (1992) 31 ILM 874 (Rio Declaration).

[5] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment, ICJ Reports 2010, 14, para. 101.

[6] On the distinction between obligations of conduct and result see J. Combacau, 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse', in P. Reuter, *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (Paris: Pedone, 1981), 181; A. Marchesi, 'The Distinction between Obligations of Conduct and Obligations of Result following its Deletion from the Draft Articles on State Responsibility', in *Studi di diritto inernazionale in onore di Gaetano Arangio-Ruiz*, Vol. 2 (Napoli: Editoriale Scientifica, 2004), 827; P.-M. Dupuy, 'Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to state responsibility' (1999) 10 EJIL 371.

[7] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, ITLOS Case No. 17, (2011) 50 ILM 458, also available at www.itlos.org, para. 203.

[8] See Chapter 34 in this volume, O. McIntyre, 'Transboundary Water Resources', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

states to provide compensation in the event that they have not breached their primary obligations.[9]

The second category is that of 'vertical' shared responsibility. There is a plurality of actors in this category: states, private entities, or international organisations that may share liability for transboundary harm. In this scenario, the obligation to ensure that the operator of the activity will compensate for the damage lies with the state where the operator is based. The operator itself is under an obligation to pay compensation. An instance of oil pollution at sea[10] would involve the liability of the operator (in this case the shipowner), while additional compensation might be paid by a fund to which other actors (such as recipients of the cargo) may contribute.

This chapter is organised as follows. Section 2 gives an account of the efforts of the ILC to codify and progressively develop a regime of liability for transboundary harm. This provides the necessary context for the analysis in section 3. Section 3.1 discusses the problems arising out of the lack of a state liability rule, and takes into account the situations where a state does not comply with its primary obligation to ensure that victims of transboundary harm are compensated. This obligation can be found in civil liability regimes. The ILC has also tried to extract a general obligation based on an analysis of these regimes. It will be argued that this general obligation is best viewed as *lex ferenda*. Section 3.2 analyses the scenarios of vertical shared responsibility where a multiplicity of actors, including states and non-state actors, award compensation. In both sections, the applicable primary as well as secondary rules are discussed in the context of shared responsibility. Finally, section 4 addresses the various procedural steps available for victims of transboundary harm.

2. The concept of liability in context: the work of the ILC

The ILC began its work on the topic of 'Injurious Consequences Arising out of Acts not Prohibited by International Law' in 1980, when Special Rapporteur Quentin-Baxter delivered his preliminary report.[11] After sixteen years of studying the topic under two Special

[9] See n. 7.
[10] See Chapter 11 in this volume, H. Ringbom, 'Ship-Source Marine Pollution', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), ___.
[11] Preliminary Report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr Robert Q. Quentin Baxter, Special Rapporteur, ILC *Yearbook* 1980/II(1), 247.

Rapporteurs,[12] by 1996 the ILC had run into an impasse. There was no agreement as to whether the focus should be the state or the private or public operator of the activity that actually caused the transboundary harm.[13] In other words, the ILC had to decide between moving towards a general state liability regime or towards a general civil liability regime. The Working Group that was set up to propose a solution as to how the ILC should proceed concluded that the topic should be divided.[14] First, the ILC should deal with the issue of prevention, and at a later stage with liability.[15] The ILC has followed the suggestions of the Working Group.

After finalising a set of Articles on Prevention in 2001,[16] the ILC proceeded with the topic of liability. The reports after 2001 were subtitled 'Legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities'. The change in title denoted a shift away from a state liability regime through the elimination of the phrase 'not prohibited by international law'.[17] This shift away from a state liability regime[18] signified a move towards a regime that would primarily focus on the victims of transboundary harm. The new focus facilitated the speedy conclusion of the ILC's work. Special Rapporteur Rao submitted his final report in 2006,[19] and the ILC adopted the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities (Principles, or ILC Principles).[20] There has been significant criticism of the shortcomings of the ILC's work on the topic of liability during the last stages of its conclusion.[21] Nevertheless, the success of the ILC in concluding a difficult and idiosyncratic topic must be commended despite its shortcomings, which are more structural than substantive. What is meant here is that the main

[12] Quentin-Baxter's term ran from 1980 until his death in 1984. He was succeeded by Julio Barboza from 1985 until 1997.
[13] The problem had already been identified by Handl in 1980. See G. Handl, 'State liability for accidental transnational environmental damage by private persons' (1980) 74 AJIL 525. In the case of transboundary harm, the discussion of organs of state, in the sense that the harm takes place in the context of state responsibility, is irrelevant. The issue here is whether the state should bear liability for the acts of a private party that performs the activity within that state's jurisdiction or control. It must also be noted that this formula was adopted in Principle 21 of the Stockholm Declaration of 1972. See Stockholm Declaration, n. 4. See also Principle 2 of the Rio Declaration, n. 4.
[14] International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, Report of the Working Group, 17 June 1997, UN Doc. A/CN.4/L.536 (1997).
[15] Ibid., para. 6.
[16] See n. 1.
[17] First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN Doc. A/CN.4/531 (2003), para. 37.
[18] Ibid. para. 16.
[19] Third report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN Doc. A/CN.4/ 566 (2006).
[20] See n. 1.
[21] J. Brunnee 'Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection' (2004) 53(2) ICLQ 531; A.E. Boyle 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 JEL 3.

problem was the decision to move away from developing a regime of state liability altogether, and not the provisions found in the final outcome: that is, the Principles.

The first report of Rao on the Allocation of Loss indicated that the ILC would move away from a civil liability regime as well as private law remedies and the concept of strict liability.[22] The Principles, however, do indeed look like a general civil liability regime rather than the flexible regime that had been envisaged by the Special Rapporteur. Therefore, this chapter will focus on civil liability, discussing both the ILC Principles and the oil pollution regime, because of the close structural connection between the two.[23]

The ILC Principles cannot be considered as part customary law. This was also the view of the Deep Seabed Disputes Chamber (Chamber) in its advisory opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*.[24] Liability in the deep seabed[25] could arise if a sponsoring state had complied with its due diligence obligations,[26] as well as its direct obligations,[27] and damage in the Area nevertheless occurred. The Chamber held that despite the efforts of the ILC on the topic, there was no general rule covering a situation like this.[28]

However, there are a number of treaty arrangements that do provide for civil liability in case of transboundary harm.[29] The most prominent one is the regime of civil liability for oil pollution. Other civil liability regimes deal with the peaceful uses of nuclear power and transboundary movement of hazardous waste.[30] Despite the varying degrees of their success

[22] Rao, First report, n. 17, para. 38.
[23] Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, London, 27 November 1992, in force 30 May 1996, 1956 UNTS 255 (CLC); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 18 December 1971, in force 16 October 1978, 1110 UNTS 57 (1971 Fund Convention); Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971, London, 27 November 1992, in force 30 May 1996, 1953 UNTS 330 (1992 Fund Convention).
[24] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, n. 7.
[25] See Chapter 15 in this volume, I. Plakokefalos, 'Environmental Protection of the Deep Seabed', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.
[26] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, n. 7, paras. 111-115.
[27] Ibid., paras. 121-140.
[28] Ibid., para. 203.
[29] For a comprehensive account of the civil liability regimes, see Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), Prepared by the Secretariat, UN Doc. A/CN.4/543 (24 June 2004).
[30] Convention on Civil Liability for Nuclear Damage, Vienna, 21 May 1963, in force 12 November 1977, 1063 UNTS 265 (Vienna Nuclear Liability Convention); Convention of 31 January 1963 Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy (as Amended by the Additional Protocol of

in terms of their application in practice, they share a number of common rules, which will be reviewed later in this chapter.

Civil liability regimes involve, almost by definition, multiple parties: liability is usually shared between the operator of the activity, insurance companies, industry-wide funds, and in some instances, states. The structure of these regimes points towards the involvement of a multiplicity of actors in the process of offering compensation that renders them closely connected to the concept of shared responsibility. However, in contrast to many situations of shared responsibility, the parties involved in awarding compensation are not bound by the same obligations. States are bound by an obligation to have the necessary legal arrangements in place so that the victims may receive compensation. The operator and the industry-wide funds bear an obligation to manage the compensation claims presented to them. The obligation of the states is based on international law, while the operators are bound by the laws that states implement in their internal legal order so as to discharge their international obligations. The position of the funds is slightly more complex. They do assume obligations under civil liability conventions, and under the International Convention on Civil Liability for Oil Pollution Damage (CLC), for example, the Fund is recognised as a legal person under the laws of the member states to the Convention.[31] Therefore, the structure of the civil liability regimes, as well as the structure envisaged by the ILC in the Principles, does not provide for

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28 January 1964 and by the Protocol of 16 November 1982), 31 January 1963, in force 4 December 1974, 1041 UNTS 358 (Brussels Supplementary Convention); Protocol to Amend the Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July as Amended by the Additional Protocol of 28 January 1964, Paris, 16 November 1982, in force 7 October 1988, 1650 UNTS 451; Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, Geneva, 10 October 1989, not yet in force, DOC.ECE/TRANS/79; Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, not yet in force, UNEP-CHW.5/29 (1999) (Basel Protocol); International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001, in force 21 November 2008, (2001) 40 ILM 1493 (Bunker Oil Pollution Damage Convention); Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, Kiev, 21 May 2003, not in force, Doc. ECE/MP/WAT/2003/3 (2003) (Protocol on Civil Liability for Damage Caused by the Transboundary Effects of Industrial Accidents); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 30 April 2010, not in force, text available at http://www.hnsconvention.org/Documents/2010%20HNS%20Convention%20Consolidated%20text.pdf. The latest addition to the long list of civil liability regimes is the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Fifth meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP 5), Decision 35 V-11, 2010, not in force. On this Protocol, see R. Lefeber, 'The Legal significance of the Nagoya-Kuala Lumpur Supplementary Protocol: The Result of a Paradigm Evolution', Amsterdam Law School Legal Studies Research Paper No. 2012-87, Centre for Environmental Law and Sustainability Research Paper No. 2012-02, available at SSRN. See Chapter 35 in this volume, K. Kummer Peiry, 'Transboundary Movement of Hazardous Waste and Chemicals', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

[31] Article 2(2) of the 1992 Fund Convention, n. 23.

the same obligations (in content or nature) for all the parties involved in awarding compensation. Nonetheless, the contribution to a single harmful outcome is remedied not only by the party that caused it, but by a number of other parties that gain from the performance of the activity.[32] Employing the terminology of state responsibility, the burden sharing under civil liability regimes takes place not at the level of breach, but at the level of reparation.

3. State and civil liability

3.1 State liability

There is a significant difference between the duty to provide compensation, as it would appear under state liability, on the one hand, and the obligation to offer reparation under the state responsibility regime, on the other. In the realm of responsibility, the obligation is imposed in order to repair the damage caused by a breach of an international obligation. In the case of liability rules, there is no breach to begin with. To the extent that state liability applies, the obligation of the state to compensate would not be the consequence of a breach of an international obligation. The obligation to compensate seeks to remedy the damage that has been caused regardless of a wrongful act by the state.

In any case, neither general international law nor any of the civil liability regimes targets states. The obligation of the operator to pay compensation arises not at the international law level, but within the domestic legal system of the victim state.

Indeed, the Principles on Allocation of Loss of the ILC do not articulate a rule that would oblige states to compensate if harm occurs. The ILC instead came up with an obligation to ensure that the victims of the damage receive prompt, adequate, and effective compensation.[33] This can hardly qualify as a liability rule. It does not provide that the state will have to compensate itself. What the ILC created in its effort to avoid the issue of state liability was a primary rule that, if breached, would lead back to responsibility.

For instance, if two states that have both contributed towards transboundary harm have breached their primary obligations as they may emerge from civil liability regimes, the rules

[32] This includes insurance companies or recipients of the cargo that contribute to the Fund.
[33] Principle 4 of the ILC Principles, n. 1.

of responsibility will apply. But such a breach and the consequent application of the rules of responsibility bring nothing new to the discussion of liability.

There is only one international convention that endorses state liability: the Convention on International Liability for Damage Caused by Space Objects (Space Liability Convention).[34] Article 2 of the Space Liability Convention posits that '[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight'. This Convention, being the sole example of state liability, clearly does not suffice for the establishment of a general rule to that effect. Moreover, state practice on liability is scarce and, what is more, it is not coupled by the requisite *opinio juris*. In the limited number of instances where states have actually compensated transboundary harm, they have done so with the explicit disclaimer that the compensation is of an *ex gratia* nature. This was the case following the Marshall Islands and the Cosmos 954 incidents.[35] In other cases, such as the Chernobyl disaster, victims have gone uncompensated by the source state. Therefore, it is safe to conclude that there is no liability rule that would oblige states to pay compensation in international law. What might be inferred, however, is that there is a *de lege ferenda* obligation of states to ensure that compensation is provided in cases of transboundary harm. The ILC Principles and the number of civil liability conventions, in combination with the general obligation to prevent transboundary harm, lead to this conclusion.[36]

The fact that there is no customary rule on state liability does not mean that states do not bear obligations, beyond those on prevention of transboundary harm, whenever damage to the environment occurs. According to the ILC Principles, the state has the obligation to ensure that the victims of the harm are compensated.[37] Similar obligations are to be found, explicitly

[34] Convention on International Liability for Damage Caused by Space Objects, London, Moscow, and Washington D.C., 29 March 1972, in force 1 September 1972, 961 UNTS 187 (Space Liability Convention). See also Chapter 18 in this volume, P. Mendes de Leon and H. Van Traa, 'Space Law', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

[35] On the Marshall Islands, see J.C. Babione, 'Mission accomplished? Fifty-four years of suffering for the people of the Marshall Islands and the latest round of endless reconciliation' (2000) 11 IICLR 115; see also Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, n. 29, paras.136-137. On the *Cosmos* incident see (1979) 18 ILM 902-930. See also A.E. Boyle, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991), 363, at 365.

[36] I. Plakokefalos, *Transboundary Environmental Harm in International Law* (Athens: Nomiki Bibliothiki, 2011) (in Greek), 242-250.

[37] Principle 4 of the ILC Principles, n. 1.

or implicitly, in a number of civil liability conventions and protocols.[38] This means that if the state that has ratified a civil liability convention fails to enact the necessary legislation so as to ensure that the victims of damage are compensated according to the rules of the convention, then it will have breached its obligation. If there are two states that have not complied with their obligations (e.g. two source states that contributed to the damage), then the victim(s) will not be able to claim compensation in either national court system. Again, in this case the rules of state responsibility would apply (and in fact lead to shared responsibility), since there is a breach of a primary obligation.

It must be borne in mind, due to the fact that most liability conventions are not in force, that the scenario wherein state responsibility is invoked for a breach of a primary obligation found in a civil liability regime will not materialise any time soon. Moreover, the whole purpose of building civil liability regimes is to move towards adjudication in a national court setting.[39] This was deemed necessary by states so as to avoid the problem of state liability.

3.2 Civil liability

Civil liability regimes almost invariably distribute liability among a number of actors. The main focus of liability regimes, including the ILC Principles, is the operator of the activity. In the ILC, the choice of the operator as the entity most appropriate for bearing the obligation to compensate was discussed during the tenure of Special Rapporteur Barboza. It was suggested that since the damage is actually caused by the operator, it is the operator that should bear liability.[40] This model was followed in the Principles. According to Principle 4, it is the operator that bears the obligation to compensate the victims of harm. Under Principle 4(3), the operator of the activity must maintain financial security, and under Principle 4(4) industry-wide funds should be established where appropriate. The liability of the operator may be

[38] See for instance Article 9 of the Brussels Supplementary Convention, n. 30; Article 8(1) of the Protocol on Civil Liability for Damage Caused by the Transboundary Effects of Industrial Accidents, n. 30; Article 12 of the Nagoya-Kuala Lumpur Protocol, n. 30.

[39] See S.D. Murphy, 'Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes' (1994) 88 AJIL 24, 38-42. The solution of local remedies has also been endorsed by Peter Sand, see P.H. Sand, 'International Cooperation: The Environmental Experience', in J. Tuchman Mathews (ed.) *Preserving the Global Environment* (New York: W.W. Norton and Company, 1991), 236, at 269-271.

[40] 'In the case of the activities under consideration, primary liability lay not with the State, but with the operator.' Summary records of the meetings of the forty-second session, Vol. I, UN Doc. A/CN.4/SER.A (1990), Statement by Mr Pellet, at 264. This position was reiterated by the observation that civil liability regimes, as opposed to state liability, were supported by state practice, see statements by Mr Graefrath, at 248; Mr McCaffrey at 254; Mr Pellet, at 264; Mr Barsegov, at 275, ibid.

strict.[41] The ILC did not take a clear position on strict liability because, depending on the activity, the liability could be anything from absolute to fault-based.

This model sets up a regime where the liability for the harm is – ideally – being shared among a multitude of actors. First, the source state has the overarching obligation to ensure that the victims of the harm are compensated. Second, the operator bears direct liability in connection to the damage, and therefore bears an obligation to compensate. Compensation itself however, can, according to the ILC, be shared by the insurance company, industry-wide funds and, if necessary, the state itself.[42] This layered approach to the obligation to compensate is, in a way, an exemplary situation of shared liability.

Civil liability regimes, being the source of inspiration for the ILC in drafting its Principles, are constructed in much the same manner. They too impose the obligation on the operator to compensate.[43] There are some variations on this theme. The Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal (Basel Protocol),[44] for example, posits that the person liable to compensate will be the one who at the time harm occurred actually handled the waste. The person who handled the waste is not necessarily the operator.[45] Variations such as this are designed to target the person who controlled the activity at the given time. A provision that seeks to differentiate between operators of nuclear plants or installations, and carriers of nuclear materials, can be found in the Vienna Convention on Civil Liability for Nuclear Damage (Vienna Nuclear Liability Convention).[46] Again, the point here is to target the person in charge of the activity.

Most of the regimes also provide for ceilings on liability, which necessarily involve multiple actors in the process of compensation. The main reason for establishing a limitation on liability was that the operator is under an obligation to carry insurance. In order for that obligation to be carried out efficiently, the states placed limits on the liability of the

[41] Principle 4(2) of the ILC Principles, n. 1.
[42] Principle 4(3), 4(4), 4(5) of the ILC Principles, ibid.
[43] See Article 3 of the CLC, n. 23; Article 2 of the Vienna Nuclear Liability Convention, n. 30; Article 4 of the Protocol on Civil Liability for Damage Caused by the Transboundary Effects of Industrial Accidents, n. 30; Article 3 of the Bunker Oil Pollution Damage Convention, n. 30.
[44] See n. 30.
[45] Article 4 of the Basel Protocol, ibid.
[46] Article 2(2) of the Vienna Nuclear Liability Convention, n. 30.

operator.[47] A limitation of liability meant that insurance companies would be willing and able to cover the operators since they would know the ceiling of the coverage. This move led to situations where, if the harm was insignificant, compensation could be paid out to the victims. On the other hand, if the harm was of a large scale, the victims could go without compensation given the limits on liability.[48] In order to remedy this problem, the parties to the CLC concluded the Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Oil Pollution Damage (Fund Convention).[49] The purpose of the Fund (which is filled by contributions from the recipients of the oil) is to contribute to the payment of compensation when the CLC limits are exceeded.[50] Also, the nuclear energy regime provides for additional layers of compensation. Instead of establishing a fund, the Convention on Supplementary Compensation for Nuclear Damage (Brussels Supplementary Convention) posits that the state should make public funds available.[51]

The work of the ILC and the civil liability regimes show that when one moves away from the state-to-state concept of shared liability, the primary obligation and, therefore, the burden to pay compensation is indeed shared. In fact, the civil liability regimes can be seen as reflecting the implementation of shared obligations.

The discussion so far has involved the multiplicity of actors participating in paying out compensation. The CLC also contains provisions regarding the multiplicity of actors that are engaged in the accident that causes the pollution. It provides that if more than one ship is involved in an incident, the shipowners of both ships are jointly and severally liable for damage that is not reasonably separable.[52] Similarly, the Liability Protocol to the Basel Convention provides that if two or more persons are liable, the victim can claim full compensation from any or all of the persons liable.[53] Joint and several liability as it appears in the oil pollution and the hazardous wastes liability regimes is to be applied by the competent national courts. The competent courts are defined in the civil liability conventions as the courts of the state in whose territory the damage has occurred. Therefore, the civil liability conventions provide at the international level for a secondary rule to be applied by courts at

[47] Article 5 of the Vienna Nuclear Liability Convention, ibid.; Article 5 of the CLC, n. 23; Articles 4 and 12(1) of the Basel Protocol, n. 30. See T. Mensah, 'The IOPC Funds: How it all started', in *The IOPC Funds 25 Years of Compensating Victims of Oil Pollution Incidents*, 2003, available at www.iopcfund.org.
[48] R. Churchill, 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems and Prospects' (2001) 12 YIEL 3, 35.
[49] See n. 23.
[50] Article 10 of the Fund Convention, ibid.
[51] Article 3(1)(a)(i) of the Brussels Supplementary Convention, n. 30.
[52] Article 4 of the CLC, n. 23.
[53] Article 4(6) of the Basel Protocol, n. 30.

the national level. It is true that most legal systems provide for some form of joint and several liability in certain situations.[54] However, it is by no means guaranteed that joint and several liability would be provided for in the instances where the civil liability regimes apply. It is clear that a joint and several liability approach favours the victim of the harm, since (s)he will not have to engage in the often costly and problematic endeavour of bringing claims in various jurisdictions.

Liability regimes also contain provisions for situations in which the victim contributes to the damage. Article 3(3) of the CLC stipulates that if the damage resulted wholly or partly due to the victim's intent, fault, or negligence, the shipowner may be exonerated, wholly or partially, from his/her liability. This approach mirrors the approach adopted by the ILC in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[55] Article 39 of the ARSIWA posits that contribution to the injury by willful or negligent action or omission of the victim (the injured state or any person entitled to reparation) should be taken into account. It is interesting, in this respect, that the ILC avoided the term 'contributory negligence' and borrowed its terminology from the Space Liability Convention.[56]

It follows that in many instances, the framework allows for the allocation of the loss among a multiplicity of actors. Since there are numerous actors that gain from these activities, either directly or indirectly, it is only reasonable that these actors should also share the costs of any harm: some through their participation in industry-wide funds; insurance companies by covering part of the compensation on behalf of their clients; and states, when the relevant conventions allow for it, as guarantors of last resort. An example of how this system works is set out in the Fund Convention. Under Article 4, the Fund must pay compensation to any victim of pollution that has been unable to obtain compensation because the operator and the insurance company are deemed to be financially incapable of covering the sum in question. This multilayered compensation scheme is what liability regimes, with their additional protocols, seek to achieve.

Two general problems can be identified with regard to civil liability. First, other than the oil pollution regime, the rest of the civil liability instruments are either not in force or have not been tested.

[54] J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 YJIL 225. See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment, ICJ Reports 2003, 161, Separate Opinion of Judge Simma, 324, paras. 66-74.
[55] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).
[56] J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 501.

The second problem relates to the move away from horizontal or state-to-state liability. The problem has become pressing, especially if one takes into account the ceilings of liability, the lack of ratifications, and the restrictive definitions of damage in most of the civil liability instruments.[57] It can be plausibly argued that the regime described above illustrates a move away from shared responsibility. Given the reluctance of states to accept a liability rule for themselves, and the restrictive nature or lack of ratifications of the civil liability regimes, the conclusion could be that international law in fact avoids the sharing of liability in any meaningful way.[58] What happens instead is buck-passing, from state to operator, from operator to insurance company, and so on, usually excluding the state. It is also not entirely clear where the buck stops. It seems, however, that if the operator, the insurance company, and the fund – if such a fund exists – pay out their share, the victims do not have many avenues by which to claim compensation for any damage that is not covered by the conventions.

4. Procedural aspects

Since the prevalent scenario requires a claim to be brought before national courts, there can be no extensive discussion of procedural rules, since the rules differ depending on the state under whose jurisdiction a claim is brought. Nevertheless, there are some points that merit attention. The ILC has sought to harmonise basic procedural rules. First of all, Principle 6(1) of the Principles provides that all states should grant their courts jurisdiction to adjudicate and have available prompt, adequate, and effective remedies for the victims of transboundary harm.

The ILC has also provided for a non-discrimination rule.[59] The principle of non-discrimination in international environmental law can have two sides. First, it dictates that states should take measures regarding transboundary effects of activities on their territory

[57] The definition of 'damage', both in the Principles and in most civil liability conventions, does include environmental damage. Nevertheless, it is usually restricted to the recovery of 'reasonable costs of reinstatement'. What is more, the CLC Fund, whenever it intervenes before domestic court proceedings, seeks to avoid contributing to compensation for environmental harm, see D. Ibrahim, 'Recovering damage to the environment per se following an oil spill: The shadows and lights of the civil liability and fund convention of 1992' (2005) 14(1) RECIEL 63, 66-68.

[58] The author wishes to acknowledge Catherine Redgwell's contribution towards the elaboration of this particular point.

[59] Principle 6(2) of the ILC Principles, n. 1, reads as follows: 'Victims of transboundary should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.'

similar to those that they take regarding domestic environmental effects.[60] Its second side is that states are not permitted to discriminate between claimants on the basis of nationality. The rule will effectively allow claimants to bring proceedings before the courts of the source state if that is more advantageous for them. This rule, while useful, will not resolve the problem of uneven environmental protection legislation. In other words, if a procedural non-discrimination rule is not coupled with a minimum standard of environmental protection, then the results could be disappointing.[61] A state might provide for access to justice and not discriminate among claimants. Nevertheless, its legislation may not provide for adequate and effective compensation. The foreign victims would then not have much to gain from the non-discrimination clause. This would be so even though the ILC Principles posit, in Principle 4(1), that there is a general obligation to provide for prompt, adequate, and effective compensation.[62] The problem with this Principle is that it sets a vague standard of compensation without imposing a substantive minimum level of protection. It is a challenge to establish that there is a generally equal level of protection among states so that a non-discrimination rule would not need to have a substantive component.[63] Therefore, unless the ILC Principles are transformed into a treaty, the existing situation cannot be seen as promising in terms of customary obligations of states.

Things are slightly different in the civil liability regimes. These too provide for the resolution of disputes at the domestic level. In addition, regard must be had to the rules and procedures of the compensation funds that might deal with a case (e.g. the International Oil Pollution Compensation Fund). In practice, all parties (the operator, insurance companies, funds and, in some instances, the state of origin) do contribute to compensation. The oil pollution regime (the CLC and the Fund Convention) is the only civil liability regime that has been active and can therefore provide some insight into what kind of processes are adopted. The procedure the

[60] H. Smets, 'Le principe de non-discrimination en matière de protection de l'environnement' (2000) 1 REDE 3, 4.

[61] P.-M. Dupuy, 'La contribution du principe de non-discrimination à l'élaboration du droit international de l'environnement' (1991-1992) 7 RQDI 135, 141. On the principle of non-discrimination, see also International Law Association, 'Transnational Enforcement of Environmental Law', Final Report, 2006, available at www.ila-hq.org/en/committees/index.cfm/cid/31.

[62] Principle 4(1) of the ILC Principles, n. 1, provides that '[e]ach State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory under its jurisdiction or control'.

[63] See for example, United Nations Environment Programme, 'Training Manual in International Environmental Law', at 51-64, available at www.unep.org/delc/Portals/119/publications/UNEP_Training_Manual_Int_Env_Law.pdf. This chapter confirms the lack of coherence among national laws on the level of protection in terms of liability.

Fund follows is the most interesting, especially because of the volume of incidents the Fund has handled so far.[64]

It must be recalled that the CLC provides for the liability of the shipowner in cases of oil pollution. The Fund comes into play if the damage or the victim is not covered by the CLC, or if the shipowner cannot cover the cost of compensation.[65] This framework showcases the shared aspect of the handling of compensation claims. First, the shipowner and his insurance company must compensate the victims.[66] The insurer will normally be one of the Protection and Indemnity Associations (P&I Clubs) that belong to the International Group of the P&I Clubs.[67] If that is not sufficient, the Fund will intervene and contribute to the compensation. It is important that the Fund works closely with the P&I Clubs in order to assess the admissibility of claims and the amounts of compensation necessary.[68] The process to be followed by claimants is made clear in the claims manuals and sample claims forms published by the Fund to this effect.

Another interesting aspect of the Fund's involvement is that most of these incidents have been settled out of court.[69] This shows that the Fund has the means and the ability to handle thousands of claims at a time without necessarily getting involved in litigation.

When claims do reach the courts, the issue becomes complex. The parties to these cases usually include the shipowner, the Fund, and the P&I Club involved. Often they also involve the classification society of the ship (which issues the classification certificate of the ship), and the authorities of the state in whose territorial sea or exclusive economic zone the incident occurred. In the criminal proceedings for the *Erika* incident, the list of defendants also included the management company of the ship and the agent of the ship.[70] On top of that, the French government and local authorities joined the proceedings as civil parties in order to claim compensation.[71] It is not unusual to have litigation among most actors that have been

[64] The Fund (both the 1971 and the 1992 versions) has been involved in 145 incidents as at the time of writing.
[65] Articles 4(1)(b), 4(2) Fund Convention, n. 23.
[66] On the role of the insurance companies, see M.M. Billah 'The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: the Case of the International Oil Pollution Liability Regime' (2001) 29 PELR 42.
[67] M. Jacobsson, 'The International Liability and Compensation Regime for Oil Pollution from Ships: International Solutions for a Global Problem' (2007) 32 TMLJ 1, 9.
[68] Ibid.; C.B. Anderson and C. de la Rue, 'The Role of the P&I Clubs in Marine Pollution Incidents' (2010-2011) 85 TLR 1257, 1263.
[69] Jacobsson, 'The International Liability and Compensation Regime for Oil Pollution from Ships', n. 67, at 8.
[70] International Oil Pollution Compensation Funds, 'Incidents involving the IOPC Funds 2012', at 7, available at www.iopcfunds.org.
[71] Ibid.

involved, either in the incident itself or in the handling of claims afterwards. These proceedings, however, are not dealt with by international law.

The important lesson from the way the Funds handle their claims is that they give effect to the shared dimension of the situation. A number of actors are involved in the carriage of oil by sea and all of these actors, one way or another, are involved in the payment of compensation. In conclusion, it must be noted that the structure of this regime, with tiers of liability and compensation, does in fact provide for shared liability.

5. Conclusions

Despite the lack of practice on liability, a number of conclusions can be drawn from the preceding analysis. The ILC has failed to establish a widely accepted regime that will govern international liability. There is no default customary rule that provides for the liability of states under international law. In sharp contrast to the issue of state liability, the civil liability regimes, despite the little practice they yield, do in fact provide for a model of liability that could accommodate the issues that arise in the context of shared obligations. This does not mean that the civil liability regimes are not problematic. This is not only because they have not been widely ratified, but also because they can be seen as the result of the lack of will by states to resolve the issue of liability. Civil liability regimes, while internally efficient (at least in theory), can be seen externally as representing an evasion of responsibility by all participating actors.

With the exception of the provisions on joint and several liability in the civil liability regimes, there is nothing novel or extraordinary that would better accommodate issues of shared obligations. Finally, the procedural aspects of liability are the mirror image of the primary rules. Again, it is the civil liability regimes that offer a number of procedures (both judicial and otherwise) that have accommodated, in the context of oil pollution, a number of actual claims. The fact that these procedures lie outside the realm of international law, at least as far as their implementation is concerned, does not necessarily render them less effective.