

## SHARED RESPONSIBILITY IN INTERNATIONAL LAW: A CONCEPTUAL FRAMEWORK

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## INTRODUCTION

In this Article we explore the phenomenon of shared international responsibility among multiple actors that contribute to harmful outcomes that

international law seeks to prevent.<sup>1</sup> We examine the foundations and manifestations of shared responsibility, explain why international law has had difficulty in grasping its complexity, and set forth a conceptual framework that allows us to better understand and study the phenomenon. Such a framework provides a basis for further development of principles of international law that correspond to the needs of an era characterized by joint and coordinated, rather than independent, action.

Questions of shared responsibility are critical to many pressing issues in international law. Consider the following examples. If states do not meet obligations to reduce emissions to prevent climate change, and human displacement and environmental harm occurs, the question will arise which states are responsible.<sup>2</sup> If states or international organizations, in particular the United Nations, fail to live up to the collective “responsibility to protect” (R2P) human populations from mass atrocities<sup>3</sup>—a responsibility that rests in part on obligations that are binding on a plurality of states or organizations<sup>4</sup>—the question will arise who is responsible for the failure to act.<sup>5</sup> If two or more states or international organizations conduct joint military operations in which some soldiers violate international humanitarian law, the question of how to distribute responsibility among these states, organizations, and individual perpetrators arises.<sup>6</sup> If states agree to cooperate,

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1. For more on the concept of “outcomes,” see *infra* Part I.B.

2. The question is not entirely hypothetical, as thought has been given to the possibility of claims that vulnerable states or populations may make against states that would be responsible for (part of) the problem. See, e.g., CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 23–49 (Richard Lord et al. eds., 2011). See generally Michael G. Faure & André Nollkaemper, *International Liability As an Instrument to Prevent and Compensate for Climate Change*, 43 STAN. J. INT’L L. 123 (2007).

3. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009). The United Nations first recognized the “three pillars” of the responsibility to protect (R2P) in 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–140, U.N. Doc. A/Res/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome].

4. DIANA AMNÉUS, RESPONSIBILITY TO PROTECT BY MILITARY MEANS—EMERGING NORMS ON HUMANITARIAN INTERVENTION? 502–25 (2008); Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT’L L. 341, 342–43, 342 n.5 (2010); Arne Johan Vetlesen, *Genocide: A Case for the Responsibility of the Bystander*, 37 J. PEACE RES. 519, 529 (2000).

5. This question has been considered to some extent by the International Court of Justice (ICJ). Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 379 (Feb. 26) (discussing the state’s responsibility for failure to prevent genocide, one of the mass atrocities that R2P requires states to prevent); see also James Pattison, *Assigning Humanitarian Intervention and the Responsibility to Protect*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 173 (Julia Hoffman & André Nollkaemper eds., 2012).

6. This question was raised after the invasion of Iraq by the United States and the United Kingdom in 2003. See, e.g., Christine Chinkin, *The Continuing Occupation? Issues of Joint and Several Liability and Effective Control*, in THE IRAQ WAR AND INTERNATIONAL LAW 161 (Phil Shiner & Andrew Williams eds., 2008). A similar question was raised regarding the distribution of responsibilities in the hybrid U.N. and African Union force in Sudan. See

whether or not through international institutions, to conserve fish stocks beyond their Exclusive Economic Zone but fail to realize that objective, the distribution of responsibility among the wrongdoing states will have to be determined.<sup>7</sup> If two states under the aegis of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) contribute to joint missions to control the external borders of the European Union (EU) and the rights of asylum seekers are violated, the question will arise which if any of the state or organizational actors involved are responsible and how that responsibility should be distributed among them.<sup>8</sup> As a final example, if two or more states agree to allocate tasks for hosting refugees and one of them does not live up to its obligations, the question may arise whether only that latter state, or both states, or perhaps also the U.N. High Commissioner for Refugees if it has been given a role, are responsible.<sup>9</sup>

A study of shared responsibility in international law is therefore timely. As states, international institutions, and other actors increasingly engage in cooperative action, the likelihood of harm or other outcomes proscribed by international law multiplies. Injured parties may then be faced with a plurality of wrongdoing actors.

The examples multiply rapidly once we recognize the variety of actors that can contribute to outcomes that, from the perspective of international law, are undesirable. In this Article we focus mainly on states and, to a lesser extent, international organizations.<sup>10</sup> However, in the above examples of

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generally Sarah E. Kreps, *The United Nations-African Union Mission in Darfur: Implications and Prospects for Success*, AFR. SECURITY REV., no. 4, 2007 at 65.

7. See, e.g., U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, N.Y.C., N.Y., July 24–Aug. 4, 1995, *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*, U.N. Doc. A/CONF. 164/37 (Sept. 8, 1995).

8. See Maarten den Heijer, *Europe Beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control*, in EXTRATERRITORIAL IMMIGRATION CONTROL 169, 191–92 (Bernard Ryan & Valsamis Mitsilegas eds., 2010); Efthymios Papatavridis, “Fortress Europe” and FRONTEX: *Within or Without International Law?*, 79 NORDIC J. INT’L L. 75, 107 (2010).

9. See Council Regulation 343/2003, *Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National*, 2003 O.J. (L 50/1) 1 (EU); AGNÈS G. HURWITZ, *THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES* 89–126 (2009); Marjoleine Zieck, *Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited*, 21 INT’L J. REFUGEE L. 387, 397 (2009).

10. We acknowledge that the multilayered nature of international organizations may pose additional challenges for the law of international responsibility to which the general rules of state responsibility are not *mutatis mutandis* applicable. See generally Christiane Ahlborn, *The Rules of International Organizations and the Law of International Responsibility* (Amsterdam Ctr. for Int’l Law, SHARES Research Paper No. 2011-03, 2011), available at <http://www.sharesproject.nl/wp-content/uploads/2012/04/SHARES-RP-02-final.pdf> (discussing the multilayered nature of international organizations and the additional challenges they

climate change and atrocities committed during armed conflicts, the role of nonstate actors is critical. These situations often bring into play the question of individual or other private-actor responsibility, an issue integral to a clear understanding of shared responsibility even though it may sometimes fly below the radar of international law.

The apparent increase of situations of shared responsibility raises fundamental questions for positive law and legal doctrine. The principles of international law on the basis of which responsibility among multiple actors is currently allocated are, in the words of Brownlie, “indistinct”<sup>11</sup> and do not provide clear guidance. There is still much truth to Noyes and Smith’s 1988 observation that “[t]he law of multiple state responsibility is undeveloped. The scholarly literature is surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility. Judicial or arbitral decisions addressing a state’s assertions that other states share responsibility are essentially unknown.”<sup>12</sup> While the latter statement is not entirely correct in light of recent judicial developments,<sup>13</sup> it remains true that as a result of jurisdictional limitations and underdeveloped principles of shared responsibility, the contribution of the case law is limited. In legal scholarship, we find useful contributions that may help us identify the conceptual tools and perspectives for reaching satisfactory solutions in situations where two or more states or other actors are collectively involved in an act or omission causing injury to third parties. However, a comprehensive conceptual framework within which to better understand the phenomenon of shared responsibility still requires formulation.

As the variety and frequency of cooperative endeavors between states and other actors increase, there is a need for new perspectives that allow us to understand how the international legal order could and does address shared responsibility. Such new perspectives might eventually help relevant actors to develop international principles and processes that are suited to address such situations. Improving the law applicable to shared responsibility may serve the interests of injured parties, who may otherwise experience difficulty in identifying the responsible entities and the scope of their responsibility, as well as the interests of states more generally by providing some predictability as to how their own responsibility might be engaged.

In attempting to formulate such new perspectives, we must cover a vast terrain, including the design, content, and role of primary rules that define the respective obligations of states and other actors in cases of collective

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pose for the law of international responsibility because of the fact that the general rules of state responsibility are not *mutatis mutandis* applicable).

11. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 457 (7th ed. 2008); see also Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 PEPP. L. REV. 233 (2011) (describing the lack of clarity under international law for apportioning responsibility in the context of tort law).

12. John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 YALE J. INT’L L. 225, 225 (1988).

13. See *infra* Part V.C.1.

action. We also must address the content and implementation of secondary obligations: how can principles of responsibility for wrongdoing themselves address shared responsibility? We furthermore cannot neglect international courts and tribunals, where claims of shared responsibility may eventually arise but where the procedural law, at least in some cases, is ill suited to deal with claims that transcend a bilateralist framework. We moreover must consider the wide variety of practices by which actors can be held accountable for their involvement in collective wrongdoing but which cannot be qualified in terms of formal international responsibility and which will not be treated as such by international courts. Examples include supervisory institutional arrangements set up under multilateral environmental agreements. Effectively addressing issues of shared responsibility requires that these problems be considered in relation to one another, rather than in isolation. And finally, each of these dimensions of shared responsibility raises fundamental normative questions regarding the criteria that should govern the apportionment of responsibility among multiple actors. Such criteria might include justice, equity, effectiveness, and power; for instance, it may be argued that those actors best placed to remedy a wrong effectively should incur more responsibility than others. Indeed, the current regime and its dynamics, potential, and limitations cannot be understood without considering the particular normative interests it serves.

In this Article, we identify the principles of international law that are applicable to cases of shared responsibility as well as gaps in the international legal framework and provide the building blocks for a new perspective that may be better able to grasp the legal complexities arising out of such situations. Our main argument is as follows: Current international law is largely based on the notion of independent international responsibility (mainly of states and international organizations). This notion does not always provide the conceptual or normative tools for allocating responsibility between a plurality of actors in situations where contributions to harmful outcomes cannot be attributed based on individual causation of each actor. Such tools cannot properly be developed unless we abandon the fiction that international responsibility is a unitary system in which a limited set of principles can address all questions of shared responsibility, irrespective of the nature of the actors, the interests at issue, and the nature of the conduct in question. In short, we advance a model for a more differentiated approach to international responsibility that can better address questions of shared responsibility.

Our methodology is dialectical, adopting both a holistic and pluralist approach to international responsibility. It is holistic in the sense that we suggest that we need not necessarily abide by the dichotomy between primary and secondary rules that often structures debates on international responsibility. Analyses of situations of shared responsibility must take into account both the content and nature of an obligation and the principles of responsibility that apply to its violation. However, we also adopt a pluralist approach, as we argue that in particular cases one needs to

distinguish between public and private dimensions of international responsibility and that differentiated approaches better reflect the varied nature of obligations and the diversity of objectives of international responsibility.

We first identify and define the core concepts that allow us to assess the law pertaining to shared responsibility and to conceptualize the relevant practice (Part I). We then identify the fundamental changes in the international legal order that explain the emergence of situations of shared responsibility and that need to be taken into account in framing the relevant legal principles and procedures (Part II). Subsequently, we discuss the potentials and limits of the current framework of international responsibility in dealing with situations of shared responsibility (Part III). Part IV then contextualizes the need to develop principles of shared responsibility by revisiting the foundations of the law of state responsibility and to construe them in a manner that is better adapted to the needs of addressing shared responsibility. Part V discusses the principles and processes of shared responsibility in light of these reconstructed foundations.

## I. A SEMANTIC TOOLBOX OF SHARED RESPONSIBILITY

The examples given in the Introduction illustrate that questions of shared responsibility may arise in a wide variety of scenarios and involve a number of different modalities. In literature and practice we do not find a consistent or well-established use of concepts and terms to capture that variety. Indeed, the term *shared responsibility* that we explore in this Article has hardly been used in legal literature at all. It is therefore necessary to provide a preliminary typology that transcends the diversity of possible situations and allows us to identify the possible situations of shared responsibility. In this Part we therefore propose a semantic toolbox of terms and concepts that form a common point of reference for constructive dialogue on questions of shared responsibility.

### A. *Responsibility*

We use the term *responsibility* to refer to ex post facto responsibility for contributions to injury. Our main interest is in situations where collaboration between two or more actors leads to harmful outcomes, for instance by infringing the rights of third parties, and in the related question of how to apportion responsibility among these actors.

The term “responsibility” has frequently been used to refer to obligations that ex ante structure the conduct of the relevant actors. Examples include Principle 21 of the 1972 Stockholm Declaration, which refers to the responsibility of all states to prevent transboundary environmental harm,<sup>14</sup>

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14. U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, ch. 1, princ. 21, U.N. Doc. A/CONF.48/14/Rev. 1 (June 26, 1972). The General Assembly subsequently embraced the Stockholm Declaration’s principal tenets in G.A. Res. 2994 (XXVII), U.N. Doc.

and the use of the term responsibility in the phrase “responsibility to protect.”<sup>15</sup> It also appears that the Obama administration has used the term “shared responsibility” primarily in this ex ante sense.<sup>16</sup> Ex ante and ex post shared responsibility can be closely related. When two or more actors have a shared responsibility in the former sense and do not do what is required, shared responsibility in the latter sense may follow. For example, when all riparian states to an international watercourse have a shared responsibility (in the sense of an obligation resting on each of them) to protect the ecosystem of the watercourse, and they all engage in acts that destroy the ecosystem, they may all be responsible for the consequences. However, for semantic clarity and to prevent confusion as to the focus of this Article, we will resist as much as possible using the word “responsibility” to describe ex ante obligations.

With the term responsibility we thus refer to international responsibility for wrongful acts in the meaning of the Articles on State Responsibility (ASR)<sup>17</sup> and the Articles on the Responsibility of International Organizations (ARIO), both developed by the International Law Commission (ILC).<sup>18</sup>

### B. Shared Responsibility

We define the term *shared responsibility* (as distinct from responsibility as such) by four main features. First, the concept of shared responsibility refers to the responsibility of multiple actors. These actors obviously include states and international organizations, but may also include other actors such as multinational corporations and individuals.

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A/RES/2994 (Dec. 15, 1972). For background information and a discussion of the Stockholm Declaration, see Dinah Shelton, *Stockholm Declaration (1972) and Rio Declaration (1992)*, in IX THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 602 (Rüdiger Wolfrum ed., 2012).

15. Concerning the semantics of the term “responsibility to protect” (formed by a bundle of primary obligations), see Sandra Szurek, *Responsabilité de Protéger: Nature de l’Obligation et Responsabilité Internationale*, in SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, COLLOQUE DE NANTERRE: LA RESPONSABILITÉ DE PROTÉGER 91, 100 (2008); see also Sigrun I. Skogly, *Global Responsibility for Human Rights*, 29 OXFORD J. INT’L L. 827, 836 (2009) (arguing that the notion of shared responsibility should consist of both a preventative and a reactive dimension).

16. See, e.g., Barack Obama, Remarks on United States Military and Diplomatic Strategies for Afghanistan and Pakistan (Mar. 27, 2009), available at <http://www.gpo.gov:80/fdsys/pkg/DCPD-200900196/pdf/DCPD-200900196.pdf> (“Security demands a new sense of shared responsibility.”).

17. Articles on the Responsibility of States for Intentionally Wrongful Acts, in *Report of the International Law Commission to the General Assembly on Its Fifty-Third Session*, 56 U.N. GAOR Supp. No. 10, at 1, 43, U.N. Doc. A/56/10 (2001) [hereinafter ASR], reprinted in [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). The Commentary to the ASR stipulates that “[t]he term ‘international responsibility’ covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State.” *Id.* ¶ 77, art. 1, cmt. 1.

18. Int’l Law Comm’n, *Responsibility of International Organizations*, U.N. Doc. A/CN.4/L.778 (May 30, 2011) [hereinafter ARIO].



Second, the term refers to the responsibility of multiple actors for their contribution to a single harmful outcome. Such an outcome may take a variety of forms, including material or nonmaterial damage to third parties. As we will further explain below, on this point we distance ourselves from the concept used by the ILC, which opted for a more narrow approach.<sup>19</sup>

The choice of the term *harmful outcome* as a defining element of shared responsibility finds support in the notion of outcome as a basis for responsibility in legal theory.<sup>20</sup> Different conceptualizations of shared responsibility may be considered, for instance, by defining it in terms of a contribution to a single injury.<sup>21</sup> However, this would force us to expand beyond the commonly considered notion of injury as a constitutive element of a particular wrongful act vis-à-vis particular parties. That is, in international law the concept of injury is typically used as an element of a particular wrongful act: state *A* acts wrongfully toward state *B* if it causes injury, whether legal or material, to that latter state. This usage is not easily combined with a concept of injury that captures acts by multiple actors contributing to outcomes that affect many states or the international community as a whole—that would encompass public-order dimensions of international responsibility.<sup>22</sup> As to the use of “harm” in our concept of outcomes: while it is true that responsibility can arise irrespective of physical harm caused,<sup>23</sup> we suggest a broad use of the term “harm,” encompassing all situations in which actors violate their obligations toward others. We thus opt for a definition referring to a contribution to harmful outcomes that the law seeks to prevent, irrespective of the question whether such an outcome causes injury to a particular actor. This will allow us, later in this Article, to conceptualize shared responsibility in both its private law and public law dimensions.

Third, the term shared responsibility *strictu sensu* refers to situations where the contributions of each individual cannot be attributed to them based on causation. If individual causal contributions could be determined, the allocation of responsibility could fully be based on principles of individual responsibility, rather than shared responsibility. In this sense, shared responsibility is an antidote for situations where causation does not provide

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19. See ARIIO, *supra* note 18, art. 48; ASR, *supra* note 17, ¶ 76, art. 47.

20. See, e.g., TONY HONORÉ, RESPONSIBILITY AND FAULT 27 (1999) (defining outcome responsibility in terms of responsibility for the good and bad outcomes of a person’s conduct); David Miller, *National Responsibility and Global Justice*, 11 CRITICAL REV. INT’L SOC. & POL. PHIL. 383, 384–85 (2008). *But see* Peter Cane, *Responsibility and Fault: A Relational and Functional Approach to Responsibility*, in RELATING TO RESPONSIBILITY 88, 88–110 (Peter Cane & John Gardner eds., 2001). For the concept of harm, see, for example, Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 683–88 (1968) (defining responsibility in terms of contribution to harm).

21. Brigitte Stern, *A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 93, 93 (Maurizio Ragazzi ed., 2005).

22. See, e.g., ASR, *supra* note 17, ¶ 77, art. 31, cmt. 5.

23. See *id.*; see also *id.* ¶ 77, art. 31, cmt. 6.

an adequate basis for responsibility.<sup>24</sup> It is precisely for such situations that existing international law has not always offered sufficient solutions.

The fourth defining feature of shared responsibility in this broad sense is that the responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively.<sup>25</sup> If the responsibility rested on a collectivity, it would no longer be shared, but rather would be the responsibility of the collectivity as such.<sup>26</sup> For instance, the responsibility of the EU for its Frontex policies is not a shared responsibility, while the responsibility of the EU member states that are involved in a Frontex action, possibly in combination with the responsibility of Frontex itself, is shared.

However, shared responsibility does not only consist of the aggregation of two or more individual responsibilities. In most of the examples given in the introduction to this Article, the relevant actors stood in some relationship to each other, for instance because they agreed to cooperate to pursue particular aims. Indeed, perhaps the most relevant application of the concept is to situations where responsibility is based on multiple actors contributing to each other's acts and thereby to the eventual outcome.<sup>27</sup> This notion of shared responsibility bears some similarity to what others have referred to as "complex responsibility," but that term fails to capture the element of sharing that is fundamental to our inquiry.<sup>28</sup>

To refer to situations of shared responsibility, we also use the term *joint responsibility*. We emphasize that, at this stage, the term "joint" is meant to be descriptive and should not be seen as entailing specific legal consequences in terms of substance or procedure, as would the expression "joint and several responsibility," as discussed in Part V.A.

### C. Cooperative and Cumulative Shared Responsibility

Instances of shared responsibility can be divided into two groups. Our main interest is in shared responsibility that arises out of joint or concerted action. We refer to such instances of shared responsibility as *cooperative responsibility*. This covers such examples as coalition warfare, joint border patrols, or one state aiding another in committing a wrongful act.

Occurrences of shared responsibility also can arise when there is no concerted action. For these cases, we adopt the phrase *cumulative responsibility*. In such cases, we recognize the need for the injured party or parties to be able to make claims against several entities, despite the fact that these entities acted independently from each other. Examples of such scenarios

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24. On shared responsibility as a concept applying in situations where causation alone is insufficient, see LARRY MAY, *SHARING RESPONSIBILITY* 37–38 (1996).

25. *Id.* at 112.

26. *Id.* at 106–07 (distinguishing between collective and shared responsibility).

27. *See id.* at 36–38.

28. *See* ANDREW LINKLATER, *THE PROBLEM OF HARM IN WORLD POLITICS: THEORETICAL INVESTIGATIONS* 101 (2011).

include pollution of an international watercourse caused by two or more riparian states and climate change caused by emissions from several states that contravene obligations under the Kyoto Protocol.<sup>29</sup>

The distinction between these two categories may be legally relevant, as consent to a collective action and its possible consequences will be absent in situations of cumulative responsibility. This may lead to distinct rules regarding the attribution of responsibility.<sup>30</sup>

#### D. *Shared Accountability*

Finally, we use the phrase *shared accountability* to cover situations in which a multiplicity of actors is held to account for conduct in contravention of international norms, but where this does not necessarily involve international responsibility for internationally wrongful acts in its formal meaning. The term “shared accountability” would apply, for instance, to actors that, even though they may be subject to international obligations, do not incur international responsibility under current international law. For example, rebel groups are bound by international humanitarian law, yet international law seems to lack a conception of international responsibility of such groups for internationally wrongful acts. The term “shared accountability” also may be used to cover situations where the responsibility of particular actors is raised in fora that are not empowered to make determinations of international responsibility. Thus, it would allow us to address such complementary but distinct aspects of a situation as states’ legal responsibility and criminal and civil liability of individuals and other nonstate actors involved, before both national and international tribunals. It also would allow us to include situations where quasi-judicial or political procedures might be used as the preferred process for supervising compliance by the actors involved in joint action, for instance under multilateral environmental agreements.<sup>31</sup> This is particularly relevant for international organizations because of the near impossibility of finding a judicial institution to litigate claims against them. The term is also applicable to the responsibility of international organizations under their internal rules.<sup>32</sup>

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29. See Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2(2), Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

30. For the difference between the two types of actions, see Noyes & Smith, *supra* note 12, at 228–31.

31. See Tullio Treves, *Introduction to NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS* 1, 2–3 (Tullio Treves et al. eds., 2009); Attila Tanzi & Cesare Pitea, *Lessons Learned and the Way Forward*, in *NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS*, *supra*, at 569, 573–74, 578.

32. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, *LAW & CONTEMP. PROBS.*, Summer/Autumn 2005, at 15, 43; Pierre Klein, *Panels, médiateurs et mécanismes informels de contrôle des activités des organisations internationales: entre accountability et responsabilité*, in 3 *SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW* 217, 219 (James Crawford & Sarah Nouwen eds., 2012).

In this Article we will leave the concept of shared accountability largely aside and confine ourselves to international responsibility proper.

## II. UNDERLYING DYNAMICS

The increase in situations of shared responsibility can be explained in light of the evolution that international society and the international legal order have undergone in recent decades. We identify four fundamental trends that contextualize the phenomenon of shared responsibility: interdependence, moralization, heterogeneity, and permeability. These trends influence each other in an intertwined way. This interaction should be kept in mind; their chronological presentation in the following Sections is somewhat artificial because they are often just different ways of describing the same phenomena, and, more specifically, they are each causes and consequences of each other. Together they help to explain the need for the international legal system to address shared responsibility.

### A. Interdependence

The first trend that is relevant to shared responsibility is that of interdependence underlying international society's passage from a system of coexistence to one of cooperation.<sup>33</sup> It is a truism that states have become increasingly dependent on each other and in turn have felt compelled to work collectively to protect common goods.<sup>34</sup> The underlying reasons for this trend stem from both changes in facts and changes in perception. As to the former, in certain areas we can identify factual effects across borders. For example, the international economy is more and more integrated, with once primarily domestic crises now having an immediate global impact.<sup>35</sup> In other areas, it is merely perception that has changed rather than reality. For example, over the last century an international consensus has emerged that genocide now is a universal harm requiring international intervention.<sup>36</sup> The cooperative response to situations of interdependence can be motivated by different objectives, such as efficiency in the case of multilateral trade

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33. See W. Friedmann, *General Course in Public International Law*, in 127 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 39, 93, 110 (1969); Georges Abi-Saab, *Whither the International Community?*, 9 EUR. J. INT'L L. 248, 256 (1998); Pierre-Marie Dupuy, *International Law: Torn Between Coexistence, Cooperation and Globalization: General Conclusions*, 9 EUR. J. INT'L L. 278, 282–83, 285–86 (1998).

34. See Ernst-Ulrich Petersmann, *International Economic Law, "Public Reason," and Multilevel Governance of Interdependent Public Goods*, 14 J. INT'L ECON. L. 23, 29 (2011).

35. See, e.g., Frederic S. Mishkin, *Over the Cliff: From the Subprime to the Global Financial Crisis*, J. ECON. PERSP., Winter 2011, at 49 (describing the impact of the 2007–08 financial crisis on the global economy).

36. See 2005 World Summit Outcome, *supra* note 3, ¶¶ 138–139; Hakimi, *supra* note 4, at 342–44, 342 n.5; Vetlesen, *supra* note 4, at 529.

agreements,<sup>37</sup> but also frequently by the desire for the legitimacy gained by collective endeavors. A state acting on its own is more vulnerable to criticism that it is acting in its own interests.<sup>38</sup>

Interdependence, whether perceived or real, may lead to the occurrence of situations implicating shared responsibility. First, the increase in mutual transborder effects in areas such as financial markets, the environment, or organized crime<sup>39</sup> is bound to result in an increase in situations where such effects originate in cooperative or cumulative actions by states. There are simply more opportunities for collectively caused harm.<sup>40</sup>

Second, interdependence drives cooperation, often through international institutions such as the G-20<sup>41</sup> or multilateral environmental institutions.<sup>42</sup> This informs the corresponding shift in international discourse toward “global governance,” thus creating an increase in situations where responsibility between such institutions and between the participating states must be sorted out if cooperation leads to harmful outcomes.<sup>43</sup> Indeed, the cooperative, collective context is prone to producing a diffusion of responsibility for which proper rules on shared responsibility can be an antidote.<sup>44</sup>

Third, increased interdependence (and more generally globalization) may also enhance the degree to which states and other actors feel related to

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37. See, e.g., WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2009: TRADE POLICY COMMITMENTS AND CONTINGENCY MEASURES 21 (2009), available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report09\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf).

38. See Pierre Buhler, *Military Intervention and Sources of Legitimacy*, in JUSTIFYING WAR? FROM HUMANITARIAN INTERVENTION TO COUNTERTERRORISM 167, 175–76 (Gilles Andréani & Pierre Hassner eds., 2008); Nicholas Tsagourias, *Cosmopolitan Legitimacy and UN Collective Security*, in COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY 129, 139–40 (Roland Pierik & Wouter Werner eds., 2010).

39. On financial markets, see, for example, Mishkin, *supra* note 35, at 68. On transnational environmental harm, see, for example, Michael Mason, *The Governance of Transnational Environmental Harm: Addressing New Modes of Accountability/Responsibility*, 8 GLOBAL ENVTL. POL., Aug. 2008, at 8. On transnational crime, see, for example, Felia Allum & Stan Gilmour, *Introduction* to ROUTLEDGE HANDBOOK OF TRANSNATIONAL ORGANIZED CRIME 1, 1–2 (Felia Allum & Stan Gilmour eds., 2012).

40. See LINKLATER, *supra* note 28, at 1–2; MAY, *supra* note 24, at 4.

41. See G-20, THE GROUP OF TWENTY: A HISTORY 5 (2008), available at <http://www.g20.utoronto.ca/docs/g20history.pdf>; see also G-20 Toronto Summit, Toronto, Can., June 26–27, 2010, *G-20 Toronto Summit Declaration*, pmbl., available at [http://www.g20.utoronto.ca/2010/g20\\_declaration\\_en.pdf](http://www.g20.utoronto.ca/2010/g20_declaration_en.pdf) (noting that the G-20 is “the premier forum for our international economic cooperation”).

42. Robert O. Keohane et al., *Introduction* to INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 3, 4–5, 7–8 (Peter M. Haas et al. eds., 4th ed. 2001).

43. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 437 (2006). See generally Carol Harlow, *Accountability As a Value in Global Governance and for Global Administrative Law*, in VALUES IN GLOBAL ADMINISTRATIVE LAW 173 (Gordon Anthony et al. eds., 2011).

44. LINKLATER, *supra* note 28, at 57, 225; MAY, *supra* note 24, at 38, 73.

events in other states and thus feel compelled to act.<sup>45</sup> For instance, the notion of R2P may, because of its collective nature, result in shared responsibility.<sup>46</sup>

### B. Moralization

Moving away from the realist view of international relations in which states seek the protection of their own interests, a combination of actors (including some [notably European] states, international organizations, NGOs, and scholars) have hypothesized that the international legal order is shifting in the direction of an increased “moralization.” We use the word “moralization” here in the most neutral way possible, as a description of the change in the discourse and *telos* of international law, rather than as an evaluation of the desirability of this trend.

In a nutshell, this trend, the subject of vast commentary,<sup>47</sup> entails a fundamental paradigm shift away from state sovereignty as the cornerstone of the legal order. It hypothesizes a paradigm based on rights of the individual,<sup>48</sup> on the one hand, and the values and interests of the international community.<sup>49</sup>

While this trend of moralization is far from being universally accepted,<sup>50</sup> it has had an undeniable impact on international law. It underlies the recognition of a hierarchy of norms, such that certain norms carry more importance for the international community as a whole and thus that the

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45. LINKLATER, *supra* note 28, at 151, 254.

46. *See, e.g.*, Pattison, *supra* note 5.

47. *See, e.g.*, ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANITY: TOWARDS A NEW JUS GENTIUM 177–79 (2010); Anne Peters, *Humanity As the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513; Sienho Yee, *Towards a Harmonious World: The Roles of the International Law of Co-progressiveness and Leader States*, 7 CHINESE J. INT’L L. 99, 102 (2008) (coining the term “co-progressiveness,” defined as “a society that is all encompassing (hence ‘co’), preoccupied with advancements in moral and ethical terms more than in other respects and having human flourishing as its ultimate goal (hence ‘progressiveness’)”).

48. And, by extension, “peoples.” *See* Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 553–60 (July 22, 2010) (separate opinion of Judge Trindade). In view of the centrality of the human person in this trend, other authors have referred to this trend as the “humanisation” of international law. *See, e.g.*, THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006); Peters, *supra* note 47, at 514.

49. For an overview of the historical evolution toward the taking into account of community interests in the law of state responsibility, see Georg 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*, 13 EUR. J. INT’L L. 1083 (2002). *See generally* SANTIAGO VILLALPANDO, L’ÉMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ÉTATS (2005).

50. *See, e.g.*, Jean d’Aspremont, *The Foundations of the International Legal Order*, 18 FIN. Y.B. INT’L L. 219 (2007); Onuma Yusuaki, *In Quest of Intercivilizational Human Rights: “Universal” vs. “Relative,”* 1 ASIA-PAC. J. ON HUM. RTS. & L. 53 (2000).

violation of those norms might entail different principles of responsibility.<sup>51</sup> Moralization has also affected the content and development of international norms through the operation of particular rules of interpretation<sup>52</sup> and the process of identifying the substance of international customary law, leading to a more flexible method of determining customary rules that are thought to promote a universal good.<sup>53</sup> More generally, this moralization underlies the public-order dimension of international law, which coexists with and to a limited extent replaces the traditional horizontal interstate model.<sup>54</sup>

The trend of moralization is a relevant contextual element for understanding the phenomenon of shared responsibility. Situations of shared responsibility often arise in areas that carry heavy moral undertones (such as R2P, protection of civilians during armed conflict, and so forth). Indeed, there is a direct connection in most discourse between the *moral* arguments underlying an *ex ante* “shared responsibility” to take action to achieve certain interests and the *legal* questions that surround a more narrowly (legally) defined *ex post facto* “shared responsibility” stemming from such situations.<sup>55</sup> The former justifies the extensive development of the latter so as to better reflect the moral rationales underlying shared responsibility.

A separate dimension of moralization that is relevant to the phenomenon of shared responsibility is the increased value attached to accountability as such. We have seen the emergence of a culture of accountability at the international level.<sup>56</sup> Both in practice and in legal scholarship, great weight is now attached to the intrinsic value of holding states and individuals

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51. See, e.g., Pierre Klein, *Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law*, 13 EUR. J. INT'L L. 1241 (2002); Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 EUR. J. INT'L L. 425 (1999); Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 841 (2002); Eric Wylter, *From “State Crime” to Responsibility for “Serious Breaches of Obligations Under Peremptory Norms of General International Law,”* 13 EUR. J. INT'L L. 1147 (2002).

52. See Dov Jacobs, *Positivism and International Criminal Law: The Principle of Legality As a Rule of Conflict of Theories*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 17–19 (Jean d'Aspremont & Jörg Kammerhofer eds., forthcoming 2013), available at <http://ssrn.com/abstract=2046311> (arguing that through methods of interpretation, judges at international criminal tribunals have imported moral considerations in the determination of customary international law).

53. For an example in international criminal law, see Noora J. Arajärvi, *The Lines Begin to Blur? Opinio Juris and the Moralisation of Customary International Law* (Mar. 2011), <http://www.ssrn.com/abstract=1823288>.

54. See *infra* Part IV.A.3.

55. See MAY, *supra* note 24, at 34–35.

56. See generally MARK BOVENS, *THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANIZATIONS* (1998); Harlow, *supra* note 43; Paul G. Lauren, *From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights Context*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 15 (Ramesh Thakur & Peter Malcontent eds., 2004).

accountable for their conduct or their inaction.<sup>57</sup> This development, which is part of a more general trend toward good governance and transparency,<sup>58</sup> may contribute to an increase in the number of situations where questions of shared responsibility will be raised.

### C. Heterogeneity

The multiplication of actors that participate in international society is a third trend that has a direct bearing on questions of shared responsibility.<sup>59</sup> This is most immediately obvious for international organizations. The fact that states now regularly defer to international organizations the authority to adopt rules on a wide array of topics—from cultural heritage to health and environmental law<sup>60</sup>—is likely to lead to questions of shared responsibility among multiple organizations and between organizations and member states. The layered nature of international organizations, which are legal persons but at the same time consist of sovereign states, facilitates the construction of responsibility for wrongdoing as a shared responsibility between the organization and its member states.<sup>61</sup> The 2011 ARIO indeed envisage that an organization can be responsible in connection with the wrongful acts of states, including the possibility that an organization may be responsible for adopting decisions that require states to commit acts that contravene international obligations.<sup>62</sup> Significantly, the Articles acknowledge that in such situations both the organization and the state can be responsible, resulting in a situation of shared responsibility.<sup>63</sup>

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57. For example, the Peace Palace Library has 123 books with the word accountability in the title, forty of which were published in the last three years. Similarly, out of 784 book chapters or articles listed in the Peace Palace Library with the word accountability in the title, a full third were published since 2009.

58. See, e.g., TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? (Christopher Hood & David Heald eds., 2006) (particularly Chapter 3, entitled “Transparency as a Human Right”); Padideh Ala’i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT’L ECON. L. 779, 780–81 (2008); Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245 (2006).

59. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39–55 (2nd prtg. 1995).

60. The World Trade Organization illustrates this trend by providing a formal negotiation forum for international trade, thus centralizing discussions on this issue within one institution. See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907, 914 (2004) (“[T]he procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law.”).

61. See generally CATHERINE BRÖLMANN, THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW: INTERNATIONAL ORGANISATIONS AND THE LAW OF TREATIES (2007) (describing the layered nature of international organizations).

62. ARIO, *supra* note 18, art. 17.

63. *Id.* art. 19.



Also, the increased role of private actors in international relations engenders additional questions of shared responsibility. The practice of states delegating power to private entities (the use of private military contractors, for example) raises questions as to the corresponding distribution of responsibility for damages caused.<sup>64</sup> A comparable example is international institutions' reliance on public-private partnerships.<sup>65</sup> While the orthodox position is that, as a matter of international law, only the delegating state (or organization) can be held responsible for harm resulting from the act of the private entity,<sup>66</sup> there is an increasing push to consider the role and coresponsibility of the private entity itself. Illustrative of this point are the U.N. Guiding Principles on Business and Human Rights, which envisage a distribution of responsibilities among states and businesses that operate in delicate human rights situations or in conflict areas.<sup>67</sup>

Apart from delegation by states or international institutions, some private entities exercise powers—directly or through their influence on states—that cannot be ignored in assessing shared responsibilities. This is for instance true in relation to the world economy, where corporations wield influence equal to—and sometimes greater than—some states.<sup>68</sup> The recent financial crisis in the EU—tied to the intricate relationship between national policies, European policies, and the influence of private actors (such as rating agencies)—provides a good illustration.<sup>69</sup> Even when private

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64. Nigel D. White & Sorcha MacLeod, *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, 19 EUR. J. INT'L L. 965 (2008).

65. These include, for example, partnerships dealing with Roll Back Malaria, Safe Injection Global Network, and Stop TB (all of which have secretariats in the World Health Organization) and the Global Alliance for Vaccines and Immunization, which has its secretariat at the U.N. Children's Fund. See *Public-Private Partnerships for Health*, WORLD HEALTH ORG., <http://www.who.int/trade/glossary/story077/en/index.html> (last visited Feb. 15, 2013). On questions of responsibility that may arise in this context, see Lisa Clarke, *Responsibility of International Organizations Under International Law for the Acts of Global Health Public-Private Partnerships*, 12 CHI. J. INT'L L. 55 (2011).

66. ASR, *supra* note 17, ¶ 76, arts. 2, 5.

67. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Ruggie Report]. These guiding principles, in addition to recalling the current obligations of states and businesses under positive law not to contribute to human rights violations, suggest a series of more flexible due-diligence obligations that can help anticipate any future violations. *Id.*

68. See, e.g., Nathan Fage & Louis T. Wells, Jr., *Bargaining Power of Multinationals and Host Governments*, 13 J. INT'L BUS. STUD. 9 (1982); Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 948 (2005) ("[S]ome multinationals have become powerful enough to exert significant pressure on many governments.").

69. See, e.g., Jonathon Katz et al., *Credit Rating Agencies: No Easy Regulatory Solutions*, CRISIS RESPONSE (The World Bank Group, Washington, D.C.), Oct. 2009, available at <http://rtr.worldbank.org/documents/CrisisResponse/Note8.pdf> (stating that in the United

actors generally may not be responsible as a matter of international law, as a factual matter they may contribute to harmful outcomes, raising the question of whether and how that influence should be relevant as a matter of international law.

Where private parties hold subjective rights under international law,<sup>70</sup> the number of legal relationships governed by international law, potentially leading to situations of (shared) responsibility, increases proportionally.<sup>71</sup> As a result, the strengthened role of the individual in the international legal order has contributed to the increased number of cases involving questions of shared responsibility. As individuals have gained access to international and national institutions, the frequency of instances in which those institutions are able to confront questions of shared responsibility has increased. International investment arbitration<sup>72</sup> and human rights bodies are examples of this trend.<sup>73</sup> The cases before the European Court of Human Rights (ECtHR) relating to extraterritorial migration policy and violations of international humanitarian law during joint military operations illustrate the relevance of shared responsibility.<sup>74</sup>

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States and Europe, faulty credit ratings and flawed ratings processes are widely perceived as being among the key contributors to the global financial crisis); *see also Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM (2008) 704 final (Nov. 12, 2008).

70. Anne Peters, *The Subjective International Right*, 59 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 411 (2011) (Ger.), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1825970](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825970).

71. For the longstanding debate on individuals as subjects of international law, see PETER PAVEL REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL* 13 (1960); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 241 (2001).

72. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* 24 (2d ed. 2010).

73. Anne F. Bayefsky, *Direct Petition in the UN Human Rights Treaty System*, 95 AM. SOC'Y INT'L L. PROC. 71 (2001); Pietro Sardaro, *The Right of Individual Petition to the European Court*, in *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS* 45, 45 (Paul Lemmens & Wouter Vandenhoe eds., 2005). Individual petition systems have been created under the following treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 38 I.L.M. 763; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 5, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22, Dec. 10, 1984, 1465 U.N.T.S. 85; American Convention on Human Rights: "Pact of San José, Costa Rica" art. 44, Nov. 22, 1968, 1144 U.N.T.S. 123; Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 302; Convention for the Protection of Human Rights and Fundamental Freedoms art. 25, Nov. 4, 1950, 213 U.N.T.S. 221 (as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, E.T.S. No. 155).

74. *See infra* notes 91–95 and accompanying text. *See generally* MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011).

Likewise, the possibility of individuals being bound by international obligations and subject to individual responsibility as a matter of international (rather than national) law leads to more questions about shared responsibility, and more particularly of what we call shared accountability.<sup>75</sup> Individuals can cause part of a harmful outcome to which states or other actors also contribute, and their responsibility can be understood as part of a larger picture. This relationship of responsibility by states, institutions, and private individuals for harm is exemplified in the case of the conflict in Bosnia. In apportioning responsibility, various international and national judicial and nonjudicial bodies have sought to hold such varied actors as Serbia, the Netherlands, the United Nations, and Ratko Mladic (among others) responsible for genocide and war crimes committed during the war.<sup>76</sup>

#### D. Permeability

A fourth trend, which explains the emergence of shared responsibility and will help shape its principles and procedures, is the permeability of the international and national legal orders.<sup>77</sup>

For one, the modern shift toward treating individuals (rather than just states) as subjects of international law and the corresponding increase in individual access to international institutions is a consequence of and reinforces the blurring of the separation between legal orders.

Second, at the institutional level, national courts of some states can increasingly be thought of as part of a comprehensive system of international law adjudication, in a realization of Scelle's theory of the *dédoulement fonctionnel* (or "role splitting").<sup>78</sup> In many (but certainly not all) parts of the

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75. See *supra* Part I.D.

76. See generally André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L & COMP. L.Q. 615 (2003) (discussing the interplay between the responsibility of individuals and states); Pemmaraju Sreenivasa Rao, *International Crimes and State Responsibility*, in INTERNATIONAL RESPONSIBILITY TODAY, *supra* note 21, at 63.

77. Janne Nijman & André Nollkaemper, *Introduction to NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL AND NATIONAL LAW* 1, 1–14 (Janne Nijman & André Nollkaemper eds., 2007).

78. Georges Scelle, *Règles générales du droit de la paix*, in 46 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 339, 358 (1933). See generally Antonio Cassese, *Remarks on Scelle's Theory of "Role Splitting" (dédoulement fonctionnel) in International Law*, 1 EUR. J. INT'L L. 210 (1990) (explaining that the basic idea behind Scelle's theory is that national institutions have a dual role, both as organs of the state and as organs of the international legal order, to compensate for the institutional deficiencies at the international level in legislative, adjudicative, and enforcement matters); Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law*, in V MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 836 (Rüdiger Wolfrum ed., 2012). Dupuy explains that the applications of the theory of role splitting seem to be expanding:

Such is the case every time the internal legal order helps to compensate the organic deficiencies of the international legal order by providing it with its competence. Due to a lack of a sufficiently developed international institutional

world, national courts adjudicate international law claims. Even if one does not accept that national courts can formally determine situations of international responsibility,<sup>79</sup> they are an intrinsic part of the system of international accountability. While few, if any, claims against multiple responsible actors have been adjudicated by national courts, this does allow for the possibility that claims against one state, or more likely a private actor, are litigated in a national court, while claims against other actors that contributed to a harmful outcome are litigated in another (either foreign or international) venue. The aforementioned complementary procedures at national and international levels in regard to the Srebrenica genocide illustrate the point.<sup>80</sup>

This permeability of the formal divide between international and national law to some extent resembles the permeability between general public international law and the internal legal orders of individual international organizations. Formally, these legal orders are shielded from general international law. Since international organizations determine whether and to what extent general international law applies to scenarios arising before them, general principles of international law regarding shared responsibility do not usually apply of their own force.<sup>81</sup> However, the boundaries are not watertight. For instance, according to the ARIIO, organizations can be responsible on the basis of decisions that compel state action, even though such decisions are governed by their internal legal regime.<sup>82</sup> Additionally, internal accountability mechanisms (for instance, noncompliance committees under multilateral environmental agreements) can result in findings relevant to shared responsibility.<sup>83</sup> Both scenarios can contribute to situations of and determinations regarding shared responsibility.

Third, the permeability of international and national legal orders supports the legitimacy of a comparative law methodology in assessing rules of shared responsibility. Moving beyond the simplistic assessment that interna-

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framework, international law relies on State organs to guarantee its effective application. These State organs thus 'kill two birds with one stone'. While still acting within the framework of their competence as it is defined in the national legal order, they also play a part in the application of international law.

*Id.* at 858.

79. André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 786–98 (1992) (discussing the various arguments in support of and against the proposition that a national court, finding a violation of an international obligation, can make a determination of international responsibility).

80. André Nollkaemper, *Multilevel Accountability in International Law: A Case Study of the Aftermath of Srebrenica*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY, AND SUBSIDIARITY 345, 354–66 (Yuval Shanay & Tomer Broude eds., 2008).

81. See generally Ahlborn, *supra* note 10.

82. ARIIO, *supra* note 18, art. 17.

83. On the relationship between such findings and formal responsibility, see Martti Koskeniemi, *Breach of Treaty or Non-compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123, 123 (1992).

tional law did not emerge *ex nihilo*, removed from the domestic legal traditions of the states that compose the international legal order, principles applicable in domestic legal orders can be relevant to international law. This applies, for instance, in regard to such concepts as joint and several liability. While obviously care must be taken against borrowing domestic concepts “lock, stock and barrel,”<sup>84</sup> Judge Shahabuddeen rightly observed that nothing in the differences between legal orders requires mechanical disregard of domestic (or municipal) law in an international adjudication. His observation that “to speak of a joint obligation is necessarily to speak of a municipal law concept”<sup>85</sup> has particular relevance for the topic at hand.

In combination, the four trends identified explain the increased frequency with which questions of shared responsibility arise. They also influence the rise in instances in which such questions will actually be addressed by international or national institutions. Finally, they shape the development of international legal principles and procedures that relate to shared responsibility. It is against this background that we now must examine the main principles of international law relevant to questions of shared responsibility.

### III. OVERARCHING PRINCIPLES OF INTERNATIONAL LAW RELEVANT TO SHARED RESPONSIBILITY

Questions of shared responsibility are not new to international law. The International Court of Justice (ICJ) has considered aspects of shared responsibility in several cases.<sup>86</sup> For instance, in the *Corfu Channel* case, the ICJ adjudicated a claim against Albania for its failure to warn the United Kingdom of the presence of mines; it was simultaneously alleged that (the former) Yugoslavia had contributed to the injury suffered by the United Kingdom as it had actually laid the mines in Albanian waters.<sup>87</sup> Other examples include the *Certain Phosphate Lands in Nauru* case (involving the possible shared responsibility of Australia, New Zealand, and the United Kingdom for mismanagement of Nauruan resources),<sup>88</sup> the *East Timor* case (involving the possible shared responsibility of Australia and Indonesia for violation of the right of self-determination of East Timoreans),<sup>89</sup>

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84. International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 126, 148 (June 11) (separate opinion of Judge McNair).

85. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240, 290 (June 26) (separate opinion of Judge Shahabuddeen). Shahabuddeen made these comments in the context of dealing with the question whether Australia could be sued alone even when it was part of a common organ with New Zealand and the United Kingdom, which had collectively administered the state of Nauru.

86. André Nollkaemper, *Issues of Shared Responsibility Before the International Court of Justice*, in *EVOLVING PRINCIPLES OF INTERNATIONAL LAW: STUDIES IN HONOUR OF KAREL C. WELLENS 199, 200–01* (Eva Rieter & Henri de Waele eds., 2012).

87. *Corfu Channel* (U.K. v. Alb.), Merits, Judgment, 1947 I.C.J. 4, 15–17 (Apr. 9).

88. *Certain Phosphate Lands in Nauru*, 1992 I.C.J. 240.

89. *East Timor* (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30).

and the *Legality of the Use of Force* cases (involving the shared responsibility of NATO states for military actions in the former Yugoslavia in response to events in Kosovo).<sup>90</sup>

The ECtHR has likewise addressed questions of shared responsibility.<sup>91</sup> In 2004, for example, the ECtHR had to address the issue of how de facto control by one state and de jure control by another over a territory affected the distribution of responsibility between Russia and Moldova over the autonomous region of Transnistria.<sup>92</sup> The Court found that both states were, on different grounds, responsible and thus effectively found that responsibility was shared.<sup>93</sup> In 2011, the Court again considered the responsibility of two states (Belgium and Greece) in relation to the treatment of refugees.<sup>94</sup> It found that both Greece (for mistreating an asylum seeker) and Belgium (for sending the asylum seeker in question back to Greece with the knowledge of potential mistreatment) were responsible for the mistreatment of an asylum seeker.<sup>95</sup>

Other international tribunals that have considered questions of shared responsibility include the Arbitral Tribunal in the *Eurotunnel* dispute, which considered whether France and the United Kingdom were jointly responsible for failure to prevent the entry of asylum seekers through the Channel Tunnel<sup>96</sup> and the Seabed Chamber of the International Tribunal for the Law of the Sea Authority, which affirmed the possibility of joint responsibility between states that sponsor an entity that engages in the exploration or exploitation of the deep seabed.<sup>97</sup>

In part based on this case law, the ILC has identified certain principles relevant to questions of shared responsibility. Both the ILC's ASR and ARIO contain such principles. For instance, under the principle of complicity-

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90. *Legality of Use of Force (Yugoslavia v. U.S.)*, Provisional Measures, Order, 1999 I.C.J. 916 (June 2).

91. Maarten den Heijer, *Issues of Shared Responsibility Before the European Court of Human Rights* (Amsterdam Ctr. for Int'l Law, SHARES Research Paper No. 2012-04, 2012), available at <http://www.sharesproject.nl/wp-content/uploads/2012/01/Den-Heijer-Maarten-Issues-of-Shared-Responsibility-before-the-European-Court-of-Human-Rights-ACIL-2012-041.pdf>.

92. *Ilașcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886>.

93. *Id.* ¶ 331 (Moldova), ¶¶ 392–394 (Russia).

94. *M.S.S. v. Belgium*, App. No. 30696/09 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

95. *Id.* ¶¶ 281, 323 (Greece); *id.* ¶¶ 360, 367–368, 396 (Belgium).

96. *Channel Tunnel Grp. Ltd. v. United Kingdom*, Partial Award, ¶¶ 165–169 (Perm. Ct. Arb. 2007), [http://www.pca-cpa.org/showfile.asp?fil\\_id=218](http://www.pca-cpa.org/showfile.asp?fil_id=218).

97. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, ¶ 192, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf).

ty, in instances where one state contributes to a wrongful act of another state, both states can be responsible for their wrongful conduct.<sup>98</sup>

Based on the work of the ILC and the (limited) international case law, in this Part we first identify the main features of the dominant legal framework and discuss how these could be relevant for situations of shared responsibility. Subsequently, we identify the limits of the prevailing principles and note attempts to mitigate or repair these shortcomings without, however, fundamentally addressing the underlying difficulties.<sup>99</sup>

### A. *The Principles of Independent and Exclusive Responsibility*

#### 1. The Dominant Role of the Principles of Independent and Exclusive Responsibility

The dominant approach of international law to the allocation of international responsibility is based on the notion of “individual” or “independent” responsibility of states and international organizations.<sup>100</sup> 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. That is, it is responsible for the conduct that is attributable to it and that is deemed in breach of its obligations.<sup>101</sup>

The principle of independent responsibility is firmly established in the ASR. Article 1 provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State,”<sup>102</sup> while Article 2 states that “[t]here 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.<sup>103</sup> These basic principles underlie all of the ASR’s subsequent principles.<sup>104</sup> In light of the possibility that a state could be responsible not only for its own act but also for an act by another, ILC Special Rapporteur Ago suggested opting for a broader opening article that would not specify that international responsibility would necessarily attach to the state that had committed the wrongful act in question, such as

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98. ARIO, *supra* note 18, art. 48; ASR, *supra* note 17, ¶ 76, art. 47.

99. For reasons of brevity, this Part will focus primarily on state responsibility. However, this should not be read as an exclusion of the issue of the responsibility of international organizations in relation to third states. The ARIO generally follow the same logic. Articles on the Responsibility of International Organizations, in *Report of the International Law Commission to the General Assembly on Its Sixty-Third Session*, 66 U.N. GAOR Supp. No. 10, at 1, 52, U.N. Doc. A/66/10 (2011) [hereinafter ARIO Commentary], reprinted in [2011] 2 Y.B. Int’l L. Comm’n (forthcoming).

100. To prevent confusion with “individual responsibility” as a term that refers to responsibility of individuals under international criminal law, in the remainder of this paper we use the term *independent responsibility*.

101. See ASR, *supra* note 17, ¶ 77, art. 47, cmt. 8.

102. *Id.* ¶ 76, art. 1.

103. *Id.* ¶ 76, art. 2.

104. See *id.* ¶ 76, arts. 16–18 (forming an exception).

“every international wrongful act by a State gives rise to international responsibility.”<sup>105</sup> However, the ILC was of the opinion that cases in which responsibility was attributed to a state other than the one that actually committed the internationally wrongful act were so exceptional that they should not influence the basic principle in Article 1.<sup>106</sup> It believed that following Ago’s suggestions would have detracted from the principle’s basic force,<sup>107</sup> and thus a state’s responsibility for its *own* wrongful conduct came to be the basic rule underlying the ASR.<sup>108</sup>

In the ARIIO, however, the ILC considered that this model was no longer tenable. Indeed, given that models of personal liability exist side by side with models of liability for acts of other persons in all legal systems,<sup>109</sup> and given the possibility that international organizations would contribute to the wrongful acts of member states or vice versa,<sup>110</sup> the ILC found the suggestion that the entire law of international responsibility should be based on responsibility for one’s own acts to be unpersuasive. Resembling Ago’s original suggestion, the very first article of the ARIIO therefore states that the Articles apply not only to the responsibility of an international organization for its own wrongful conduct, but also to “the international responsibility of an international organization for *an* internationally wrongful act.”<sup>111</sup> This provision thus covers both cases of responsibility arising out of the organization’s own wrongful conduct and situations in which an in-

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105. Special Rapporteur on State Responsibility, *Second Rep. on State Responsibility*, ¶¶ 29–30, Int’l Law Comm’n, U.N. Doc. A/CN.4/233 (Apr. 20, 1970) (by Roberto Ago) [hereinafter *Second Ago Report*].

106. Special Rapporteur on State Responsibility, *Third Rep. on State Responsibility*, ¶ 47, Int’l Law Comm’n, U.N. Doc. A/CN.4/246 & Add.1–3 (Mar. 5, 1971) (by Roberto Ago) [hereinafter *Third Ago Report*].

107. *Report of the International Law Commission to the General Assembly on the Work of Its Twenty-Fifth Session*, 28 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/9010/Rev.1 (1973), reprinted in [1973] 2 Y.B. Int’l L. Comm’n 161, ¶ 11, U.N. Doc. A/CN.4/SER. A/1973/Add. 1.

108. *But see* ASR, *supra* note 17, ¶ 77, art. 17, cmt. 9 (stating that the directed state can also be responsible, since the mere fact that it was directed to carry out an internationally wrongful act does not constitute a circumstance precluding wrongfulness). *But see* ASR, *supra* note 17, ¶ 76, ch. IV, for an exception to this rule.

109. EUR. CTR. OF TORT & INS. LAW, UNIFICATION OF TORT LAW: LIABILITY FOR DAMAGE CAUSED BY OTHERS (J. Spier ed., 2003); EUR. GRP. ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY, art. 6:102(1) (2005) [hereinafter PETL], available at <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf> (“A person is liable for damage caused by his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct.”); COMM’N ON EUR. CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II, art. 8:107 (Ole Lando & Hugh Beale eds., 1998) (“A party which entrusts performance of the contract to another person remains responsible for performance.”).

110. *See* ARIIO, *supra* note 18, arts. 14–17.

111. *Id.* art. 1(1) (emphasis added). Note that the internationally wrongful act is still a basis for responsibility—which may be questionable in connection to coercion and circumvention. We will come back to this below. *See infra* Part IV.



ternational organization incurs international responsibility for conduct other than its own.<sup>112</sup> Thus, such responsibility might flow from conduct that itself need not be wrongful but that triggers responsibility because it contributes to wrongful conduct of another state or organization.

The scope and contents of this extension of the basis of responsibility remains undeveloped, however. The ILC could not provide much evidence in the practice of states and international organizations to support this possibility of responsibility in connection with the act of another state or organization.<sup>113</sup> In the face of this limited practice, it did not venture to suggest the directions in which the law could or should be developed.

The principle of independent responsibility is directly related to the principle of exclusive responsibility. In practice, conduct is commonly attributed to one actor only. Dual attribution is rare. Although a few scholars have defended the possibility of dual attribution, in particular in the context of peacekeeping operations,<sup>114</sup> there are few instances of courts recognizing double attribution.<sup>115</sup> At least for some bases of attribution, the ILC has denied the possibility of dual attribution. The commentary to Article 6 of the ARIO emphasizes that in principle the attribution of wrongful conduct is made on an individual basis and that attribution is an exclusive operation.<sup>116</sup> This reflects Ago's treatment of acts of organs of a state that are put at the disposal of another state. In his Third Report, Ago recognized that "it may be that if another State is given an opportunity to use the services of such an organ, its demands may not be so exacting as to prevent the organ from

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112. ARIO Commentary, *supra* note 99, ¶ 88, art. 1, cmt. 4.

113. *Id.* ¶ 88, ch. IV.

114. Luigi Condorelli, *Le Statut des Forces de l'ONU et le Droit International Humanitaire*, 78 RIVISTA DI DIRITTO INTERNAZIONALE 881, 897 (1995); Luigi Condorelli, *Le Statut des Forces des Nations Unies et le Droit International Humanitaire*, in LES CASQUES BLEUS: POLICIERS OU COMBATTANTS? / BLUE HELMETS: POLICEMEN OR COMBATANTS? 87, 104–05 (Claude Emanuelli ed., 1997); Tom 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*, 51 HARV. INT'L L.J. 113, 192 (2010); Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUM. RTS. L. REV. 151, 167 (2008); Nicholas Tsagourias, *The Responsibility of International Organizations for Military Missions*, in INTERNATIONAL MILITARY MISSIONS AND INTERNATIONAL LAW 245, 253–54 (Marco Odello & Ryszard Piotrowicz eds., 2011) (recognizing the possibility of multiple attribution of conduct to both international organizations and troop-contributing states).

115. See, e.g., Rechtbank's-Gravenhage, 10 december 2008, LJN: BF0181/265615; ILDC 1092, ¶¶ 47–49 (NL 2008) (HN v Netherlands) (Neth.). However, the Court of Appeal departed from this holding and found that one act could both be attributed to the Netherlands and the United Nations. Hof 's-Gravenhage, 5 juli 2011, LJN: BR 5388 (Hasan Nuhanović v Netherlands) (Neth.); see also André Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*, 9 J. INT'L CRIM. JUST. 1143, 1145 (2011).

116. ARIO Commentary, *supra* note 99, ¶ 88, art. 7, cmt. 1 ("[T]he problem arises whether specific conduct of the seconded organ or agent is to be attributed to the receiving organization or to the seconding State or organization."); *id.* ¶ 88, art. 7, cmt. 9.

continuing to act simultaneously, though independently, as an organ of its own State.”<sup>117</sup> However, he appeared to exclude the possibility that an act of such an organ would be attributed to both states concerned. He noted that “[i]n such cases it will be necessary to ascertain in *each particular instance on whose behalf and by whose authority a specific act or omission has been committed*.”<sup>118</sup> He also recognized that

[i]t may be that a State at whose disposal a foreign State has placed a person belonging to its administration will appoint this person to a post in its [own] service, so that at a given moment he will formally be an organ of two different States at the same time.<sup>119</sup>

However, in such a situation, “the person in question will in fact be acting *only for one* of the two States or at all events in different conditions for each of them.”<sup>120</sup> According to that view, the defining criterion of “genuine and exclusive authority”<sup>121</sup> by definition can only be fulfilled for one state at a time.<sup>122</sup>

The question whether responsibility of one actor excludes responsibility of the other arises in particular in those cases where a state is not responsible for its own acts but can be responsible in connection with the wrongful act of another state.<sup>123</sup> It was answered in the affirmative by Ago in relation to what is now Article 6 of the ARIO.<sup>124</sup> The ILC eventually decided otherwise,<sup>125</sup> but the situation remains controversial. For instance, in the case of a state directing or controlling another state,<sup>126</sup> the question may arise whether the directing state is solely responsible or whether this responsibility is shared with the subordinate state. Dominicé answers the question by concurring with Ago: it is only the controlling state that is responsible, “for it is either that the state is responsible for the act of another carried out under its

117. *Third Ago Report, supra* note 106, ¶ 201.

118. *Id.* (emphasis added).

119. *Id.*

120. *Id.* ¶ 201, n.401 (emphasis added).

121. *Id.* ¶¶ 202, 206.

122. *See, e.g.*, Special Rapporteur on State Responsibility, *Fourth Rep. on State Responsibility*, ¶ 147, Int’l Law Comm’n, U.N. Doc. A/CN.4/264 & Add.1 (June 30, 1972) (by Roberto Ago). If, on the other hand, as we have pointed out, the persons concerned, although acting in the territory of another state, are still under the orders and exclusive authority of their own state or of the organization to which they belong, any acts or omissions by them are, and remain, acts of that state or organization. In no circumstances can they be attributed to the territorial state or involve its international responsibility. *Id.*

123. ASR, *supra* note 17, ¶ 76, arts. 16–18.

124. Special Rapporteur on State Responsibility, *Eighth Rep. on State Responsibility*, ¶ 45, Int’l Law Comm’n, U.N. Doc. A/CN.4/318 & Add.1–4 (Jan. 24, 1979) (by Roberto Ago).

125. ASR, *supra* note 17, ¶ 76, art. 19.

126. *Id.* ¶ 76, art. 18.

direction or control, or the dependent state maintains a certain degree of freedom, in which case it is responsible for its own conduct.”<sup>127</sup> He adds that in the latter case, “the dominant state may have incited the conduct, but mere incitement is not unlawful.”<sup>128</sup> Likewise, in the case of coercion, only the coercing state would be responsible<sup>129</sup> even though it may well be argued that even a coerced state has a degree of freedom that would justify considering it as bearing international responsibility.<sup>130</sup>

As noted above, the ILC ultimately did not follow Ago’s approach, and both the ASR and the ARIO<sup>131</sup> recognize that state or organizational responsibility that is incurred as a result of directing and controlling another (or, in the case of an organization, for adopting decisions that compel conduct by member states) does not exclude potential responsibility of the subordinate state or organization.<sup>132</sup> However, application of this principle remains rare, and the modalities of responsibility sharing remain uncertain. In the relatively scarce case law, international courts have consistently upheld the principle of independent responsibility. The ICJ focused on independent wrongdoing in the *Corfu Channel*<sup>133</sup> and *Certain Phosphate Lands in Nauru*<sup>134</sup> cases. Likewise, in *M.S.S. v. Belgium*, the ECtHR considered the responsibility of Belgium and Greece independently.<sup>135</sup> The Tribunal in the *Eurotunnel* case also preferred to approach international responsibility for two states in the framework of a common organ through the lens of independent responsibility.<sup>136</sup>

## 2. Factors that Explain the Dominance of the Principles of Independent and Exclusive Responsibility

Two factors in particular explain the dominance of the principles of independent and exclusive responsibility. The first explanatory factor, specifically applied to states, is the principle of sovereignty, defined in terms

127. Christian Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 281, 284–88 (James Crawford et al. eds., 2010).

128. *Id.*

129. *Id.* at 289.

130. James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility*, 40 *VAND. J. TRANSNAT’L L.* 611, 639 (2007).

131. ARIO, *supra* note 18, arts. 19, 63; ASR, *supra* note 17, ¶ 76, art. 19.

132. See ARIO, *supra* note 18, art. 48 (recognizing the possibility of joint responsibility); ASR, *supra* note 17, ¶ 76, art. 47.

133. *Corfu Channel (U.K. v. Alb.)*, Merits, Judgment, 1947 I.C.J. 4 (Apr. 9).

134. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240, ¶ 48 (June 26).

135. *M.S.S. v. Belgium*, App. No. 30696/09 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

136. *Channel Tunnel Grp. Ltd. v. United Kingdom*, Partial Award, ¶ 187 (Perm. Ct. Arb. 2007), [http://www.pca-cpa.org/showfile.asp?fil\\_id=218](http://www.pca-cpa.org/showfile.asp?fil_id=218).

of independence and liberty from other states.<sup>137</sup> Sovereignty implies that a state is not responsible for acts of another state (or more generally another legal person). Just as international criminal law rejects the concepts of collective responsibility or guilt by association, instead relying on the principle of individual autonomy to limit responsibility to individuals only for their actual conduct, states resist principles of responsibility that require them to be responsible for conduct other than their own.

This reticence to hold a state responsible for acts it did not commit is illustrated by the high threshold for attribution of acts by private persons to states. As the ICJ explained in the *Genocide* case:

[T]he “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. . . . [T]he “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.<sup>138</sup>

Just as a state would not accept responsibility for acts of private persons that it did not effectively control, we cannot expect a state to accept responsibility for acts of other states on the basis of a loose involvement with those other states.

The second main explanatory factor, which is linked to the principle of sovereignty, is the inherently consensual nature of most international dispute settlement mechanisms. For example, the ICJ may only exercise jurisdiction where both parties have accepted ICJ jurisdiction through a special agreement or *compromis*, an existing treaty dispute resolution clause, or general ex ante acceptance of ICJ jurisdiction under Article 36(2) of the ICJ Statute. Since this effectively means that the ICJ will hear a case only when all parties to a dispute have agreed to it, this limits the opportunities for the Court to exercise jurisdiction over multiple parties in shared responsibility cases.<sup>139</sup> This limits both the individual instances in which the Court will be able to make findings regarding shared responsibility as well as the possibility that the Court can contribute to the development of the principles applicable in such situations.

This consensual procedural requirement may be contrasted with international criminal tribunals established by the Security Council, which have been endowed with the power to exercise jurisdiction over individuals

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137. At this stage of the Article, we use a traditional approach to “sovereignty” as a historical paradigm and for descriptive purposes.

138. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 406 (Feb. 26).

139. It is only on a voluntary basis that states can intervene in the proceedings. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Application for Permission to Intervene, Order, 2011 I.C.J. 143 (July 4).

irrespective of their individual consent.<sup>140</sup> Moreover, these tribunals have developed concepts such as joint criminal enterprise, thus allowing individuals to be held responsible for acts with which they were, in some cases at least, only loosely associated.<sup>141</sup> They also have the power to join related cases, irrespective of the consent of the parties involved.<sup>142</sup> The fact that courts with jurisdiction over states lack the powers of courts with jurisdiction over individuals has both reduced the possibility of holding multiple actors responsible and has hampered courts' ability to develop international law to better deal with questions of shared responsibility.

It should be noted that the situation is not identical among all international courts. The ECtHR's compulsory jurisdiction has allowed it to deal with a larger number of multidefendant cases.<sup>143</sup> Nonetheless, the underlying principle may still be relevant in cases where the legal interests of a noncontracting state are at issue. In cases of extradition and expulsion, the Court has made clear that although the establishment of the responsibility of the expelling state "inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. . . . there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise."<sup>144</sup>

Notwithstanding these differences among states, on the whole the principle of independent and exclusive responsibility is firmly entrenched in the law of international responsibility and the procedural law of institutions that may apply it.

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140. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704, Annex (May 3, 1993) (annexing the Statute of the International Criminal Tribunal for the Former Yugoslavia).

141. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 133 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). For an analysis of the concept, see, for example, Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91 (2007).

142. See, e.g., Rome Statute of the International Criminal Court art. 64(5), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 45, at 40, r. 48 (Dec. 8, 2010), available at [http://icty.org/x/file/Legal%20Library/Rules/procedure\\_evidence/IT032Rev45\\_en.pdf](http://icty.org/x/file/Legal%20Library/Rules/procedure_evidence/IT032Rev45_en.pdf).

143. den Heijer, *supra* note 91, at 2.

144. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 35–36 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619>; Mamatkulov v. Turkey, 2005-I Eur. Ct. H.R. 295, ¶ 67, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68183>; see Saadi v. Italy, 49 Eur. H.R. Rep. 730, ¶ 126 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276>; Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 30 (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57674>.

*B. How Independent (and Exclusive) Responsibility  
May Be Relevant to Shared Responsibility*

While, as is explained in the next Section, the ILC framework has shortcomings in situations of shared responsibility, it is not powerless in this regard. Solving questions of shared responsibility as they increasingly arise in practice does not necessarily, or primarily, require an entire overhaul of the system of responsibility. It first and foremost requires appreciating what can be done within the corners of existing law.

Independent responsibility is obviously applicable and adequate in situations of cumulative responsibility where each of the individual acts in itself is a violation of an international obligation. Moreover, in certain cases, cooperative action may be “debundled” into individual conduct. The principle of individual responsibility may then be adequate for evaluating cooperative action. Thus, in the *East Timor* case, Judge Weeramantry, dissenting with the majority judgment, noted that “[e]ven if the responsibility of Indonesia is the prime source, from which Australia’s responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility.”<sup>145</sup> Australia’s own role in regard to the treaty was therefore sufficient for its (independent) responsibility. And with respect to a situation where two states set up a common organ (for instance, the Coalition Provisional Authority set up by the United Kingdom and the United States during the occupation of Iraq), the ILC took the position that

the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts.<sup>146</sup>

Specifically in the context of the ICJ, disaggregating collective action into individual (wrongful) conduct can have the benefit of making it less likely that proceedings will be dismissed because a potential party is not in-

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145. In 1975, Indonesia invaded East Timor, despite it being recognized by the United Nations as under Portuguese administration. In 1989, Australia recognized that East Timor was part of Indonesia and both countries signed a treaty to delineate the outline of the continental shelf between Australia and East Timor. Portugal brought the case before the ICJ claiming that Australia, by recognizing the annexation of East Timor and signing the treaty with Indonesia, had violated East Timor’s right to self-determination. The ICJ refused to address the substance of the claim, in application of the *Monetary Gold* principle. See *East Timor (Port. v Austl.)*, Judgment, 1995 I.C.J. 90, 172 (June 30) (dissenting opinion of Judge Weeramantry); see also *infra* Part V.C.3.

146. *Report of the International Law Commission to the General Assembly on the Work of Its Thirtieth Session*, 33 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int’l L. Comm’n 1, ¶ 94, art. 27, cmt. 3, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 2).

volved in the proceedings under the *Monetary Gold* principle.<sup>147</sup> Also, the practice of the ECtHR shows that the principle of independent responsibility allows the assignment of responsibility in cases where two or more states were, either independently or through cooperative action, involved in a wrongful act.<sup>148</sup>

In sum, there is some room in the current framework to determine and implement shared responsibility. However, the power of the principle of independent responsibility to address questions of responsibility that arise in cases where there is a multiplicity of wrongdoing actors is limited in several aspects, as will now be discussed.

### *C. The Limitations of Independent Responsibility*

Reducing complex relationships to individual state responsibility may, for a number of reasons, be unlikely to result in a satisfactory outcome. In combination with the procedural limitations of dispute settlement, the conceptual tools of exclusive individual responsibility of states have led courts to reduce complex cooperative schemes to binary categories without engaging in principled discussions of the shared nature of responsibility.<sup>149</sup> A 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 United Nations, and not its member states, without considering the possibility of a more nuanced solution in which responsibility would be shared.<sup>150</sup> This approach raises the question whether exclusive responsibility is conducive to a rule-based society in which responsibility fulfills the essential function of ensuring a return to legality and ensuring that the actors that acted in breach of international law will comply with their obligations.<sup>151</sup> What are the costs of accountability gaps when only one actor is found responsible, even though another actor contributed to

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147. *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. & U.S.), Preliminary Question, Judgment, 1954 I.C.J. 19, 31–32 (June 15) (formulating an exception to the principle that the absence of a state that is concurrently or jointly responsible for a wrongful act does not preclude the exercise of jurisdiction). For a recent statement of the principle, see *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, ¶ 127 (Feb. 3, 2012), <http://www.icj-cij.org/docket/files/143/16883.pdf>.

148. *E.g.*, den Heijer, *supra* note 91 (concluding that the European Court of Human Rights' independent-responsibility approach does not necessarily preclude determinations of multiple responsibility).

149. *See, e.g.*, *Legality of Use of Force* (Serb. & Montenegro v. U.K.), Provisional Measures, Order, 1999 I.C.J. 826 (June 2); *East Timor* (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30); *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27); *Corfu Channel* (U.K. v. Alb.), Merits, Judgment, 1949 I.C.J. 4 (Apr. 9).

150. *Behrami v. France*, App. Nos. 71412/01 & 78166/01, Admissibility Decision (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830>.

151. For discussion of the relationship between the rule of law and state responsibility, see IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 79 (1998).

the harmful outcome? For instance, if only the directed (and not the directing) state is held responsible, do we have a proper set of principles that allow us to establish for which part of the injury to a third party it is responsible? If so, is it fair to leave the injured party with the remaining costs? If not, is it fair to hold the directed state responsible for all injury? The larger point here is that reducing situations of shared responsibility to individual responsibility may create an accountability gap that implies costs for the injured parties and the larger system and raises questions of fairness among the responsible parties.

Two more specific drawbacks can be pointed out in relation to the prevalent system of individual responsibility. First, the normative foundation of shared responsibility remains unsettled, and often it is not at all clear on what basis one or more of the actors involved can be held responsible. This applies both to the question whether dual attribution is possible<sup>152</sup> and to the question whether a state or organization can be responsible based on conduct—itsself not inherently wrongful—that contributes to a wrongful act perpetrated by another. As to the latter, the ILC has suggested that in certain situations shared responsibility may arise from a combination of wrongful conduct attributable to one actor, on the one hand, and responsibility attributed to another actor. Responsibility thus is not necessarily based on an act attributed to an actor (state or organization) that is in breach of its obligation, but can also be directly attributed to an actor, even one that was not engaged in a wrongful act.<sup>153</sup> Examples of such situations, which almost by definition raise the possibility of shared responsibility, are the responsibility of states arising out of aid and assistance,<sup>154</sup> direction and control,<sup>155</sup> coercion,<sup>156</sup> a combination of decisions of the organization and wrongful acts of the state(s),<sup>157</sup> and a combination of attributions of responsibility to a state (for example, based on direction or control) and wrongful conduct by an organization.<sup>158</sup> However, it remains controversial whether a state's responsibility arising from the wrongful act of another is based on an independent wrong, a contribution to the conduct, or a contribution to the

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152. See *supra* notes 114–115 and accompanying text.

153. ARIO, *supra* note 18, art. 63.

154. *Id.* arts. 14, 58; see also HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* (2011); August Reinisch, *Aid or Assistance and Direction and Control Between States and International Organizations in the Commission of Internationally Wrongful Acts*, 7 INT'L ORG. L. REV. 63, 66–67 (2010).

155. ARIO, *supra* note 18, arts. 15, 59; see also Reinisch, *supra* note 154, at 73–75.

156. ARIO, *supra* note 18, arts. 16, 60; see also Fry, *supra* note 130, at 618.

157. ARIO, *supra* note 18, art. 17; see also Niels Blokker, *Abuse of the Members: Questions Concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations*, 7 INT'L ORG. L. REV. 35, 37–39 (2010).

158. ARIO, *supra* note 18, art. 62; Jean d'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT'L ORG. L. REV. 91, 98–99 (2007).



proscribed outcome.<sup>159</sup> In the situation where the normative basis for responsibility is undetermined, it is a rather empty proposition to say that the state or organization to whom responsibility is attributed is responsible on the basis of its own act; in any case it is not on the basis of its own wrongful act. The foundations of this construction of responsibility are undertheorized, and their relationship with the normal conditions of wrongfulness not at all well articulated.

The second, related point is that the principle of independent responsibility in itself provides no basis for the apportionment of responsibility and, in particular, reparation. In each situation where two or more actors are responsible the question will arise what portion of the injury caused to a third party the actors are responsible for. As noted in Part I.B above, shared responsibility *strictu sensu* is characterized by the fact that individual apportionment based on causation is not possible. If two or more states are held responsible based on their respective wrongful acts, the question then may arise how responsibility and reparation will be apportioned between them if both acts contributed to the injury. As a consequence, the absence of proper criteria for allocating responsibility may either result in too little or too much responsibility for a given individual state or other actor.

The absence of proper criteria for allocating responsibility may result in too little responsibility allocation because of the impossibility of determining with sufficient certainty which of the states involved was responsible for which wrongdoing, which may effectively prevent a finding of responsibility. An example of this phenomenon was the *Saddam Hussein* case before the ECtHR. Saddam Hussein brought a case against twenty-one states that were allegedly implicated in the invasion of Iraq and his capture.<sup>160</sup> The Court held that as long as the applicant could not identify the specific wrongful acts of the defendant states, no responsibility of any member state in connection with either the invasion of Iraq or the detention of Hussein could be found.<sup>161</sup> The decision of the ECtHR in *Behrami*, while resting on different grounds, is another example of a case where the application of principles of responsibility precluded a determination that any actor was responsible.<sup>162</sup>

Critically—and this indeed is a major ground of our critique of the existing arrangements for addressing shared responsibility—the involvement of a multiplicity of actors in cases of concerted action may lead to blame shifting

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159. See Nataša Nedeski & André Nollkaemper, *Responsibility of International Organizations in Connection with Acts of States*, 9 INT'L ORG. L. REV. (forthcoming 2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2071179](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071179).

160. *Hussein v. Albania*, App. No. 23276/04, at \*1, \*3–4 (Eur. Ct. H.R. 2006), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72789>.

161. *Id.*

162. See *Behrami v. France*, App. Nos. 71412/01 & 78166/01, Admissibility Decision, at \*17–18 (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830>.

(or “buck passing”) between the various actors involved.<sup>163</sup> In the Srebrenica cases, which sought to hold the Netherlands and the United Nations responsible in relation to the eviction of persons from the U.N. compound in Srebrenica, both defendants denied responsibility; they thus effectively placed the blame on each other.<sup>164</sup> A multiplicity of actors may lead to the following paradox of shared responsibility: “As the responsibility for any given instance of conduct is scattered among more people, the discrete responsibility of every individual diminishes proportionately.”<sup>165</sup>

On the other hand, the lack of a clear conceptual basis for the allocation of responsibility between multiple actors can result in the assignment of too much responsibility. As responsibility cannot easily be apportioned, the result can be that one state is forced to shoulder all of the blame. This was recognized by Judge Ago, who noted in his dissenting opinion in the *Nauru* case that, given the fact that the wrong to Nauru involved concerted action between Australia, New Zealand, and the United Kingdom, it would be on “an extremely questionable basis” if the ICJ were to hold that Australia was to shoulder in full the responsibility in question.<sup>166</sup>

Our general point here is that the principle of individual responsibility may not always provide a basis for the task of apportioning responsibilities among multiple wrongdoing actors. On the basis of what criteria is reparation to which injured parties are entitled to be distributed among multiple wrongdoers? In the *Nauru* case, the ICJ did not reach the question of allocation. Judge Shahabuddeen noted that the question whether “Australia alone can be sued, and, if so, whether it can be sued for the whole damage” was a matter for the merits.<sup>167</sup> But it is far from obvious how the Court could have dealt with the question.

The principle of independent responsibility in itself provides no basis for this task. Article 47 of the ASR deals in some way with this issue.<sup>168</sup>

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163. See generally Christopher Hood, *The Risk Game and the Blame Game*, 31 *Gov't & Opposition* 15 (2002).

164. See generally Nollkaemper, *supra* note 80.

165. BOVENS, *supra* note 56, at 46. For a comparable point, see MAY, *supra* note 24, at 37–38. For further discussion on the subject, see Dennis F. Thompson, *Designing Responsibility: The Problem of Many Hands in Complex Organizations*, in *THE DESIGN TURN IN APPLIED ETHICS* (Jeroen van den Hoven et al. eds., forthcoming 2012), available at [http://scholar.harvard.edu/dft/files/designing\\_responsibility\\_1-28-11.pdf](http://scholar.harvard.edu/dft/files/designing_responsibility_1-28-11.pdf).

166. Certain Phosphate Lands in Nauru (*Nauru v. Austl.*), Preliminary Objections, Judgment, 1992 I.C.J. 240, 328 (June 26) (dissenting opinion of Judge Ago).

167. *Id.* at 286 (separate opinion of Judge Shahabuddeen).

168. It provides:

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

However, although this article is a welcome acknowledgement of situations of multiple wrongdoers, it raises as many questions as it answers. The ILC declined to express a clear opinion on whether responsibility shared by multiple actors is joint or joint and several, and it provided few answers as to whether and how any responsibility between multiple responsible parties should be allocated.

As a consequence, the principle of individual responsibility and the accompanying procedures may undermine the main functions of responsibility, in particular the restoration of legality and the protection of the rights of injured parties. If states can effectively shift blame to others and avoid being held responsible, it is unlikely that they will be required to change their (wrongful) conduct. Similarly, injured parties, as a result of jurisdictional limitations, may be unable to bring successful claims against one or more of the responsible parties.<sup>169</sup>

#### D. *Tentative yet Unsatisfactory Solutions*

Two ways to deal with these difficulties would be for the relevant actors to agree on ex ante arrangements (Subsection 1) or to propose some adjustments to the secondary rules (Subsection 2). However, as will be suggested below, these approaches are unsatisfactory or at least presuppose a prior fundamental rethinking of the nature of responsibility and the interests that it serves (Subsection 3).

##### 1. Relying on Ex Ante Arrangements

First, questions of shared responsibility could be solved by relying on ex ante arrangements. After all, whether or not two states are jointly responsible for a particular act is first and foremost governed by what states have actually agreed to, whether in drafting their primary obligations or in providing for specific secondary rules of responsibility.<sup>170</sup> If states and other actors wish to prevent the above-noted problems of too much or too little responsibility, they simply should agree on the modalities of sharing ex ante.

We recognize that such ex ante arrangements (whether of a primary or secondary nature—if that distinction can be made at all<sup>171</sup>) are of key importance for addressing problems of shared responsibility. The type of responsibility assigned (whether individual or shared) is to a large extent a

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(b) is without prejudice to any right of recourse against the other responsible States.

ASR, *supra* note 17, ¶ 76, art. 47.

169. The functions of responsibility are of course open to discussion. This will be discussed in more detail in Part IV (discussing the public and private dimensions of international responsibility).

170. Channel Tunnel Grp. Ltd. v. United Kingdom, Partial Award, ¶¶ 165–167 (Perm. Ct. Arb. 2007), [http://www.pca-cpa.org/showfile.asp?fil\\_id=218](http://www.pca-cpa.org/showfile.asp?fil_id=218).

171. See *infra* Part III.D.3.

function of the nature of the underlying obligations. In the event that states accept a joint obligation,<sup>172</sup> or when obligations provide for collective action,<sup>173</sup> shared responsibility may be implied in case of breach.<sup>174</sup> If, to the contrary, obligations provide for individual action, no questions of shared responsibility need arise (though they may arise, for instance in the case of cumulative responsibility).<sup>175</sup>

The prospect of litigation in situations of shared responsibility, precisely in light of the uncertain rules of apportionment of responsibility, and in particular reparation, may induce states to clarify their respective obligations and responsibilities beforehand. While responsibility as we construe it refers essentially to a retrospective process (involving accounting for prior conduct), it may also trigger prospective negotiations and standard setting. An example of this can be seen in the agreements made by states with respect to climate change under the Kyoto Protocol, which can be considered an *ex ante* apportionment of responsibility.<sup>176</sup>

The criteria that may be used in apportioning responsibilities *ex ante* may not be dissimilar from those used to apportion responsibilities after harm is caused. Criteria such as capacity, contribution, control, and causation will be relevant both when states *ex ante* agree who is to carry what burden and when courts make *ex post facto* determinations of responsibility.<sup>177</sup>

By providing clarity on such points, the possibilities that parties will be willing to entrust adjudication of claims of shared responsibility to courts may increase.<sup>178</sup>

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172. For a discussion of this concept, see *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240, 280–93 (June 26) (separate opinion of Judge Shahabuddeen).

173. See, e.g., Kyoto Protocol, *supra* note 29, art. 2(2) (“The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.”).

174. Channel Tunnel Grp. Ltd. v. United Kingdom, Partial Award, ¶ 167 (Perm. Ct. Arb. 2007), [http://www.pca-cpa.org/showfile.asp?fil\\_id=218](http://www.pca-cpa.org/showfile.asp?fil_id=218).

175. See *supra* Part I.C.

176. See, e.g., Kyoto Protocol, *supra* note 29, art. 2(2); see also Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT’L L. 276, 276–81 (2004).

177. See *infra* Part V.B.1.a.

178. Cf. David Caron, *The Basis of Responsibility: Attribution and Other Transubstantive Rules*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109, 163 (Richard B. Lillich et al. eds., 1998) (“[I]t will [not] be simple for arbitrators to determine the percentage of contribution or [for] States [to] feel comfortable with leaving such a difficult determination to arbitrators.”).

## 2. Modifying the General Secondary Principles of Responsibility

A second possible approach to the difficulties identified would be to develop principles of shared responsibility to fill the “gaps” of the ILC Articles and to ensure that the law of responsibility better addresses questions of shared responsibility. Such principles could replace the fiction of exclusive attribution (for example, under Articles 6 or 18 of the ASR) with a more express acknowledgement of the possibility of dual attribution or a combination of attribution of conduct and attribution of responsibility.<sup>179</sup> These principles could also clarify how to divide responsibility and damages between multiple tortfeasors, including the role of causation, the legal basis for a responsible state to claim part of the damages due from a coresponsible state, and a development of how such dual responsibilities would relate to each other.<sup>180</sup>

The ILC has to some extent proceeded in this direction. The ARIO are a noteworthy improvement over the ASR in that they acknowledge that organizations can be responsible in connection with wrongful acts of states, and vice versa, and openly recognize the possibility that the responsibility of an organization does not exclude responsibility of one or more states,<sup>181</sup> and vice versa.<sup>182</sup> As we have indicated above, however, the scope of this expanded basis of responsibility remains unclear. The ILC could not provide much evidence in the practice of states and international organizations to support this rule, and consequently its foundations and consequences remain undetermined.<sup>183</sup>

Additionally, the ILC has to some extent accommodated the possibility of shared responsibility in Article 47 of the ASR, providing that if two states are responsible for the same wrongful act, each state can be held responsible.<sup>184</sup> Article 48 of the ARIO contains a comparable provision.<sup>185</sup> While these articles provide for independent responsibility, the possibility of parallel or concurrent independent wrongs makes them directly relevant to questions of shared responsibility. However, as also indicated above, Article 47 of the ASR and Article 48 of the ARIO have little normative content and, moreover, raise several questions. The core question raised is the following: What is the meaning of the requirement that the separate conduct of two or

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179. See Fry, *supra* note 130, at 638.

180. Dominicé, *supra* note 127.

181. See, e.g., ARIO, *supra* note 18, art. 19 (“This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.”).

182. *Id.* art. 63.

183. See text accompanying *supra* note 113.

184. ASR, *supra* note 17, ¶ 76, art. 47.

185. ARIO, *supra* note 18, art. 48(1) (“Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.”).

more states or international organizations results in the “same wrongful act”?

From the commentary to the ARIО, it appears that the ILC considered that two or more states or international organizations could be responsible for the same wrongful act.<sup>186</sup> Some of the examples given in the commentary to Article 48 of the ARIО indeed may concern “the same wrongful act.” This holds true in particular for direction and control,<sup>187</sup> coercion,<sup>188</sup> and circumvention of international obligations through decisions and authorizations,<sup>189</sup> though in some circumstances the situations covered by these articles may involve different wrongful acts (for example, when a decision of an organization as such is in contravention of an international obligation).

Apart from the less-than-perfect fit between principle and examples, there are fundamental problems with defining joint responsibility in terms of the “same wrongful act” rather than (as is done in some domestic systems) in terms of the “same injury”<sup>190</sup> or, as we propose in this Article, in terms of a single harmful outcome. The first problem is that it may be underinclusive, as it excludes the possibility of shared responsibility of an organization and a state committing different wrongful acts resulting in a harmful outcome. One example is the situation where two or more states commit independent wrongs resulting in a single harmful outcome.<sup>191</sup> Another example is aid and assistance (or “complicity”). There is good authority for the proposition that both the state or organization committing the wrongful act *and* a state or organization aiding it can be jointly responsible for the result produced.<sup>192</sup> This conforms with the principles of European tort law.<sup>193</sup> It appears that that the ILC intended to follow this approach, and it used the term “joint responsibility” to refer to responsibility triggered by aid or assistance to a state that commits an international wrong.<sup>194</sup> However, it is somewhat of a stretch to construe these separate wrongs as the “same wrongful act,” as the aiding state or organization is, strictly speaking, not responsible for the same wrongful act as the state that committed the principal wrong. Aid and assistance is defined precisely by the fact that it is a *separate*, not the same,

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186. ARIО Commentary, *supra* note 99, ¶ 88, art. 48, cmt. 2 (discussing situations where an international organization and a state are responsible for the same wrongful act, that is, jointly responsible).

187. ARIО, *supra* note 18, art. 15.

188. *See id.* art. 16.

189. *Id.* art. 17; *see also* Blokker, *supra* note 157, at 39; d’Aspremont, *supra* note 158, at 92.

190. On the failure to recognize the role of legal injury, see Stern, *supra* note 21, at 98–115.

191. *See supra* Part I.C.

192. IAN BROWNLIE, 1 SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 7–8 (1983); MAY, *supra* note 24, at 37–39; Orakhelashvili, *supra* note 71, at 258.

193. PETL, *supra* note 109, art. 9:101(1)(a).

194. ARIО, *supra* note 18, art. 14; *see also* Reinisch, *supra* note 154, at 65.

wrong.<sup>195</sup> It might well be argued that it is only if aid and assistance reaches a certain threshold—for example, if the aiding state makes a significant-enough contribution to the wrong—that we speak of joint responsibility.<sup>196</sup> But in that case, aid and assistance would no longer be a separate wrong. If aid and assistance as such is to be considered as an example of joint responsibility, as the ILC apparently intended, it cannot be based on the concept of joint responsibility for the same wrongful act. Rather, it must be defined differently, such as joint responsibility for the injury or harm that the wrong causes to third parties.

A better conceptual foundation for joint (and thus shared) responsibility may be found in defining joint responsibility not in terms of a contribution to a single wrongful act, but in terms of contribution to a harmful outcome (that may encompass injury to individual states), as also suggested in our conceptual approach to shared responsibility.<sup>197</sup> In some domestic legal systems, joint responsibility does not refer to some abstract responsibility for a single act but rather to the possibility that injured parties possess a claim to provide reparation for indivisible injury against each of the responsible actors.<sup>198</sup> It would seem that if joint responsibility is to be a useful concept in international law, it should likewise be defined in terms of what injured parties, or international institutions, can demand of each of the responsible states. Allowing injured parties to direct a claim at each of the responsible actors only makes sense if combined with injury-based reparation. Indeed, allowing third parties to direct a claim—which necessarily is based on the same injury—toward all responsible actors is the reason why provision is made for joint responsibility at all. However, as we will explain below, this option needs to be qualified in terms of the mixed private-public nature of international responsibility.

### 3. The Elusive Character of These Solutions

The previous comments indicate that both reliance on rules agreed to ex ante by the parties or on technical changes to a few secondary rules can go some way toward solving problems of shared responsibility. However, their scope may be limited, and they necessarily require a fundamental reflection on the grounds and nature of shared responsibility.

As to ex ante rules, while states and organizations may consider including such provisions in future arrangements, it is not realistic to expect an overhaul of the large number of existing treaty arrangements. In any case, this solution is unlikely to work for customary international law.

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195. AUST, *supra* note 154, at 289.

196. For a discussion of the need for differentiation, see *id.* at 219–20; Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 29 REVUE BELGE DE DROIT INTERNATIONAL 370, 373 (1996) (stating that the ILC Draft Articles “seemed to leap the barrier between secondary and primary rules”).

197. See *supra* Part I.B.

198. PETL, *supra* note 109, arts. 10:101, 10:104.

Even if there is an *ex ante* allocation of responsibility, it is unlikely to address all aspects of shared responsibility, in relation to issues such as fault, causation, quantum, criteria for reparations, and so on. There will always be a need for a more general and comprehensive set of secondary rules dealing with international responsibility.<sup>199</sup>

The fundamental problem that will arise when relying on new primary rules or adjustment of rules of secondary responsibility is that the question is not so much whether this can be done, but rather in which direction it should be done. We submit that formulating a set of primary rules or new secondary principles raises fundamental conceptual, methodological, and political challenges. Given the normative implications of alternatives, formulating principles on shared responsibility can hardly be conceived as merely a technical exercise. It would be intellectually unsatisfactory, akin to adding floors to a building without considering its foundations. As indicated above, the shortcomings in the system that the ILC has created in the ASR (notably Article 47) and in the ARIO (Articles 14 through 17 and 48) raise a range of questions that are not easily answered in view of ambiguities in the law of responsibility itself and that require consideration of the very foundations of the law of responsibility.

The next Part explains that the fundamental changes in the international legal order that give rise to situations in which shared responsibility may occur require a fundamental reflection on how international law can accommodate such changes.

#### IV. NEW CONCEPTUAL FOUNDATIONS FOR SHARED RESPONSIBILITY: DIFFERENTIATION WITHIN THE LAW OF INTERNATIONAL RESPONSIBILITY

Against the background of the fundamental changes identified in Part II, the following Sections will revisit three foundations of the current law of international responsibility that are of central importance to the principles and procedures relevant to shared responsibility, namely the unity of international responsibility, the dichotomy between primary and secondary norms, and the dichotomy between responsibility and liability. Based on these findings, the final Section of this Part will suggest a new, more differentiated approach to shared responsibility.

##### *A. Moving Away from the Unity of the Law of International Responsibility*

How we address questions of shared responsibility depends in part on our understanding of the nature and aims of international responsibility. Questions of joint and several liability are strongly associated with a private law paradigm and involve a transposition of notions of private law to the

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199. See Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 *EUR. J. INT'L L.* 483, 484–85 (2006).



public international sphere. Tellingly, in his separate opinion in the *Oil Platforms* case, Judge Simma examined private law principles and derived from them a general principle of law.<sup>200</sup> Alford similarly compares national legal systems to identify a possible principle of joint (and several) liability in international law.<sup>201</sup> However, it may be possible to conceive of shared responsibility in terms that are less associated with private law regimes. For instance, in the *Legality of the Use of Force* case, the proposition by the counsel for Yugoslavia that NATO states were involved in a joint enterprise<sup>202</sup> has as many connotations with the notion of joint criminal enterprise in international criminal law as it does with private law. More generally, it seems that a concept of shared responsibility that is based on domestic private law analogies and that fulfills functions that are comparable to private law can only capture part of the modern practice of international responsibility.

We argue that the concept of shared responsibility can encompass several legal phenomena, some of which are more akin to private law concepts, and some of which more resemble public law ones. The developments identified in Part II sustain and strengthen both aspects, making it more difficult for one set of principles to cater to both interests. In effect, we need to “de-bundle” the dominant notion of the law of international responsibility as a unitary phenomenon.

### 1. What Is the Unity of International Responsibility?

The common understanding is that the rules of the international responsibility of states and the responsibility of international organizations form a single, unitary system.<sup>203</sup> It is advanced by some that since the international legal system is fundamentally different from domestic legal systems, domestic notions of private or public law cannot easily be transposed to the international level. Pellet rightly warned against undue reliance on domestic analogies when he wrote that international responsibility is neither public nor private, but “simply international.”<sup>204</sup>

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200. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 354–58 (Nov. 6) (separate opinion of Judge Simma). The *Oil Platforms* case was brought by Iran against the United States and concerned the destruction of three offshore oil platforms in the Persian Gulf in 1987 and 1988. The United States brought a counterclaim arguing that Iran had also violated international law by laying mines. *Id.* ¶ 9 (opinion of the court). It was not clear, however, whether particular mines had been laid by Iran or Iraq. *Id.* This led Judge Simma to discuss the principle of joint and several liability. *Id.* at 354–58 (separate opinion of Judge Simma).

201. Alford, *supra* note 11, at 240–41.

202. *Legality of Use of Force (Serb. & Montenegro v. U.K.)*, Verbatim Record, 16 (May 12, 1999, 10 a.m.), <http://www.icj-cij.org/docket/files/111/4485.pdf>.

203. James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, in *INTERNATIONAL LAW* 442, 451 (Malcolm D. Evans ed., 2003).

204. Pellet, *supra* note 51, at 433–34; accord Alain Pellet, *The Definition of Responsibility in International Law*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 127, at 3, 3–16.

International law does not distinguish between contractual and tortious responsibility or between civil, criminal, or other forms of public law (administrative) responsibility of states or international organizations.<sup>205</sup>

What is meant by the law of responsibility as a unitary system is that the various forms of responsibility (responsibility based on fault, responsibility based on damage, ordinary wrongs, wrongs arising out of serious breaches of peremptory norms, and so forth) are subject to the same general principles of responsibility and that they form a relatively coherent whole. For instance, it is thought (though not without controversy<sup>206</sup>) that serious breaches of peremptory norms are subject to the same principles of attribution, defenses, and reparation as ordinary wrongful acts.<sup>207</sup> In the *Genocide* case, the ICJ stated that the particular characteristics of genocide do not justify the Court's departure from the criteria for attribution as they apply under general international law.<sup>208</sup>

The question is whether principles that might be applicable to shared responsibility, *de lege lata* or *de lege ferenda*, can be captured within this single unitary system. We argue that there is reason to be critical of the unitary perspective and that it has hampered the development of international law's ability to fulfill the necessary functions in regard to shared responsibility.

At the outset, therefore, it is necessary to identify the distinct private and public law dimensions of international responsibility.

## 2. The Private Law Dimensions of International Responsibility

International responsibility traditionally has served the interests of individual states (rather than the public interest).<sup>209</sup> In this respect, it shares a dominant feature with private law.<sup>210</sup> The core of the traditional law of international responsibility is the notion of legal injury of individual states

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205. See *Rainbow Warrior (N.Z. v. Fr.)*, 20 R.I.A.A. 215 (1990); Crawford & Olleson, *supra* note 203, at 451–52.

206. See Georges Abi-Saab, *Whatever Happened to Article 19*, in FRIEDEN IN FREIHEIT 821, 827–28 (Andreas Fischer-Lescano et al. eds., 2008); Pierre-Marie Dupuy, *Action publique et crime international de l'Etat: A propos de l'article 19 du projet de la Commission du Droit International sur la responsabilité des Etats*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 539, 539 (1979); Shabtai Rosenne, *State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 N.Y.U. J. INT'L L. & POL. 145, 153 (1997).

207. Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43 (Feb. 26).

208. *Id.* ¶ 379. For a brief discussion of whether attribution in cases of serious breaches of peremptory norms are necessarily governed by the same principles as ordinary wrongs, see Nollkaemper, *supra* note 76, at 626–27.

209. Albert Bleckmann, *The Subjective Right in Public International Law*, 28 GER. Y.B. INT'L L. 144, 144 (1985).

210. Richard Wright, *The Grounds and Extent of Legal Responsibility*, 41 SAN DIEGO L. REV. 1425, 1433 (2003).

caused by breaches of the law by other states.<sup>211</sup> Anzilotti wrote that responsibility derives its *raison d'être* from the violation of a right of another state.<sup>212</sup> In view of these structural similarities, Lauterpacht concluded that public international law “belongs to the *genus* private law,”<sup>213</sup> and Holland said that international law is “private law writ large.”<sup>214</sup> There indeed is a remarkable overlap between the key principles of international responsibility, as partly codified by the ILC, and the Principles of European Tort Law—an authoritative set of principles that, to a large extent, are common to domestic systems in Europe.<sup>215</sup> This private law dimension remains relevant to shared responsibility. Principles such as causation,<sup>216</sup> contribution to the injury by the injured state,<sup>217</sup> responsibility based on negligence or lack of due diligence,<sup>218</sup> defenses,<sup>219</sup> and reparation<sup>220</sup>—all recognized in the Principles of European Tort Law—are relevant for apportioning responsibility and damages among multiple wrongdoing states.<sup>221</sup>

### 3. The Public Law Dimensions of International Responsibility

However, modern international law of responsibility also has a distinct public law dimension. The law of responsibility as construed by the ILC is objective in nature, in the sense that responsibility can arise regardless of

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211. Stern, *supra* note 21, at 94–95.

212. Dionisio Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, in *OPERE DI DIONISIO ANZILOTTI* (1956), cited in *Second Ago Report*, *supra* note 105, ¶¶ 29–30.

213. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 81 (1927).

214. T.E. HOLLAND, *STUDIES IN INTERNATIONAL LAW* 152 (Oxford, Clarendon Press 1898).

215. For example, Article 6:102 of the Principles of European Tort Law, like principles of international responsibility, extends liability to “the damage caused by . . . auxiliaries.” PETL, *supra* note 109, art. 6:102.

216. Compare PETL, *supra* note 109, art. 3:101, with Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 462 (Feb. 26) (discussing the formulation of the standard of causation by the ICJ).

217. Compare PETL, *supra* note 109, arts. 3:106, 8:101, with ASR, *supra* note 17, ¶ 76, art. 39.

218. Compare PETL, *supra* note 109, art. 4:101–:102, with RICCARDO PISILLO MAZZESCHI, “DUE DILIGENCE” E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI 23 (1989) (discussing the due-diligence standards in international law).

219. Compare PETL, *supra* note 109, art. 7:101, with ASR, *supra* note 17, ¶ 76, arts. 20–27.

220. Compare PETL, *supra* note 109, art. 10:101, with ASR, *supra* note 17, ¶ 76, art. 31.

221. See also *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 354–58 (Nov. 6) (separate opinion of Judge Simma) (discussing the influence of domestic tort law on general principles).

damage to any particular state or organization.<sup>222</sup> Both the ASR and the ARIO provide for two conditions for the existence of an internationally wrongful act: the act must breach an obligation of the state, and the act must be attributable to the state.<sup>223</sup> There is no mention of damage or injury.<sup>224</sup> Responsibility thus is not contingent upon a showing that a disputed act has caused injury to a state or other person to whom an international obligation is owed, but rather is premised on the notion of an illegal act.<sup>225</sup> In this construction, the law of international responsibility does not only protect the rights of injured parties but protects the international legal order as such against acts that violate international law.<sup>226</sup>

One practical consequence of the elimination of damage as a condition of responsibility is that the obligations of cessation, continued performance, and reparation are not contingent on invocation by a responsible state. Whereas reparation traditionally was considered a right of the injured state in the traditional law of state responsibility, the ILC—following the lead of Roberto Ago—took the position that the obligation to provide reparation is not dependent on a prior invocation of responsibility.<sup>227</sup> The ILC thus introduced the protection of legality as a freestanding legal objective. Indeed, the obligation of cessation<sup>228</sup> and the obligation to provide guarantees of non-repetition<sup>229</sup> have more to do with a return to legality than with reparation.<sup>230</sup>

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222. See Pellet, *supra* note 51. Another way of illustrating this irrelevance of legal injury is its inclusion in the notion of wrongfulness itself. See Dionisio Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers*, 13 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 13 (1906) (“Le dommage se trouve compris implicitement dans le caractère antijuridique de l’acte. La violation de la règle est effectivement toujours un dérangement de l’intérêt qu’elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l’intérêt appartient.”).

223. See ARIO, *supra* note 18, art. 4; ASR, *supra* note 17, ¶ 76, art. 2.

224. See ARIO, *supra* note 18, art. 4; ASR, *supra* note 17, ¶ 77, art. 2, cmt. 9.

225. Alain Pellet, *Remarques sur une révolution inachevée, le projet d’articles de la CDI sur la responsabilité des États*, 42 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7, 101 (1996).

226. Stern, *supra* note 21, at 95 (noting that it would introduce a “review of legality through the institutions of international responsibility”).

227. According to Pellet, “Ago’s revolution” is most evident in Article 1 of the ASR, which simply states that “[e]very internationally wrongful act of a State entails the international responsibility of that State,” ASR, *supra* note 17, ¶ 76, art. 1, without any reference to injury. Alain Pellet, *The ILC’s Articles on State Responsibility*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 127, at 75, 76–77; see also Special Rapporteur on State Responsibility, *Third Rep. on State Responsibility*, ¶ 26, Int’l Law Comm’n, U.N. Doc. A/CN.4/507 (Mar. 15, 2000) (by James Crawford) [hereinafter *Third Crawford Report*] (“[T]he general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form that reparation should take in the circumstances may be contingent.”).

228. ASR, *supra* note 17, ¶ 76, art. 30(a).

229. *Id.* ¶ 76, art. 30(b).

230. *But see* Stern, *supra* note 21, at 102 (arguing that both legal consequences can be based on the notion of injury).

While a few states have voiced their concern about the fundamental nature of the shift in the law of international responsibility that was brought on by the introduction of the notion of objective responsibility,<sup>231</sup> most states appear to have few problems with the notion.<sup>232</sup>

Basing responsibility on illegality rather than injury is a significant symbolic step toward a more public law-oriented law of responsibility. This step is further buttressed by the above-mentioned developments of interdependence<sup>233</sup> and moralization.<sup>234</sup> This conceptual move may have important benefits as it could redress a fundamental weakness of the traditional law of international responsibility: the fact that the absence of invocation (for political or other reasons) rendered the law of responsibility nonoperational in regard to acts that upset the international legal order.

Construing responsibility as not based on injury to individual states also allows us to better consider questions of shared responsibility as these arise in the context of multilateral agreements that protect the collective interests of the parties. Several aspects of joint liability as it has developed in a domestic law context cannot be easily transplanted into such a public law context. While, for instance, joint responsibility in regard to transboundary environmental harm may function in a way that resembles its domestic tort law origins (for instance when two upstream riparian states cause damage to a downstream state), joint responsibility functions in a different way in settings that resemble public or administrative law: for instance, in the context of noncompliant institutions under multilateral environmental agreements. While these institutions do not make formal determinations of state responsibility,<sup>235</sup> they make findings on whether states meet their obligations and, if not, what consequences result.

However, the rejection of injury as a necessary constitutive element of (shared) responsibility does not mean that we must discard the concept of injury altogether. Indeed, it remains a critical element of those cases where multiple actors interfere with the rights of third parties.

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231. France, in its comments on the ILC draft articles, commented that draft Article 1 of the Articles on State Responsibility was not acceptable because it attempts to set up an international public order and to defend objective legality rather than subjective rights of states. Int'l Law Comm'n, Comments and Observations Received from Governments, at 31, U.N. Doc. A/CN.4/488 (Mar. 25, 1998) [hereinafter Comments and Observations]; see also Stern, *supra* note 21, at 99.

232. Comments and Observations, *supra* note 231, at 31.

233. See *supra* Part II.A.

234. See *supra* Part II.B.

235. Antonio Cardesa-Salzmann, *Constitutionalising Secondary Rules in Global Environmental Regimes: Non-compliance Procedures and the Enforcement of Multilateral Environmental Agreements*, 24 J. ENVTL. L. 103 (2012) (discussing the informal enforcement of multilateral environmental agreements by noncompliance institutions); Martti Koskeniemi, *Breach of Treaty or Non-compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L., 123, 123–28 (1992) (discussing the “open ended” informal enforcement of the Montreal Protocol).

#### 4. Downsides of Maintaining Unity

It appears from the discussion above that the law of international responsibility encompasses quite distinct concepts and principles, all serving different functions. It may be said that these concepts and principles have coexisted without major difficulty, and that the unitary approach to the law of responsibility can simultaneously serve a multitude of functions. However, we argue that precisely in relation to shared responsibility, the unitary nature of international responsibility shows its limitations and helps to explain why the system is devoid of the necessary principles, procedures, and mechanisms that allow it to address shared responsibility.

Retaining the unitary approach has a number of negative consequences for the role that the law of international responsibility can play in addressing questions of shared responsibility. For one, the application of the current rules in this unitary context creates a certain substantial and institutional ambiguity. Moreover, unity can only be maintained to the detriment of the refinement of certain rules that apply to both the private and public dimensions of international responsibility.

##### a. Substantial and Institutional Ambiguity

It is not always easy to reconcile the private and public law aspects of rules on state responsibility. For example, while causation may be less relevant in the public law dimension of international responsibility, it will be key for its private law dimension. Likewise, while the notion of injury to individual states seems pivotal in a private law approach to international responsibility,<sup>236</sup> it is much less central and arguably even superfluous in a public law perspective.

While on paper all forms of responsibility may be subjected to similar conditions and conceptual strictures, the resolution of ambiguity is only spurious. For instance, responsibility, abstracted from any particular injured party who may seek relief, becomes a rather esoteric notion. It is not easy to see how a court or other institution could consider a case of responsibility, determine injury, and fashion appropriate relief if there are no injured parties.<sup>237</sup>

Clinging to unity also creates tensions with respect to the institutional role of international courts. The emphasis that the ECtHR now places on guarantees of nonrepetition, as well as its resort to “pilot-judgments,” may signal its increasing constitutional role in the protection of legality, but also may make the ECtHR less accessible for compensation claims—and thus

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236. See Stern, *supra* note 21, at 94–95.

237. It has been written that these public forms of international responsibility are platonic. NGUYEN QUOC DINH ET AL., *DROIT INTERNATIONAL PUBLIC* 765 (6th ed. 1999).

conflict with an approach based on individual injury.<sup>238</sup> These effects are primarily a consequence of organizational problems of the ECtHR, but they also are a necessary consequence of the use of competing public and private law conceptions of the role of the Court.

The example of the International Criminal Court is also telling. Indeed, although not directly related to state responsibility, it illustrates the tensions that arise when both public and private interests are expected to be promoted within a single institution. By adding a civil reparations dimension to the Rome Statute,<sup>239</sup> and more generally providing for the participation of victims in the criminal process,<sup>240</sup> the drafters have burdened this Court with finding a balance between vastly competing interests, most notably the rights of the victims and the rights of the defense.

### b. Unity at the Cost of Refinement

Maintaining unity may come at the cost of refinement, detail, and progress in those areas where there is no common ground. Both the principles of responsibility applying to reparation for injury and the principles serving a more public law function remain relatively primitive as a result of the attempt to keep them together. It may be true that they do not stand in the way of finding more refined solutions in particular cases, but it also is true that they do not help, in effect leaving everything to the judge if a shared-responsibility dispute ends up in court.

As to principles governing reparation, a number of issues related to their application in cases of multiple culpable parties remain underdeveloped. Examples include questions of extinctive prescription,<sup>241</sup> joint and several liability,<sup>242</sup> and causation.<sup>243</sup> Perhaps such lacunae often go unnoticed because of the fact that few interstate claims actually lead to monetary

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238. See Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness As a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 147–57 (2008).

239. Rome Statute, *supra* note 142, art. 75; see also WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY TO THE ROME STATUTE* 878–83 (2010) (discussing Article 75); Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT'L L. 667 (2002) (discussing Article 75).

240. Rome Statute, *supra* note 142, art. 68(3); see also Claude Jorda & Jerome de Hemptinne, *The Status and Role of the Victim*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1412 (Antonio Cassese et al. eds., 2002); Carsten Stahn et al., *Participation of Victims in Pre-trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219, 219–20 (2006).

241. See KAJ HOBÉR, *EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION* 16 (2001).

242. See Noyes & Smith, *supra* note 12, at 232.

243. See TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* 3 (2006); François Rigaux, *International Responsibility and the Principle of Causality*, in *INTERNATIONAL RESPONSIBILITY TODAY*, *supra* note 21, at 81.

damages,<sup>244</sup> but the increasing judicialization of the law of international responsibility<sup>245</sup> may make the need for a developed system of “private wrongs” for the handling of international claims more important. The absence of developed principles for handling civil claims will, for instance, be felt in the virtual absence of private law principles that the International Criminal Court can apply in handling claims by a victim. The Rome Statute does not provide any rules on principles of compensation of victims, and there is no clear body of principles that the Court can draw on.<sup>246</sup> Also, the ECtHR has been compelled to develop its own *lex specialis* on questions of compensation.<sup>247</sup>

Additionally, the public law dimensions of the law of international responsibility remain relatively undeveloped and have been dealt with in an unprincipled and ad hoc manner, mostly outside the law of international responsibility. Given the fact that the unitary nature of the law of responsibility leaves little room for detailing such principles, as they might become inconsistent with other principles, states and organizations have opted to develop public law–type principles (now often discussed in terms of global administrative law<sup>248</sup>) outside the law of responsibility.

The preference of relevant actors for addressing public-order aspects arising out of nonperformance of international obligations outside the law of international responsibility can be explained by obvious political reasons. One explanation for the demise of the concept of state crimes is the fact that states preferred to leave the consequences of serious violations of fundamental international norms to political organs, notably the U.N. Security Council.<sup>249</sup> More generally, states and international organizations do not treat public-order questions in terms of responsibility. They do not consider noncompliance mechanisms under international environmental treaties as a

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244. It is noteworthy, however, that in practice compensation regularly takes precedence over other forms of reparation, in particular restitution. For a discussion of the rather theoretical primacy given to restitution, see Christine Gray, *The Different Forms of Reparation: Restitution*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 127, at 589.

245. See *infra* Part V.C.1.

246. See Gioia Greco, *Victims' Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis*, 7 *INT'L CRIM. L. REV.* 531, 534 (2007).

247. Matti Pellonpää, *Individual Reparation Claims Under the European Convention on Human Rights*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS* 109, 110 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

248. See Kingsbury et al., *supra* note 32, at 54; see also Benedict Kingsbury & Richard B. Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, in *INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN A CHANGING WORLD: UNITED NATIONS ADMINISTRATIVE TRIBUNAL CONFERENCE 1*, 17 (Spyridon Flogaitis ed., 2008).

249. See, e.g., Comments and Observations, *supra* note 231, at 53.



matter of international responsibility.<sup>250</sup> Indeed, noncompliance mechanisms are precisely a response to the limits of the conceptual structures and limitations of the classic doctrine of state responsibility.<sup>251</sup> Such procedures are not primarily concerned with providing redress and reparation for victims but are instruments to secure control of public power, to limit abuses of power, and to further the rule of law. These noncompliance mechanisms more resemble a public law concept of *ultra vires* acts and, in many respects, may be more akin to constitutional or administrative law principles.<sup>252</sup>

This approach to address acts that are not in conformity with international law outside the law of responsibility may be an area of potential growth for shared responsibility, in that it may create a layer of legal processes short of international responsibility.

However, while there has been some development of such public mechanisms through the notion of global administrative law, the nature and content of the accountability principles and their relationship with the law of responsibility<sup>253</sup> remains ill developed, in particular where it concerns principles relevant to situations of shared responsibility.<sup>254</sup>

We do recognize that the principles of reparation as they are laid out in the ASR and the ARIO allow for a wide variety of legal consequences that may be tailored to particular circumstances and that take into account the nature of the obligation, the nature of the breach, and the public nature of the interests at stake. Indeed, it may be argued that the law as formulated by the ILC, while not perfect, offers sufficient flexibility to address questions of shared responsibility.

However, two comments are in order. First, it is precisely in the further articulation and development of principles relevant to shared responsibility that a unitary model is less plausible, as such principles must cater to different types of interests. In this sense, unity may only be tenable at a high level of abstraction. Second, in some respects, the system of international state responsibility contains tensions that might impede this normative

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250. See Jutta Brunnée, *Compliance Control*, in *MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL* 376, 383 (Geir Ulfstein et al. eds., 2007) (discussing how international environmental treaties are not viewed by states and international organizations as mechanisms to “lay blame for violations”).

251. See Jutta Brunnée, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 *NETH. Y.B. INT’L L.* 21, 24 (2005).

252. See Kingsbury et al., *supra* note 32, at 27–28.

253. We do recognize that some noncompliance procedures, for instance under the Aarhus Convention, do frequently refer to principles of responsibility. See *CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2008)*, at 57–65 (Andriy Andrushevych et al. eds., 2008).

254. Ulf Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology—The Role of Language for an Understanding of the International Legal System*, 78 *NORDIC J. INT’L L.* 53, 72 (2009).

development, mostly related to the role of the injured state,<sup>255</sup> which thus reduces the potential flexibility of the modes of reparation.<sup>256</sup>

In sum, both in its private and public law dimensions, the law of responsibility is in need of further development, but it is unlikely that this can be achieved within a unitary set of principles. Different problems call for different solutions.

### B. *Reconsidering the Distinction Between Primary and Secondary Norms*

We argue that, in examining any particular instance where responsibility needs to be determined in relation to multiple actors that have contributed to a harmful outcome, it will often be necessary to assess primary and secondary rules in their mutual connection. After highlighting the difficult application of the dichotomy reflected in the ILC Articles, this Section will illustrate the shaky conceptual foundations and confusion created by it before suggesting how to depart from it.

#### 1. The Use of the Dichotomy by the ILC

The rules relating to international responsibility are considered to be secondary (as opposed to the primary) rules of international law, which provide for the content of the obligations of states and international organizations. This distinction is fundamental to the work of the ILC, illustrated by the fact that it appears at the very beginning of the commentary to the ASR:

The emphasis is on the secondary rules of State Responsibility: that is to say the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The Articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of primary rules, whose codification would involve restating most of the substantive customary and conventional international law.<sup>257</sup>

Despite this clear description of the distinction between primary and secondary rules, a reading of the ASR and the ARIO highlights the difficulty in distinguishing between the two. Indeed, it seems difficult to affirm that the Articles deal only with secondary norms. For example, according to Article 16,

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255. ASR, *supra* note 17, ¶ 76, art. 42.

256. Article 48 of the ASR provides a theoretical remedy for this shortcoming, but its full conceptual and practical aspects are yet to be explored. *See id.* ¶ 76, art. 48; *see also* Pierre-Marie Dupuy, *A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUR. J. INT'L L. 1053, 1053 (2002); Andrea Gattini, *A Return Ticket to 'Communitarisme', Please*, 13 EUR. J. INT'L L. 1181, 1181 (2002) (describing the difficulties faced in applying Article 48).

257. ASR, *supra* note 17, ¶ 77, cmt. 1.

aid or assistance in the commission of an internationally wrongful act is clearly conceived of as giving rise to a distinct obligation from the underlying substantive obligation breached by the wrongful act. The commentary to this article explicitly states that the complicit state is not held responsible for the international wrongful act of the main perpetrator but for the act of aiding and abetting itself.<sup>258</sup> In this sense, Article 16 is a primary rule rather than a secondary one.<sup>259</sup>

More generally, it is difficult to categorize the subject matter of Part II of the Articles, relating to the content of a state's international responsibility. Whereas it is true that these relate to consequences of wrongful acts, and therefore can be considered secondary norms, they also provide for obligations (cessation and nonrepetition<sup>260</sup> and reparation<sup>261</sup>) that can be breached and as such be subjected to secondary norms, rendering them primary norms to a certain extent.<sup>262</sup>

The inherent duality of Part II demonstrates that if the primary-secondary dichotomy had been strictly followed as a conceptual matter (rather than pragmatically, as discussed below), Part II could never have existed at all. Instead, the existence of obligations to repair, or at the very least the scope and extent of those obligations, would have been left to the content of each individual primary obligation in the same way that the requirements for fault or damage are left to primary obligations.

To be clear, this would certainly be impractical and is not the solution we advocate. However, it does illustrate the difficulty of identifying what actually constitutes a primary or a secondary rule beyond the pragmatic considerations of efficiency. Following this same logic, one could even argue that the rules of attribution could very well have been considered to be primary obligations in the same way as fault or damage. The same holds true of circumstances precluding wrongfulness, to the extent that they affect the initial violation itself.<sup>263</sup>

## 2. The Conceptual Limits and Confusion of the Dichotomy

The above examples highlight the difficulty in establishing what aspects of responsibility should be left entirely to primary rules (fault, damage) and what should not (attribution, reparation). The ILC seems to refer to a Hartian model, whereby the primary rules are the strict rules of conduct and all

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258. *Id.* ¶ 77, art. 16, cmt. 10.

259. See Graefrath, *supra* note 196, at 372 (noting the distinct impression that certain articles are "primary").

260. ASR, *supra* note 17, ¶ 76, art. 30.

261. *Id.* ¶ 76, art. 31.

262. *Third Crawford Report*, *supra* note 227, ¶ 7 (noting the "internal application" and the "reflexive nature" of the draft Articles on State Responsibility).

263. Eric David, *Primary and Secondary Rules*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 127, at 27, 29.

the rules of responsibility should be considered as secondary rules of adjudication.<sup>264</sup>

However, it appears that the dichotomy between primary and secondary rules was adopted for essentially pragmatic reasons rather than conceptual ones. This is confirmed by the drafting process and discussions held within the ILC.<sup>265</sup> The dichotomy allowed the ILC to circumscribe its work, which had reached an impasse—most notably on the question of injuries to aliens and their property—by excluding from its purview the question of the sources and contents of the obligations and focusing only on the determination of the breach of an obligation and the consequences of such a breach.<sup>266</sup> Crawford confirms the fundamentally pragmatic approach adopted and the rejection of any conceptual objective: “the distinction between primary obligations and secondary rules of responsibility is to some extent a functional one, related to the development of international law rather than to any logical necessity.”<sup>267</sup> He adds that since the ILC was not engaged in posterior analytics, “this does not seem to be much of a criticism.”<sup>268</sup> The positive consequence of such an approach by the ILC must be recognized because it enabled the ILC to move forward and ultimately conclude its work on the ASR (and later on the ARIO).

However, the conceptual relevance of this dichotomy can be questioned. It appears that the dichotomy was not meant to be conceptual at all, apart from its functional character, but rather masked an entirely different criterion for inclusion in the ILC Articles: that of generality. “What defines the scope of the articles is not their ‘secondary’ status but their generality: the articles represent those areas where the ILC could identify and reach consensus on general propositions that can be applied more or less comprehensively across the entire range of international law.”<sup>269</sup> Crawford noted, “[T]o some extent the classification of a rule of responsibility as secondary or not is linked to the issue of its generality. The articles are aimed at specifying certain *general* rules concerning the existence or consequences of the breach of an international obligation.”<sup>270</sup>

As previously stated, the ILC’s pragmatism is certainly laudable as allowing the ILC to finish its work on the Articles. It does however raise a question: Why “burden” the theoretical debate on responsibility with the

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264. See Jean d’Aspremont, *Hart et le positivisme postmoderne en droit international*, 113 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 635, 636–37 (2009).

265. See David, *supra* note 263, at 27–28.

266. See *id.* at 28–29.

267. James Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 *AM. J. INT’L L.* 874, 879 (2002).

268. *Id.* at 879.

269. Daniel Bodansky & John R. Crook, *Introduction and Overview*, 96 *AM. J. INT’L L.* 773, 780–81 (2002).

270. Crawford, *supra* note 267, at 879.

primary-secondary dichotomy? Indeed, it creates a certain amount of unnecessary confusion.

For one, such an approach creates an illusion of a chronological application of the two types of rules,<sup>271</sup> the primary rules being the main source of obligations and the secondary rules a subsidiary set of principles and source of obligations. But the process of establishing the responsibility of states and international organizations is both more complex and more holistic. The operation of attribution implies some consideration of the content of the obligation,<sup>272</sup> just as the drafting of the primary obligation may be influenced by a consideration of the reparation that may apply in case of breach and, moreover, will affect the requirements of reparation.<sup>273</sup> There is an interaction between the two sets of rules that makes the primary-secondary model confusing, if only semantically.

Second, if we base the distinction between primary and secondary rules on the generality of the latter category, the exact nature of the notion of *lex specialis* becomes somewhat confusing. Indeed, in the context of state responsibility, the rule on *lex specialis* theoretically provides that where issues covered by the ASR are governed by “special rules of international law,” the ASR does not apply.<sup>274</sup> However, once established that the ILC labeled what could have been considered principles of responsibility as primary rules, we are left with the question what the distinctive nature of *lex specialis* is. For example, because the requirement of fault is excluded from the ASR, agreements between states on this issue constitute “primary rules,” whereas because the ASR considers attribution, agreements on this issue are *lex specialis*. In other words, this category only applies to those rules of responsibility that the ILC considered, but not to other relevant rules of responsibility that might have been left out for entirely pragmatic reasons. Crawford confirmed the relative nature of the distinction when he wrote,

The distinction between primary and secondary obligations was, and is, somewhat relative. A particular rule of conduct might contain its own special rule of attribution or its own rule about remedies. In such a case, there would be little point in arguing about questions of classification. The rule would be applied and it would normally be treated as a *lex specialis*, that is, as excluding the general rule.<sup>275</sup>

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271. Roberto Bobbio, *Nouvelles réflexions sur les normes primaires et secondaires*, in *LA RÈGLE DE DROIT* 104, 104–06 (Chaim Perelman ed., 1971).

272. See, e.g., Jean d’Aspremont, *Le tyrannicide en droit international*, in *THE RIGHT TO LIFE* 287, 312–13 (Christian Tomuschat et al. eds., 2010) (arguing that in cases involving tyrannicide, the applicability of the primary rule—the right to life—may depend on the secondary rule of attribution).

273. This is in addition to being affected by the public or private interests protected. See *infra* Part IV.D.

274. See ASR, *supra* note 17, ¶ 76, art. 55.

275. Crawford, *supra* note 267, at 876–77.

However practical this may sound, it is intellectually unsatisfactory to treat pragmatic considerations, while legitimate, as the conceptual foundation of a category of rules.

### 3. Shifting Away from the Dichotomy

In light of the conceptual uncertainty underlying the ILC's dichotomy, as explained in more detail below,<sup>276</sup> we argue for a holistic and integrated approach that looks at both the content of obligations as well as the rules that were designated by the ILC as rules of responsibility. We must consider all the rules of responsibility. Notably, specific arrangements (such as treaty provisions) regarding shared responsibility between states, which were formerly considered to be either primary rules or *lex specialis* based on their inclusion in the ILC framework, should instead be considered together.

#### C. The Responsibility-Liability Dichotomy

The terms liability and responsibility are often used interchangeably to address either issues of responsibility *strictu sensu* or issues of reparations.<sup>277</sup> Some treaties use the term liability in a way that seems identical to responsibility. Article 235 of the U.N. Convention on the Law of the Sea (UNCLOS) provides that "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."<sup>278</sup> The former sentence may be understood as referring to the contents of primary obligations, whereas the second sentence refers to responsibility in the same sense used by the ILC.<sup>279</sup> Article 6 to Annex IX of UNCLOS provides for joint and several liability of the EU and member states.<sup>280</sup> It does not appear that liability in this context means anything other than responsibility as used by the ILC.<sup>281</sup>

However, there is considerable ambiguity in the use of the terms responsibility and liability, both in international and comparative law

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276. See *infra* Part IV.D.

277. See, e.g., Noyes & Smith, *supra* note 12; James Crawford & Jeremy Watkins, *International Responsibility*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 283, 283–84 (Samantha Besson & John Tasioulas eds., 2010).

278. U.N. Convention on the Law of the Sea art. 235(1), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

279. Special Rapporteur on International Liability, *Fifth Rep. on International Liability for Injurious Consequences Arising out of Acts Prohibited by International Law*, ¶ 39, Int'l Law Comm'n, U.N. Doc. A/CN.4/383 (1984) (by Robert Quentin-Baxter) [hereinafter *Report on International Liability*].

280. UNCLOS, *supra* note 278, annex IX, art. 6(2).

281. *Report on International Liability*, *supra* note 279, ¶ 39; see also Special Rapporteur on International Liability, *Preliminary Rep. on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, ¶¶ 9–15, Int'l Law Comm'n, U.N. Doc A/CN.4/334 (1980) (by Robert Quentin-Baxter).

literature. The decision of the ILC to reserve the term liability for obligations with respect to injury arising from acts not prohibited by international law<sup>282</sup> and, later, to civil liability<sup>283</sup> has made the use of the term liability in connection with internationally wrongful acts confusing.<sup>284</sup>

It appears that many of the cases where the term (joint) liability is used pertain specifically to the obligation to provide compensation for *damage*. That certainly is true of the term's usage in domestic law<sup>285</sup> and in civil liability conventions,<sup>286</sup> as well as in the work of the ILC on allocation of loss in the case of transboundary harm arising out of hazardous activities.<sup>287</sup> It is also true for some treaties dealing with damage caused by states.<sup>288</sup> The term (joint) liability then indicates that in a case where multiple tortfeasors together have caused damage, the plaintiff can collect the entire sum of compensation from either one of the defendants. This is also how the term is used in, for instance, the Outer Space Liability Convention<sup>289</sup> and in UNCLOS<sup>290</sup> as well as in civil liability schemes.<sup>291</sup>

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282. JULIO BARBOZA, *THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW* 10 (2011).

283. Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, in *Report of the International Law Commission on Its Fifty-Eighth Session*, 61 U.N. GAOR Supp No. 10, at 1, 106, ¶ 67, princ. 4, cmt. 26, U.N. Doc. A/61/10 (2006) [hereinafter Draft Principles on Transboundary Harm], reprinted in [2006] 2 Y.B. Int'l L. Comm'n (forthcoming).

284. See M.B. Akehurst, *International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, 16 NETH. Y.B. INT'L L. 3, 8 (1985); Alan Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP. L.Q. 1, 1 (1990); Karl Zemanek, *State Responsibility and Liability*, in ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 197 (Winfried Lang et al. eds., 1991).

285. PETL, *supra* note 109, art. 1:101 (“[A] person to whom damage to another is legally attributed is liable to compensate that damage.”).

286. See, e.g., International Convention on Civil Liability for Oil Pollution Damage art. 1(2), Nov. 29, 1969, 26 U.S.T. 765, 973 U.N.T.S. 3 [hereinafter CLC].

287. Draft Principles on Transboundary Harm, *supra* note 283.

288. See, e.g., UNCLOS, *supra* note 278, art. 232 (“States shall be liable for damage or loss attributable to them.” (emphasis added)); *id.* art. 235(2); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 7, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

289. Convention on International Liability for Damage Caused by Space Objects art. 4, opened for signature Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention].

290. UNCLOS, *supra* note 278, art. 139.

291. See, e.g., CLC, *supra* note 286, art. 4 (“When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable.”); see also Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment, U.N. Env't Programme Decision SS.XI/5 B, Annex,

We acknowledge that using the term liability to refer to the legal consequences of a wrongful act in terms of reparation can be confusing, if not misleading. This is not only so because some languages do not have an equivalent for the term responsibility and thus can only use the term liability (or its equivalent),<sup>292</sup> but also because it is precisely these consequences that form the very contents of international responsibility. Moreover, construing a freestanding concept of responsibility disconnected from its legal consequences is problematic and in fact may shield states and international organizations from such consequences.<sup>293</sup>

Nonetheless, from the perspective of analyzing shared responsibility, a twofold qualification of the common equation of responsibility and liability is called for. First, in line with our earlier distinction between public and private law dimensions of international responsibility, we need to recognize that determination of responsibility, on the one hand, and determination of the legal consequences of such responsibility in terms of compensation to injured parties, on the other, raise different questions, in particular in regard to the apportionment of damages. To say that two or more states or international organizations are jointly responsible for a particular wrongful act does not necessarily mean that these states or international organizations will be obliged to pay full compensation for the injury (as is often implied by the concept of joint liability). As we will further explain below, the operation of principles of shared responsibility may differ between determinations of responsibility and determinations of reparation.

Second, we must recognize the different ways in which liability, in the sense of an obligation to provide reparation, can come into existence. This holds first and foremost for liability for acts that are not (necessarily) internationally wrongful: for example, the principle of joint liability under the Outer Space Treaty is not contingent on a finding of wrongfulness.<sup>294</sup> Following from that, and pushing this logic further, we would argue that the term liability can be applied methodologically to all situations where obligations to compensate arise, irrespective of whether the wrongfulness of the

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11th Sess., Feb. 24–26, 2010, U.N. GAOR, 65th Sess., Supp. No. 25, U.N. Doc. A/65/25, at 18, guideline 7 (Feb. 26, 2010).

292. Crawford & Watkins, *supra* note 277, at 283.

293. See Phillip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 3 (1988).

294. See Outer Space Treaty, *supra* note 288. Article 7 provides:

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air or in outer space, including the moon and other celestial bodies.

*Id.* art. 7. Liability is then only based on damage, irrespective of wrongfulness. See MANFRED LACHS, *THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING* 124 (2010).



act or the responsibility of the compensating entity has been considered. This expansion allows for a more comprehensive discussion of reparation for injury in international law because it covers not only formal judicial decisions that establish the responsibility of an entity and the corresponding obligations of reparation, but also any agreement that provides for reparation irrespective of responsibility (strict liability), decisions of quasi-judicial or political bodies (reparation commissions, for example), and even unilateral acceptance of obligations to provide reparation.

#### *D. A New Approach to International Responsibility: From a Unitary Regime to a Differentiated Approach*

On the basis of the above discussions, we argue that we must move away from a unitary approach toward a differentiated approach to responsibility that reflects the differences between norms and their breaches as well as the various objectives of international responsibility.<sup>295</sup> Such a differentiated approach will allow us to consider both the principles of the general regime of responsibility and possible derogations (that would in particular, but not exclusively, be contained in treaties<sup>296</sup>) that would modify the application of the general regime.<sup>297</sup>

##### 1. A Differentiated Approach

Three preliminary points should be made regarding our use of the notion of differentiation. First, it rests largely on the distinction between public and private law models, but we do acknowledge that the distinction is not watertight. These models should be considered as a continuum rather than a rigid dichotomy. To do otherwise would be to somewhat open ourselves to the compelling critique of the private-public dichotomy in international law.<sup>298</sup> Nonetheless, we submit that it is useful and possible to identify distinctions between public and private law dimensions of responsibility that can be captured by our “differentiated approach.”

Second, while we refer here to differentiation primarily in terms of principles of responsibility, such principles are mostly embedded in and interrelated with institutional structures. These institutional structures also mirror the differences between private and public dimensions. The nature

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295. See *supra* Part IV.A.

296. It is also conceivable that such principles emerge by particular custom, at the regional level for example. See Bruno Simma & Dirk Pulkowski, *Leges Speciales and Self-Contained Regimes*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 127, at 139, 139–40.

297. At this stage, we do not take a position on the order in which these need to be examined. The order in which principles should be considered will depend, among other things, on the approach to the international legal order from the angle of unity or the angle of fragmentation. *Id.* at 146–47.

298. See, e.g., Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 *EUR. J. INT'L L.* 387, 387–95 (1999).

and institutional structure of noncompliance mechanisms in international environmental law is a good example; they have more in common with public law administrative procedures for reviewing the exercise of public authority than with private law procedures for determining compensation for damage.<sup>299</sup>

Third, the differentiation that we advance does not correspond to fields of international law such as human rights, law of the sea, refugee law, or environmental law, in the sense that each such field has its own set of principles. Of course, we acknowledge that these fields have sometimes developed (semi-)autonomously with specific rules of responsibility and discrete mechanisms of implementation. However, conceptually, our approach aims at transcending these apparently separate areas of law and looking at the possible common interests that they might aim to protect.

With this caveat in mind, we will first identify sources of differentiation (the nature of the norm and the nature of the breach) and then discuss legal requirements for establishing responsibility.

#### a. Sources of Differentiation

A central proposition of our approach is that the nature of the obligation may determine the nature of corresponding responsibility. The nature of the obligation can be approached from two angles: the hierarchy of norms and the subjects of norms. For one, the increased hierarchy in the international legal order affects the nature of responsibility. The paradigmatic example is the development of *jus cogens* norms, which has triggered a more general discussion about a possible hierarchy of norms. Some argue that a series of “constitutional” principles<sup>300</sup> such as certain human rights obligations, are placed at the top of the hierarchy.<sup>301</sup> It is conceivable that an obligation could be qualified as having per se a public or a private objective, triggering the application of particular principles of responsibility that serve to ensure the protection of that objective. This would apply to norms that do not directly focus on the effect or injury to a particular state but rather serve communitarian objectives, such as the prohibition on polluting the high seas.<sup>302</sup>

In terms of the subjects of international obligations, obligations vary from being bilateral to multilateral to *erga omnes*, placing them at different points along the public-private spectrum. For example, obligations contained in a bilateral trade agreement will not necessarily bring into play the

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299. See Tanzi & Pitea, *supra* note 31, at 578.

300. JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1–2, 26 (2009); Stefan Kadelbach & Thomas Kleinlein, *International Law: A Constitution for Mankind?: An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 GER. Y.B. INT’L L. 303, 305 (2007).

301. Lee M. Caplan, *State Immunity, Human Rights and “Jus Cogens”*: A Critique of the Normative Hierarchy Theory, 97 AM. J. INT’L L. 741, 741 (2003).

302. UNCLOS, *supra* note 278, art. 232.

same principles of responsibility and the same consequences in terms of shared responsibility as a multilateral treaty on the conservation of fish stocks. We thus must recognize the possibility of classifying obligations according to their subjects and how this might affect the shared responsibility for their breach.<sup>303</sup>

However, the nature and subject of the obligation will not always indicate the nature of the relevant principles of responsibility. Often, it will be the interest protected by the obligation (or the treaty in which it is contained) itself that will trigger particular principles and procedures of responsibility. This resembles the way the law of responsibility is applied in many domestic legal systems where different regimes (such as tort, criminal, contract, and administrative law), and their respective sets of rules in terms of procedure and invocation, may each apply to the same violation as considered below.<sup>304</sup> Such a framework will allow us to imagine different rules for different situations without having necessarily to choose between them in an institutional void, as the unitary approach to international responsibility would impose on us.

#### b. Differentiated Requirements for Establishing Responsibility

In terms of requirements for determining responsibility, two examples can be given: the question of fault and the role of injury. We note however that the above considerations can also affect other possible conditions for the establishment of responsibility or allocation of loss, such as causation, effective control, or geographical proximity.

First of all, it is conceivable that the nature of the conduct that triggers responsibility will be different depending on the protected interest, thus allowing for a gradation between fault and objective responsibility. In contrast to ordinary situations of responsibility, in cases of aggravated responsibility associated with the public dimensions of responsibility fault will invariably be a component of the principles of responsibility.<sup>305</sup>

However, the relationship between the nature of the interests and the requirement of fault is not straightforward and may depend on the foundations of and justifications for responsibility. For example, a utilitarian approach

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303. Incidentally, this will also challenge the idea that the source of the obligation is irrelevant for international law. Indeed, the violation of a treaty obligation of a bilateral nature could lead to different consequences than the violation of a customary norm of *jus cogens*. In the same way, the relationship between *erga omnes partes* treaty obligations and *erga omnes* customary obligations, even if they can overlap in cases of nearly universal ratification of a given treaty, will need to be explored in light of the public or private nature of the interest being protected. For a discussion of the different “types” of *erga omnes* obligations, see *infra* Part IV.D.1.c.

304. See *supra* Part III.B.

305. See, e.g., Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, in *LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT* 25, 25–26 (Mélanges Michel Virally ed., 1991).

could justify a system in which the more crucial the interest and the greater the consequence of a breach (in the case of nuclear activities, for example), the less role fault should play in determining responsibility.<sup>306</sup> On the other hand, a more Kantian approach, which relies on moral autonomy, would suggest that moral blame should only rest on the state that had an intent to commit the breach so as not to attach the stigma of responsibility too widely.<sup>307</sup> Such an approach would also suggest that, should the intent be established, stronger consequences be attached to the breach in terms of reparations.<sup>308</sup>

The second example is that of injury. As discussed previously, injury has been removed from the requirements of establishing responsibility.<sup>309</sup> However, distinctions may need to be made in this respect. We take the position that the removal of injury, and more generally of outcome, as a constitutive element of responsibility, is conceptually problematic; a concept of responsibility expressly based on injury would have been conceptually preferable.<sup>310</sup> Nonetheless, it may be necessary to differentiate between different roles of the concept of injury. The concept plays a cardinal role in a case of breach of a bilateral treaty obligation, which is therefore of a private (contract) law nature and causes injury to the other party. Injury suffered by the direct beneficiary of the obligation is then the measure of responsibility and reparation. On the other hand, in more public law-oriented situations, the interest protected by the existence of the norm requires that neither responsibility nor reparation is made contingent on a specific injury, thus reducing the importance of injury as a component of responsibility, even if it might be taken into account in the reparations phase.<sup>311</sup>

### c. Differentiated Conditions for Invocation

The acknowledged differences between the public and private law models require a reexamination of the conditions necessary for the invocation of state responsibility under international law. Indeed, it is possible to deter-

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306. See BROWNLIE, *supra* note 192, at 38.

307. On the Kantian principle of autonomy, see generally KANT ON MORAL AUTONOMY (Oliver Sensen ed., forthcoming 2013). For its relation with attribution of moral blame, see Mordechai Kremnitzer & Tatjana Hörnle, *Human Dignity and the Principle of Culpability*, 44 ISR. L. REV. 115, 122 (2011) (explaining that, under the principle of culpability, punishment should be dependent on the moral culpability of the individual rather than on consequentialist considerations). For a specific application of this concept in international law, see Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 MELB. J. INT'L L. 1 (2012) (arguing, in part, that the culpability principle requires that only individuals who have actually contributed to a crime be punished for it under international criminal law).

308. For a discussion of the implications on shared responsibility, see *supra* Part III.

309. See *supra* Part I.B.

310. Stern, *supra* note 21, at 93.

311. For a discussion of the implications on shared responsibility, see *infra* Part V.

mine which states can and should have *locus standi* based on the applicable principles of responsibility and in light of the public-private dichotomy.

The ILC recognized that on this point distinctions needed to be made, and indeed this issue illustrates perfectly that the unitary model of the law of international responsibility is not tenable. On the question of *locus standi*, ASR Article 42 allows either the individual state to which the obligation is owed individually—or any states that might be specially affected by the violation of an obligation owed to a group of states or the international community as a whole—to raise a claim against the transgressing state(s).<sup>312</sup> This invocation mechanism fits the private law model of international responsibility by requiring the state bringing the claim to demonstrate its specific interest in the performance of the obligation. ASR Article 48, on the other hand, functions very differently.<sup>313</sup> It does not require that the invoking state be injured to raise the claim where the obligation protects a collective interest of a group of states<sup>314</sup> or of the international community as a whole.<sup>315</sup> This is clearly a public law approach, such that a state invoking responsibility under Article 48 is clearly acting on behalf of the community (either of some states or all states) to protect a community interest.<sup>316</sup>

This analysis highlights the ambiguity in the expression of an obligation “owed to the international community as a whole,” or an *erga omnes* obligation. There exist in fact two types of *erga omnes* obligations, depending on the interest protected by the obligation and the legal regime of responsibility applied. For example, in some national legal systems, the obligation not to cause damage may be owed to everyone, but a claim of legal responsibility generally only arises from a specific injury to an individual who alone possesses the *locus standi* for that claim. On the other hand, the obligation not to kill under criminal law is also owed to everyone, but the violation of that obligation and the ensuing injury to an individual does not necessarily give that individual standing; rather, the *locus standi* resides with a public authority.<sup>317</sup>

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312. ASR, *supra* note 17, ¶ 76, art. 42(1)(a) (individual state); *id.* ¶ 76, art. 42(1)(b) (any affected states).

313. Article 48(1) provides:

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

*Id.* ¶ 76, art. 48(1).

314. *Id.* ¶ 76, art. 47(1)(a).

315. *Id.* ¶ 76, art. 47(1)(b).

316. For an overview of the historical evolution toward the taking into account of community interests in the law of state responsibility, see VILLALPANDO, *supra* note 49; Nolte, *supra* note 49.

317. This is a general model. A number of national systems provide for privately triggered public prosecutions, but they all involve to a large extent public authorities exercising some form of discretion in the opportunity of pursuing the investigation or prosecution.

This applies *mutatis mutandis* to international law. For example, the obligation to respect diplomatic immunity is in the abstract owed to all states, and in this sense is *erga omnes*; but should it be breached, it is only the injured state that will be able to bring a claim.<sup>318</sup> On the other hand, the obligation not to commit genocide is not simply *erga omnes* in the abstract; rather, its breach will grant *locus standi* not only to the injured state, but also to any other state acting on behalf of the international community.<sup>319</sup>

This duality in the concept of *erga omnes* is better captured by a differentiated rather than a unitary approach to international responsibility. The dissociation of public and private dimensions leads to results that better address the different objectives of international responsibility. The injured state under Article 42 and the noninjured state acting essentially as a public prosecutor under Article 48 cannot be subject to the same requirements given the different rationale of the interests protected. The ILC, while recognizing the different aims and foundations of the two models of invocation, has not reasoned the point to its logical conclusion. As a result, in developing the technical requirements of invocation, it remained trapped in the ideal of unity. In particular, one can question whether all requirements of Article 48 fit the public law dimension of that article. For example, should a state falling under that article be subject to Article 45 (on the loss of the right to invoke responsibility)?<sup>320</sup>

The manifestations of invocation in its public and private law dimensions have notable, if sometimes indirect, relations to shared responsibility. In particular, they allow for differentiating the possible types of reparations available to different claimants in relation to the nature of the responsibility. Recovery of certain types of reparations might not be possible against some responsible contributing states depending not only on the nature of the obligation breached, but also on the role of the claimant.

## 2. The Relationship Between the General Regime of Responsibility and Derogations

The second dimension of our proposed model is the relationship between the general principles of responsibility and principles that constitute derogations, that is, principles that deviate from the general principles. This point is not a new one—it is a manifestation of the relationship between general laws and *lex specialis*.<sup>321</sup> Treaties often provide for possible derogations (and their

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318. See YITIHA SIMBEYE, *IMMUNITY AND INTERNATIONAL CRIMINAL LAW* 143 (2004).

319. See Robert Kolb & Sandra Krähenmann, *The Scope Ratione Personae of the Compulsory Jurisdiction of the ICJ*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* 429 (Paola Gaeta ed., 2009).

320. See ASR, *supra* note 17, ¶ 76, art. 48(3); see also Gattini, *supra* note 256, at 1197–98.

321. See Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 *NORDIC J. INT'L L.* 27, 37 (2005); Erich Vranes, *Lex Superior*,

limits).<sup>322</sup> Within the law of state responsibility, the issue is equally present. The ASR enshrines the principle of *lex specialis derogat legi generali* in Article 55, according to which the Articles do not apply if the issues of responsibility “are governed by special rules of international law.”<sup>323</sup>

The relationship between the general regime of responsibility and derogations will likewise be affected by the public or private nature of the interest protected by both the obligation and the applicable principles of responsibility. In relation to primary norms, the Vienna Convention on the Law of Treaties provides an example by stating that a treaty cannot derogate from a *jus cogens* norm.<sup>324</sup> The Commentary to Article 55 of the ASR echoes this example by suggesting that “States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law.”<sup>325</sup> Although the commentary of Article 55 may suggest a single solution to a given situation, we argue that the same set of facts might give rise to different answers under different legal regimes. While, following a private law logic, it is conceivable that states could exclude their responsibility for damage or limit their reparation obligations between themselves, that will not be possible in the public law dimension of responsibility. This is once again similar to the national context. Indeed, while two parties can exclude or limit the scope of damages paid in case of breach of contract, for example, or even of civil reparations for injury to persons or property, these two parties cannot contract out their criminal responsibility.

In sum, we argue that we must recognize that different principles of responsibility may apply in such areas as military operations, refugee law, and environmental law. Each of these areas has its own set of primary obligations relevant to questions of shared responsibility as well as its own private and public law dimensions; a differentiated approach to shared responsibility seems inevitable.

## V. PRINCIPLES AND PROCESSES OF SHARED RESPONSIBILITY

In light of our critique of the unitary nature of international responsibility and its reliance on the strict separation between primary and secondary

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Lex Specialis, Lex Posterior—Zur Rechtsnatur der “Konfliktlösungsregeln,” 65 HEIDELBERG J. INT’L L. 391 (2005).

322. See, e.g., Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 11, Mar. 22, 1989, 1673 U.N.T.S. 57 (providing that any special agreement should not “derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention”).

323. ASR, *supra* note 17, ¶ 76, art. 55; see also Axel Marschik, *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, 9 EUR. J. INT’L L. 212 (1998). For a recent series of articles discussing, among other things, the human rights systems, the World Trade Organization, and the EU, see THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 127.

324. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

325. ASR, *supra* note 17, ¶ 77, art. 55, cmt. 2.

rules,<sup>326</sup> we will now revisit the principles that can be applied to situations of shared responsibility. As we identified above, the prevailing system of international responsibility suffers from a lack of clarity as to whether and when responsibility can in fact be shared or what consequences would arise from sharing it; this is particularly due to the contested nature of double attribution, the failure to articulate a normative basis for attributing responsibility (rather than conduct), and the absence of principles to apportion responsibility and reparation when principles of causation are insufficient.<sup>327</sup> We thus focus on what is perhaps the quintessential question for shared responsibility: how to determine who is responsible for what.

In order to tie together the fundamental developments sketched in Part II, the deficiencies in the current regime of international responsibility sketched in Part III, and the differentiated approach proposed in Part IV, we must now reconsider how identified principles and processes of shared responsibility can apply to the variety of situations in which multiple actors contribute to proscribed outcomes. We first examine the principle of joint (and several) responsibility as a possible solution to situations of multiple wrongdoing actors. We then focus respectively on the substantive aspects of allocation of responsibility among multiple wrongdoing states or between transgressing and injured states and the procedural aspects that will arise in (quasi-)judicial proceedings.

#### A. Joint (and Several) Responsibility

In domestic legal systems, situations where multiple actors contribute to a single injury can often be addressed in tort law by resort to the principle of joint and several liability.<sup>328</sup> What is meant by this expression is that the victim can recover the full amount of reparations from one of the responsible actors, which can in turn require compensation from the other responsible actors that may have contributed to the damage.<sup>329</sup>

Several scholars have advocated the application of this principle in international law.<sup>330</sup> The principle is contained in some treaties<sup>331</sup> and has been considered in some case law. For example, the Seabed Chamber affirmed the applicability of this principle under UNCLOS, writing, “Joint and several

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326. See *supra* Part IV.A–B.

327. See *supra* text accompanying notes 131–136.

328. Note that the PETL adopted a different terminology. The drafters of this project believed that the expression “joint and several” might be misleading because “it may suggest that the tortfeasors have to be sued together and secondly because of the association with ‘joint tortfeasors’ who form only a part of those exposed to ‘joint and several liability.’” W.V. Horton Rogers, *Comparative Report on Multiple Tortfeasors*, in UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS 271, 272 (W.V.H. Rogers ed., 2004). They therefore found the expression of “solidary liability” more appropriate. *Id.* at 278.

329. See PETL, *supra* note 109, art. 9:101(3).

330. See, e.g., Chinkin, *supra* note 6, at 181–83; Noyes & Smith, *supra* note 12, at 259.

331. See *supra* Part IV.D.



liability arises where different entities have contributed to the same damage so that full reparation can be claimed from all or any of them.”<sup>332</sup>

However, application of the principle as a solution to situations of multiple contributions to a single harmful outcome encounters two possible problems. First, the concept of joint responsibility, being initially based on a private law model, may need to be adapted to public law contexts. While joint responsibility may function in some multilateral situations in a way that resembles its domestic tort law origins (for instance, when two upstream riparian states cause damage to a downstream state), it is harder to transpose the principle to cases that more resemble a public law– or administrative law–type setting. In particular, whereas joint and several responsibility can be helpful as a means of providing relief to injured parties, it is much less relevant when the aim is not reparation but the return to legality of all responsible actors. This is directly related to the different nature and role of injury in such situations.<sup>333</sup> This does not mean, however, that concepts of joint responsibility from public-order fields, such as international criminal law, might not be relevant for the identification of the principles of shared responsibility.<sup>334</sup>

Second, the decentralized nature of the international legal order, combined with the lack of courts with compulsory jurisdiction, suggests that the international legal order is much less conducive to the application of joint and several responsibility. For one thing, the principle implies that one actor may be held responsible and forced to provide reparation for injury caused jointly with another actor. As indicated above, this is in tension with the fundamental principle of sovereignty in international law. This problem could be resolved if a coresponsible actor could require the other responsible actors to provide their share of compensation for the injury. Indeed, the principle, in its domestic application, assumes that one responsible person who has compensated a victim can subsequently bring a claim against other responsible parties. But when no court is available for such claims, that possibility remains merely theoretical, casting doubt on the principle’s relevance in international law. The difficulty of transposing the principle as such to the international legal order leads us to reflect further on the substantive and procedural aspects of allocation of responsibility in situations of multiparty responsibility.

### B. *Substantive Aspects*

As regards the substantive aspects of shared responsibility, two sets of questions have to be considered: the first relating to the relationship between

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332. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, ¶ 201, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf).

333. See *supra* text accompanying notes 222–232.

334. See *infra* Part V.B.

the tortfeasors and the victim, and the second relating to the relationship among the tortfeasors. These two aspects will be discussed separately in Parts V.B.1 and V.B.2.

### 1. The Relationship Between the Injured State and the Responsible States

A core question in situations of shared responsibility is that of determining against which state(s) a claim can be brought. Here we need to distinguish between the normative foundations of identifying the subjects of claims and the question what can be claimed.

#### a. The Subject of Claims

We suggest that on this point a distinction be made between situations of cooperative and cumulative responsibility, which respectively involve concerted and independent acts.<sup>335</sup> In situations of concerted action the traditional response, as stated previously, would be for responsibility to flow from the individual attribution of the act.<sup>336</sup> The question then is whether there is a basis for holding states, or international organizations, responsible not on the basis of their own act, but on their involvement, or participation, in the wrongful act of another state. As indicated earlier, both the ASR and the ARIO have recognized this possibility to a limited extent, notably through the constructions of aid and assistance and attribution of responsibility.<sup>337</sup> But the constructions recognized in these articles do not exhaust the range of possibilities for addressing cooperative responsibility.

We identify three possible foundations for shared responsibility in such situations: consent, control, and the nature of the obligations at issue.

First, one possible avenue is to consider that, under certain conditions, participation would in and of itself be a criterion for the ability to raise a claim against a state, even if by applying the ILC principles, the conduct that led to the wrongful act is attributable to another state.<sup>338</sup> This approach could imply either a broadening of grounds for attribution of conduct or a shift from the attribution of conduct to an attribution of responsibility.<sup>339</sup> As indicated above, while the ILC did recognize the possibility of such joint responsibility, the normative basis thereof remains unclear. One possible basis that has not found its way into the ILC texts is a form of implied consent to the consequences of participation in a joint enterprise.

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335. See *supra* Part I.C.

336. See *supra* Part I.C.

337. ARIO, *supra* note 18, arts. 14–17; ASR, *supra* note 17, ¶¶ 76, arts. 16–18.

338. One way of making this work under the ILC articles would be to apply ASR Article 11, which concerns “conduct acknowledged and adopted by a State as its own.” ASR, *supra* note 17, ¶¶ 76, art. 11. Participation in a common enterprise would involve implied consent to adopting the conduct theoretically attributable to another state.

339. This would be in line with the approach advocated in terms of moral philosophy by Larry May. See MAY, *supra* note 24, at 112.

Arguably, the grounds for moving international responsibility toward such a consent model of attribution are stronger in a situation where the public-order dimensions of responsibilities are more prevalent. One can find some inspiration in the use of concepts of joint enterprise as developed in other fields of international law, such as international criminal law.<sup>340</sup> Indeed, from its emergence after the Second World War, international criminal law has grappled with the difficulty of moving beyond individual responsibility to encompass the collective dimensions of some crimes. While the theory of conspiracy was used in the Nuremberg and Tokyo trials,<sup>341</sup> the International Criminal Tribunals for the Former Yugoslavia and Rwanda developed the notion of joint criminal enterprise.<sup>342</sup> This concept has given rise to strong criticism,<sup>343</sup> and the transposition of its conditions (most notably its subjective, or *mens rea*, elements) to the sphere of responsibility of states or international organizations is not without difficulty. Nonetheless, for the purposes of rethinking shared responsibility in international law, it is relevant to analyze how the case law conceptualizes and implements a mode of participation that goes beyond direct commission by a single actor.

This approach would also be consistent with the fact that in the ASR and the ARIO the obligation not to provide assistance (one form of participation) is more stringent in the case of serious breaches of peremptory norms than in the case of breaches of other international obligations.<sup>344</sup>

In contrast, in situations of *cumulative* responsibility, where states or international organizations act independently and where there is no concerted action, it seems difficult to adopt a principle of consent-based attribution to render an actor responsible for another's conduct. In such situations, the traditional model of attribution is more adequate and allows for the development of principles of parallel attribution based on independent acts, with the principle contained in Article 47 of the ASR (that is, where several states are responsible for the same internationally wrongful act, the responsibility of each state may be invoked in relation to that act) as a starting point.

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340. See Mohamed Shahabuddeen, *Judicial Creativity and Joint Criminal Enterprise*, in *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* 184 (Shane Darcy & Joseph Powderly eds., 2010).

341. See Cherif Bassiouni, *Nuremberg Forty Years After: An Introduction*, 18 *CASE W. RES. J. INT'L L.* 261, 261 (1986); Frank Mignone, *After Nuremberg, Tokyo*, 25 *TEX. L. REV.* 475, 487 (1947).

342. Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 *J. INT'L CRIM. JUST.* 109, 110 (2007); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 *J. INT'L CRIM. JUST.* 69, 70 (2007); Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 *J. INT'L CRIM. JUST.* 91, 92 (2007).

343. Cassese, *supra* note 342, at 114; Ohlin, *supra* note 342, at 69; Wilt, *supra* note 342, at 91.

344. ASR, *supra* note 17, ¶ 76, art. 41.

A second possible basis for shared responsibility is not consent, but control.<sup>345</sup> While the control exercised by one actor need not be of such a nature that it results in attribution of the conduct itself, it may contribute to the eventual wrong (and injury).<sup>346</sup> Since the contribution of the controlling state and of the acting state may not easily be apportioned, joint responsibility may be a proper response.

This construction, which obviously applies only in cases of cooperative responsibility and not in situations of cumulative responsibility, indeed is a conceptual foundation for attribution of responsibility in the ARIO,<sup>347</sup> though not recognized as such in the text. While in the scenario envisaged by the ARIO, in which responsibility must be attributed to both an organization and its member states, the wrongfulness of the acts by member states is a given—it is after all the member state to whom an act must be attributed—the organization would be responsible if the member states, under the rules of the organization, *had* to carry out an act that would be wrongful according to their international obligations. That act could only be withdrawn or changed by the organization, not by the member states.

This scenario fits more closely with the public, rather than private, law perspective. This is so because the fundamental question addressed by private law is on what basis a state or organization would be responsible vis-à-vis a third state. This is yet another manifestation of the fact that a system of joint responsibility requires differentiation between public and private law dimensions.

Third, it may be argued that the nature of some obligations themselves affects the allocation of responsibility, especially if some obligations can be *ex ante* qualified as “shared” obligations. If a state commits genocide in another state, and other states may have been in a position to take action to prevent this genocide, the question arises against whom the victim state may bring a claim for the failure to protect it.

One way of resolving this issue is to devise a series of allocation principles to identify the state or states that bear the greatest duty to respond to such a situation. This seems to have been the approach adopted in the *Genocide* case, where the ICJ referred to a number of criteria that could be taken into account to determine *in concreto* the scope of a state’s duty to prevent genocide.<sup>348</sup> Such criteria included “means reasonably available,” “the capacity to influence effectively the action of persons likely to commit, or

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345. The term control is used here in a loose sense. It should not be equated with “effective control.” See ARIO, *supra* note 18, art. 7.

346. Thus, we have to distinguish between effective control as a basis for attribution of conduct (for example, under Article 8 ASR and Article 7 ARIO) and control as a basis for attribution of responsibility (for example, under Article 15 ARIO). Note that the distinction is not always sharp. See Reinisch, *supra* note 154, at 63.

347. ARIO, *supra* note 18, art. 17.

348. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26).

already committing, genocide,” and the “geographical distance of the State concerned from the scene of the events.”<sup>349</sup>

However, this approach, while certainly having some practical justifications, may not in fact encapsulate the conceptual foundations of such collective obligations. Indeed, this obligation is more than just another obligation. It represents the recognition of a form of primitive social contract at the international level, whereby the international community as a reified entity owes a sort of sovereign duty to protect its subjects in the same way that a state must protect its citizens against crime.<sup>350</sup> In this sense, the duty is truly a shared one: it is owed by the international community as a whole and, by implication (as the international community is not an entity as such), by all states constituting that community, irrespective of their special relationship to the injured state.

In this context we therefore also have to consider the role of the United Nations as the most advanced, if imperfect, embodiment of the international community. To the extent that a breach of these obligations falls within the scope of a threat to or breach of the peace, or an act of aggression under Article 39 of the U.N. Charter, the United Nations has the responsibility and arguably a duty to repair the consequences of the violation. Such responsibility then coexists with the obligations of member states, which arguably can be held responsible for failure to allow the United Nations to act. This approach is related to the emerging literature on the possible obligation of the U.N. Security Council to act in R2P situations.<sup>351</sup>

Quite obviously, such a collective duty to act through the United Nations is not recognized in positive international law.<sup>352</sup> It would also ignore the essential differences between the relevant actors within the United Nations in terms of their respective powers and capacities.<sup>353</sup> The alternative of directing claims against the members of the international community requires a fundamental consideration of the relevant factors that could differentiate states’ respective responsibility, which goes much beyond the rather superficial approach advanced in the *Genocide* case.<sup>354</sup>

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349. *Id.*

350. See THOMAS HOBBS, *LEVIATHAN* 335–53 (C.B. MacPherson ed., Penguin Books 1984) (1651).

351. See, e.g., Anne Peters, *The Responsibility to Protect and the Permanent Five: The Obligation to Give Reasons for a Veto*, in *RESPONSIBILITY TO PROTECT*, *supra* note 5, at 199, 199.

352. See *id.* (stating that discussing the obligations are a “thought experiment, because the binding legal force of [R2P] is not settled”).

353. As such, there is indeed merit in construing this situation in terms of *shared* rather than *collective* responsibility. See MAY, *supra* note 24, at 37–38; see also *supra* Part I.B.

354. For examples of more comprehensive approaches to differentiating states’ respective responsibility, see Miller, *supra* note 20; Pattison, *supra* note 5.

### b. What Can Be Claimed

The above foundations (consent, control, and nature of the obligation) are independent of (if related to) the extent of the claim of the injured party once the principle of responsibility has been established. What can an injured party claim against a specific state or organization? As indicated above, the idea behind joint responsibility is that an injured party can claim the whole damage award against a state or organization, even if that state or organization is only one of a multiplicity of responsible actors. An alternative is that of proportionate liability, when a claim can only be brought for the damage attributable to a given state.

The first option could seem like a natural consequence when responsibility is based on consensual participation in a common endeavor. However, as indicated above, joint responsibility functions better in a private law paradigm rather than a public law paradigm where return to legality by *all* responsible actors is essential and where, moreover, the symbolic acknowledgment of responsibility could be seen as sufficient to satisfy the requirements of the sanctity of the international legal order.<sup>355</sup>

However, fundamental considerations of fairness may oppose holding one party responsible for the entire injury, in particular when the concerted nature of the collective action is weak.<sup>356</sup> Moreover, doing so would be difficult to justify since there is little if any basis for responsible parties to invoke the coresponsibility of those that contributed to the injury. The legal basis for claims between responsible actors is uncertain and in international law, more often than not, no court will be available in which coresponsible parties can direct claims against each other.

The second option of proportionate liability raises different concerns, chiefly related to attribution and causation. The essential problem with this option is that in situations of concerted action it will not be easy, and often may be outright impossible, to determine a causal contribution by individual actors to the proscribed outcome. Indeed, if such a causal contribution could be identified, there might not be a need to resort to joint responsibility at all; a solution could be found in parallel application of individual responsibility of the actors involved. There thus is need for an alternative basis for apportionment, such as fault or a predetermined apportionment derived from the relevant applicable law and the nature of the collective endeavor. We leave these matters for later consideration.

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355. One could of course contest this conceptually, arguing that without an actual “sanction” the deterrent purpose loses all of its potency, and practically, arguing that an injured party might be unlikely to make a claim if no compensation is envisioned. That is certainly true, but one should not underestimate the symbolic nature of international legal proceedings.

356. See *MAX*, *supra* note 24, at 41–42.

## 2. The Relationship Between the Responsible States

A separate set of questions concerns the relationship between the contributing states. This is where several liability may come into play. As mentioned previously, several liability generally entails that an entity will only be ultimately liable vis-à-vis other responsible entities for what is attributable to it.<sup>357</sup> In the event that it had to compensate fully for the damage, this principle gives the entity held responsible a claim against the others. Obviously, therefore, the question of several liability only arises when one adopts a system of “solidary” liability, as defined in the Principles of European Tort Law.<sup>358</sup> Like proportionate responsibility, several liability also raises similar questions of causation and the decisive criteria for apportionment.

The question remains whether, outside specific regimes such as UNCLOS, international law recognizes a principle of several liability that allows for claims among responsible states. The issue has not been explored and to our knowledge has not been raised in practice, but nonetheless a few thoughts can be advanced.

In theory we could propose an approach where there is in fact no apportionment between the contributing parties themselves. But this would be hard to defend conceptually: why should a state that has not fully contributed to the damage, but has nevertheless paid full compensation, be prevented from claiming compensation from another state that has also contributed to the injury?<sup>359</sup> This would require some kind of “procedural luck” concept according to which the first to be brought to court should bear the brunt of reparations.

One could also argue that a single responsible state’s payment of reparations in full to the injured party simultaneously ends the injured party’s claims and transfers the injured party’s rights to the party that “overpaid” for them, allowing it to raise claims against other, coresponsible states. This mechanism would be similar to the situation in which a person *A* owes a person *B* some money. Enter person *C*, who pays off the debt, resulting in his substitution as *B* in relation to *A*. In this new (and autonomous) proceeding, it will be for the respondent state (who escaped responsibility in the first action) to invoke the contributing act of the petitioning state in order to reduce the quantum of damages.

If we accept this analysis, the term “several” itself, if useful from a descriptive point of view, becomes inadequate from a procedural point of view. In effect, once a state has compensated the injured party fully, the whole process starts over: the compensating state becomes the injured party

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357. See *supra* Part V.A.

358. PETL, *supra* note 109, art. 9:101 (defining “solidary liability”).

359. The PETL do mention an interesting scenario where, if one contributing party cannot be made to pay, its share is allocated to the other responsible parties in proportion to their responsibility. PETL, *supra* note 109, art. 9:102(4). This is therefore one case where some contributing parties may pay more than what they should.

in relation to other states and may invoke their responsibility as would have the injured state.

This construction raises fundamental questions, however, mostly in relation to the origin of the responsibility of the contributing state that has not yet paid any reparations. This might logically be said to be the violation of the initial primary obligation—but that obligation was initially only owed to the victim state, and not to the coresponsible state or states. One could also conceive of an autonomous duty to compensate the paying responsible state. In any case, whatever the legal foundation of the duty to repair, the state's proportion of contribution to the harm would still have to be demonstrated as a matter of fact, once again emphasizing issues of causation and proportionality.

### C. Procedural Aspects

In addition to the more substantive principles of shared responsibility discussed above, we must also consider certain aspects of its procedure and processes, in particular relating to procedures before international courts.

Although fundamental questions remain, principles of shared responsibility are bound to crystallize in the jurisprudence of international courts as international law becomes increasingly judicialized. This trend calls for greater analysis devoted to the multilateralization of dispute settlement.

#### 1. The Judicialization of the International Legal Order

In addition to the four main trends identified previously,<sup>360</sup> one can also identify a fifth trend that contextualizes questions of shared responsibility: the increasing judicialization of international law. Judicialization certainly is not limited to international law<sup>361</sup> but has had a profound impact on it during the last few years. We have seen an increase in the caseload of existing tribunals and the establishment of new tribunals. The practice of the ICJ, the dispute settlement mechanism of the World Trade Organization, investment arbitration, the Seabed Chamber of the International Tribunal for the Law of the Sea, and regional human rights courts illustrate this trend.<sup>362</sup> Furthermore, supervisory bodies established to control compliance with

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360. See *supra* Part II.

361. See MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 1 (2002) (noting that judicialization is found not only in the international law context, but also at the regional level).

362. See, e.g., Christian Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS 1 (Rüdiger Wolfrum & Deutsch Ulrike eds., 2009) (noting that the European Court of Human Rights is faced with an increasing caseload); Freya Baetens, *No Law Is an Island, Entire of Itself: How International Investment Law Interacts with Other Fields of Public International Law*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES (Freya Baetens ed., forthcoming 2013).



treaty obligations (such as those in the fields of human rights, international environmental law, and international labor law) have adopted decisions in an increasing number of specific cases. National courts have also contributed to this trend by increasingly adjudicating international law claims.<sup>363</sup>

This trend has implications for our approach to shared responsibility. It may be said that in the past there was no strong need for detailed rules of shared responsibility simply because there were few cases in which such rules were needed and because as long as claims are settled outside courts, there is less need to resort to such technical rules. But as more claims involving multiple responsible parties reach the courts, there will be an increasing need for more detailed and subtle rules governing the allocation of responsibility among them. In the absence of such rules, fundamental questions with normative implications will be left to the courts.

The trend toward judicialization is itself fuelled by several of the previously identified trends. This is particularly true of the increasing heterogeneity of actors, as most judicial decisions are rendered in cases where private parties have either individual rights—as in human rights and investment law—or individual obligations—as in international criminal law. Judicialization is also fueled by the increasing permeability of international and national law as the number of national court adjudications of international law claims vastly outnumbers judgments by international courts.<sup>364</sup>

However, we also note that the trend toward judicialization raises fundamental questions about the authority and legitimacy of international courts. These questions have been raised extensively in recent literature, notably in relation to the issue of the lack of democratic credentials of international judicial bodies<sup>365</sup> and their extensive lawmaking powers.<sup>366</sup> Because principles and processes of shared responsibility involve fundamental normative questions pertaining to the allocation of responsibility, it should be considered whether these decisions are properly entrusted to international courts.<sup>367</sup>

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363. See *Oxford Reports on International Law in Domestic Courts*, OXFORD REPS. ON INT'L L., [http://www.oxfordlawreports.com/subscriber\\_articles\\_by\\_category?module=ildc](http://www.oxfordlawreports.com/subscriber_articles_by_category?module=ildc) (last visited Feb. 15, 2013).

364. This is evidenced by the rapidly growing number of national court decisions reported in *Oxford Reports on International Law*. See *id.* (listing 1070 domestic court adjudications of international law claims).

365. See, e.g., Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 43, 47 (2012) (citing various examples of scholars noting the lack of democratic accountability in the international criminal tribunals and other courts).

366. See generally Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, in INTERNATIONAL JUDICIAL LAWMAKING 473, 475 (Armin von Bogdandy & Ingo Venzke eds., 2012). For a discussion of judicial lawmaking in the field of international criminal law, see Jacobs, *supra* note 52.

367. Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 25 (2012).

## 2. The Limits of Bilateral Dispute Settlement Mechanisms

The principles of individual responsibility are accompanied by processes for implementation and enforcement that match the characteristics of individual rather than shared responsibility.<sup>368</sup> However, in the increasingly complex character of international relations, “legal disputes between States are rarely purely bilateral.”<sup>369</sup> The present system of international dispute settlement is hardly designed to deal with multilateral disputes.<sup>370</sup> Procedures may not be able to capture all parties involved and may not do justice to the complexity of a multilateral context.

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 prevent any case against it for shared responsibility from undergoing judicial scrutiny. Likewise, where one of the responsible actors is an international organization, most international judicial bodies will not be able to hear claims of shared responsibility against them because acts by such organizations are typically not judiciable.

For instance, after the bombardment of the Federal Republic of Yugoslavia (FRY) by NATO began in 1999, the dispute was considered to exist in different variations, including as a conflict between the FRY and the U.N. Security Council, NATO, and NATO member states. Due to the aforementioned limitations on judiciability of organizational acts, a legal claim was brought by the FRY against only the member states of NATO. A dispute in legal terms only arose after individualization of disputes between FRY and each of the states.<sup>371</sup>

The bilateral nature of dispute settlement proceedings is particularly unsatisfactory for two reasons. On the one hand, if a complex dispute is recharacterized as a bilateral dispute because of procedural requirements of judicial institutions, it may inevitably have consequences for the states excluded from the dispute settlement process. Reisman noted that “[a]s interaction increases, more bilateral disputes will have peripheral effects.”<sup>372</sup>

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368. For a discussion of the connection between substance and procedure, see Markus Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 *LAW & PRAC. INT'L CTS. & TRIBUNALS* 369, 407 (2006); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 *COLUM. L. REV.* 1013, 1013 (2008).

369. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240, 298 (June 26) (separate opinion of Judge Shahabuddeen).

370. Lori Fisler Damrosch, *Multilateral Disputes*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 379, 379 (Lori Fisler Damrosch ed., 1987).

371. The Federal Republic of Yugoslavia instituted proceedings before the ICJ against ten NATO member states, each of which had recognized the ICJ's compulsory jurisdiction. *See, e.g.,* *Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order, 1999 I.C.J. 761 (June 2); *Legality of Use of Force (Serb. & Montenegro v. U.K.)*, Provisional Measures, Order, 1999 I.C.J. 826 (June 2); *Legality of Use of Force (Yugoslavia v. U.S.)*, Provisional Measures, Order, 1999 I.C.J. 916 (June 2).

372. WILLIAM MICHAEL REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* 332 (1971).

For example, a possible determination of the liability of the first state might entail the effective determination of the liability of others in fact involved in the dispute, if not the dispute settlement.<sup>373</sup>

On the other hand, the absence of potentially coresponsible parties from a dispute settlement proceeding may adversely affect the interests of the respondent state “both by its inability to obtain needed evidence and by the differential levels of obligation that could be created when some but not all of the involved states are bound by the Court’s judgment.”<sup>374</sup>

Developing the international legal regime in a direction where it can better deal with questions of shared responsibility therefore does not only require adjustment of principles but also of processes of responsibility and adjudication.

### 3. Dealing with the Limits of Bilateral Mechanisms

In considering how dispute settlement can better take into account the context of collective action, we distinguish between the two categories of situations as previously described: how to promote multiparty proceedings and how to deal with the absence of some contributing entities from the proceedings.

First of all, what procedures should be put in place to facilitate the most comprehensive participation in the proceedings of all relevant parties? The answer depends on who has the obligation to ensure that this happens. From the point of view of an international court, this may involve consideration of joinder procedures, which grant courts the power to add parties to a procedure, and powers to order production of evidence in the hands of third parties. On this point, substantial differences exist between the practices of different international courts; for example, in the ECtHR joinder is more common than in the ICJ.<sup>375</sup> In principle, these differences can be

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373. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240, 329 (June 26) (dissenting opinion of Judge Schwebel); Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. & U.S.), Preliminary Question, Judgment, 1954 I.C.J. 19, 31–33 (June 15).

374. Damrosch, *supra* note 370, at 391.

375. Both the European Court of Human Rights and the ICJ court rules permit joinder. See Eur. Court of Human Rights, Rules of Court, r. 42(1), (2) (Sept. 1, 2012), available at [http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT\\_EN\\_2012.pdf](http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf); Int’l Court of Justice, Rules of Court, art. 47 (July 1978), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>. However, as a practical matter, the ICJ is less likely to order joinder. See Legality of Use of Force (Serb. & Montenegro v. U.K.), Preliminary Objections, Judgment, 2004 I.C.J. 1307, 1441–42 (separate opinion of Judge Kreća) (explaining the limited nature of joinder in the ICJ); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application for Permission to Intervene, Judgment, 2001 I.C.J. 575 (Oct. 23) (rejecting joinder request); Peter H.F. Bekker, International Decision, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States)*, 92 AM. J. INT’L L. 503, 508 (1998) (“[The] ICJ has ordered a formal joinder of the proceedings in two cases only.”); Hugh Thirlway, *The*

well explained by (and indeed support our distinction between) the public and private law dimensions of international courts. This is particularly true of the ICJ, where there is a fundamental tension between the Court's consensual structure and the public law nature of the claims it may be asked to adjudicate.

In relation to this point, although issues of shared responsibility primarily focus on situations of multiple responsible entities rather than multiple claimants, it should be acknowledged that the latter situation can be affected by the existence of the former. For example, the drafting of ASR Article 46, which relates to multiple claimants,<sup>376</sup> is evidently premised on the idea of independent attribution of responsibility that underlies the ILC framework. Indeed, it mentions "the state" that has committed the wrongful act, rather than "the states." Interestingly, although not unsurprisingly given the general philosophy of the Articles, this point is not discussed in the commentary, which only says that Article 46 enshrines "the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account."<sup>377</sup> It is therefore likely that rules of shared responsibility will impact the operation of Article 46, most notably on the question whether all injured states can raise a claim against all contributing states and on the question of the nature and quantum of the reparations that can be claimed against one or more states by one or more injured states.

The second issue to consider is how courts should deal with the absence of a party to the proceedings. Indeed, for a number of reasons, not all responsible entities might be present. This could be due to the fact that a state has not consented to the relevant court's exercise of jurisdiction (notably in the ICJ) or simply because the plaintiff has directed the claim against only one or a few responsible parties. Moreover, the ICJ does not have jurisdiction over a number of entities that might have contributed to injury, such as international organizations, individuals, or other nonstate actors.

The starting point for discussion in relation to this latter problem is the *Monetary Gold* principle. This principle, which has its origin in the 1954 ICJ judgment,<sup>378</sup> provides that

where the legal interests of a third State, which itself is not subject to the jurisdiction of the respective tribunal, forms the very subject-matter of the dispute, the case cannot be heard and decided. Such

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*Law and Procedure of the International Court of Justice 1960–89: Part Ten*, 2000 BRIT. Y.B. INT'L L. 1, 164 (discussing identical cases before the ICJ that were not joined and resulted in separate judgments).

376. ASR, *supra* note 17, ¶ 76, art. 46 ("Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.").

377. ASR, *supra* note 17, ¶ 77, art. 46, cmt. 1.

378. *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. & U.S.), Preliminary Question, Judgment, 1954 I.C.J. 19 (June 15).

third State is considered a ‘necessary third party’ to the case, the interests of which form the very core of the underlying dispute.<sup>379</sup>

The main issue relating to this principle and how it affects situations of shared responsibility relates to its scope. The original judgment of the ICJ in 1954 was relatively narrow and case specific. It was narrow in the sense that it found that it could not consider what constituted a legal dispute between Italy and Albania without the consent of Albania. In the Court’s words, “To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle in international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.”<sup>380</sup> It was case specific in the sense that the ICJ was called upon to decide on the very material allocation of gold to Italy, the United Kingdom, or Albania. In light of this, at least some of the subsequent extensions of the principle<sup>381</sup> can be subjected to critique, not only because of the barriers they impose for a workable system of shared responsibility, but also based on the consistency of the case law of the Court itself.

One of these possible extensions is whether the principle applies beyond states to international organizations. In his dissenting opinion in the *Lockerbie* case, Judge Schwebel argued that it does, choosing to apply *Monetary Gold* to find that the ICJ lacked the ability to consider the legality of a Security Council resolution in light of its absence in the proceedings.<sup>382</sup> More recently, the Court implicitly recognized that the *Monetary Gold* principle could extend to organizations by rejecting its application to NATO on factual grounds, rather than *ab initio*.<sup>383</sup> Given the fact that a number of collective endeavors are now the result of collaborations between states and international organizations, or actions of states within the framework of international organizations, such an extension would have notable consequences on the capacity of the ICJ to adjudicate in situations of shared

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379. Andreas Zimmerman, *International Courts and Tribunals, Intervention in Proceedings*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L., [http://www.mpepil.com/subscriber\\_article?id=epil/entries/law-9780199231690-e37](http://www.mpepil.com/subscriber_article?id=epil/entries/law-9780199231690-e37) (last updated Aug. 2006).

380. *Monetary Gold*, 1954 I.C.J. at 32.

381. This is most notable in the *East Timor* case, where the ICJ declined to consider the responsibility of Australia based on the fact that this would involve discussing the legality of Indonesia’s occupation of East Timor in the absence of Indonesia as a party to the proceedings. See *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶ 34 (June 30).

382. See Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, Judgment, 1998 I.C.J. 115, 172 (Feb. 27) (dissenting opinion of President Schwebel) (“For the Court to adjudicate the legality of the Council’s decisions in a proceeding brought by one State against another would be for the Court to adjudicate the Council’s rights without giving the Council a hearing.”).

383. Application of Interim Accord of 13 September 1995 (Former Yugoslav Republic of Maced. v. Greece), Judgment, ¶¶ 41–44 (Dec. 5, 2011), <http://www.icj-cij.org/docket/files/142/16827.pdf>.

responsibility. One way to counter this broad interpretation of the principle is to return to its roots, namely the way it was framed in the *Monetary Gold* judgment. One can thus argue that a logical consequence of the Court's consent-based reasoning is that the principle only applies to entities that could in fact consent to the Court's jurisdiction, which would exclude international organizations and other nonstate entities. In addition, this would coincide with the fact that, in the absence of any possible jurisdiction over an entity, the ICJ cannot be said to ever be able to adjudicate (in a technical sense) on the rights of that entity. Finally, should the principle be applied to international organizations, entities over which the ICJ does not have jurisdiction, what conceptual barrier would exist to applying it to other entities over which the Court does not have jurisdiction, such as individuals or various nonstate actors? The consequence of a broad reading of the principle would be to seriously impair the role of the ICJ given that most attribution operations involve, at some level or another, discussion of the acts (and the legality thereof) of individuals or organs acting as de jure or de facto organs of the state.

#### CONCLUSION

As illustrated by this Article, changes in modern international relations and the international legal order bring to the fore the necessity of a comprehensive discussion of issues of shared responsibility. The interdependence of a variety of actors increases the likelihood of concerted action (and harm occurring from it) and requires that new rules be conceived to address this new reality. Moreover, the growing recognition of the public-order dimensions of international society implies that the traditional construction of international responsibility needs to be revisited.

Discussions on shared responsibility cannot remain purely technical without being embedded in a broader conceptual discussion of international responsibility in general. The current framework is the historical fruit of a primitive and horizontal conception of the international legal order. However, the current framework does not fully correspond any longer with the reality of today's international legal order, which has reached a new level of maturity. And maturity is necessarily accompanied by complexity, complexity of the legal relationships among actors and complexity of the interests promoted and protected by the law. The law of responsibility must acknowledge this complexity.

This is why, as a conceptual foundation of shared responsibility, we propose an approach to international responsibility that is based on greater differentiation than the traditional unitary model and that better reflects the diversity of interests protected. More specifically, we call for a more systematic reading of the objectives of international responsibility in light of the public-private dichotomy. While this dichotomy is not watertight and should be considered as a continuum with shades of grey, we believe that it provides for a more relevant framework of analysis for thinking about inter-

national (and shared) responsibility. Using the same logic, we also call for moving beyond the primary-secondary dichotomy so as to better explain the relationship between obligations and the attribution of responsibility. This framework provides us with a starting point to discuss issues of shared responsibility in a more subtle and comprehensive way.

In this context, we have suggested a number of avenues that may be explored, both with respect to the content of the law of responsibility and its practical application. In relation to the substantive rules of responsibility, a key proposal is the possible adoption of joint and several responsibility in international responsibility, the scope and content of which would depend not only on the “simple” operation of individual attribution, but on a number of other considerations. For one, the relationship of the responsible entities needs to be considered. As was explained, consent to cooperative actions may justify that responsibility flow from consent rather than actual conduct. Second, the nature of the particular obligations, such as those relating to international crimes, might justify in themselves that responsibility be shared by a group of states or even the international community as a whole. Finally, the nature of the responsibility (along the public-private distinction) might justify different rules, such as the apportionment of reparation obligations among a number of responsible entities.

In relation to the application of the law of responsibility, we have suggested the need to reconsider the fundamentally bilateral dynamic of international dispute settlement, which does not allow for the adequate addressing of situations of shared responsibility. This requires that procedural rules be devised to address the absence of possible coresponsible entities, both by allowing them to be joined to the proceedings and for preventing proceedings from being terminated as a result of their continued absence, as illustrated by a more restrictive reading of the *Monetary Gold* principle.

We recognize that our proposed approach may meet fundamental obstacles in terms of its reception by states. The current state of the law, which may favor “buck passing” and may make it difficult to implement principles of shared responsibility, may work to the benefit of states by giving them a better chance of avoiding responsibility. This being so, it is not likely that they will easily embrace change.

Moreover, any change in the existing system will need to take into account the fundamental interests of foreseeability and predictability. In particular, when a seemingly uniform system is replaced by a more contextual and differentiated approach, it should be considered whether it is desirable that breaches of one type of obligation trigger different responsibility rules than breaches of another treaty that might be dealing with similar types of obligations.<sup>384</sup>

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384. In this respect there is a close relationship between the principles applying to (shared) responsibility and the rule of law. See BROWNLIE, *supra* note 151, at 79. For a discussion of the role of legality and foreseeability as rule-of-law criteria, see Arthur Watts, *The International Rule of Law*, 36 GER. Y.B. INT'L L. 15, 26–28 (1993).

However, the primary ambition of the intellectual project that underlies this Article is to lay the groundwork for a comprehensive discussion of shared responsibility, based on an examination, critique, and development of relevant practices. This will require uniting fragmented discussions from different fields of law and other disciplines, such as sociology, philosophy, and political theory. In this sense, to advance this ambitious project, this Article serves as a meeting point and a stepping stone for the bringing together of various communities of international law, including academics and practitioners from across doctrinal fields such as human rights, military operations, refugee law, and environmental law as well as other communities from the social sciences without which a conceptual discussion of the issues would remain impossible. Only through this intellectual cross-fertilization will the dynamics of shared responsibility be adequately explained, understood, and ultimately implemented in the ever-evolving international society.