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ISSUES OF SHARED RESPONSIBILITY BEFORE THE
INTERNATIONAL COURT OF JUSTICE

Andre Nollkaemper

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Issues of Shared Responsibility before the International Court of Justice

Andre Nollkaemper*

1. Introduction

While most instances in which the international responsibility of states is engaged, involve wrongful acts committed by individual states, international responsibility also may arise out of the acts of two or more states. Examples can be found in the context of multinational military operations,¹ extra-territorial migration policies,² or acts that contribute to climate change or other transboundary environmental problems.³ In these cases, responsibility may be shared between two or more states.⁴

The principles applicable to cases of shared responsibility are not well developed. The International Law Commission (ILC), both in its work on responsibility of states and the responsibility of international organizations, recognized that attribution of acts to one state or

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¹ See generally: Dannenbaum, Tom, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers" (2010) 51(1) *Harv Int'l LJ* 113.

² Ryan, Bernard and Mitsilegas, Valsamis, *Extraterritorial Immigration Control: Legal Challenges* (Immigration and Asylum Law and Policy in Europe, Martinus Nijhoff Publishers, Leiden and Boston 2010).

³ See for instance: Okowa, Phoebe N., *State Responsibility for Transboundary Air Pollution in International Law* (Oxford UP, 2000) 195, discussing "Responsibility and Multiple State Actors".

⁴ For further clarification of the term 'shared responsibility' see section 2.

organization does not exclude the possible attribution of the same act to another state or organization.⁵ But it has provided limited guidance to the allocation of responsibility or reparation in such cases. Article 47 of the Articles on State Responsibility stipulates that where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. However, the article raises several questions, and the ILC left aside many aspects of the problem of shared responsibility.⁶ The principles of international law on the basis of which such allocation should proceed are, in the words of Brownlie, ‘indistinct’⁷ and may not provide clear answers for the intricate questions that arise in practice.

A lack of clarity in the law pertaining to shared responsibility is a matter of practical significance. It can hamper redress for injured parties, who may not be able to determine to

⁵ International Law Commission (hereinafter: ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UN GAOR Supplement No. 10 (A/56/10) chp.IV.E.1 (hereinafter: Articles on State Responsibility) Article 19: “This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.” and ILC, *Draft Articles on the Responsibility of International Organizations*, Report of the sixty-first session (2009) UN GAOR (A/64/10) chp.IV–C (hereinafter: Articles on the Responsibility of International Organizations) Article 62: “This Part is without prejudice to international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.”

⁶ See e.g.: ILC, Report on the work of its fifty-second session (2000) UN GAOR Supplement No. 10 (A/55/10) 46, para 252: “[T]he draft articles could not deal with all of the procedural ramifications of situations of multiple responsibility.” and ILC, Summary records of the 2662nd meeting, 52nd session (2000) in *Yearbook of the ILC 2000*, Vol. I (A/CN.4/SER.A/2000) 396 para 59: “[T]he articles did not address the question of how responsibility was shared when several States were responsible for the same wrongful act.”

⁷ Brownlie, Ian, *Principles of Public International Law* (8th edn, Oxford UP, 2008) 457. See also Okowa (n 3) 200, noting that: “[N]o definitive principles can be delineated from this limited international practice. Indeed, there is little evidence to suggest that international law already recognizes that in appropriate circumstances responsibility may be joint and several. Such evidence as exists is far from conclusive. It is therefore suggested that the principles which ought to determine the apportionment of responsibility can only be suggested as part of the progressive development of the law.” See also Orakhelashvili, Alexander, “Division of Reparation Between Responsible Entities” in Crawford, J. Pellet, A. and Olleson, S. (eds), *The Law of International Responsibility* (Oxford UP, 2010) 647, 664, noting that the law is currently “uncertain, unsatisfactory and even chaotic.”

whom a claim should be addressed, and find that actors who are responsible for part but not all of the injury pass the buck. It also may undermine the preventative effects of responsibility when the law of responsibility cannot be implemented towards all States that participate in wrong and injury.⁸ Finally, it may endanger legal certainty, as states can be held responsible on the basis of a remote connection to a wrongful act committed by another state, and responsibility could not be foreseen.⁹

Against this background, it is useful to examine the few principles of responsibility that have been formulated by the International Court of Justice (ICJ) in relation to shared responsibility. Judgments of the ICJ and its predecessor the Permanent Court of International Justice (PCIJ) on questions of international responsibility almost invariably have been attributed much authoritative weight, and large parts of the law of international responsibility, including the principle of responsibility itself,¹⁰ attribution of conduct to states of *de facto* organs¹¹ and attribution of conduct based on acknowledgement¹² are largely based on this case-law.¹³

In quite a few cases the Court has been confronted with situations where two or more states, and sometimes also other subjects of international law, were involved in internationally

⁸ Orakhelashvili (n 7).

⁹ Ibid 649.

¹⁰ *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A, No. 9, 21 and (Merits) [1928] PCIJ Rep Series A, No. 17, 47; Article 1 of the Articles on State Responsibility.

¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America (hereinafter: USA))* (Merits) [1986] ICJ Rep 14 (*Nicaragua case*); Article 8 of the Articles on State Responsibility.

¹² *Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Merits) [1980] ICJ Rep 3 (*Consular Staff in Tehran case*); Article 11 of the Articles on State Responsibility.

¹³ See generally on issues of responsibility before the ICJ: Higgins, Rosalyn, “Issues of State Responsibility before the International Court of Justice” in Fitzmaurice, M. and Sarooshi, D. (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing, Oxford 2004) 1; Higgins, Rosalyn, “The International Court of Justice: Selected Issues of State Responsibility” in Ragazzi, M. (ed), *International Responsibility Today: essays in memory of Oscar Schachter* (Martinus Nijhoff, Leiden 2005) 271.

wrongful acts. Notable examples are the *Corfu Channel* case,¹⁴ *Certain Phosphate Lands in Nauru*,¹⁵ the *East Timor* case¹⁶ and the *Legality of the Use of Force* cases.¹⁷ While these cases do not provide comprehensive discussion of the problems raised by shared responsibility, they do contain pronouncements on a few particular aspects, and as such provide some useful building blocks for a comprehensive theory of shared responsibility.

The aim of this article is to systematize the case law of the ICJ and to assess how the ICJ has treated certain core aspects pertaining to shared responsibility. After a brief explanation of the main terms and concepts (section 2), the article will discuss some hurdles of a procedural nature, faced by the Court in dealing with problems of shared responsibility (section 3). It will then discuss the case-law on shared responsibility involving two or more states (section 4) and the implications of shared responsibility for reparation (section 5). Section 6 discusses questions of shared responsibility involving states and non-state actors. Section 7 contains brief conclusions.

2. Conceptual issues

2.1 Forms of shared responsibility

It is the premise of this article that shared responsibility causes certain complex question of determination and allocation of responsibility and reparation that are different from situations

¹⁴ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland (hereinafter UK) v Albania)* (Merits) [1949] ICJ Rep 4; ICGJ 199 (ICJ 1949) (*Corfu Channel* case).

¹⁵ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240; ICGJ 91 (ICJ 1992) (*Nauru* case).

¹⁶ *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90 (*East Timor* case).

¹⁷ *Legality of the Use of Force (Yugoslavia v USA)* (Provisional Measures) [1999] ICJ Rep 916 (*Legality of the Use of Force* cases).

where only one state is responsible. As such, shared responsibility represents a useful analytical category for examining questions of international responsibility,

In this article I use the term shared responsibility to refer to situations where two or more states have committed an internationally wrongful act and these two wrongs result in, or contribute to, a single injury. As both states are then responsible in respect of the same injury, the responsibility, and thus also the obligation to provide reparation to an injured party, is shared. Contrary to what perhaps may be suggested by the term, such responsibility does not fall on these states as a collectivity, but falls on each of them as individual states.¹⁸

We can distinguish three cases in which such shared responsibility can exist.¹⁹ First, the term covers two independent wrongs, arising out of separate acts that are attributable to two states, that result in a single injury. An example from the case law of the ICJ are the facts leading to the *Corfu Channel* Case, where it appeared that Yugoslavia and Albania committed separate wrongful acts, resulting in damage to a British ship.²⁰ Another example, at least on one reading of the facts of the *Oil Platforms* Case, are the independent wrongful acts of Iran and Iraq consisting of placing mines in the Persian Gulf, leading to injury for the United States in that its ability to engage in free navigation through the Gulf was impaired.²¹ In such cases, it can be said that each state is individually responsible for its own wrongdoing, and that they are concurrently responsible.²² Yet, it is not improper to say, certainly from the perspective of

¹⁸ May, Larry, *Sharing Responsibility* (University of Chicago Press, Chicago 1992) 38 noting that it is precisely the fact that responsibility distributes to individual states rather than to them collectively, that is the defining feature of shared responsibility.

¹⁹ One possible form of shared responsibility that I leave out of consideration concerns the sharing of responsibility between the responsible state and the injured state, raising issues of contributory fault. This relationship has been considered in terms of shared responsibility. See in particular the statement made by Mr. Mahiou in the discussions at the 2171st meeting of the proposals of Special Rapporteur Arangio-Ruiz on reparation in *Yearbook of the ILC 1990*, Vol. I (A/CN.4/SER.A/1990) 166, para 68.

²⁰ See section 4.1.

²¹ See section 4.3.

²² Talmon, Stefan, "A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq" in Shiner, Paul and Williams, Andrew (eds), *The Iraq war and International Law* (Hart, Oxford and Portland 2008) 185, 212.

the injured state, that the responsibility for the injury is shared between the two wrongdoing states.²³

The examples of the *Corfu Channel Case* and the *Oil Platforms Case* make clear that there is no absolute opposition between shared responsibility and what the ILC named ‘independent responsibility’. The latter term refers to the principle under which each State is responsible for its own internationally wrongful conduct, that is: for conduct attributable to it under the principles of attribution set forth in chapter II of the Articles on State Responsibility, which is in breach of an international obligation of that State in accordance with chapter III of those Articles.²⁴ Two cases of independent responsibility can combine to result in a single injury, and thus can be treated as a case of shared responsibility.

The second situation covered by the term shared responsibility is the situation where one act is attributed to two or more states. An example is the situation where the organ of one State acts on the joint instructions of its own and another State, or where two or more states may have committed a single wrongful act by acting through a joint or common organ that functions as an organ of both states.²⁵ An act of that organ is then attributable to each of the states in question.²⁶ This was the situation in the *Nauru* case, where Australia, New Zealand and the United Kingdom were designated as the joint Authority which was to exercise the administration of Nauru. The acts of the Authority could be attributed to each of these three states.²⁷ We then can say that the act is shared, as is the resulting responsibility. It is this multiple attribution of a single act that is the essential distinction with the first category. In the

²³ Dominicé, Christian, “Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility” in Crawford, J. Pellet, A. and Olleson, S. (eds), *The Law of International Responsibility* (Oxford UP, 2010) 284.

²⁴ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries” in *Yearbook of the ILC 2001*, Vol. II (A/CN.4/SER.A/2001/Add.1) (Part 2) (hereinafter: Commentaries to the Articles on State Responsibility) 64, para 1.

²⁵ Commentaries to the Articles on State Responsibility, Commentary to Article 6, 44 para 3.

²⁶ Ibid; Brownlie, Ian, *State Responsibility* (System of the Law of Nations, Clarendon Press, Oxford 1983) 191-92.

²⁷ See section 4.4.

arguments of Serbia and Montenegro in the *Legality on the Use of Force* cases, this also was the situation for the bombing of Belgrade carried out by NATO member states.²⁸

Third, there is a category that consists of situations in which one state commits a wrongful act in conjunction with another state. This category contains a wide variety of situations that each may present a separate subcategory, but that for present analytical purposes can be grouped together on the basis of the relationship between two wrongful acts. These include the situations where a state aids or assists in the wrongful act of another state or another entity, as was considered by the Court in the *Bosnian Genocide Case*;²⁹ directs or controls the wrongful act by another state;³⁰ or coerces another state in committing a wrongful act.³¹ It is to be added that whether or not in case of direction and control and coercion we speak of two separate wrongs or of one wrongful act that is attributed to both states is rather unclear and itself requires further analysis.

This category also includes the situations where one state places an organ at the disposal of another state without that organ falling under the exclusive control of the receiving state.³² Whereas in the cases of aid and assistance one wrongful act is committed, in this situation only one wrongful act is committed.

An additional scenario falling in this category involves cases where a state commits a wrongful act in conjunction with an international organization, for instance by ‘using’ an international organization to commit a wrongful act, that then may lead to responsibility of both to the state and to the organization,³³ or by acting wrongfully by implementing a decision of an international organization, thereby contravening an international obligation.³⁴

²⁸ See section 4.3.

²⁹ See section 6.

³⁰ Article 17 of the Articles on State Responsibility.

³¹ Article 18 of the Articles on State Responsibility.

³² ILC Special Rapporteur James Crawford, *Third Report on State Responsibility*, 52nd session (2000) UN GAOR (A/CN.4/507/Add.2) para 267.

³³ Article 60 of the Articles on the Responsibility of International Organizations.

³⁴ Article 16 of the Articles on the Responsibility of International Organizations.

2.2 Shared and joint (and several) responsibility

Sometimes, some or even all of these situations of ‘shared responsibility’ are referred to by the term ‘joint responsibility’ or ‘joint and several responsibility’. For instance, Orakhelashvili refers to the concept of joint and several responsibility to refer to the principle under which the responsibility of a state is not reduced even if another state is involved in the perpetration of that wrongful act.³⁵ Brownlie uses the term to refer to particular situations where one state aids or assists another state in the commission of a wrongful act.³⁶

If the term joint, or joint and several, responsibility is to be used in international law, it is to be used as a formal category recognized by existing secondary rules and to which specific legal effects are attached. Whereas shared responsibility is used here as an analytical category to bring together cases have certain common features, to say that states are jointly, or jointly or severally, responsible, is to imply certain consequences.³⁷ If the term joint responsibility as a legal category is to be useful, such legal consequences have to differ from the legal consequences of independent responsibility. Whether and to what extent in international law a distinct category of joint responsibility indeed exists and what its features are, is a matter of some uncertainty.

It has been said that, as far as joint responsibility is concerned, this consequence would be that the responsibility of each of the states is not reduced by the involvement of another state.³⁸ However, that is simply another way of phrasing the principle of independent responsibility: each state is responsible for its own wrongs, and for the damage caused thereby. The qualification of an action or responsibility as ‘joint’ then does not carry any additional legal consequences. It also has been suggested that when two (or more states) were engaged in a single wrongful act, these states can only be held responsible as a collectivity.

³⁵ Orakhelashvili (n 7) 657.

³⁶ Brownlie, *State Responsibility* (n 26) 191.

³⁷ It is to be noted that Garner, Brian A. (ed), *Black's Law Dictionary* (8th edn, West, 2004) defines ‘joint liability’ in very general terms as “liability shared by two or more parties”.

³⁸ Orakhelashvili (n 7) 657-58.

This was the argument of by Australia in the *Nauru* case, which however was rejected by the Court.³⁹ Perhaps the most relevant (potential) legal consequence of the qualification of a situation as joint responsibility arises if it would not just be joint, but also joint and several responsibility. The consequence would then be that injured parties could bring a claim against each of the states that are part of the joint action, irrespective of whether the other party would also be sued: possibly (though that is a matter of some uncertainty) it could also mean that the injured state then could obtain full compensation from each of the co-responsible parties. Particular treaty regimes do provide for such joint responsibility,⁴⁰ but the question whether it exists as a matter of international law is uncertain.⁴¹

The term joint responsibility has been applied to each of the three situations discussed above. First, it has been applied to refer to two independent wrongs resulting in a single injury.⁴² Second, it has been used to refer to a situation where a wrong by one state necessarily also is the wrong of another state, because the act is doubly attributed to both states. And third, it has been used to refer to cases where two wrongful acts are related to each other, as in the case of aid or assistance.⁴³

³⁹ See section 4.3.

⁴⁰ See e.g. Agreement on the Promotion, Provision and Use of GALILEO and GPS Satellite-Based Systems and Related Applications (European Community - USA) (28 June 2004) <http://ec.europa.eu/enterprise/policies/satnav/galileo/files/2004_06_21_eu_us_agreement_en.pdf> accessed 7 February 2011, Article 19 para 2 states that: "If it is unclear whether an obligation under this Agreement is within the competence of either the European Community or its Member States, at the request of the United States, the European Community and its Member States shall provide the necessary information. Failure to provide this information with all due expediency or the provision of contradictory information shall result in joint and several liability."

⁴¹ See e.g. *Eurotunnel Arbitration (Channel Tunnel Group Ltd and France-Manche SA v France and UK)* (Partial Award) [30 January 2007] PCA, para 165-69.

⁴² All examples from national law discussed in the separate opinion by Judge Simma in the *Oil Platforms* case (see section 4.3) relate to liability arising out of acts of independent wrongdoers, and this was indeed the focus of his analysis of the independent wrongs of Iran and Iraq.

⁴³ Brownlie, *State Responsibility* (n 26) 191; Chinkin, Christine, "The Continuing Occupation? Issues of Joint and Several Liability and Effective Control" in Shiner, Paul and Williams, Andrew (eds), *The Iraq War and International Law* (Hart Publishing, Oxford and Portland 2008) 164.

However, joint responsibility is not a term of art in international law. The ILC did not use it in its Commentary to the Articles on State Responsibility, and warned against assuming that

‘internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.’⁴⁴

The ILC did include Article 47, providing that where two or more States are responsible for the same internationally wrongful act, the responsibility of each State or may be invoked in relation to that act. However, it stated in its Commentary that paragraph 1 of Article 47 ‘neither recognize[d] a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act’.⁴⁵

In contrast, the commentary of the first draft of the Articles on the Responsibility of International Organizations expressly uses the term ‘joint responsibility’. It states that ‘[t]he joint responsibility of an international organization with one or more States is envisaged in articles 13 to 17, which concern the responsibility of an international organization in connection with the act of a State, and in articles 57 to 61, which deal with the responsibility of a State in connection with the act of an international organization.’⁴⁶ These are cases that would fall in the third category identified above. However, the Commentary does not provide a concise definition, and it is unclear whether it meant to say that two independent wrongs that result in a single injury cannot be qualified as joint responsibility.

⁴⁴ Commentaries to the Articles on State Responsibility, Commentary to Article 47, para 3.

⁴⁵ Ibid para 6.

⁴⁶ ILC, *Text of the Draft Articles on the Responsibility of International Organizations with Commentaries Thereto*, Report of the sixty-first session (2009) UN GAOR Supplement No.10 (A/64/10), chp.IV-C.2, Commentary to Article 47 para 1. See also Bell, Caitlin A., “Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision” (2010) 42(2) *N Y U J Int'l L & Pol* 501, 517-518.

Whether or not use of the term joint responsibility has a added conceptual value and is actually related to a particular legal category, requires further analysis.⁴⁷ In part it is answered by the conclusions of the substantive analysis of this body of international law, and it is suggested that in the present unclear state of the law, this is best approach inductively. Also for that reason, we now will examine the use of terms and concepts by the ICJ.

3. Procedural hurdles in the ICJ

The possibility that the ICJ considers questions of shared responsibility and contributes to the development of the relevant principles is somewhat limited by the Court's dependency on sovereign states' readiness to submit their behavior to the scrutiny of the Court and which can each decide whether or not they consent to its jurisdiction of the Court. As a result, the Court lacks the power to direct that a third state, that does not consent to it, be made a party to the proceedings.⁴⁸

One consequence of this dependency is that the Court's jurisdiction is in the hands of the parties. A state (allegedly) injured by acts of multiple states, who may share the responsibility for such acts, may choose whether or not to bring a case against all states (assuming that they all have accepted the jurisdiction of the Court), or may proceed separately. This raises the question of the possible impact of the absence of (one of the) responsible parties for the ability of the Court to rule on the conformity with international law of their behavior.

This point was raised in connection to the various proceedings relating to the conflict in Nicaragua in the 1980s, when Nicaragua brought separate proceedings against the United States, Costa Rica and Honduras. The latter state objected to this process of 'serial application', and said that this created an 'artificial and arbitrary dividing up of the general

⁴⁷ A more comprehensive analysis will be provided by separate publications part of the SHARES project.

⁴⁸ In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392; ICGJ 111 (ICJ 1984) (*Nicaragua case* (Jurisdiction and Admissibility)) para 86 the Court observed that it did not possess the power to direct that a third state be made a party to the proceedings; See also Okowa (n 3) 200.

conflict existing in Central America' that moreover would have 'negative consequences for Honduras as a Defendant State before the Court, since it affects the guarantee of a sound administration of justice and undermines the principle laid down in Article 59 of the Statute of the Court.'⁴⁹ The Court rejected this argument, stating that 'it is for the parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties.'⁵⁰ The Court referred to Article 59,⁵¹ and it indeed would seem that only a strict application of Article 59, including to findings of fact, would protect the interests of a state that, while allegedly being one of multiple responsible states, is brought to the Court individually rather than jointly.⁵²

The more general point is that Article 59 in principle allows the Court to exercise jurisdiction, and that the possible effects of a judgment on a third state do not affect the exercise of jurisdiction by the Court. A State which is not a party to a case is free to apply for permission to intervene in accordance with Article 62 of the Statute.⁵³ But, in principle, the absence of such a request does not preclude the Court from adjudicating upon the claims submitted to it. Where the Court does act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court. However, there is one major exception to this starting point. This is the indispensable parties principle.

3.1 The indispensable parties principle

⁴⁹ *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69; ICGJ 102 (ICJ 1988) (*Border and Transborder Armed Actions* case) para 53.

⁵⁰ *Ibid* para 54

⁵¹ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (hereinafter: ICJ Statute), Article 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

⁵² See on this point also: Separate Opinion of Judge Schwebel in the *Border and Transborder Armed Actions* (n 49) ICJ Rep 126-32.

⁵³ ICJ Statute, Article 62 (1) providing that: "Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene."

In the *Monetary Gold* case the Court formulated an exception to the principle that the absence of a state who is concurrently or jointly responsible for a wrongful act does not preclude the exercise of jurisdiction.⁵⁴ The case is of fundamental importance for the role of the Court in cases of shared responsibility, and needs to be considered at some length. The Court was requested to decide that the three respondent States (France, United Kingdom, United States) “should deliver to Italy any share of the monetary gold that might be due to Albania under the Paris Act of January 14th, 1946⁵⁵, in partial satisfaction for the damage caused to Italy by an Albanian law that expropriated Italian property. The Washington Agreement⁵⁶ by which the parties had agreed to submit the case to the ICJ, specified in advance one of the purposes of Italy's Application, namely, the “determination of the question whether, by reason of any right which she claims to possess as a result of the Albanian law of 13th January, 1945, or under the provisions of the Italian Peace Treaty,⁵⁷ the gold should be delivered to Italy rather than to Albania”.

As Italy believed that she possessed a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her, the Court found that in order to determine whether Italy is entitled to receive the gold, “it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation.”⁵⁸ The Court then held that since Albania had not consented to the jurisdiction of the Court, it could not exercise jurisdiction; doing so would run counter to the principle

⁵⁴ *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Question) [1954] ICJ Rep 19; ICJ 183 (ICJ 1954) (*Monetary Gold* case).

⁵⁵ Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold (adopted 14 January 1946, entered into force 24 January 1946) 555 UNTS 69.

⁵⁶ Agreement for the Submission to an Arbitrator of Certain Claims with Respect to Gold Looted by the Germans from Rome in 1943 (France - UK - USA) (signed 25 April 1951) 100 UNTS 21.

⁵⁷ Treaty of Peace with Italy (signed 10 February 1947) 49 UNTS 3.

⁵⁸ *Monetary Gold* case (n 54) para 42.

that the Court can only exercise jurisdiction over a State with its consent.⁵⁹ Crucially, it found that “Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.”⁶⁰

The Court thus said that it could not exercise jurisdiction when the principal issue requires a determination of the legal position of a third State that is not a party to the proceedings.⁶¹ Only when such a prior determination of a legal position of a third state is at issue, the legal interest of that state forms the subject-matter of a decision, and only when the legal interest of a third state form the subject matter of a dispute, exercising jurisdiction would run counter to the principle that the Court can only exercise jurisdiction over a State with its consent. In such a case, the third state is an indispensable party, and we can therefore refer to the principle expressed by the Court as the indispensable parties principle.

Although this aspect of the *Monetary Gold* case did not concern a question of shared responsibility, the principle of indispensable parties that the Court formulated in this case may have implications for particular scenarios of shared responsibility. Indeed, in almost all cases before the Court which raised questions of shared responsibility, the indispensable parties rule was at one stage of the procedure invoked.

Only in one of these cases, the *East Timor* case, the Court found that the indispensable parties principle precluded it from exercising jurisdiction. The *East Timor* case presented issues of shared responsibility since Portugal had brought a claim in respect to a wrongful act allegedly committed by Australia, that consisted in the conclusion of a treaty with Indonesia in respect to exploration of oil and gas off the coast of East-Timor. The right breached (the right of self-determination) was accepted by the Court to be a right *erga omnes*, thus imposing obligations on both Australia and Indonesia.⁶² The implication was that both Australia and Indonesia

⁵⁹ Ibid para 43.

⁶⁰ Ibid para 45.

⁶¹ Shabtai, Rosenne, “International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications” in Wolfrum, R. (ed), *The Max Planck Encyclopedia of Public International Law* (Heidelberg and Oxford UP, 2011) <www.mpepil.com> accessed on 9 February 2011 (article was last updated March 2006), para 7.

⁶² *East Timor* case (n 16) para 29.

were obliged to refrain from interfering with this right – *erga omnes* rights are by definition the corollary of multilateral obligations.⁶³ From that perspective, the case involved the possible shared responsibility of Australia and Indonesia.

Since Indonesia was a party to the proceedings, the question was whether the Court could individualize the wrong committed by Australia (which was said to consist of the conclusion of a bilateral treaty with Indonesia) and exercise jurisdiction. Portugal said on this point that its Application was concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question was perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. While the Court did not as such reject this latter proposition, it did find that before being able to adjudicate this particular claim, it should first determine the rights of Indonesia over the disputed territory. In view of the absence of Indonesia from the proceedings, it then found that the Monetary Gold principle barred the exercise of jurisdiction. It noted that

‘the effect of the judgment requested by Portugal would amount to a determination that Indonesia’s entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have treaty making power in matters relating to the continental shelf resources of East Timor. Indonesia’s rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State’s consent.’⁶⁴

The Court added that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things: “Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to

⁶³ Dissenting Opinion of Judge Weeramantry in the *East Timor* case (n 16) ICJ Rep 139-223, 172 para (iii), emphasizing the individual nature of obligations flowing from *erga omnes* rights. He noted that “[A]n *erga omnes* right is a series of separate rights *erga singulum*, including *inter alia*, a separate right *erga singulum* against Australia, and a separate right *erga singulum* against Indonesia. These rights are in no way dependent one upon the other. With the violation by any State of the obligation so lying upon it, the rights enjoyed *erga omnes* become opposable *erga singulum* to the State so acting.”

⁶⁴ *East Timor* case (n 16) para 34.

the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.⁶⁵

This decision has been subjected to considerable critique.⁶⁶ Application of the indispensable parties rule may seem logical if the fundamental question of the case is construed, as presented by Australia, as the question whether ‘in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia’⁶⁷ But it is questionable whether that indeed was the ‘fundamental question’ of the case. Surely an answer to Portugal’s submission that Australia by concluding the treaty has infringed the right to self-determination of the people of East-Timor would not seem to depend on the treaty-making power of Indonesia.⁶⁸

The application of the indispensable parties principle by the Court in the *East Timor* case casts considerable doubt on the Court’s ability to adjudicate certain questions of shared responsibility, notably in cases involving aid and assistance and direction and control.⁶⁹ This also might apply in respect to the responsibility of an act of a state that is coerced in the commission of a wrongful act and would, in view of such coercion, plead for mitigation of reparation. The Court then would have to determine that there indeed was an act of coercion, implicating the responsibility of the coercing state.⁷⁰ In such cases, the application of

⁶⁵ Chinkin, Christine M., “The East Timor Case (Portugal v. Australia)” (1996) 45(3) *Int'l & Comp L Q* 712, 712-13 and 716-22; Lefeber, René and Raič, David, “Frontiers of International Law Part One: The Chechen People” 9 *LJIL* 6-7.

⁶⁶ Dissenting Opinion of Judge Weeramantry in the *East Timor* case (n 16) ICJ Rep 139-223, 172 para (iii); See also Orakhelashvili (n 7) 664.

⁶⁷ *East Timor* case (n 16) para 27.

⁶⁸ A more relevant question on this point, as noted by Judge Oda in his Separate Opinion, is how exactly, if at all, Australia by doing so would breach an international obligation, but that is a different matter.

⁶⁹ Commentaries to the Articles on State Responsibility, Commentary to Article 1, para 11: On the former, the ILC recognized that the Monetary Gold principle may well apply to cases involving aid and assistance.

⁷⁰ Compare Crawford, *Third Report on State Responsibility* (n 32) para 267, recognizing the possibility that the coerced state invokes a circumstance precluding wrongfulness.

substantive principles pertaining to shared responsibility may be hampered by the procedural principles governing the functioning of the Court.

On the other hand, the apparent increase in the number of cases involving shared responsibility,⁷¹ and the development of substantive principles of responsibility in respect to such cases, may lead to an undesirable conflict between the substantive and the procedural law of the ICJ, seriously limiting the degree in which the ICJ could give effect to the policy rationale underlying the system of responsibility. Perhaps induced by this consideration, in quite a few other cases the Court has narrowly construed the indispensable parties principle in other situations of shared responsibility. These may be grouped in two categories: situations of concurrent independent wrongdoing, on the one hand, and situations of double attribution, on the other.

3.2 The indispensable parties rules in cases of concurrent independent wrongful acts

The indispensable parties rule does not prevent the Court from exercising jurisdiction in case of two concurrent independent wrongful acts. This can be inferred from the Court's exercise of jurisdiction in the *Corfu Channel* Case. The fact that Yugoslavia was not a party to the dispute did not preclude the Court from exercising its jurisdiction under the indispensable parties rule. While the Court had to make some determinations that would at least have indirect legal relevance in a hypothetical legal proceedings against Yugoslavia (such as its pronouncements on the legality of the navigation of the British warships), the possible wrongfulness of the acts of Yugoslavia did not constitute the very subject matter of the dispute between Albania and the United Kingdom. For the Court to pronounce on the responsibility of Albania in the *Corfu Channel* case it was not necessary to make a determination on the responsibility of Yugoslavia, and as such the responsibility of Yugoslavia was not the subject matter of the dispute.⁷² From this case one can infer that in a

⁷¹ See Separate Opinion of Judge Shahabuddeen in the *East Timor* case (n 16) ICJ Rep 119-128, para 3 noting that: "Problems of this kind are apt to arise from the fact that, in the increasingly complex character of international relations, legal disputes between States are rarely purely bilateral.)"

⁷² Ibid para 7.

situation of two concurrent independent wrongful acts, the Court can independently determine responsibility of each of the wrongdoing states without them being simultaneously party to the proceedings.⁷³

The Court's discussion of the indispensable parties principle in the *Nicaragua* case points in the same direction. It had been alleged that Honduras also had acted wrongfully against it by allowing their territory to be used as a staging ground for unlawful uses of force against Nicaragua.⁷⁴ It could be inferred that responsibility for the attacks against Nicaragua was shared between the United States and Honduras. The United States used this shared responsibility aspect to argue for application of the *Monetary Gold* principle, on the ground that adjudication of Nicaragua's claim would necessarily involve the adjudication of the rights of third states with respect to their rights under article 51 of the UN Charter.⁷⁵

The Court rejected that claim, noting that where claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. Other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention, but "There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings." The Court added that the "circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction ; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings."⁷⁶ This part of the judgment confirms a narrow construction of the *Monetary Gold* principle, that in principle does not preclude the Court from exercising jurisdiction in

⁷³ Of course the *Corfu Channel* case preceded the *Monetary Gold* case, but in view of the later *Nicaragua* and *Nauru* cases, discussed in section 3.3, it can safely be concluded that the Court would not decide this aspect of the *Corfu Channel* case differently today than it did at the time.

⁷⁴ *Nicaragua* case (Jurisdiction and Admissibility) (n 48) para 86.

⁷⁵ *Ibid* para 86.

⁷⁶ *Ibid* para 88.

cases of shared responsibility, where a judgment against one state may have implications for other states whose responsibility is not decisive for the outcome of the proceedings concerned, but does not depend on a prior determination of their legal position.

Judge Simma drew the same conclusion in this Separate Opinion in the *Oil Platform case*. He noted that it would be possible to hold Iran responsible for the undivided wrongful act that it committed together with Iraq, and on that basis to pronounce on the generic counterclaim against Iran. For doing so it would not have been necessary to make a determination on the legality of acts of Iraq.⁷⁷

A contrary argument was made by Italy in the *Legality of Use of Force* cases. It noted that the implication of holding all NATO Member States, without distinction, responsible for the “Allied Force” action, was that it requested the Court to deliver a judgment on the merits, which would inevitably prejudge the legality of the conduct of States not parties to these proceedings. On this basis, Italy requested the Court to find that the Application of Serbia and Montenegro is inadmissible.⁷⁸ The Court did not rule on this argument, but there is little doubt that, on the basis of the interpretation of the Monetary Gold principle in *Nicaragua* and *Nauru*, it would fail to satisfy the *Monetary Gold* standard.

3.3 *The indispensable parties rules in cases of multiple attribution*

The Court also has excluded from the scope of the *Monetary Gold* principle cases of double attribution, that is: responsibility arising out of an act of a joint organ that can be attributed to two or more states. If an act of a common organ is attributable to each state involved, a pronouncement on the responsibility of that common organ, or of a state acting on behalf of that common organ, necessarily is a determination of the responsibility of all states involved. Yet, in *Certain Phosphate Lands in Nauru (Nauru v. Australia)* concluded that in such cases the Court can exercise jurisdiction against a single responsible state.

⁷⁷ Separate Opinion of Judge Simma in *Oil Platforms (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Rep 324-61 (Separate Opinion of Judge Simma in the *Oil Platforms* case); See further section 4.____.

⁷⁸ *Legality of Use of Force (Serbia and Montenegro v Italy)* (Oral Proceedings) [Public Sitting 22 April 2004] CR 2004/22, para 34-35.

Nauru alleged a breach of the Trusteeship Agreement by Australia. The Trusteeship Agreement for Nauru, which was concluded pursuant to Article 77 of the UN Charter, provided for an “Administering Authority”. Article 2 of the Trusteeship Agreement stated that:

“The Governments of Australia, New Zealand and the United Kingdom (hereinafter called ‘the Administering Authority’) are hereby designated as the joint authority which will exercise the administration of the territory.”⁷⁹

The acts performed by Australia involved both “joint” conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf.⁸⁰ Australia relied on Article 2 to support the argument that it was under no separate obligation:

“the trusteeship obligations rest on the Administering Authority. The three Governments together constituted that ‘Administering Authority’, as a form of ‘Partnership’ [...] Accordingly, any breach of the obligations of the Administering Authority would be, *prima facie*, the joint responsibility of the Governments of Australia, New Zealand and the United Kingdom.”⁸¹

It then argued that a finding of responsibility against one state would be a simultaneous determination of the responsibility of all three States and that such a determination would be precluded by the fundamental reasons underlying the Monetary Gold decision.

The Court concluded, however, that the *Monetary Gold* standard did not act as a bar to its jurisdiction over Australia. It said that ‘the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application. It recognized that a finding by the Court regarding the existence or the

⁷⁹ Trusteeship Agreement for the Territory of Nauru (Australia - UK - New Zealand) (approved by the GA on 1 November 1947) 10 UNTS 3 (Trusteeship Agreement), Article 4: The three Governments had arranged that Australia would, unless otherwise agreed, “continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory.”

⁸⁰ Commentaries to the Articles on State Responsibility, Chapter IV, 64, para 3.

⁸¹ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections of the Government of Australia) [December 1990] Written Proceedings Vol. I, para 321.

content of the responsibility attributed to Australia by Nauru ‘might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.’⁸²

This judgment has been subject of substantial criticism that illustrates the difficult relationship between procedural issues of jurisdiction and substantive issues of (shared) responsibility. President Jennings maintained that, inasmuch as the three States formed the joint authority which exercised the administration of Nauru, the legal interest of New Zealand and the United Kingdom were so inextricably bound up with those of Australia in this matter that they would form the very subject-matter of the decision.⁸³ Judge Schwebel considered that a judgment by the ICJ on the responsibility of Australia would appear to be tantamount to a judgment on the responsibility of New Zealand and the United Kingdom, which were not before the court.⁸⁴

In particular, it seems difficult for the Court to determine the share of the liability falling upon a state that was involved through a common organ if the other states involved would not be present before the court⁸⁵ It appears that it was in this respect that Judge Ago stated that “it is precisely by ruling on these claims against Australia alone that the Court will, inevitably, affect the legal situation of the two other States, namely, their rights and their obligations. If, when dealing with the merits of the case, the Court were to recognize that responsibility and accordingly seek to determine the share of the responsibility falling upon Australia, it would thereby indirectly establish that the remainder of the responsibility would fall upon the two other States. Even if the Court were to decide - on what would, incidentally, be an extremely questionable basis - that Australia was to shoulder in full the responsibility in question, that decision would, equally inevitably and just as unacceptably, affect not only the ‘interests’ but also the legal situation of two States that are not parties to the proceedings. In either case, the

⁸² *Nauru* case (n 15) para 55.

⁸³ Dissenting Opinion of President Sir Robert Jennings in the *Nauru* case (n 15) ICJ Rep 301–2.

⁸⁴ Dissenting Opinion of Judge Schwebel in the *Nauru* case (n 15) ICJ Rep 329–43.

⁸⁵ Talmon (n 22) 209-11.

exercise by the Court of its jurisdiction would be deprived of its indispensable consensual basis. ”⁸⁶

The Court noted on this point that its ruling on the *Monetary Gold* objection did not prejudge the merits.⁸⁷ It thus left open the possibility that even though its jurisdiction may not be limited by the shared nature of responsibility, its possibility to award full reparation would in fact be restricted by such shared responsibility. The question remains, whether any determination on that point would not in fact involve a determination implicating the legal interests of the other states to such an extent that this would be the very subject matter of the dispute.⁸⁸ Perhaps the Court’s practice of reserving such questions to the merits is induced by the general expectation that the Court will not reach a liability phase at all. But that approach would be more pragmatic than of a principled nature.

3.4 The indispensable parties rules in cases of responsibility of international organizations

The *Legality of Use of Force* cases raised the question whether the Monetary Gold standard should be applied in cases of a responsibility that is shared between states and international organizations. Serbia and Montenegro argued that if two or more States together take joint action to the detriment of a third state, they are co-authors of any internationally wrongful act derived from their joint action, and that each of the states would be responsible for that action.⁸⁹ In this respect the claim was not dissimilar from the basis of the claim of Nauru

⁸⁶ Dissenting Opinion of Judge Ago in the *Nauru* case (n 15) ICJ Rep 326-28.

⁸⁷ *Nauru* case (n 15) para 56.

⁸⁸ Dissenting Opinion of President Sir Robert Jennings in the *Nauru* case (n 15) ICJ Rep 301–2: This was in fact suggested by Ago and also by Jennings, who noted: “Moreover, one must contemplate the situation that must arise if, on the merits, there should be any question of assessing the reparation that might be due from Australia (see para. 48 of the Judgment). If the obligations from which the liability arises are held to be solidary (joint and several) so that Australia is liable for the whole, or whether, alternatively, Australia is held liable only for some proportion of the whole sum, it is clear in either case that the Court will unavoidably and simultaneously be making a decision in respect of the legal interests of those two other States.”

⁸⁹ *Dominicé* (n 23) 282.

against Australia. The main difference was that in this case, as also agreed by the applicant, the joint action took place in the framework of an international organization with legal personality (NATO). It argued on this point that the respondent states were jointly and severally responsible for the actions of the NATO military command structure, which constitutes an instrumentality of the respondent states.⁹⁰ Several states, including Portugal, noted that responsibility of Member States would presuppose NATO's conduct being regarded as unlawful. It considered that this would be a matter of the responsibility of the Member States by virtue of the acts of an international organization and that the Court could never rule on Portugal's responsibility without first having ruled on the legality of NATO's conduct.⁹¹

The argument raises the question is whether the *Monetary Gold* standard applies at all to cases of indirect responsibility of member states for acts of international organizations, for instance in case of the principle proposed by the ILC that a State member of an international organization 'incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation so-called abuse of the legal personality of the organization.' According to the logic of the ILC Articles on the Responsibility, which should not be considered as the last word on this, in such cases there could be shared (or what the ILC calls joint) responsibility between the member states and the organization.⁹² The question then is whether the Court can adjudicate a claim against the state in the absence of an organization.

The Court did not decide the issues, but a few points can be noted. The question is what is the proper foundation of the indispensable parties rule: is it to be found in the sovereign equality of states (in which case it would not be applicable to international organizations) or is it a procedural mechanism that safeguards the quality of the decision-making of the Court? The

⁹⁰ *Legality of Use of Force (Serbia and Montenegro v UK)* (Oral Proceedings) [Public Sitting 10 May 1999] CR 1999/14, para VII.

⁹¹ *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections of the Portuguese Republic) [July 2000] para 145; *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections) [2004] ICJ Rep 1160, para 22.

⁹² Article 60 and 62 of the Articles on the Responsibility of International Organizations.

Court has not been in a position to address the question, but in literature it has been suggested that the principle should equally be applicable to (in any case non-UN) organizations.⁹³ It can be recalled that in the *Monetary Gold* case itself, the Court ultimately based the indispensable parties rule on the principle that the Court can only exercise jurisdiction over a State with its consent.⁹⁴ That argument is grounded in the consensual character of the Court's jurisdiction.⁹⁵ While the Court has always formulated this principle with respect to its (lack of) jurisdiction over particular states, in principle it would also seem applicable to international organizations, which (as evidenced in the practice of the European Union) also only can be submitted to the jurisdiction of an international court if they consent to such jurisdiction.

However, it seems doubtful whether the *Monetary Gold* principle is applicable to international organizations. The Statute does not give contentious jurisdiction to the Court for adjudicating disputes involving international organizations.⁹⁶ It follows that acts of international organizations are, as a matter of principle, not justiciable before the Court, as the Statute does not give contentious jurisdiction to the Court for adjudicating disputes involving international organizations. Hence, the Court can by definition not determine the legal position of such organizations, and it on that basis that the *Monetary Gold* principle does not seem applicable. In that sense, the ICJ Statute excludes the application of *Monetary Gold* to international organizations.

In any case, the *Monetary Gold* rule would not apply to instances where an incidental assessment of the conduct or responsibility of UN institutions may have to be made: "The United Nations is not a sovereign entity. Institutionally, since the Court is one of its own

⁹³ See d'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States" (2007) 4(1) *IOLR* 91, 117, noting that in such a case, the responsibility of the organization will be part of the "very subject matter" brought before the tribunal concerned, thus requiring the appearance of the international organization. The absence of jurisdiction *ratione personae* of the ICJ over international organizations should lead the Court to dismiss claims based on the responsibility of states for abuse of the legal personality of the organization at the decision-making level.

⁹⁴ *Monetary Gold* case (n 54) para 43.

⁹⁵ See also Zimmermann, Andreas, Tomuschat, Christian and Oellers-Frahm, Karin, *The Statute of the International Court of Justice: A Commentary* (Oxford UP, 2006) 604.

⁹⁶ Article 34 of the Statute.

organs, it must be deemed to be debarred from arguing that no judicial determination on its rights and obligations may be carried out in its absence.”⁹⁷

3.5 Other procedural hurdles

Apart from the Monetary Gold principle, questions of shared responsibility may encounter different procedural hurdles in the ICJ. The *Nicaragua case* is a prominent example. The United States had argued that it was primarily for the benefit of El Salvador, so as to help it in its defense against an armed attack, that the US claimed to exercise its right of collective self-defense. To the extent that several states were involved in a collective act of self-defense, the possible wrongfulness of such self-defence would in fact be a collective wrongdoing, and raise an issue of shared responsibility.

In contrast to the earlier rejection of the argument based on Monetary Gold, this intertwining of collective self defence by El Salvador and the United States, in fact limited the exercise of the Court’s jurisdiction. The United States’ (then) acceptance of jurisdiction under Article 36(2) of the Statute included the so-called multilateral treaty reservation, that excluded from its application ‘disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.’ The Court distinguished this procedural aspect from that of the operation of the Monetary Gold Principle,⁹⁸ found that any decision on the US claims would affect El Salvador, and on that basis found itself without jurisdiction in regard to the claims based on the multilateral treaties in question (notably the UN Charter).⁹⁹ This part of the judgment is not without problems.¹⁰⁰ In any case, it is so tied to the rather

⁹⁷ Ibid.

⁹⁸ *Nicaragua case* (n 11) para 54.

⁹⁹ Ibid para 56.

¹⁰⁰ See Crawford, James, “Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)” in Wolfrum, R. (ed), *The Max Planck Encyclopedia of Public International Law*, (Oxford UP, 2011) <www.mpepil.com> accessed 9 February 2011 (article was last updated August 2006) para 13-17.

unique US reservation, that it is unlikely to have broader implications for the power of the Court to adjudicate questions of shared responsibility.

Finally, it is to be observed that the procedural hurdles caused by the bilateral nature of dispute settlement before the Court obviously do not apply in Advisory Opinions. If the question put to the Court in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)* had been formulated differently, the Court may well have had to consider the consequences of possibly wrongful (collective) recognition by states.¹⁰¹ The Monetary Gold Principle would not be relevant in such a case - indeed, it seems inherent to the procedure that, for instance, the General Assembly can ask questions that require the Court to express itself on rights and obligations of states. Legal consequences of any statement on such rights and obligations for states would already be precluded by the advisory nature of the opinion.

4. Principles of shared responsibility in the case law of the Court

Against the background of the procedural limitations of the Court, we can now examine what the principles the Court has been able to develop in its case-law on questions of shared responsibility.

4.1 Concurrent responsibility between independent wrongdoers

In the *Corfu Channel* case, the Court had occasion to pronounce on what at first sight is the least controversial scenario of shared responsibility: that of an injury resulting out of two

¹⁰¹ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) 2010 <<http://www.icj-cij.org/docket/files/141/15987.pdf>> accessed 10 February 2011; The possibility to consider questions of joint responsibility in advisory proceedings is also illustrated by: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [Seabed Disputes Chamber of the International Tribunal for the Law of the Sea] Case No. 17, 1 February 2011 <http://www.itlos.org/start2_en.html> accessed 12 February 2011, para 190-192.

independent wrongful acts by two states. The Court determined that Albania had acted wrongfully for its failure to comply with the obligation to warn the United Kingdom of the presence of the mines, thus allowing the mines to damage the British warships.¹⁰² The failure to warn led to the sinking of two warships and loss of lives, for which Albania had to pay compensation. Albania had, however, not itself laid those mines. The United Kingdom suggested that in fact Yugoslavia had laid those mines.¹⁰³ The Court did not find sufficient proof of this, but in any case did not suggest that the alleged role of Albania would diminish the responsibility of Albania.

The Corfu Channel case thus stands for the principle that in a situation where two states act independently from each other in contravention of an international obligation, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations. The ILC indeed primarily relied on the *Corfu Channel* case in support of this principle. Such responsibility would be neither precluded nor diminished by the possible responsibility of the other state.¹⁰⁴

The *Corfu Channel* case sometimes is attributed more relevance for the topic under consideration than it can bear. It has been suggested that the judgment is an application of the principle of joint and several liability.¹⁰⁵ However, the Court only found Albania responsible for its own wrongdoing, and it is not clear that classifying this finding as a case of joint and several liability adds anything to the legal situation. The situation may have been different if there would have been a case of collusion, or concerted action between Albania and

¹⁰² *Corfu Channel* case (n 14) para 43 and 49–56.

¹⁰³ Ibid para 36 - 37, 78 and ANNEX 1 para 84, 110: The UK's contention that the mines were laid by two Yugoslav war vessels was never proven since it was based only on circumstantial evidence. See for suggestion that the mines were laid by Yugoslavia also Gattini, Andrea, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment" 18(4) *Eur. J. Int'l L.* 695, 710-11.

¹⁰⁴ Commentaries to the Articles on State Responsibility, Commentary to Article 47, para 8.

¹⁰⁵ Brownlie, *State Responsibility* (n 26) 189 (? Does discuss Corfu Channel, but does not expressly state that it is an application of joint&several liability. Perhaps Brownlie 2008? In that case create a cross-reference to n 7 in the following manner: Brownlie, *Principles of Public International Law* (n 7) and pinpoint location); Okowa (n 3) 200; Wendel, Philip, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer Verlag, Berlin and New York 2007) 137.

Yugoslavia, as suggested by the United Kingdom.¹⁰⁶ Perhaps this scenario underlies statements to the effect that the *Corfu Channel* case would be an example of a situation where ‘one course’ of wrongful conduct is attributable to multiple states and each of these states is responsible for it.¹⁰⁷ It then may have been argued that Albania should not only have been responsible for its failure to warn but also for the laying of the mines itself. The existence of some form of collusion was not, however, proven before the Court,¹⁰⁸ and in this respect the *Corfu Channel* case is not a case of joint responsibility for a single course of conduct.

In contrast, the question of joint (or joint and several) responsibility – in the sense of a legal principle with distinct consequences -, was relevant to the facts of the *Oil Platforms* case. The Separate Opinion of Judge Simma in this case is one of the texts of the ICJ jurisprudence that contains the most lengthy analysis of the problem of shared responsibility. Simma’s Opinion takes the holding of *Corfu Channel* one step further, in that it argues that a state can be held responsible, if it has committed an independent wrong that together with an independent wrong of another state has caused injury, even if it is not proved what the causal connection of either state to the injury was.

The issue arose as a result of the United States’ counterclaim, to the effect that as a result of the cumulation of attacks on US and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf, Iran made the Gulf unsafe, and thus breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty. The problem was that acts that made Gulf unsafe had also been undertaken by Iraq, and it proved difficult (indeed too difficult for the Court) to determine what acts were attributable to Iran. The outcome, that is somewhat unsatisfactory, then is that because it was impossible to determine

¹⁰⁶ *Corfu Channel* case (n 14) para 33: The UK had argued that: “[T]he minelaying operation was carried out by two Yugoslav warships at a date prior to October 22nd, but very near that date. This would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mine.”

¹⁰⁷ Bell (n 46) 526.

¹⁰⁸ *Corfu Channel* case (n 14) para 37.

precisely who did what, neither of the two States could be held responsible.¹⁰⁹ Judge Simma argued that even though responsibility for the impediment caused to United States commerce with Iran could not be apportioned between Iran and Iraq, Iran should nevertheless have been held in breach of its treaty obligation to protect the freedom of commerce under the 1955 treaty.¹¹⁰ To arrive at this conclusion, he based himself on the principle of the joint-and-several liability according to which multiple tortfeasors can be held responsible individually even when the damage cannot be apportioned among them, which he found to be a “general principle of law” within the meaning of Article 38, paragraph 1 (c), of the Statute of the ICJ.¹¹¹

Joint and several responsibility in national legal systems commonly sees to two or more acts that result in the same wrongful act or the same injury. Judge Simma observed that this condition was satisfied, since in the context of the generic counter-claim, “the “internationally wrongful act” is constituted by the creation of negative economic, political and safety conditions in the Gulf rather than by a specific incident. The bringing about of this environment, taken as a whole, is attributable to both States, as it is common knowledge that they both participated in the worsening of the conditions prevailing in the Gulf at the time.”¹¹² It then would follow is that the two states were both responsible for the same act: the creation of dangerous conditions for shipping and doing commerce in the Gulf. As a result, the United States could invoke the responsibility of either State, that is, also of Iran, individually.

The main difference with *Corfu Channel* was that in that case the wrongful acts, and the damage, were divisible, and that it therefore could be adjudicated on basis of principle of independent responsibility. The qualification of joint and several responsibility in this case has no additional value. In this case the situation was different, as the injury was caused by a combination of acts that could not be divided – indeed, it might not be possible to find that either of the states individually had committed a wrongful act. To hold either state responsible, it then was not necessary to look only at individual causation, but resort was

¹⁰⁹ Separate Opinion of Judge Simma in the *Oil Platforms* case (n 77) para 65.

¹¹⁰ Ibid para 74.

¹¹¹ Ibid.

¹¹² Ibid para 77.

taken the general principle that in cases of indivisible damage, all states can be held responsible individually even when the damage could not be apportioned among them. The question may be raised, though, whether this was indeed the ‘same wrongful act’ (the treaty was only binding on Iran, and at best there could be a case of parallel, identical wrongful acts).

In any case, the Court did not follow the line of argument suggested by Simma. It rejected the claim of the United States, as it found that ‘the United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran.’¹¹³ It thus appeared to base itself on the principle of independent responsibility – the burden imposed on the United States was to demonstrate that Iran individually infringed the obligation under the 1955 Convention.

4.2 Responsibility of states acting in concert

Both the *Corfu Channel* case, on the facts as found by the Court, and the *Oil Platforms* case presented cases of injury arising out of concurrent independent action. A different scenario is presented by situations where two states act in collusion. This was what happened in the *Corfu Channel* case according to the United Kingdom.¹¹⁴ Several other cases have been brought to the Court where the applicant argued that two or more other states, acting in concert, had committed an internationally wrongful act. In *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People’s Republic and Union of Soviet Socialist Republics)*, the United States of America instituted separate proceedings against Hungary and the Soviet Union. It submitted that the Soviet Union “in concert with and aided and abetted by” Hungary caused the seizure of a United States Air force C-47 type aircraft, together with its crew of four American nationals and its contents, after which both governments engaged in unlawful actions against the crew and the United States, constituting both serious violations of existing treaties as well as manifest denials of justice and other international wrongs. The United States asked the Court to decide

¹¹³ *Oil Platforms (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Rep 161 (*Oil Platforms* case) para 123.

¹¹⁴ *Corfu Channel* case (n 14) para 33-40.

that the governments are “jointly and severally liable” to the United States for the damage caused. However, the Court removed the cases from its list, since neither Hungary nor the Soviet Union had accepted the jurisdiction of the Court in the matter.¹¹⁵

An - in some respects - similar claim was made by Serbia and Montenegro in the *Legality of the Use of Force* cases. It argued that if two or more States together take joint action to the detriment of a third state, they are co-authors of any internationally wrongful act derived from their joint action, and that each of the states would be responsible for that action.¹¹⁶ The respondent states would be jointly and severally responsible for the actions of the NATO military command structure, which constitutes an instrumentality of the respondent states.¹¹⁷ Brownlie argued for the applicant that the North Atlantic Council directed the war against Yugoslavia as a joint enterprise and that ‘It would be a legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member States. This joint and several responsibility was justified both in legal principle and by the conduct of the member States.’¹¹⁸

The Court did not decide on any of these claims. It is not without interest, however, that, as noted by Brownlie, after the destruction of the Chinese Embassy in Belgrade, the British Prime Minister apologized to the Chinese Government, although there had been no suggestion that a British plane had fired the missiles.¹¹⁹

The Court thus never has expressed itself on questions of responsibility of states acting in concert, and the question whether all such cases can be solved by the principle of independent responsibility remains an open one.

¹¹⁵ *Treatment in Hungary of Aircraft and Crew of United States of America (USA v Hungarian People’s Republic and Union of Soviet Socialist Republics)* (Order) [July 12th 1954] ICJ Rep 103 and ICJ Rep 99. Perhaps additional references are needed for the citations in previous sentences?

¹¹⁶ *Dominicé* (n 23) 282.

¹¹⁷ *Legality of Use of Force* case (*Serbia and Montenegro v UK*) (Oral Proceedings) (n 90).

¹¹⁸ *Legality of Use of Force (Serbia and Montenegro v UK)* (Oral Proceedings) [Public Sitting 12 May 1999] CR 1999/25, 16.

¹¹⁹ *Ibid.*

4.3 Shared responsibility in case of common organs

The case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)* presented a substantive question of shared responsibility in a slightly different factual scenario. Australia relied on Article 2 of the Trusteeship Agreement to support the argument that it was under no separate obligation:

“the trusteeship obligations rest on the Administering Authority. The three Governments together constituted that ‘Administering Authority’, as a form of ‘Partnership’ [...] Accordingly, any breach of the obligations of the Administering Authority would be, *prima facie*, the joint responsibility of the Governments of Australia, New Zealand and the United Kingdom.”¹²⁰

Australia argued that in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. This appears to be claim of joint responsibility, at least in the particular meaning where joint would be opposite of individual, and not necessarily imply several. In effect it denied that international law recognized a concept of joint and several liability as known to municipal systems; since the Court could only determine their potential liability jointly.¹²¹

In what probably is the most relevant contribution of the case to the law of shared responsibility, the Court noted that no reason had been shown

‘why a claim brought against only one of the three States should be declared inadmissible in *limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in

¹²⁰ *Nauru* case (Preliminary Objections of the Government of Australia) (n 81) para 321.

¹²¹ *Ibid.* and *Nauru* case (n 15) para 48.

the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.’¹²²

The Court thus suggested that: even though the obligations may have been shared, they were also individual obligations, for which each state individually could be held responsible.¹²³ Judge Shahabuddeen noted in this respect that “the obligations of the three Governments under the Trusteeship Agreement were joint and several”, and that this conclusion disposed of Australia's contention that proceedings will not lie against one only of the three Governments.¹²⁴ While the use of the term ‘joint and several’ to refer to primary obligations is not common, it indicates well the nature of such obligations: the obligations were at the same time shared between the states, and continued to rest on them individually. Crawford refers to the Trusteeship agreement as an example of a situation where ‘one “party” to a treaty may be defined to consist of a number of legal persons acting as a collective,’¹²⁵ but ‘the use of a collective designation for one of the “parties” to a treaty does not prevent that treaty being multilateral in character, if the collective designation does not correspond to a single legal person.’¹²⁶

4.4 Distribution of responsibility under multilateral obligations

Several of the cases in which questions of shared responsibility was raised concerned situations where two or more states are both bound by a common (multilateral) obligation and both states act in breach of that obligation. This was the situation in the *East Timor* case, where Portugal had contended that the right breached (the right of self-determination) was accepted by the Court to be a right *erga omnes*. The implication was that both Australia and

¹²² *Nauru* case (n 15) para 48.

¹²³ Talmon (n 22) 209.

¹²⁴ Separate opinion of Judge Shahabuddeen in the *Nauru* case (n 15) ICJ Rep 270-300; ICGJ 91 (ICJ 1992) para 4.

¹²⁵ Crawford, James, *Multilateral Rights and Obligations in International Law* (Collected Courses of the Hague Academy of International Law 319, Martinus Nijhoff Online, 2006) 336.

¹²⁶ *Ibid* 336-338

Indonesia were obliged to refrain from interfering with this right – erga omnes rights are by definition the corollary of multilateral obligations.¹²⁷ And in *Certain Phosphate Lands in Nauru*, Australia, New Zealand and the United Kingdom were bound, and possibly all breached, the same obligation.

In such cases the question may arise how responsibility is to be allocated between multiple responsible states. This is a matter of primary rather than of secondary obligations, but it is one that will have direct consequences for questions of shared responsibility as defined in section 2 above. This is illustrated by the Court’s judgment in the *Bosnian Genocide* case. The Court concluded that the basis of Serbia’s responsibility was its failure to prevent genocide.¹²⁸ If a state that does not directly commit genocide can be responsible for its failure to prevent, there is no *a priori* reason to limit that responsibility to Serbia. Indeed, the obligation under Article 1 of the Genocide case is an example of a collective responsibility (used here in the sense of primary obligations) where the collective failure of states to comply with their obligations results in shared responsibility.

While in some respects this is a hypothetical question as no proceedings were initiated against other states, it is to be recalled that in the ILC’s conception of international responsibility, such responsibility does not depend on any claims by injured parties.¹²⁹ Moreover, the question of responsibility of other states or entities may come up in different proceedings, whether before an international or a national court.¹³⁰

¹²⁷ See para 3.1 The opposite of course is not true, as not all multilateral obligations give rise to erga omnes obligations.

¹²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case) para 450.

¹²⁹ Commentaries to the Articles on State Responsibility, 116 Part III.

¹³⁰ See *H. Nuhanovic v the Kingdom of the Netherlands*, District Court of the Hague, Rechtbank ’s-Gravenhage [10 September 2008] LJN: BF0184, 265615 / HA ZA 06-1671, in which plaintiffs argued that even if responsibility would lie with the UN, such responsibility would not necessarily be exclusive.

The question then is how responsibility and liability are to be allocated between multiple responsible states. The Court suggested that the obligation varied depending on each state's influence over the authors of the genocide.¹³¹ It said that

“Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing genocide.”¹³²

The case raises many questions. One is whether, given that responsibility can arise independently from invocation, all states that did not act were responsible, with capacity only functioning to allocate degrees of responsibility, or liability, or that only those states that actually had capacity to influence Serbia were required to act, and the others did not even breach the obligation. The Court suggested that it opted for the latter interpretation, as it said ‘The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide.’¹³³ This suggests that while in the abstract all states may have been obliged to act (comparable to a situation that in the abstract everyone may be obliged to act to save a drowning person), but only those in the actual situation to do so, would act in violation of that obligation if they would not act.

Indeed, it has been suggested that the responsibility based on failure to prevent cannot be seen apart from the fact that ‘Serbia was not a disconnected bystander with only the capacity to influence the Bosnian Serbs.’¹³⁴ Even though political and military support of Bosnian Serbs did not result in attribution, it may well be that that relationship was relevant, because it meant that Serbia was especially capable of restraining the Bosnian Serbs.¹³⁵ This

¹³¹ Hakimi, Monica, “State Bystander Responsibility” (2010) 21(2) *Eur J Int'l L* 341, 364-65.

¹³² *Genocide* case (n 128) para 430.

¹³³ *Ibid* para 461.

¹³⁴ Hakimi (n 131) 364-65.

¹³⁵ *Ibid* 365, noting that: “Its causal connection to the abuse provides the normative justification for assigning it an obligation to protect.”

construction may be supported by the Court's statement that a state's capacity must 'be assessed by legal criteria' that limit whether the state may act in a particular situation and that define the state's 'legal position vis-à-vis the situations and persons facing the danger'. These criteria thus would distinguish the position of Serbia from that of other states, unconnected to the conflict, even though they may have had the power to influence the Bosnian Serbs.

The more general point here is that in determining whether breach of multilateral obligations of conduct, in a situation where multiple states have refrained from the required conduct, results in shared responsibility will depend on a careful analysis of the contents and scope of such obligations. Questions of shared responsibility more often than not will turn on an analysis of primary rather than secondary rules.

5. Principles of shared reparation in the case-law of the Court

Quite distinct from the question whether a state can held responsible in a situation where the wrong, or the injury, was committed also by one or more other states, is the question how in such cases obligations of reparation should be implemented. The question how compensation is to be allocated between two or more states is particularly relevant; much of the doctrine on joint (and joint and several) liability in national law sees precisely to this question.¹³⁶

The case-law of the Court relevant to this question obviously is very limited, as the Court so rarely pronounces on question of compensation at all. But we can infer from the *Corfu Channel* case that the responsibility of an independently responsible state entails an obligation of full reparation of the damage suffered by the injured State to the extent that it caused by that responsible state, without that obligation being limited in view of the damage caused by

¹³⁶ See eg The European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, (Springer, Wien 2005) <<http://www.egtl.org/principles/text.htm>> accessed 10 February 2011, Article 9:101(2): "Where persons are subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him."

the other wrongdoing state.¹³⁷ All what the Court had to determine is whether, and to what degree, the respondent in a legal sense caused the damage complained of. Each State is responsible for its own actions and the consequences that follow there from, and a finding on the degree of causation by Albania as such would not have had legal consequences for the position of Yugoslavia.

In somewhat different factual circumstances, the United States relied on the same principle in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (c) and (d), of the ICJ Statute, that “in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage.”¹³⁸ The argument, and indeed the case as such, was not decided upon by the Court.

The ILC relied on both these cases, to conclude that in cases where the injury was effectively caused by a combination of factors and only one of such factors can be linked to the responsible State, “international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.”¹³⁹ This would only be different if “some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.”¹⁴⁰

¹³⁷ *Corfu Channel (UK v Albania)* (Judgment on Compensation) [1949] ICJ Rep 244 (Corfu Channel case (Judgment on Compensation)) 250. See also Dominice (n 23) 283; Noyes, John E. and Smith, Brian D., “State Responsibility and the Principle of Joint and Several Liability” (1988) 13 (2) *Yale J.Int'l L.* 225, 246 and 248.

¹³⁸ *Aerial Incident of 27 July 1955 (USA v Bulgaria)* (Merits - Memorial submitted by the United States Government) [2 December 1958] Part I, 229.

¹³⁹ Commentaries to the Articles on State Responsibility, Commentary to art 31, para 12.

¹⁴⁰ *Ibid* para 13.

Special Rapporteur Arangio-Ruiz had taken a different position; he had argued that in cases of concurrent causation the state's liability should be proportionally reduced.¹⁴¹ It has been suggested that the language in the commentary on Article 31 of the ILC Articles on State Responsibility ('cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone) would allow for such reduction',¹⁴² but it also should be observed that this language has not found its way in the commentary on Article 47 dealing with the question of a 'plurality of responsible States' in relation to the same internationally wrongful act.¹⁴³

Because in the *Corfu Channel* case the Court did not consider the possible contribution by Yugoslavia, the judgment also does not help us for developing the principles governing allocation of liability between multiple responsible states. In the scenario where both Albania and the Yugoslavia would have been found responsible, the question may have arisen how the compensation was to be allocated between the two states. One can speculate on the factors that should be relevant in that scenario. It has been suggested that in such cases of multiple wrongdoing states, the principal burden of the reparation ought to fall on the author of the principal breach.¹⁴⁴ In this respect it can be noted that some authors have interpreted the judgment as saying that the duty on the side of Albania was not an absolute one; Albania was only under a duty to take steps that were actually open to it.¹⁴⁵ In that reading, it may well be that Yugoslavia had more possibilities to prevent, and on that account (quite separate from who was the initial author) it may be argued that Yugoslavia should bear the principal burden of the reparation. In his dissenting opinion in the damages award, Judge Ečer had said that the

¹⁴¹ Arangio-Ruiz, "Second Report on State Responsibility" in *Yearbook of the ILC 1989*, Vol. II (A/CN.4/SER.A/1989/Add.1) (Part 1) 14 para 44. See also *Yearbook of the ILC 1990*, Vol. I (A/CN.4/SER.A/1990) 175, para 60.

¹⁴² Gattini (n 103) 710-11.

¹⁴³ Ibid.

¹⁴⁴ Dominicé (n 23) 283.

¹⁴⁵ Fitzmaurice, Gerald G., "Law and Procedure of the International Court of Justice: The General Principles and Substantive Law" (1950) 27 *British Yearbook of International Law* 1 or Fitzmaurice, M.A., "The Corfu Channel Case and the Development of International Law" in Ando, N. (ed), *Liber amicorum judge Shigeru Oda* (Kluwer, The Hague 2002) 119, 136.

degree of *culpa* would be relevant for the degree of compensation.¹⁴⁶ However, because the Court based itself on full causation, there is nothing in the judgment that supports consideration of such factors one way or the other.

Finally, because the Court did not consider the possible contribution by Yugoslavia, the judgment also does not help us to construe the legal relationship between Albania and Yugoslavia. In the hypothetical scenario where the United Kingdom subsequently would have pressed charges against Yugoslavia, and a determination would have been made that Yugoslavia was to provide reparation, the scope of such reparation would have to be limited by the principle that the injured State should not obtain compensation greater than the injury sustained.¹⁴⁷ From the perspective of Albania, it may then seem unfair if it would have to shoulder the full compensation – certainly in the suggested scenario where Albania and Yugoslavia in fact had acted in collusion.¹⁴⁸ Hypothetically, Albania might have tried to recover part of the money from Yugoslavia. But the question is what would be the legal basis of such a claim. It also might face procedural barriers: if the two states had not consented to the jurisdictional basis of an international court, the possibility to recover part of the damages may well remain a theoretical one. The point here is that both the substantive and procedural principles governing shared responsibility are underdeveloped, certainly if compared to the comparable principles as they operate in national legal systems.¹⁴⁹

None of the other cases in which questions of shared responsibility arose contain express pronouncements on the consequences of shared responsibility for the obligation to provide compensation. In the merits stage of the *Nicaragua* case, the possible wrongfulness of acts of Honduras¹⁵⁰ did not play any role. Conceivably, it might have been relevant at the stage of reparation, if the Court would have been asked to determine shares of liability for specific

¹⁴⁶ Dissenting opinion by Judge ad hoc Ečer in the *Corfu Channel* case (Judgment on Compensation) (n 137) ICJ Rep 252-56, para 7.

¹⁴⁷ Article 47 (1) a of the Articles on State Responsibility prohibits ‘double dipping’.

¹⁴⁸ *Corfu Channel* case (n 14) para 36.

¹⁴⁹ See generally: Dam, Kees van, *European Tort Law* (Oxford UP, 2006).

¹⁵⁰ See section 3.2

injury in Nicaragua. The second stage that the Court envisaged¹⁵¹ never materialized. The Court did note, however, that in such a subsequent phase Nicaragua should have been afforded the possibility to demonstrate ‘exactly what injury was suffered as a result of each action of the United States which the Court had found contrary to international law’.¹⁵² While it emphasized the importance of allowing the United States to present argument,¹⁵³ it did not refer to any possible role of other states. This suggests that the Court treated this case as one of individual responsibility and individual liability, to be determined on the basis of a causal connection between breach and damage.

The question of reparation was hinted at in the *Nauru* case. Australia had raised the question ‘whether the liability of the three States would be “joint and several” (solidaire), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share.’ However, as the case was settled the Court did not get to a discussion of this question. From the fact that the Court accepted jurisdiction, it cannot be inferred that the Court would have upheld the existence of the principle of joint and several liability in international law, or whether responsibility in these instances should instead be grounded on individual causal contribution.¹⁵⁴

The possible responsibility of other states for the determination of compensation was also relevant to the Court’s holdings on the reparation to be provided by Serbia in the *Bosnian Genocide* case. The Court found that Serbia was not required to provide compensation because it could not be determined that if Serbia had acted, the genocide committed at Srebrenica would not have occurred.¹⁵⁵ This may be taken to imply that the Bosnian Serbs would have done what they did anyway.¹⁵⁶ But it also may be taken to imply that Serbia was on its own not in a position to bring enough power to persuade the Bosnian Serbs to refrain

¹⁵¹ *Nicaragua* case (n 11) para 284.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Okowa* (n 3) 196-97 and 200.

¹⁵⁵ *Genocide* case (n 128) para 460.

¹⁵⁶ See section 6.

from their plans, and that in that respect there was no full causation. In the latter interpretation, the Judgment is difficult to square with the Court's earlier observation that

'it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.'¹⁵⁷

It would have been consistent with this recognition that the combined efforts of states might have been able to produce what Serbia could not do alone, if the Court would have recognized the possibility of alternative causes, leading to a relative share of liability of Serbia, proportionate to its own (causal) contribution to the genocide – however difficult it would be to calculate this.¹⁵⁸ The Court did not choose this path, however, and did not use what perhaps was the best change to explain the law concerning reparation in situations of shared responsibility.

6. Shared Responsibility between States and Non state actors

Quite a different set of question is raised in cases where states and non-state actors share responsibility for a particular wrongful act and/or for a particular injury. Of course, the Court is not well positioned to consider such cases, as non-state entities are not a party in proceedings. However, it would seem that while the Court cannot and will not make determinations of the legal responsibility of non-state entities, the role of such entities may play a role as a concurrent cause in determining shared liability.

6.1 International Organizations

¹⁵⁷ *Genocide* case (n 128) para 430.

¹⁵⁸ See for critique on the Court's treatment of the question of causation Gattini (n 103) 708-9.

Apart from the jurisdictional aspect discussed above, the *Legality of the Use of Force* cases brought by Serbia and Montenegro also raised substantive questions of shared responsibility. Serbia and Montenegro argued that if two or more States together take joint action to the detriment of a third state, they are co-authors of any internationally wrongful act derived from their joint action, and that each of the states would be responsible for that action.¹⁵⁹ It argued that the respondent states were jointly and severally responsible for the actions of the NATO military command structure, which constitutes an instrumentality of the respondent states.¹⁶⁰ While not disputing that NATO had legal personality, it argued that such legal personality did not preclude the responsibility of the individual members.¹⁶¹ Relevant considerations in this regard were the fact that under Article 5 of the NATO (Washington) Treaty states shall take action “individually and in concert with others”, that the ultimate decision to use force rests with individual States and this remains a sovereign prerogative of NATO Members, that the *NATO Handbook* stated that “[e]ach nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions” and that national authorities did have the power to approve or veto the targets, which power would be pertinent to their international responsibility.¹⁶²

The argument raised important questions on the command and control over the operations, and the implications thereof for the allocation of responsibility. Arguments by respondent states focused on the alleged absence of any basis in international law for finding that Member States would have concurrent or secondary responsibility if NATO's acts were unlawful,¹⁶³ on a possible parallel with UN peacekeeping operations (which Portugal saw as

¹⁵⁹ *Dominicé* (n 23) 282.

¹⁶⁰ *Legality of Use of Force case (Serbia and Montenegro v UK)* (Oral Proceedings) (n 90) 40.

¹⁶¹ *Legality of Use of Force (Serbia and Montenegro v UK)* (Oral Proceedings) [Public Sitting 21 April 2004] CR 2004/14, 54, para 28. It can be added that the question whether or not the NATO indeed has legal personality is not entirely beyond dispute, see d’Aspremont, “Abuse of the Legal Personality of International Organizations and the Responsibility of Member States” (n 93) 93, n 6.

¹⁶² *Ibid* 49, para 7.

¹⁶³ *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Oral Proceedings) [Public Sitting 19 April 2004] CR 2004/9, 22, para 4.8 (Portugal - Galvão Teles).

a reason to allocate responsibility to NATO rather than to individual states),¹⁶⁴ and on the question whether individual state responsibility was to be ruled out because the states did not act individually and autonomously ('All the acts in which it took part for those: purposes were carried out under the guidance and control of international organizations - and principally NATO',¹⁶⁵) The position of these states is not insignificant, and may cast doubt on the proposition that even when an organization would be responsible, this would not necessarily exclude responsibility of member states, in particular those states that were actively engaged in the planning or carrying out of the operation.¹⁶⁶ However, not all participating states relied on the arguments used by France, Portugal and Italy, and it may be inferred that at least some of them actually accepted that by virtue of their control over the operation or on other grounds, they, rather than NATO, remained responsible for the acts. But one should be careful in drawing such conclusions - an alternative explanation may be that some states took the position that NATO could not be responsible because it was not a legal person.

As the Court never reached the merits, it did not considered questions of shared liability – but clearly questions of multiple or concurrent causes might have arisen. The applicant noted that as the choice and approval of targets was controlled by the highest national authorities, individual states could be held responsible, and added that 'The question of whether some Respondents exercised fuller control than the others' would be 'of relevance for the allocation of responsibility at the merits stage.'¹⁶⁷ All of this remains undecided by the Court and, partly as a result, the state of the law in this respect remains rather undeveloped and unclear.

6.2 Other non-state actors

¹⁶⁴ Ibid para 4.4 (Portugal - Galvão Teles).

¹⁶⁵ *Legality of Use of Force (Serbia and Montenegro v France)* (Oral Proceedings) [Public sitting 20 April 2004] CR 2004/12, 19, para 50.

¹⁶⁶ Orakhelashvili (n 7)

¹⁶⁷ *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Oral Proceedings) [Public sitting 23 April 2004] CR 2004/23, 32, para 12.

It is of course quite common that a state is being held responsible in conjunction with acts of non-state actors. It then can be said that two actors combine to cause damage. The *United States Diplomatic and Consular Staff in Tehran* case is an example. The initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy.¹⁶⁸ The judgment does not suggest that the fact that the injury in question was caused by a combination of factors, only one of which is to be ascribed to the responsible State, in any way reduced the responsibility, or the obligation to provide reparation by Iran. Indeed, the ILC relied on this case in support of the same principle that it derived from the *Corfu Channel* case: 'international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.'¹⁶⁹

In the *Nicaragua* case, Nicaragua had argued that the *contras* were bands of mercenaries recruited, organized, paid and commanded by the Government of the United States who would have no real autonomy in relation to that Government. Consequently, any offenses which they have committed would be imputable to the Government of the United States.¹⁷⁰ The Court then found that the act of the *contras* could not be treated as acts conducted by the United States.¹⁷¹ The Court did note that 'the *contras* remain responsible for their acts'.¹⁷² It also noted that 'The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty.'¹⁷³

What these latter statements mean as a matter of international law is somewhat uncertain, but the use of the term 'responsible' probably should not be qualified in terms of international

¹⁶⁸ *Consular Staff in Tehran* case (n 12); See also Commentaries to the Articles on State Responsibility, Commentary to Article 31, para 12.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Nicaragua* case (n 11) para 15.

¹⁷¹ *Ibid* para 109 and 115.

¹⁷² *Ibid* para 116.

¹⁷³ *Ibid.*

law. In principle the Court was not tasked to determine any responsibility or ‘guilt’ of the contras, and it indeed said that it ‘does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them’.¹⁷⁴ There is nothing in the case that considers whether such responsibility or guilt of the contras would be relevant to the (degree of) responsibility of the US, other than that knowledge of such responsibility or guilt might be relevant for the (performance of) the obligations of the US.¹⁷⁵ The US was responsible for its own acts, notably the violation of the prohibition of intervention, and not for the specific violations of human rights law and humanitarian law.

The question may be raised whether, if the Court would have come to a liability phase, any responsibility of the contras for their own act would, as concurrent causes be relevant in that they might limit the degree in which the US could have held liable to compensate for specific injuries committed by the contras. Such a determination would have to be based on causation between the violations attributed to the US on the one hand, and specific harm on the other hand. In that causal relationship, the responsibility of the contras at least as a factual matter seems an intervening variable. Even though the Court could not determine responsibility of the *contras* as a matter of international law, their acts may be relevant as a concurrent cause for the sake of mitigating the obligation to compensate. It may be recalled recognized that according to the ILC international law may require a reduction of reparation for concurrent causes, when ‘an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone’.¹⁷⁶

The possibility that state commits a wrongful act in conjunction with another entity (not being a state or international organization) also was raised in the *Bosnian Genocide* case. Here the Court did in fact make a judgment on a substantive principle of shared responsibility in relation to non-state actors. The Court, first having determined that the acts of genocide were not attributable to Serbia and Montenegro, accepted the possibility that acts which could be characterized as “complicity in genocide”, within the meaning of Article III, paragraph (e), of

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Commentaries to the Articles on State Responsibility, Commentary to Article 31.

the Genocide Convention could be attributed to the Respondent.¹⁷⁷ Significantly for our purposes, it noted that this notion of “complicity” is similar to the prohibition of aid or assistance in terms of Article 16 of the ILC Articles., thus raising the spectrum of issues of shared responsibility.

On the facts of the case, the Court concluded that the international responsibility of Serbia and Montenegro was not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention.¹⁷⁸ But an interesting, if somewhat speculative question is what would have been the situation if the Court would have found that Serbia and Montenegro would have been responsible for aiding and assisting in the crimes committed by individuals. Of course, the issue before the Court was not the responsibility of individuals of or the Bosnian Serb Republic. But as a factual matter the question of concurrent causes might well be relevant in this type of scenario.

Questions of concurrent causes were also raised by the Court’s conclusion that it could not order Serbia and Montenegro to provide compensation because it could not determine that the genocide would not have been committed if Serbia and Montenegro would have attempted to prevent the genocide. The Court said that in order to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it.¹⁷⁹ The question was whether there is a sufficiently direct and certain causal nexus between the wrongful act, Serbia and Montenegro’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant.¹⁸⁰ The Court found that it could not ‘regard as proven a causal nexus between the Respondent’s violation of its obligation of prevention’ and the genocidal acts of the Bosnian Serb authorities. As a result, it did not consider financial compensation ‘the appropriate form of reparation for the breach of the obligation to prevent genocide.’¹⁸¹

¹⁷⁷ *Genocide case* (n 128) para 418.

¹⁷⁸ *Ibid* para 424.

¹⁷⁹ *Ibid* para 462.

¹⁸⁰ *Gattini* (n 103).

¹⁸¹ *Genocide case* (n 128) para 462.

The fact that the Court did not find that preventative action by Serbia and Montenegro would have prevented the genocide, suggests a degree of autonomy of the perpetrators, who may only to a limited extent be open to influence by Serbia and Montenegro. A more decisive stance on the part of Serbia and Montenegro in preventing the commission of the genocide in Srebrenica would, in the view of the Court, not have made a difference: the genocide would most probably have been committed anyway by the organs of the Republika Srpska. However, as in *Corfu Channel*, the Court did not consider the question of the consequences of 'concomitant causation' - the possibility that the same loss can be linked to more than one cause. The black and white approach of the Court is difficult to understand, and it might well have approached the question in terms of concurrent causes. It then could have attributed to the acts of the Bosnian Serb authorities a weight that would have reduced, rather than excluded, the liability of Serbia and Montenegro.¹⁸² The Court phrased the question as whether there was 'a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide.' Gattini observes:

'Put in these extreme terms, the answer cannot but be negative. But the point was exactly to determine which part of the damage, be it material or moral, had been caused by the omissions of a state which, to use the same words of the Court, although aware of the grave risk of a genocide and having the means whereby it could at least have tried to prevent it, 'manifestly refrained from employing them.'¹⁸³

Whereas in *Corfu Channel* the possibility of a concurrent cause did not prevent the Court from finding an obligation to provide full compensation for Albania, in this case the presence of a concurrent cause led to Court to find that there was no obligation to provide compensation at all. It is true that the applicant had not asked for compensation for breaches of Article 1 of the Convention¹⁸⁴. But that was not the ground on which the Court rejected compensation, and the absence of any reasoning on this point is indicative of the poor state of development of principles of shared responsibility.

¹⁸² See also section 5.

¹⁸³ Gattini (n 103) 710.

¹⁸⁴ As noted by Gattini, *ibid.*.

7. Conclusion

Although the Court has been confronted with questions of shared responsibility in quite a few cases, its contribution to the principles governing such shared responsibility has been limited. In part this is explained by the *Monetary Gold* principle that precluded exercise of jurisdiction in the *East Timor* Case. It would seem that the *Monetary Gold* principle should be narrowly construed and generally should not preclude the exercise of jurisdiction in cases of shared responsibility. More relevant is that in several potentially important ‘shared responsibility cases’ jurisdiction was declined on other grounds, or the case was settled out of the Court (notably the *Nauru* case). As a result, several important shared responsibility questions have not been adjudicated by the Court, notably the application of the principle to situations of aid and assistance and responsibility of states in connection with the responsibility of international organizations.

Several cases, including *Nauru* and *Nicaragua* have illustrated the tension between the bilateral nature of dispute settlement before the Court and the more collective, multilateral nature of some of the substantive principles (whether *de lege lata* or *de lege ferenda*) of shared responsibility. As many authorities will look to the Court as a first port of call for guidance, the procedural aspects of the Court’s jurisdiction indeed has hampered the development of the law.

On the substantive principles of shared responsibility, perhaps the two most important principles stipulated by the Court are, first, the reaffirmation of the principle of independent state responsibility and the applicability thereof in situations of concurrent responsibility (as in the *Corfu Channel* case) and, second, the principle that in case of acts of a joint organ, each state can individually be held responsible (*Nauru* case). Also of some importance is the rejection of the generic counterclaim in the *Oil Platforms* case, suggesting that in that type of scenario of shared responsibility, where it can not be demonstrated which state caused what part of the injury, the Court will not apply a principle of joint and several responsibility, but simply reject the claim for lack of evidence of individual causation.

Otherwise, much of the substantive law pertaining to shared responsibility has not been decided by the Court, including questions of responsibility arising out of concerted action (as allegedly at issue in the *Legality of the Use of Force* cases), the possible relevance of the notion of joint enterprise in such a context (as suggested by Brownlie as counsel for the Applicant),¹⁸⁵ the conditions and consequences of shared responsibility arising out of aid and assistance, and the questions arising out of shared responsibility between states and organizations (again an issue in the *Legality of the Use of Force* cases).

The Court has had even less opportunity to address questions of reparation arising out of situations of shared responsibility. A major question in this regard was put to the Court by Australia in the *Nauru* case, where it raised the question whether the liability of the three States would be joint and several, 'so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share.'¹⁸⁶ As the case was settled the Court did not get to a discussion of this question, and this remains a fundamental open question of shared responsibility. On the important question of the influence of concurrent causes in situations of shared responsibility, the Court suggested in *Corfu Channel* that there was no reduction in such cases. But while the conclusion in that case appears unproblematic, the treatment of the issue in the *Bosnian Genocide* case is highly unsatisfactory.

In conclusion, while the Court has laid some important building blocks for principles that can be applied to situations of shared responsibility, major issues have not been examined let alone decided. The increasing degree of cooperation (with resulting risks of multiple state responsibility) makes it likely that the questions will come back before the Court. However, its bilateralist procedure militates against a full consideration of relevant issues. For a fuller understanding, the case-law of other courts should also be considered, which, due to a different procedural context, may be better positioned to express themselves on questions of shared responsibility.¹⁸⁷ The whole issue is undertheorized and underexplored, and such case

¹⁸⁵ (n 118).

¹⁸⁶ See Section 5.

¹⁸⁷ See eg *M.S.S. v Belgium and Greece* (Merits and Just Satisfaction) [GC] no. 30696/09, 21 January 2011.

law, may, together with the contribution of the Court, help to provide a better understanding and explanation of the law of shared responsibility.