# Unravelling a Paradox of Shared Responsibility

*The Disconnection between Substantive and Adjudicate Law*

Nollkaemper, A.

DOI
10.1017/9781316996836.009

Publication date
2021

Document Version
Final published version

Published in
Whither the West?

# 8

# Unravelling a Paradox of Shared Responsibility

## *The Disconnection between Substantive and Adjudicate Law*

Andre Nollkaemper

### 8.1 INTRODUCTION

In this chapter I explore the paradox that when substantive principles of international responsibility increasingly accommodates situations of shared responsibility between multiple parties, international adjudication becomes less suited as a process for implementing such responsibility.

While international adjudication generally has shown remarkable development in the past decades, in various areas such growth has not kept pace with the transformations of substantive international law. One of such areas is the law on shared responsibility. International courts routinely apply various principles of responsibility.[1] However, principles relating to shared responsibility are only rarely invoked let alone applied in international adjudication. International courts rarely apply even the relatively well-established principles relating to shared responsibility, such as dual attribution,[2] aid and assistance,[3] or direction and control.[4] Moreover, they have been unable or unwilling to develop principles of shared responsibility that are still controversial, and that reflect different conceptions about what the substantive law of responsibility is or should be. Examples are the principle of circumvention[5] or, even more controversially, joint and several responsibility.[6] Among several other reasons,

[1] Simon Olleson , State Responsibility Before International and Domestic Courts: The Impact and Influence of the ILC Articles (2017).

[2] Int'l Law Comm'n, Articles on the Responsibility of International Organizations, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at Art. 19 (2011) [hereinafter ARIO].

[3] Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n Y.B. 2001/II(2) Art. 16 [hereinafter ARSIWA]; ARIO, *supra* note 2, Art. 14.

[4] ARSIWA, *supra* note 3, Art. 17; ARIO, *supra* note 2, Art. 15.

[5] ARIO, *supra* note 2, Arts. 17 and 61.

[6] Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 Pepp. L. Rev. 233 (2011).



https://doi.org/10.1017/9781316996836.009 Published online by Cambridge University Press

it appears that procedures for international adjudication often do not match the development of the substantive law of responsibility. A consequence is that international adjudicative law to some extent acts as a break on the further development of the substantive law of responsibility.

One may advance two propositions on the connection between the substantive and the adjudicative law of shared responsibility. One, and perhaps the more dominant one, is that the development of adjudicative law lags behind the development of the substantive law of responsibility, and that over time it will adjust. The other, and this is the proposition that I will explore here, is that the very development of the substantive law makes adjudication of shared responsibility claims more difficult. The substantive law is premised on the connection between multiple actors committing wrongful acts, whereas that very connection hampers adjudication. In this sense, we indeed would be able to speak of a paradox of shared responsibility.

I lay out the argument in four parts: (1) in an increasing number of situations, international responsibility is of a relational nature, (2) the substantive law of international responsibility is slowly adjusting to this relational nature, (3) procedures of international adjudication in many respects are not well suited for incorporating this relational nature, and (4) there are considerable differences between states, in terms of their willingness to submit themselves to adjudication of shared responsibility claims, event within 'the west', as a result of which responsibility will often will be shared between some states, but not all.

## 8.2 THE RELATIONAL NATURE OF INTERNATIONAL RESPONSIBILITY

A useful starting point for understanding the role of international courts in relation to shared responsibility is the articulation of a relational account of international responsibility. In this account, responsibility is not grounded in individual conduct but rather in the relations between actors. We can unpack the concept of "relational responsibility" by distinguishing between two constitutive elements of such a relational concept: interdependence of conduct (8.2.1) and interdependence of outcomes (8.2.2).

### 8.2.1 *Interdependent Conduct*

The first constitutive element of relational responsibility is that the conduct of the actors that contribute to harm often is interdependent. Such

https://doi.org/10.1017/9781316996836.009 Published online by Cambridge University Press

interdependence arises when the conduct of one state or international institution is conditional on and/or conducive to acts or omissions of other actors. Interdependent conduct may, but need not, take the form of concerted action. The observation by Lucas that "often our actions are concerted to form one coherent whole, and the action is described in terms of that whole, not of its individual constituents,"[7] captures the idea of interdependence in cases of concerted action. If cooperative conduct cannot be reduced to conduct of individual participating actors, responsibility needs to connect to the relationship between the individual actors. Individualizing responsibility may miss the point. Relational responsibility, then, does not refer to parallel individual wrongdoing, but involves interactions between actors that in combination cause harm.[8]

The extraordinary rendition practice illustrates the point: the contributions by the dozens of states that assisted the United States in extraordinary renditions would not have been sufficient in themselves to cause the outcome in terms of human rights violations. But in combination with the conduct of US agents, they were necessary for the result to occur, and on that basis both the assisting states and the United States can be held responsible.[9] We can thus speak of relational responsibility when multiple actors act together or contribute to each other's acts.[10]

The relatively well-established forms of such concerted action in the law of international responsibility, such as complicity,[11] direction and control,[12] and circumvention of responsibility,[13] are all characterized by the fact that the conduct of one actor influences or is influenced by the acts of other actors. Beyond these terms that appear in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO), there are different terms that capture similar phenomena, such as contribution, collusion,

[7] John Randolph Lucas, Responsibility 75 (1995).

[8] Larry May, Sharing Responsibility 38 (1996). Compare also French, distinguishing between an "aggregate collectivity" – "merely a collection of people" – and a "conglomerate collectivity" – "an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization." Peter A. French, *Collective and Corporate Responsibility* 46–47 (1984).

[9] *See* generally Helen Duffy , *Detention and Interrogation Abroad: The "Extraordinary Rendition" Programme*, *in* The Practice of Shared Responsibilityin International Law 89 (Andre Nollkaemper & Ilias Plakokefalos eds., 2017).

[10] May, *supra* note 8, at 36–38.

[11] ARSIWA, *supra* note 3, Art. 16; ARIO, note 2, Arts. 14 and 58.

[12] ARSIWA, *supra* note 3, Art. 17; ARIO, note 2, Arts. 15 and 59.

[13] ARIO, *supra* note 2, Arts. 17 and 61.

connivance, and condoning.[14] Common to such concepts is that multiple actors interact and that the conduct of each of the individual actors is dependent on, or contributes to, the actions of another.

The degree to which the conduct of actors is indeed interdependent and, accordingly, the normative justifiability of holding an individual actor responsible in connection with the acts of others, varies from case to case. The connection between actors is strong in cases where the actors act through a common organ, as in *Eurotunnel*[15] or the *Nauru* case.[16] In joint police operations the impact might be weaker, but may still be strong enough to hold one state responsible in connection with the conduct of another actor.[17] In cases where states have agreed to common obligations but do not act together, it may be that only the individual conduct is the proper unit of analysis.

### 8.2.2 *Interdependent Outcome*

The flipside of interdependence of conduct is that concerted action can achieve results that could not be achieved by actors alone. Concerted actions "enable their members to perform actions that they could not have performed on their own."[18] Erskine notes in this context that "agents who come together, even in an informal association, to work towards a shared goal are able to achieve things by cooperating that they would not be able to achieve independently."[19] Again, the extraordinary rendition saga is a good example. The conduct of states like Macedonia and Poland was influenced by the conduct of the United States, and in turn influenced the subsequent conduct of the United States.[20] Together they realized results that they could not have alone.

The implication is that if the harm is caused by multiple actors acting in a particular relationship, we may not be able to say that the conduct of

[14] *See* Chiara Lepora & Robert E Goodin, On Complicity and Compromise 36 ff. (2013).

[15] *The Channel Tunnel Group Ltd & France-Manche S.A. v. United Kingdom & France*, Case No. 2003–06, PCA Case Repository, Partial Award, (Perm. Ct. Arb. 2007), https://pcacases.com/web/sendAttach/487 [hereinafter Eurotunnel Arbitration].

[16] *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240, (June 26) [hereinafter *Nauru* case].

[17] Saskia Maria Hufnagel, Policing Cooperation Across Borders: Comparative Perspectives on Law Enforcement within the EU and Australia (2013).

[18] Larry May, The Morality of Groups 26 (1987).

[19] Toni Erskine, *"Coalitions of the Willing" and the Shared Responsibility to Protect*, in Distribution of Responsibilities in International Law 256 (André Nollkaemper & Dov Jacobs eds., 2015).

[20] *El-Masri v. the Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 2012 Eur. Ct. H. R. 263 (2012), [hereinafter *El-Masri* case].

individual states or international organizations (IOs) is the direct and exclusive cause of the harm. In that sense, the phrase that "a State is responsible only for its *own* conduct" (as the ICJ put it in the *Genocide* case)[21] is misleading when the harm only occurs because of the involvement of other actors. The Court emphasized that there should be a sufficiently close connection "between the conduct of a State's organs and its international responsibility."[22] There certainly needs to be such a connection; however, there may well be other actors positioned between the conduct of a state's organs and the eventual harm.

Another example was the situation where Italian authorities assisted the CIA in abducting an Egyptian cleric. In that case, it can be argued that Italy committed a separate wrongful act of aiding or assisting. Yet that wrong was also a cause of the illegal abduction committed by the USA. The aid or assistance was necessary for the abduction to occur. In that case the eventual harm was the result of both the acts of both states. Neither of the two states could have produced the outcome alone.[23]

When two or more actors contribute to a particular harmful outcome, the eventual harm can be indivisible. That is, it cannot – without loss of meaning – be divided between the individual contributing actors. Multiple contributions are causally linked to the harmful outcome, but none of such contributions is by itself sufficient to produce the harmful outcome.[24] Rather, the harm may be an indivisible totality which results from the addition of various contributions and the interaction between them.

It may be argued that since, for instance, human rights are by definition held against particular states, which each owe individual obligations towards individuals under their jurisdiction, an eventual human rights violation can always be traced back to individual states rather than to "collective actors." In cases where the harmful outcome is a human rights violation, the harmful outcome would then necessarily lead to individual actors rather than to "relationships." However, it is possible to distinguish between the specific human rights violation consisting of a singular breach by one actor vis-à-vis an individual, on the one hand, and a "global harm" that consists of a cumulation

[21] *Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 406 (Feb. 2007), [hereinafter, *Genocide* case). Emphasis added.

[22] *Id.*

[23] Pierre d'Argent, *Reparation, Cessation, Assurances and Guarantees of Non-Repetition*, in Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art 225 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

[24] Brigitte Bollecker-Stern, Le Préjudice dans la Théorie de la Responsabilité Internationale 267 (1973); d'Argent, *supra* note 23, at 228.

of acts of multiple actors vis-à-vis that individual. In the context of extraordinary rendition, where one state illegally arrests and then hands over an individual to another state, which then illegally detains and tortures that person, we can identify both two separate wrongs, on the one hand, and a larger, "global" wrong that results from two separate wrongs, on the other.[25]

For the above reasons, we can indeed identify situations where states and/or international institutions can achieve results by acting in concert that they could not achieve alone. If so, the proper unit of analysis in understanding responsibility is not the individual actor, but rather the relationship between the actors contributing to the harm.

### 8.2.3 *Shared Responsibility*

The interdependent nature of conduct and outcomes justifies ascribing responsibility for the harmful conduct not to one actor, but rather to "each and all of those taking part."[26] The fact that two or more actors that contributed to the harm stand in a relevant relationship to each other, and together achieve a result that could not have been achieved by themselves alone, justifies a sharing of responsibility.[27] As May observes, the concept of shared responsibility focuses attention "on the interaction of one with the other, rather than on acts of isolated agents."[28]

The defining feature of shared responsibility is that the responsibility of two or more actors for their contribution to a particular outcome is distributed between them separately, rather than resting on them collectively.[29] If the responsibility were to rest on a collectivity, it would no longer be shared, but would instead be a responsibility of the collectivity as such.[30] Somewhat counterintuitively, because the term may suggest otherwise, shared responsibility is by definition thus a responsibility that rests on individual actors for their contribution to a particular harm.

However, it follows from the above that shared responsibility is not simply the aggregation of two or more individual responsibilities. The responsibility of separate actors is connected by the interdependence of conduct and by their respective links to the same harmful outcome. The prototypical example of

[25] *Id.*, at 225.
[26] Lucas, *supra* note 7, at 7.
[27] Seumas Miller, *Collective Responsibility*, 15 Pub. Aff. Q. 65 (2001).
[28] May, *supra* note 8, at 38.
[29] *Id.*, at 112.
[30] *Id.*, at 116.

https://doi.org/10.1017/9781316996836.009 Published online by Cambridge University Press

the concept of shared responsibility is a situation where multiple actors contribute to each other's acts and thereby to the eventual outcome.[31]

This distributive understanding of shared responsibility thus presumes that when multiple actors together contribute to a harmful outcome, the responsibility of each of them should be understood in nonexclusive terms. Assignment of responsibility to one actor does not exclude the other. Such a nonexclusive concept has been defended on theoretical terms. Lucas observes that responsibility is not a material object – "I can be held responsible for an action you did, without your being thereby any the less responsible for it too."[32]

## 8.3 TRANSFORMATION OF THE SUBSTANTIVE LAW

If individual conduct and outcomes are explained in terms of the relations between actors in causing the harm, it follows that in principle responsibility for such harm should not be allocated to individual actors, but rather to all actors involved in such a relationship. While international law traditionally was based on the notion of independent responsibility (8.3.1), over time it is more and more recognized the relational nature of responsibility (8.3.2), though in key areas that development is incomplete and leaves open significant questions (8.3.3).

### 8.3.1 *The Traditional Principle of Independent Responsibility*

The dominant approach of international law to the allocation of international responsibility is based on the notion of "individual" or "independent" responsibility of states and international organizations.[33] In this account, actors are only responsible for their *own* wrong, irrespective of their connection to other actors.[34]

The dominant paradigm of individual responsibility rests essentially on two grounds. The first ground is of a methodological nature. For the purposes of

[31] *Id.*, at 36–38.

[32] LUCAS, *supra* note 7, at 75. Also, Zimmerman notes that "surely more than one person can be responsible for the same outcome"; *see* Michael J. Zimmerman, *Sharing Responsibility*, 22(2) AM. PHIL. Q. 115 (1985).

[33] To prevent confusion with "individual responsibility" as a term that refers to responsibility of individuals under international criminal law, in the remainder of this paper I use the term independent responsibility.

[34] Int'l L. Comm'n, Commentary to Articles on the Responsibility of States for Internationally Wrongful Acts, Int'l L. Comm'n Y.B. 2001/II 2001, [hereinafter ARSIWA Commentary], commentary to Art. 47, para. 8.

determinations of responsibility, the relevant units of analysis would be individual actors rather than collectivities of actors. This ground is premised on methodological individualism: in the final analysis all conduct is explained by the actions of individuals.[35] This approach is commonly applied to justify individual criminal responsibility.[36] Given the centrality of the sovereign state as the dominant agent in international law, this perspective can also be applied to justify the focus on individual states as agents that cause harmful effects.

The second ground underlying the paradigm of individual responsibility is of a normative nature. Just as international criminal law rejects the concepts of collective responsibility or guilt by association, instead relying on the principle of individual autonomy to limit responsibility to individuals only for their actual conduct, it would be normatively problematic to require states to be responsible for conduct other than their own.[37]

This idea of independent responsibility is reflected in the ARSIWA. The idea that individual states commit individual wrongful acts (expressed in Article 1: "every internationally wrongful act of a State entails the international responsibility of that State") underlies the ARSIWA as a whole.[38] In view of the possibility that a state might be responsible not only for its own acts but also for the acts of others, Special Rapporteur Ago suggested opting for a broader opening Article, providing that "every international wrongful act by a State gives rise to international responsibility," without specifying that this responsibility would necessarily attach to the state that had committed the wrongful act in question.[39] However, the ILC was of the opinion that the situations in which responsibility was attributed to a state other than the state that committed the internationally wrongful act were so exceptional that they should not influence the basic principle in Article 1,[40] and that following Ago's proposal would detract from the principle's basic force.[41] Thus state responsibility for

[35] Kenneth J. Arrow, *Methodological Individualism and Social Knowledge*, 84 Am. Econ. Rev. 1; Steven Lukes, *Methodological Individualism Reconsidered*, 19 Brit. J. of Soc. 119 (1968); J. W. N. Watkins, *The Principle of Methodological Individualism*, 3 Brit. J. for the Phil. of Sci. 186 (1952).

[36] *See, e.g.*, Harmen van der Wilt, *Joint Criminal Enterprise. Possibilities and Limitations*, 5 J. of Int'l. Crim. Just. 91 (2007).

[37] Compare *Genocide* case, *supra* note 21, ¶ 406 (critiquing on this ground the overall test as a basis for attribution of conduct).

[38] ARSIWA, *supra* note 3, Arts. 16–18 of the ARSIWA to some extent form an exception.

[39] Int'l L. Comm'n, Second Rep. on State Responsibility by Special Rapporteur Roberto Ago, U. N. Doc. A/CN.4/233 (1970), ¶¶ 29–30.

[40] Int'l L. Comm'n, Third Rep. on State Responsibility by Special Rapporteur Roberto Ago, U. N. Doc. A/CN.4/246 and Add.1-3 (1971), ¶ 47.

[41] Int'l L. Comm'n, Rep. of the Int'l L. Comm'n on the Work of its Twenty-Fifth Session, U.N. Doc. A/9010/Rev.1,176,7 May-13 (July 1973), ¶ 11.

the state's *own* wrongful conduct came to be the basic rule underlying the ARSIWA.

In the relatively scarce case law, international courts have based themselves on this principle of independent responsibility. The International Court of Justice (ICJ) focused on independent wrongdoing in *Corfu Channel*[42] and *Certain Phosphate Lands in Nauru*.[43] Likewise, the ECtHR considered the responsibility of Belgium and Greece independently in *M.S.S.* v. *Belgium and Greece*.[44] The Tribunal in the *Eurotunnel* case also preferred to approach international responsibility for common conduct through the lens of independent responsibility.[45]

The principle of independent responsibility applies in situations of concerted action no less than in situations where states act alone. Individual actors retain their individual obligation, even when they act in concert. In principle, the fact that more than one actor is engaged in a particular wrongful act, does not release each individual actor from its responsibilities. In the *East Timor* case, Judge Weeramantry, dissenting with the majority judgment, noted that "[e]ven if the responsibility of Indonesia is the prime source, from which Australia's responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility."[46] Australia's own role in regard to the treaty was therefore sufficient for its (independent) responsibility.

Nonetheless, the principle of individual responsibility can have shortcomings in situations of shared responsibility. A system of responsibility that disaggregates responsibility into individual cases of wrongdoing, and that does not connect well to the structure of international cooperation, may undermine key benefits of the law of responsibility. It may hinder answerability for the exercise of public authority, sustain collective action problems and legitimize harmful practices. Its most visible drawback is that it makes it difficult for persons who suffer injury to figure out who is to blame for particular harmful effects. In combination with the procedural limitations of dispute settlement, the conceptual tools of exclusive individual responsibility of states have led courts to reduce complex cooperative schemes to binary categories without engaging in principled discussions of the shared nature of

[42] *Corfu Channel Case*, (*U.K. v. Alb.*), Judgment 1949 I.C.J. Rep. 4 (May 1949) [hereinafter *Corfu Channel* case].

[43] *Nauru* case, *supra* note 16.

[44] *M.S.S. v. Belgium and Greece*, App. No. 30696/09 2011 Eur. Ct. H.R., 21 (2011).

[45] *Eurotunnel Arbitration*, *supra* note 15.

[46] *Concerning East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J Rep. 90 (Jun. 1995), (dissenting opinion of Judge Weeramantry), [hereinafter *East Timor* case].

responsibility.[47] A noteworthy example is the decision of the ECtHR in *Behrami*. The Court attributed all acts and omissions relating to the failed demining operations in Kosovo exclusively to the United Nations, and not its member states, without considering the possibility of a more nuanced solution in which responsibility would be shared.[48] This approach raises the question whether independent responsibility is conducive to a rule-based society in which responsibility fulfills the essential function of ensuring a return to legality and ensuring that the actors that acted in breach of international law will comply with their obligations.[49] Attributing responsibility only to one actor, even though another actor contributed to the harmful outcome, also raises normative questions. For instance, if only a directed (and not the directing) state is held responsible, do we have a proper set of principles that allow us to establish for which part of the injury to a third party it is responsible? If so, is it fair to leave the injured party with the remaining costs? If not, is it fair to hold the directed state responsible for all injury? The larger point here is that reducing situations of shared responsibility to individual responsibility may create an accountability gap that implies costs for the injured parties and the larger system and raise questions of fairness among the responsible parties.

Yet, in the light of the relational nature of responsibility as explained in Section 8.2, the foundations of independent responsibility may not be able to withstand a critical review. The idea of methodological individualism is problematic in light of the intertwined nature of conduct and outcomes. Likewise, the argument that actors should only be responsible for their own action or inaction, is less plausible when it is difficult or even outright impossible to isolate individual conduct.

### 8.3.2 *Emergence of the Substantive Law of Shared Responsibility*

While neither the ARSIWA nor the ARIO were designed and drafted with situations of shared responsibility in mind, both texts contain principles that addresses or allow for the possibility of international responsibility of multiple

[47] *See, e.g., Legality of Use of Force (Serb. & Montenegro v. U.K.)*, Provisional Measures, Order, 1999 I.C.J Rep. 113 (Apr. 1999), [hereafter *Case on the Legality of the Use of Force against the U.K.*]; *East Timor* case, *supra* note 46; *Nauru* case, *supra* note 16; *Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.)*, Judgment, 1986 I.C.J Rep. 14 (Jun. 1986); *Corfu Channel* case, *supra* note 42.

[48] *Behrami v. France*, Admissibility Decision, App. No. 71412/01 & 78166/01 2007 Eur. Ct. H.R., 2 (2007).

[49] For discussion of the relationship between the rule of law and state responsibility, *see* Ian Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations 79–81 (1998).

wrongdoers. The most explicit principle is the principle that where several states and/or international organizations are responsible for the same internationally wrongful act, the responsibility of each state or organization may be invoked in relation to that act.[50] This principle recognizes that several states and/or international organizations can be responsible for the same wrongful act, without expressly stating this.

It is possible to discern a marked transformation in the law of responsibility over the past few decades. This can best be illustrated by the difference between article 1 ARSIWA which, as noted, is based on the notion of independent responsibility, and Article 1 ARIO. This latter Article stipulates that the ARIO apply not only to the responsibility of an international organization for its own wrongful conduct, but rather to "the international responsibility of an international organization for *an* internationally wrongful act."[51] This concept of responsibility thus refers to a responsibility of international organizations and states that derives not only from their *own* wrongful conduct, but also for wrongful acts brought about by a cooperative action of which they were a part. Given the possibility that international organizations would contribute to the wrongful acts of member states, or vice versa,[52] the ILC found the suggestion of basing the entire law of international responsibility on individual responsibility to be unpersuasive and opted for a construction that it had rejected in relation to the responsibility of states. In this sense, the ARIO as a whole are based on a "relational account" of international responsibility.

Both the ARSIWA and the ARIO allow ample opportunities for sharing responsibility between multiple states and/or international organizations. The international law of responsibility is a flexible body of law that can be applied in, and adjusted to, a wide variety of situations, including situations involving shared responsibility. Apart from the principle on the same wrongful act, both the ARSIWA and the ARIO implicitly recognize the possibility of shared responsibility by their inclusion of "without prejudice" provisions. These provisions stipulate that attribution to, or responsibility of, one state or international organization is without prejudice to attribution to, or responsibility of, another actor and thus make clear that responsibility of one actor need not be exclusive.[53]

[50] ARSIWA, *supra* note 3, at Art. 47; ARIO, *supra* note 2, at Art. 48.

[51] Int'l L. Comm'n, Commentary to Art. on the Responsibility of Int'l. Org., Int'l L. Comm'n. Rep. on the Work of its Sixty-Third Session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011), ¶ 4, [hereinafter ARIO Commentary].

[52] ARIO, *supra* note 2, at Arts. 14–17.

[53] ARSIWA, *supra* note 3, at Arts. 10(3), 19, 57 and 58; ARIO, *supra* note 2, at Arts. 19, 63, and 66.

Also the principles relating to attribution are flexible and allow for a determination of shared responsibility. This holds both for attribution of conduct and attribution of responsibility. As to the former the provisions on attribution of conduct concerning a multiplicity of possibly responsible actors are largely unproblematic.[54] The ARSIWA and the ARIO enable, for instance, shared responsibility in situations involving joint organs (as supported by the *Nauru*[55] and *Eurotunnel*[56] cases), and situations where both international organizations and their member states incur responsibility.

The picture for attribution of responsibility is not any different. Both the ARSIWA and the ARIO leave open the possibility of attributing responsibility to one actor for internationally wrongful conduct committed by another actor. Indeed, it can be inferred from the very definition of attribution of responsibility, in terms of responsibility for the conduct of another, that there cannot be situations where all of the parties bear attributed responsibility. Fry thus observes that the "combination of attributed responsibility to one state or international organisation, on the one hand, and attribution of responsibility or conduct to another, on the other, might lead to multiple attribution (of responsibility, conduct, or both)."[57]

The principle of complicity is the paradigmatic example of a principle that enables shared responsibility: indeed, shared responsibility between the complicit state and the principal wrongdoing state is inherent in the very concept of complicity.[58] The aid provided may rise to a level where the aiding state becomes co-perpetrator, and thus jointly responsible with the state or organization that receives the aid. If not, the aiding state will be responsible for a separate wrong. But, either way, responsibility will only arise when the receiving state indeed commits the wrong.

The principles pertaining to reparation appear to be similarly flexible. Apart from the case of responsibility "for the same internationally wrongful act,"[59]

[54] The exception is transferred organs where international law does not recognize multiple attribution, *see* Francesco Messineo, *Attribution of Conduct*, in Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art 60 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

[55] *Nauru* case, *supra* note 16.

[56] *Eurotunnel Arbitration*, *supra* note 15.

[57] J. D. Fry, *Attribution of Responsibility*, in Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art 98 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

[58] V. Lanovoy, *Complicity in an Internationally Wrongful Act*, in Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art 134 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

[59] ARSIWA, *supra* note 3, at Art. 47; ARIO, *supra* note 2, at Art. 48.

where the responsibility of each state or organization may be invoked in relation to that internationally wrongful act, the Articles are silent in relation to shared responsibility stemming from different wrongful acts. However, this does not mean that the ARSIWA and the ARIO cannot accommodate such questions. D'Argent notes that "this silence is best explained by the fact that no specific rule is actually required in such cases and that the question of the allocation of the obligation to make reparation is simply governed by the orderly and reasoned application of the usual rules."[60]

Beyond the world of the ILC, there is a diverse practice that can be captured in terms of shared responsibility. The ILC version of the law of responsibility needs to be understood as a part of a broader process of global governance, that involves diverse principles and processes of accountability and responsibility for evaluating and adjudicating harmful conduct, and that may initiate a renewed cycle or development of rules.[61]

### 8.3.3 *Remaining Controversies*

The incorporation of shared responsibility in the positive law of responsibility still is very much work in progress. In part, the articles clearly are *lege ferenda*. This holds for instance for most articles in Part Five of the ARIO – on responsibility of states for circumvention, aid or assistance or directing and controlling an international organization.[62]

Moreover, the articles do not provide much direction for the scope and distribution of shared responsibility. The law rarely provides guidance on (often complex) questions of determination, allocation, and implementation in situations where responsibility is shared. This is in part caused by the fact that the construction of the principles of international responsibility, in relation to questions of shared responsibility could not be based on significant practice. On issues such as attribution of conduct, circumstances precluding wrongfulness, or countermeasures, hardly any practice exists in relation to multiple wrongdoers.

While to some extent such lack of guidance is not due to the specific features of shared responsibility, but rather reflects the generality of the law

[60] D'Argent, *supra* note 23, at 217.

[61] K. Van Kersbergen and F. Van Waarden, *"Governance" as a Bridge between Disciplines: Cross Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy* (2004) 43(2) European Journal of Political Research 143.

[62] A. Gattini, *Breach of International Obligations*, in Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art 25 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

of international responsibility as such, the specific nature of questions of shared responsibility, combined with the lack of practice, enhances the uncertainty in the construction and application of principles of international responsibility. This is true most of all for the problem of distribution of responsibility, and in particular, reparation between multiple actors. In those cases where it can be determined that multiple states and/or international organizations are responsible, the question will arise whether they are then responsible for the same act or omission, and to the same degree. Most ILC Articles do not differentiate between degrees of responsibility. While this is consistent with the "objective responsibility" regime the ILC sought to establish, in cases of multiple responsible states it suggested "all or nothing" solutions that might be seen as too rigid.

A key problem is the lack of a well-defined concept of causality. While in the Articles as designed by the ILC, causation is not, strictly speaking, an element of responsibility, in actual determinations of (shared) responsibility, causation will frequently be decisive. Given the definition of shared responsibility as referring to situations where different actors contribute to a single harm,[63] the determination of degrees of contribution is key not only for defining whether or not the case at hand is indeed a case of shared responsibility at all, but also for identifying degrees of responsibility. For instance, in a situation where some of the actors are bound by a negative obligation and some by a positive one, a concept of causality that would be varied according to the different kinds of obligations that were violated would permit better fine-tuning between the different responsibilities of different actors.[64] The possibility of different degrees of responsibility is also recognized by Fry, who observes that attribution of responsibility seems to be grounded on the notion of – varying – degrees of control. But there does not appear to be a coherent basis for variation.[65]

The law is largely silent on how to determine shares of reparation in those situations where causation does not provide easy answers. This holds both in situations where there is a single wrongful act, and in situations of different wrongful acts (whether concurrent or cumulative responsibility). As to the former, Article 47(2) of the ARSIWA stipulates that the principle enunciated in paragraph 1 is without prejudice to allocation of reparation between the

[63] A. Nollkaemper & D. Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. OF INT'L L. 359, 366–68 (2013); A. Nollkaemper, *Introduction: Procedural Aspects of Shared Responsibility in International Adjudication*, 4 J. OF INT'L DISPUTE SETTLEMENT 277 (2013).

[64] Gattini, *supra* note 62, at 31.

[65] Fry, *supra* note 57, at 128.

responsible parties, but neither the principle nor the Commentary provides the beginning of an analysis on how this allocation should proceed. As to the latter, d'Argent notes that the ARSIWA and the ARIO only partly address the complexity stemming from situations of shared responsibility when it comes to the allocation of the secondary obligations of reparation, cessation, and assurances and guarantees of non-repetition. Furthermore they fail to consider cases where the harmful outcome is the result of several wrongful acts for which several subjects are responsible.[66]

The lack of guidance also applies to complicity. Profound questions remain as to what degrees of contribution actually trigger responsibility of the aiding state, and thereby shared responsibility, and how the law deals with possible variations in responsibility between the aiding and the aided state. Lanovoy observes that the current regime of responsibility for complicity leaves little room "for the injured party to obtain full reparation for the injury that bears an imprint of complicity."[67] He critiques the ILC for failing "to provide guidance on the causal standards governing a third party's contribution to an internationally wrongful act".[68] While d'Argent identifies several options for allocation of reparation, it is difficult to know which of those approaches is favored by international practice.[69]

## 8.4 INTERNATIONAL ADJUDICATIVE LAW

The paradox identified in this article is that the relational nature of responsibility that underlies principles of shared responsibility may complicate effective adjudication of claims of shared responsibility. Precisely the fact that in cases of concerted action the conduct of one actor often cannot be disconnected from that of other actors, and that the substantive law of responsibility has to accommodate such relations, may limit the power of international courts to effectively adjudicate shared responsibility claims. Factors that help explain this phenomenon are that courts are governed by a procedural logic that may lead them into different directions than the substantive logic of shared responsibility (8.4.1); that because of the structure of the international legal system often not all co-responsible parties will be before the court, with the consequence that courts have to disaggregate complex multiparty problems (8.4.2); and that questions of shared responsibility may involve such large

[66] D'Argent, *supra* note 23, at 249.
[67] Lanovoy, *supra* note 59, at 136.
[68] *Id.*
[69] D'Argent, *supra* note 23, at 230–31.

https://doi.org/10.1017/9781316996836.009 Published online by Cambridge University Press

numbers of parties that such questions may be better addressed by negotiation and regulation than by adjudication (8.4.3).

### 8.4.1 *The Independent Logic of Adjudicative Law*

Proceedings in courts are governed by different logic than law of responsibility. International adjudication is governed by procedural rules, broadly defined. Examples of such procedural rules are rules on joinder, evidence, and fact-finding. The principles of shared responsibility, including those that relate to reparation by multiple wrongdoing actors, are better placed in the category of substantive law than in the category of procedural law (whether in the narrow or in the broad sense).[70] This also holds for reparation: to define reparation in terms of procedure would be "to confound the remedy with the process by which it is made available."[71] Indeed, the ARSIWA and the ARIO formulate reparation largely, though not entirely, in terms of substantive rather than procedural law.[72]

Where substantive law does provide for shared responsibility, there is no automatic connection with procedural law. While in some cases procedure may be seen as a facilitator of the application or development of substantive law,[73] "adjudicative law" may serve different interests and even may impede the realization of substantive law of responsibility. Particular procedural principles may lead or assist a court to formulate particular substantive principles of responsibility, or deny it the possibility to do so. It rightly has been said that "[p]rocedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights."[74]

[70] Also, Bentham interpreted the definition of the possible range of remedies that might be accorded for a violation of a right as being part of the substantive law. *See*, D. M. Risinger, *"Substance" and "Procedure", Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebutable Presumptions,"* 30 UCLA L. Rev. 189, (1982); *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment. 2002 I.C.J. Rep. 3 (Apr. 2002); *Greece Intervening: Jurisdictional Immunities of the State (Ger.v. It.)*, Judgment, 2012 I.C.J. Rep. 99 (Feb. 2012), (stating that "whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation").

[71] *Contra* Alford, *supra* note 6, at 233, 247 (remedy is procedure).

[72] ARSIWA, *supra* note 3, at Art. 31; ARIO, *supra* note 2, at Art. 31.

[73] C. Wilfred Jenks, The Prospects of International Adjudication 184 (1964); Jeremy Bentham, *Principles of Judicial Procedure with the Outlines of a Procedure Code*, in The Works of Jeremy Bentham Vol. 2 Part 1 (John Bowring ed., 1843), cited in J. S. Martinez, *Process and Substance in the "War on Terror,"* 108 Colum. L. Rev. 1013, 1022 (2008); R. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 617 (1908).

[74] T. Main, *The Procedural Foundation of Substantive Law*, 87 Wash. U. L. Rev. 801, 802 (2010).

https://doi.org/10.1017/9781316996836.009 Published online by Cambridge University Press

Procedural rules may have a different logic and different aims than giving effect to substantive principles of (shared) responsibility. We can recall Franck's distinction between the substantive and procedural aspects of fairness, which "may not always pull in the same direction."[75] This applies more generally to procedure in international courts. Procedural fairness, informed by equality of the parties, can conflict with what may be necessary for the implementation of shared responsibility. For instance, is it proper for a court in a procedure against state A to attribute weight to a determination of another court in a procedure against state B, if state A was not a party to the latter proceedings? The possibility that attributing such weight may help implement principles of responsibility may need to be weighed against, and may be overridden, by the procedural fairness of not burdening a party with an outcome of a procedure in which it had no part.

Moreover, procedural rules not only serve their own ends, but that they may have an impact on the status and construction of substantive rules themselves. The absence of proper procedures may cast doubt on the status and meaning of the substantive rules themselves. The fundamental point is that procedure is not just the transmitter of substance, or protective of intrinsic procedural rights, but is codeterminative of what the law is in the first place. For instance, the lack of procedural arrangements that would allow for recourse between multiple responsible parties casts doubt on the existence of joint and several liability in international law.[76]

### 8.4.2 *Disaggregation*

Procedures for international adjudication were not designed for multiparty disputes.[77] Just as the substantive principles of international responsibility developed by the ILC barely recognize the possibility of shared responsibility, the procedural rules of international courts have little to say on the situation where there is not one responsible State but multiple responsible States acting as defendants.[78] Thus, the procedural rules that apply to litigation of shared

[75] T. M. Franck, Fairness in International Law and Institutions (1995).

[76] A. Orakhelashvili, *Division of Reparation Between Responsible Entities*, in The Law of International Responsibility 663–64 (J. Crawford et. al. eds., 2010).

[77] L. Fisler-Damrosch, *Multilateral Disputes*, in The International Court of Justice at a Crossroads 376 (L Fisler-Damrosch ed., 1987).

[78] As noted by Paparinskis: "while cases of shared responsibility might illustrate the evidentiary challenges in particularly clear terms, the challenges are those of evidence in the ICJ (and international dispute settlement) more broadly and would have to be dealt with in terms of those debates." M. Paparinskis, *Procedural Aspects of Shared Responsibility in the International Court of Justice*, 4 J. of Int'l. Disp. Settlement 295 (2013).

responsibility are the ordinary procedural rules, that largely have to be adjusted to fit the specific characteristics of shared responsibility and, more generally, multilateral dispute settlement. While the powers and procedures of international courts leave leeway for broadening shared responsibility disputes beyond narrow bilateral settings, in several respects they restrict the possibility to take into account the distinctive multiparty nature of shared responsibility.[79] In particular in the ICJ there is a tension between the collective, multilateral nature of substantive principles that the Court may be asked to litigate, and the bilateral nature of its procedures.[80]

Because of the dominant role of consent, courts often can exercise jurisdiction over only a part of the co-responsible parties. The consequence may be that courts will be required to disaggregate complex issues. There may be multiple reasons why an international court will exercise jurisdiction over only part of the co-responsible parties. Often, plaintiffs will seek only redress from some, but not all (possibly) co-responsible parties. This in turn may be due to the fact that some parties offer better remedial prospects, or that the plaintiff has particular ties with one or a few, but not all defendants. It also may be due to the fact that a court will not be able to exercise jurisdiction over all co-responsible parties.[81] Here several situations need to be distinguished. The court may not be able to exercise jurisdiction over all types of actors that are co-responsible for a particular harm. Here considerable differences exist between international courts. In the ICJ only States can be parties in proceedings.[82] If a (co-)responsible party is an organization, a company, or private individual, these cannot be brought before the Court. In contrast, the dispute settlement procedures of the ITLOS are also open to "entities other than States Parties."[83] The WTO dispute settlement procedure can hear claims against States and

[79] Exceptions are Fisler-Damrosch, *supra* note 77, and M. Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 The L. & Prac. of Int'l. Ct. & Trib. 369 (2006); see generally on procedural aspects of international litigation, I. Venzke, *Antinomies/ and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law*, in International Dispute Settlement: Room for Innovations? (R. Wolfrum & I. Gätzschmann eds., 2013).

[80] Fisler-Damrosch, *supra* note 77, at 376. An example of the latter is the judgment of the ICJ in Jurisdictional Immunities, *supra* note 70.

[81] See generally on the jurisdiction of international courts, C. F. Amerasinghe, Jurisdiction of International Tribunals (2003).

[82] Statute of the International Court of Justice (June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1179, 1186) [hereinafter ICJ Statute], Arts. 34–35.

[83] Article 20 of the Statute of the International Tribunal for the Law of the Sea, which is Annex VI to the Law of the Sea Convention (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

the EU.[84] The ECtHR at present can only hear claims against States, but in the future will be able to decide claims against the EU. For arbitral tribunals, everything depends on the terms of the arbitration agreement, and there is no a priori limitation to the actors that can be brought before such tribunals.

Within the category of actors that in principle can be brought before an international court, only those actors can appear as defendants that have consented to the jurisdiction of the court, through a bilateral or multilateral treaty or otherwise.[85] In some situations States and/or international organizations have given their consent before a questions of shared responsibility arises; this will apply to the ECtHR and the WTO dispute settlement procedure. However, in such cases regional limitation of jurisdiction may apply. The position of the USA in relation to the rendition cases before the ECtHR is an example. In the *El-Masri* case, the ECtHR could adjudicate questions against Macedonia, but not against the United States.[86] In situations where no such a priori consent has been given, it is likely that one or a few, but not all co-responsible parties can be brought before the court. In the ICJ, jurisdictional limitations stem in particular from the requirement of state consent to the jurisdiction.[87] The East Timor case,[88] the Legality of the Use of Force cases,[89] and Obligations concerning Negotiations relating to Cessation of the Nuclear

[84] *See* L. Bartels, *Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System*, 4 J. OF INT'L. DISP. SETTLEMENT 343 (2013).

[85] *See, e.g.*, J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 119–23 (2005).

[86] *See El-Masri* case, *supra* note 20; Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950, 213 U.N.T.S. 221, 224), Art. 1, (limiting the applicability of the Convention to the High Contracting Parties).

[87] ICJ Statute, *supra* note 82, at Art. 36

[88] *East Timor* case, *supra* note 46, at ¶104; *Greece Intervening: Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99 (Feb. 2012).

[89] *See*: *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 270 (July 1996); *Legality of Use of Force (Yugoslavia v. U.S.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 916, 925 (June 1990); *Legality of Use of Force (Yugoslavia v. U.K)*, Request for the Indication of Provisional Measure, 1990 I.C.J. Rep. 829, 839 (June 1990); *Legality of Use of Force (Yugoslavia v. Port.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 656, 671 (June 1990); *Legality of Use of Force (Yugoslavia v. Neth.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 542, 557 (June 1990); *Legality of Use of Force (Yugoslavia v. It.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 481, 492 (June 1990); *Legality of Use of Force (Yugoslavia v. Ger.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 422, 432 (June 1990); *Legality of Use of Force (Yugoslavia v. Fr.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 363, 373 (June 1990); *Legality of Use of Force (Yugoslavia v. Can.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 259, 273 (June 1990); *Legality of Use of Force (Yugoslavia v. Belg.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. Rep. 124, 139 (June 1990).

Arms Race and to Nuclear Disarmament Cessation of the Nuclear Arms Race are examples of cases where the Court was asked to adjudicate claims against some, but not all (allegedly) responsible parties.[90]

The powers of courts to determine responsibility of multiple responsible parties also may be limited by the applicable law. Given that international courts can only apply a certain set of rules, the potential responsibility of an actor under another set of rules is irrelevant for that particular court. For instance, the dispute settlement mechanism under the Law of the Sea Convention will in principle only be able to adjudicate claims under this Convention. If one of the potentially co-responsible parties has, by its contribution to the single harmful outcome, acted in contravention of a human rights treaty, that might make it co-responsible, but the LOSC DSP will not be able to adjudicate claims on that basis.

Finally, the possibility that all responsible parties may be brought before an international court may be limited by the standing of a State, or other actor, to present a claim against two or more responsible actors, over which the court in principle has jurisdiction. In the ICJ, if a State has no legal interest in the subject matter of his claim (a right that is potentially violated by a particular party), the State will lack standing and the court will not deal with the substantive questions of that particular claim.[91] While standing may at first sight seem less relevant to questions of shared responsibility, as it relates primarily to the plaintiff rather than to the responsible parties, in particular cases rules on standing can present a barrier to litigation of questions of shared responsibility. A plaintiff may have a right to bring a claim against one, but not against all responsible parties. In regard to proceedings in the ICJ, if the obligations breached by separate responsible parties are different, it may be the case that a claimant has standing vis-à-vis some responsible states but not against others. Another example is a case based on diplomatic protection, where remedies may have been exhausted in some, but not in all responsible States. In the ECtHR, the admissibility criteria contained in the Convention may prevent standing of individuals who are not under the jurisdiction of all responsible parties, or who are not a victim of breaches by all responsible States.[92]

[90] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Cessation of the Nuclear Arms Race (Marsh. Is. v. U.K.)*, Preliminary Objections, 2016 I.C.J. Rep. 160 (2016).

[91] This may be different in other courts, such as the WTO, see EC – Regime for the Importation, Sale and Distribution of Bananas (Banana´s III) WT/DS27/AB/R AB-1997-3 (rejecting a requirement of legal standing).

[92] M. Den Heijer, *Procedural Aspects of Shared Responsibility in the European Court of Human Rights*, 4 J. of Int'l. Disp. Settlement 361 (2013).

When for any of these reasons only a part of the co-responsible parties is defendant in a particular case, a court will be forced to disaggregate shared responsibilities. Whether or not that will be problematic will depend on the circumstances of the case. In cases where the responsibility of each of the parties can be determined in isolation of the responsibility of the other parties, such disaggregation may be relatively unproblematic. But in cases where the responsibilities are intertwined, when harm is undivided, and the contributions by multiple parties are cumulative, it may be difficult to disaggregate the dispute. For instance, one court may not be able to pronounce on the responsibility of state A without considering the factual and legal position of state B, and conversely, a court's decision on state A may have implications for the assessment of the legal position of co-responsible state B.

This may be is unsatisfactory for three reasons. First, the Court may not be able to properly address, let alone resolve, the underlying problems. Second, it may not be able to provide proper remedies to plaintiffs (either in term of cessation or reparation). Indeed, the sheer complexity of doing this may lead a court to decline to determine any reparation, as in the *Genocide* case. Third, the result may be unjust between the parties, when those parties that will appear before the court will have to carry the burden for a larger group of actors that do not participate in the proceedings. If a court adjudicates the responsibility of only one actor, that actor may be held responsible, and be ordered to provide reparation for wrongs committed in whole or in part by another actor.

### 8.4.3 *The Political Process*

The more complex problems of shared responsibility become, and the more extensive and intertwined the underlying relations between actors become, the less useful the role of international adjudication becomes in handling such problems. Questions of shared responsibility relating to harmful effects of concerted action may present a complexity that exceeds the ability of international courts to address them, and more generally may be unsuited for international adjudication.

While some problems of shared responsibility may present themselves in relatively simple party-structures (e.g., a situation of extradition by a state to another state of a person in the face of risk that that person would be tortured), in other situations a high number of states can be involved. Examples are climate change, trade in endangered species, and the global financial crisis. Theoretically it may not be impossible to adjudicate claims against large numbers of parties. However, existing procedures are hardly suited for such

"mass-adjudication." This may be due to the need to establish jurisdiction for each of the co-responsible parties, to differences in terms of the applicability of primary obligations, which may impact on admissibility of claims, or on evidentiary questions. But the more general point is that in complex multiparty settings, harmful outcomes will require political responses and regulation, rather than one-off adjudication. Shared responsibility problems may involve substantive obligations, rather than the allocation of ex post facto responsibility. The problem of shared responsibility in relation to the Mediterranean refugee crises is an example. While it cannot be excluded that in particular cases justiciable claims could be made against one or a few states involved in maritime operations in the area, it is quite obvious that there would be a mismatch between the judicial approach to such problems and the preeminently political questions of shared responsibility in terms of who should do what. The same can be said for climate change – one-off litigation between individual actors may well be possible. But also here there may be a mismatch between the potential outcome of such litigation and the underlying structural causes of the problem, which again required political and regulatory solutions, rather than adjudication.

It may even be said that in particular cases litigation of parts of a complex problem may be counterproductive.[93] The possibility that individual states may be brought before a court may make them less eager to engage in collective agreements that would detail obligations of multiple parties. Designing adjudication procedures in a way that would optimize litigation of shared responsibility issues (for instance by narrow interpretation of the Monetary Gold rule, flexible rules of evidence, etc.), might undermine the acceptance of shared responsibilities ex ante, which in the long run need not benefit the achievement of the particular regime in question.

None of this is unique to questions of shared responsibility. It rather is a manifestation of the fundamental tension between adjudication on the one hand, and the political process, on the other, which underlies the modest role of international adjudication in international affairs in general. However, that tension definitively will become stronger and more complex in multiparty settings, where questions of distribution of responsibility (whether ex post or ex ante) will be highly complex. Of course, it may well be possible to identify narrow legal issues in an otherwise highly political context, allowing courts to exercise either contentious or advisory jurisdiction. Shared responsibility questions will not, as a general matter, be excluded by some political questions

[93] D. Cole, *The Problem of Shared Irresponsibility in International Climate Law*, in *supra* note 19, at 290.

doctrine. But it may be questionable whether outcomes of such adjudication are beneficial from the perspective of the achievement of public goals, which may need to involve the wider spectrum of parties. To some extent, this indeed highlights the tension between private and public aspects of shared responsibility.[94] All of this should lead us to some modesty in terms of what we can expect from international courts in relation to shared responsibility.

## 8.5 DIVERSITY

The role of international adjudication in relation to shared responsibility differs widely – both between international courts and between states in terms of their willingness of states to subject themselves, or make use of, international adjudication.

As to the former, influenced by differences in the applicable law and the underlying values and constituencies, the ability of courts to handle questions of shared responsibility differs significantly.[95] For instance, while in the ICJ there is a tension between the collective nature of wrongdoing and the bilateral nature of its procedures,[96] the rules of the ECtHR and arbitral tribunals are flexible and may accommodate such complex types of adjudication. Notable differences exist in the type of actors whose shared responsibility is engaged that can be brought before the court, in the role of consent as a precondition to the exercise of jurisdiction over co-responsible States, in the scope of the applicable law as a manifestation of jurisdiction, in the requirements of standing, in the practice of joinder, in the role of the indispensable parties rule, and in the powers of the courts to obtain evidence from actors that are not party to the proceedings. Some courts are better able to handle questions of shared responsibility than others. In the ICJ, in particular the Monetary Gold principle and the rule and practice of joinder may complicate determinations on shared responsibility.[97] In the ECtHR, both these rules are less problematic, but other problems exist here, notably the requirements of a jurisdictional link and the victim requirement.[98]

[94] Nollkaemper & Jacobs, *supra* note 63.

[95] See e.g. for the rather particular approach of the ECtHR on questions of reparation, M. Pellonpää, *Individual Reparation Claims under the European Convention on Human Rights*, *in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 112–25 (A. Randelzhofer and T. Tomuschat, eds., 1999); *See* generally C. Gray, *The Choice Between Restitution and Compensation*, 10 EUR. J. OF INT'L. L.413, 418, 422–23 (1999).

[96] Fisler-Damrosch, *supra* note 77, at 376.

[97] Paparinskis, *supra* note 78.

[98] Den Heijer, *supra* note 92, at 363.

Perhaps the most important factor that accounts for such differences is that the degree in which a treaty regime protects particular public values influences the way that questions of shared responsibility will be adjudicated. In a horizontal, bilateral setting, consent in relation to jurisdiction (and joinder) remains more dominant, and the powers of courts and tribunals vis-à-vis actors that are not before the court are more limited. It is this factor that explains why the procedure in the ECtHR displays a relatively large degree of openness towards multilateral dispute settlement. However, precisely the example of the ECtHR shows that the public law nature of the regime does not provide a comprehensive explanation of the ability of the court to address questions of shared responsibility – other barriers such as jurisdiction and the victim requirement remain,[99] and call for different explanations.

There is another dimension to the diversity in international adjudication of shared responsibility problems that should be considered. This is that there are considerable differences between states that are willing and able to submit their shared responsibility disputes to international courts. Much of the practice involves a very limited number of states, in particular in "the West." But also within that group there are significant differences. The adjudication of claims in relation to extraordinary rendition provides an example. Whereas European states such as Macedonia[100] and Poland[101] were found responsible by the European Court in relation to their (shared) responsibility, the USA has always resisted attempts to be subjected to adjudication for their leading role in extraordinary rendition. The US has been able to preclude international proceedings by not accepting jurisdiction of relevant international procedures, notably the Human Rights Committee (HRC), the Committee against Torture (CAT), and the ICJ.[102] This means that no international court has authoritatively determined that the USA has committed a wrong, or determined a factual account of the conduct of the USA as part of its extraordinary rendition policy. Domestic claims in the USA were rejected on procedural grounds before reaching the merits.[103] The only case in which US agents were found responsible was an Italian decision of the Court of Appeals of Milan,

[99] *Id.*, at 368.

[100] *El-Masri* case, *supra* note 20.

[101] *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. ¶ 511 (2014).

[102] The USA is not a party to the First Optional Protocol to the ICCPR (International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171). It withdrew the acceptance of compulsory jurisdiction of the ICJ in 1984. See the Status of Ratification Interactive Dashboard of the UN Office of the High Commissioner for Human Rights, at http://indicators.ohchr.org/.

[103] *See, e.g., El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

which determined (in absentia) criminal liability of twenty-two CIA agents and one US military official for kidnapping Abu Omar.[104] This episode illustrates that the ability of courts to adjudicate shared responsibility claims (already limited because of the complexity of the cases, identified above), differs significantly between states – and indeed also between Europe and the United States.

## 8.6 CONCLUSION

The somewhat paradoxical conclusion of the above analysis is that reconstructing responsibility in a relational sense, based on the fact when acting together they can achieve things they cannot achieve alone, underpins the development of substantive law of shared responsibility, but at the same time reduces the possibility that it may be resolved through adjudication. Precisely the fact that in cases of concerted action the conduct of one actor often cannot be disconnected from that of other actors, may both justify shared responsibility, and may limit the power of international courts to effectively adjudicate shared responsibility claims.

The development of the substantive law of responsibility can call for the renewal and change of procedural law. This connection ultimately rests on the idea that it is a task of procedural law to transmit substantive obligations or rights. In particular, relatively confined, cases of shared responsibility international courts may extend their power beyond individual actors that directly caused harmful effects, and may exercise jurisdiction to co-responsible parties. Examples are rules on introduction of claims and intervention, collection of evidence in relation to absent parties and joinder. Judgments of the ECtHR in rendition cases, where it had to acquire information related to the USA, provide a good example. However, more generally there may be significant

[104] F. Messineo, *"Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy*, 7 J. OF INT'L. CRIM. JUST. 1023, 1036, 1044 (2009); For a detailed account of the facts of the Abu Omar case see the Italian arrest warrant for involved (US) agents: Adler et al., Prosecutor, Monica Courtney Adler, Gregory Asherleigh, Gabriel Lorenzo Carrera, Eliana Castaldo, Victor Castellano, Drew Carlyle Channing, John Kevin Duffin, John Thomas Gurley, Raymond Harbaugh, Ben Amar Harty, James Robert Kirkland, Anne Lidia Jenkins, Liliana Brenda Ibanez, Robert Seldon Lady, Cyntia Dame Logan, L. George Purvis, Pilar Rueda, Joseph Sofin, Michalis Vasiliou Registro Generale Notizia di Reato No 10838/05 Registro Giudiziario Giudice per le Indagini Preliminari No 1966/05 (Tribunale de Milano, 22 June 2005), official English translation by A Bygate and N Hazzan, available at http://www.statewatch.org/cia/documents/milan-tribunal-19-us-citizens-sought.pdf. In 2012, the convictions were upheld by Italy's highest appeals court.

time-lags between the development of substantive law and the development of procedural law – certainly if the contents of the substantive law is not very clear to start with. Moreover, the fact that procedural law has its own logic may hamper the development of substantive law, and may even work in an opposite direction.

The result is that when courts do adjudicate claims of shared responsibility, they generally are forced to debundle complex situations – and steer away from any pronouncements on the responsibility of other actors involved. Thereby courts may not be able to properly address, let alone resolve, the underlying causes of harm. They also may not be able to provide proper remedies to plaintiffs (either in terms of cessation or reparation). Indeed, the sheer complexity of doing this may lead a court to decline to determine *any* reparation, as we saw in the *Genocide* case.

If a court does not seek to disaggregate a situation of multiparty responsibility, and accept that the conduct is intertwined and cannot be disconnected, this may imply that a court has to declare itself without jurisdiction. In this sense, the somewhat paradoxical outcome is that a reconstruction of responsibility in a relational sense, based on the fact that when acting together they can achieve things they cannot achieve alone, is necessary for determination of shared responsibility in a substantive sense, but may run counter the interest of a comprehensive adjudication.

The larger point is that when a court seeks to engage with a shared responsibility question in its full complexity, it will appear that the role of international adjudication in the overall scheme of shared responsibility is limited. In complex multiparty settings, possible responses to harmful outcomes will require political responses and regulation, rather than one-off adjudication. Climate change is an example. None of this is unique questions of shared responsibility. It rather is a manifestation of the fundamental tension between adjudication on the one hand, and the political process, on the other. However, that tension definitively will become stronger and more complex in multiparty settings, where questions of distribution of responsibility will be highly complex. All of this should lead us to some modesty in terms of what we can expect from international courts in relation to shared responsibility.