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# CONCERTED ADJUDICATION IN CASES OF SHARED RESPONSIBILITY

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## I. INTRODUCTION

In this Article, I address the question of the grounds on which an international court that is asked to determine the responsibility of a state and the possible consequences thereof should attach weight to prior judicial findings by different courts in relation to other actors that have contributed to the same harm and who on that ground can be considered co-responsible parties. Framed differently, I consider the question of the grounds on which courts should engage in concerted adjudication on questions of shared responsibility.<sup>1</sup> I use the term “concerted adjudication” in this context to refer to a process where courts take into account and, if appropri-

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1. See generally André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT’L L. 359 (2013) (explaining and discussing the concept of shared responsibility).

ate, attach weight to findings of other courts in adjudicating claims relating to the same harm. Others have used the term “cross-judging” to refer to such processes.<sup>2</sup> The term “concerted action” does not suggest that courts mutually coordinate their legal reasoning or approaches—a scenario that obviously is neither realistic nor desirable.

An example illustrates the question which the Article is concerned with. Assume that three states engage in a counterterrorism operation. The operation is jointly planned and coordinated, and each of the states contributes by providing intelligence and material support. The operation results in agents of two of the three states carrying out raids on private homes. Shots fired by one of the agents kill innocent persons. Both the state on whose territory the operation was carried out without its consent and the relatives of the victims bring claims against each of the three responsible states in separate courts, say in the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and a domestic court. The question then is this: Should any of these courts, in adjudicating a claim against one of the contributing states, attribute weight to what another court may have said in prior or parallel proceedings against the other contributing states? If so, why?

Concerted adjudication in situations of shared responsibility does not occur frequently. While situations of multiple wrongdoing are quite common,<sup>3</sup> it is rare that claims against a plurality of wrong-doing actors are adjudicated.<sup>4</sup> It is even more rare that they are litigated in different courts.

However, the question addressed here is not entirely devoid of practical relevance. In *The Genocide case*, the International Court of Justice (ICJ) was faced with the question of what weight it should attribute to prior decisions of the Inter-

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2. E.g., Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959 (2009).

3. See Nollkaemper & Jacobs, *supra* note 1, at 362–63 (commenting on the increasing frequency of cooperative action among international actors).

4. See generally André Nollkaemper, *Introduction: Procedural Aspects of Shared Responsibility in International Adjudication*, 4 J. INT'L DISP. SETTLEMENT 277 (2013) (providing an overview of adjudication of claims against a plurality of actors).

national Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>5</sup> The ICJ adjudicated the contributions that Serbia and Montenegro made to the genocide. The ICTY had earlier decided on the contributions of individuals relating to the same factual events, in particular Dražen Erdemović, Radislav Krstić, and Slobodan Milošević.<sup>6</sup> The ICJ considered that the latter contributions were factually and legally related to the case against Serbia and Montenegro and attributed weight to the findings of the ICTY.<sup>7</sup> The question of what weight should be given to the ICTY's determinations in relation to Serbian defendants is also likely to arise in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*.<sup>8</sup>

The question of whether courts should have engaged in cross-judging could also have arisen in the adjudication of claims in relation to the U.S. rendition policy—a notable example of shared responsibility. In the *El-Masri* case,<sup>9</sup> the ECtHR held that the Former Yugoslav Republic of Macedonia (FRYOM) was responsible in connection with the ill treatment and torture of Khaled El-Masri. El-Masri, a Lebanese-born German national, alleged that between 2003 and 2004 he had been subjected to a rendition operation, in which agents of the FRYOM had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to CIA agents who then transferred him to Afghanistan, where he was detained and suffered ill-treatment for over four months. Various proceedings followed in different courts against different actors. In the FRYOM, a criminal

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5. *Application of Convention on Prevention and Punishment of Crime of Genocide (The Genocide Case) (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 47, ¶ 255 (Feb. 26).

6. *Prosecutor v. Milošević*, Case No. IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 1, 2004); *Prosecutor v. Krstić*, Case No. IT-98-33, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); *Prosecutor v. Erdemović*, Case No. IT-96-22, Judgment, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

7. *The Genocide Case*, 2007 I.C.J. 47, ¶¶ 212–223.

8. 2008 I.C.J. 412 (Nov. 18).

9. *El-Masri v. Former Yugoslav Republic of Macedonia*, 2012 Eur. Ct. H.R., ¶¶ 223, 241 available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621#{"itemid":\["001-115621"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621#{).

complaint against unidentified law-enforcement officials on account of the unlawful detention and abduction was rejected as unsubstantiated.<sup>10</sup> In the United States, the American Civil Liberties Union (ACLU) filed a claim on behalf of the applicant in the United States District Court for the Eastern District of Virginia against a number of defendants, including the former CIA director George Tenet and certain unknown CIA agents. The case was dismissed under the state secrets privilege.<sup>11</sup> In Germany, on January 31, 2007, the Munich public prosecutor issued arrest warrants for thirteen CIA agents on account of their involvement in the applicant's alleged rendition. However, the German government decided not to seek extradition of the CIA agents.<sup>12</sup> Eventually, the ECtHR found Macedonia responsible for the conduct of its agents and the ill treatment El-Masri had suffered by the CIA in Macedonia and abroad.<sup>13</sup> If Macedonian, German, or U.S. courts had ruled on the matter, the question of whether the ECtHR should have attributed weight to their findings would have arisen.

Questions of cross-judging could arise in many other situations relating to multiple wrongdoing; for instance, litigation of multiple contributions to climate change, human trafficking, trade in endangered species, peacekeeping operations, and so on. All such cases illustrate that, as Judge Shahabuddeen noted, in the increasingly complex character of international relations, "legal disputes between States are rarely purely bilateral."<sup>14</sup>

The potential significance of concerted adjudication in situations of shared responsibility stems from two features. The first relates to the jurisdictional limitations of (international)

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10. *Id.* ¶¶ 67–71.

11. *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007). For the factual account, see also *El-Masri*, 2012 Eur. Ct. H.R., ¶¶ 62–63.

12. *El-Masri*, 2012 Eur. Ct. H.R., ¶ 58. See also *Bundesregierung verhindert Auslieferungsantrag für CIA-Agenten*, DER SPIEGEL (Sept. 22, 2007, 10:30 AM), <http://www.spiegel.de/spiegel/vorab/a-507227.html>.

13. *El-Masri*, *supra* note 9, at ¶¶ 78–81.

14. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 120 (June 30) (separate opinion of Judge Shahabuddeen) ("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."); see also Lori Fisler Damrosch, *Multilateral Disputes*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 376, 379 (Lori Fisler Damrosch ed., 1987).

courts. The second relates to the substantive law of responsibility.

On the one hand, while multiple actors may share responsibility for contributing to a single harm, the jurisdiction of any single court over (co-)responsible parties will frequently be limited. In the ICJ, jurisdictional limitations stem in particular from the requirement of state consent to the jurisdiction.<sup>15</sup> The *East Timor* case and *Legality of the Use of Force* cases are examples of instances where the Court could have adjudicated against some, but not all, (allegedly) responsible parties.<sup>16</sup> Regional courts will be unable to adjudicate claims against co-responsible parties that are not party to the constitutive treaty. In the *El-Masri* case, the ECtHR could adjudicate questions against Macedonia, but not against the United States.<sup>17</sup> With respect to states that are party to a regional treaty, limitations will also apply. For instance, the ECtHR will be limited by the requirement that all victims were under the jurisdiction of each of the co-responsible parties.<sup>18</sup> And obviously, domestic courts have their own set of limitations to adjudicate claims against foreign states or international organiza-

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15. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060, 3 Bevens 1179, 1186 [hereinafter ICJ Statute].

16. *East Timor*, 1995 I.C.J. at 104; *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 270 (July 8); *Legality of Use of Force (Yugoslavia v. U.S.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 916, 925 (June 2); *Legality of Use of Force (Yugoslavia v. U.K.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 829, 839 (June 2); *Legality of Use of Force (Yugoslavia v. Port.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 656, 671 (June 2); *Legality of Use of Force (Yugoslavia v. Neth.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 542, 557 (June 2); *Legality of Use of Force (Yugoslavia v. It.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 481, 492 (June 2); *Legality of Use of Force (Yugoslavia v. Ger.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 422, 432 (June 2); *Legality of Use of Force (Yugoslavia v. Fr.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 363, 373 (June 2); *Legality of Use of Force (Yugoslavia v. Can.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 259, 273 (June 2); *Legality of Use of Force (Yugoslavia v. Belg.)*, Request for the Indication of Provisional Measure, 1999 I.C.J. 124, 139 (June 2).

17. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, 224 (limiting the applicability of the Convention to the High Contracting Parties).

18. Maarten den Heijer, *Procedural Aspects of Shared Responsibility in the European Court of Human Rights*, 4 J. INT'L DISP. SETTLEMENT 361, 362 (2013).

tions in cases of shared responsibility, due to the principles of immunity of states<sup>19</sup> and international organizations.<sup>20</sup>

On the other hand, it is uncertain whether the law of international responsibility allows a court to hold a defendant party responsible for the entirety of the harm to which it contributed, when such harm also resulted from contributions by other co-responsible parties. This will only be different when there is a clear causal link between the contribution and the entire harm. General international law does not know a principle of joint and several liability, according to which each of multiple contributing actors would be held responsible for all harm caused by a concerted action.<sup>21</sup> While a court may determine responsibility of one contributing state in cases where its contributions can be easily determined and divided based on causal analyses, in situations of undivided harm or in situations of co-perpetration, it may be difficult or impossible to allocate multiple contributions to separate actors.<sup>22</sup>

The result of the combination of jurisdictional limitations and the substantive principles of responsibility is that courts that are asked to consider claims relating to shared responsibility may be able to adjudicate claims against one or a few, but not all, co-responsible parties. As a result, they may have difficulty in determining all relevant aspects of shared responsibility.

It is in relation to this category of cases that the question of whether, and on what grounds, courts should consider and weigh what other courts have said in relation to different co-responsible parties arises. On what grounds should a court transcend the essentially bilateral structure of international adjudication<sup>23</sup> by connecting to other courts with a view to addressing the essentially interconnected nature of concerted international policies?

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19. *See, e.g.*, *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (applying the rule of foreign official immunity).

20. HR 13 April 2012, LJN: BW1999 2012, (*Moeders van Srebenica/Nederlanden*) (Neth.).

21. *Channel Tunnel Grp. Ltd. v. United Kingdom*, Partial Award, at 58 (Perm. Ct. Arb. 2007), [http://www.pca-cpa.org/showpage.asp?pag\\_id=1184](http://www.pca-cpa.org/showpage.asp?pag_id=1184); JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 330–32 (2013).

22. *See discussion infra* Part III.

23. Damrosch, *supra* note 14.

The angle of the analyses of this Article differs from most other examinations of “judicial dialogues”<sup>24</sup> or cross-judging.<sup>25</sup> These concepts are commonly used to study the practice of a court that is interpreting or applying a particular international right or obligation, in the process of which the question arises whether that court should consider prior determinations made by other courts in relation to that right or obligation. Dialogues and cross-judging may then be relevant for the construction and development of a particular norm. The question considered here is different. It is one thing to say that a court should attribute weight to findings of other courts in the interpretation of a particular international norm. It is quite something else to say that a court should do so in determining the responsibility of a particular state. It is true that some of the considerations relevant to cross-judging as part of an interpretative exercise may be equally relevant to determinations of responsibility, and indeed, questions of interpretation of a norm may have a direct impact on a determination of responsibility for breach of that norm. However, it would seem that as a general proposition, the legal impact of cross-judging in cases of state responsibility is potentially more significant, as it may have a direct bearing on the determination of responsibility. It may be hypothesized that as the impact of such cross-judging is more significant, the threshold for granting weight to findings of other courts may have to be higher.

The answer to the question of the grounds on which courts should engage in concerted adjudication cannot be found in the (procedural) rules of courts themselves. Just as the principles of international responsibility developed by the International Law Commission (ILC) barely recognize the possibility of shared responsibility,<sup>26</sup> the procedural rules of inter-

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24. For articles employing the dialogue concept, see generally Tullio Treves, *Judicial Lawmaking in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 587 (Wolfrum & Röben eds., 2005); Antonios Tzanakopoulos, *Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument*, in THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 185 (Ole Kristian Fauchald & André Nollkaemper eds., 2012); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2004).

25. See generally Teitel & Howse, *supra* note 2, at 959.

26. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries art. 47, in Rep. of the Int’l Law Comm’n, 53d Sess.,

national courts have very little to say about a situation in which there is not one responsible actor, but claims against multiple co-responsible actors are brought before multiple courts. In exploring the foundation of cross-judging in situations of shared responsibility, we thus should look beyond the rules that apply to individual courts.

In this Article, I argue that in situations where multiple parties contribute to an indivisible harm, a court that adjudicates claims against one contributing actor should in principle consider and attach weight to judgments of other courts in relation to other contributors. This will allow the court to get a fuller factual account of the various contributions to the harm and their interrelationship, and to better assess the scope of shared responsibilities. In this respect, the Article argues that concerted judicial action is a correct response to the concerted state action that results in shared responsibility. However, the analysis also indicates that international law provides little guidance as to the role and weight of determinations made by other courts in the construction of shared responsibility. The procedural uncertainty of the role and weight of cross-judging reflects a more fundamental uncertainty on, and tension between, the underlying principles of shared responsibility, from which procedural law should derive its direction.

The scope of the argument of this Article is in principle limited to situations where claims are being brought in an international court against states, and the question arises as to the weight that should be given to determinations made in relation to the co-responsibility of other actors, whether these are states, international organizations, or individuals. Given the wide differences among the powers and procedures of various international courts determining questions of state responsibility, this already involves a heterogeneous set of cases. The Article does not consider the issues at stake in adjudication of claims against non-state actors (for instance, international criminal tribunals), and the determination of weight of prior findings in procedures against states or other actors. One example is how much weight the ICTY in the remaining

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Apr. 21–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001) [hereafter ARSIWA]; Responsibility of International Organizations art. 48, G.A. Res. 66/100, Annex, U.N. Doc. A/RES/66/100 (Dec. 9, 2011) [hereafter ARI0].

cases on Srebrenica (notably Karadžić and Mladić<sup>27</sup>) should attach to the findings of the ICJ on the responsibility of Serbia for its contribution, albeit by omission, to the genocide. The Article also does not address questions that may arise when claims are brought in a national court—for instance, in determining the complicity of corporations, how much weight the United States should have attached to determinations by other courts in relation to wrongdoing by states.<sup>28</sup> Both the powers and procedures of international criminal tribunals and those of national courts may differ significantly from those of other international courts. Nonetheless, to some extent the normative considerations pertaining to concerted adjudication by international courts determining the responsibility of states may be equally relevant to other international and national courts, and to this extent, the analysis of the Article is of a wider relevance.<sup>29</sup>

In Part II, I will first examine the question of whether only one of a multiplicity of wrong-doing actors appearing before the court would preclude the exercise of jurisdiction by the court. In regard to those situations where the question has to be answered in the negative, and a court can proceed to consider a claim against a single responsible state, I explore in Parts III and IV the grounds for cross-judging in situations of multiple wrongdoing by addressing the intertwined nature of responsibility in cases of shared responsibility. Finally, in Part V, I address the question of what weight has to be attributed to determinations by other courts. Part VI concludes.

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27. Prosecutor v. Karadžić, Case No. IT-95-5, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 11, 2013); Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Decision (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2013).

28. See, e.g., *In re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273, 1293–96 (S.D. Fla. 2006) (finding that plaintiffs failed to show a state action for which conspiracy to violate the Alien Tort Claims Act and Torture Victim Protection Act could attach); see also, e.g., *John Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 27 (D.D.C. 2005) (declining to determine whether there was joint action between the defendants and the Indonesian military because doing so would come close to adjudicating the actions of the Indonesian government).

29. See generally André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 Am. J. INT'L L. 760, 778–98 (2007) (analyzing the basis and implementation of principles of international responsibility in domestic courts).

## II. THE POWER OF COURTS TO ADJUDICATE CLAIMS IN SITUATIONS OF SHARED RESPONSIBILITY

Before examining the grounds on which courts should engage in concerted adjudication in situations of shared responsibility, we must address the preliminary question of whether a court having jurisdiction over only one or a few co-responsible actors will preclude it from exercising jurisdiction over the claim. If so, the possibility of cross-judging would not even arise. However, on the basis of a comparative assessment of the practice in different courts, it can be concluded that this will only be the case in very rare situations.<sup>30</sup>

The starting point for a consideration of this question is the *Monetary Gold* principle. This principle, which has its origin in the 1954 ICJ judgment that is known by that same name,<sup>31</sup> provides that “where the legal interests of a third State, which itself is not subject to the jurisdiction of the respective tribunal, forms the very subject-matter of the dispute, the case cannot be heard and decided. Such third State is considered a ‘necessary third party’ to the case, the interests of which form the very core of the underlying dispute.”<sup>32</sup> While the decision of the ICJ did not involve questions of shared responsibility, it is potentially relevant for questions of shared responsibility. This can be illustrated by the application of the indispensable parties rule in the *Case Concerning the Delimitation of Maritime*

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30. See Nollkaemper, *supra* note 4, at 277–80 (describing the increasingly multilateral nature of cross-border disputes and the growing body of case law in cases of multiple parties).

31. *Monetary Gold Removed From Rome in 1943 (Monetary Gold)*, Preliminary Question (It. v. Fr., U.K. & U.S.), 1954 I.C.J. 19, 32 (June 15) (refusing to decide a dispute implicating Albania because Albania had not consented to the court’s jurisdiction and was not present in the lawsuit). See generally Alexander Orakhelashvili, *The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: From Monetary Gold to East Timor and Beyond*, 2 J. INT’L DISP. SETTLEMENT 373, 376–80 (2011) (questioning the basis and impact of the indispensable parties’ doctrine of *Monetary Gold* on the jurisprudence of international tribunals); Martins Paparinskis, *Procedural Aspects of Shared Responsibility in the International Court of Justice*, 4 J. INT’L DISP. SETTLEMENT 295, 305–17 (2013) (discussing the impact of *Monetary Gold* and interpretive solutions for litigating shared responsibility cases within the *Monetary Gold* framework).

32. Andreas Zimmerman, *International Courts and Tribunals, Intervention in Proceedings*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 7 (2006) (“Intervention and the Concept of ‘Necessary Third Parties’”).

*Areas* between Canada and France. In this case, the Court of Arbitration declined to address the delimitation of the continental shelf beyond 200 nautical miles, stating that this would have involved international organs entrusted with the administration and protection of the Area, which were not represented in the proceedings.<sup>33</sup> Such a broad interpretation of the indispensable parties rule would severely limit the possibility of courts to decide cases in situations of shared responsibility.

However, the principle as formulated by the ICJ was quite limited and it would seem that only in rare cases would a court be precluded from exercising jurisdiction by the fact that only one or a few of a multiplicity of wrongdoers are before the court. Three points should be noted. First, the ICJ limited the principle to situations where the “vital issue to be settled concerns the international responsibility of a third State,” which is not subject to the jurisdiction of the tribunal.<sup>34</sup> In the type of scenarios sketched in the introduction, where a court adjudicates a claim against one co-responsible party, the legal interest of another co-responsible party may be relevant to an appraisal of the responsibility of state A, but need not be “the very subject-matter of the decision.” Significantly, the Court may not need to determine the legal position of state B before deciding on the responsibility of state A.<sup>35</sup>

Second, it is doubtful whether the indispensable parties rule as formulated by the ICJ can be extended to co-responsible parties other than states. The principle as pronounced by the Court in the *Monetary Gold* case was based on the absence of consent by Albania. In the Court’s words: “To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with

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33. Court of Arbitration for the Delimitation of the Maritime Areas Between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas, 31 I.L.M. 1145, 1172 (1992); Rüdiger Wolfrum, *Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 1132, 1141–43 (Ulrich Fastenrath et al. eds., 2011).

34. *Monetary Gold*, 1954 I.C.J. at 33.

35. Paparinskis, *supra* note 31, at 316.

its consent.”<sup>36</sup> It may be inferred that the principle thus is limited to actors (states) that could have given their consent to the exercise of jurisdiction by the court, but have not done so.

In light of this, the question is whether the principle should extend to international organizations. This possibility was acknowledged by the dissenting opinion of Judge Schwebel in the *Lockerbie Case*, where he applied *Monetary Gold* to deny the ICJ the possibility of considering the legality of a Security Council Resolution.<sup>37</sup> In *Application of The Interim Accord of 13 September 1995*, the Court implicitly recognized such a possibility by not rejecting *ab initio* the application of the principle to NATO, considering rather that it did not apply in the case under consideration because of factual differences with *Monetary Gold*.<sup>38</sup> Given the fact that a number of collective endeavors that may result in shared responsibility are now the result of collaborations between States and international organizations, or actions of States within the framework of international organizations, such an extension would have notable consequences on the capacity of the ICJ to adjudicate in situations of shared responsibility. However, if the principle is based on consent, one can argue that a possible logical consequence is that it only applies to entities that could in fact consent to the Court’s jurisdiction. In the absence of any possible jurisdiction over an entity, the ICJ cannot be said to ever be able to adjudicate (in a technical sense) on the rights of that entity. This would exclude international organizations and other non-state entities from the scope of the principle.

It can also be noted that should the principle be applied to international organizations, entities over which the ICJ does not have jurisdiction, there is a question as to what conceptual barrier would exist to applying it to other entities over which the Court does not have jurisdiction, such as individuals or various non-state actors. The consequence of this would seriously impair the role of the ICJ, given that most attribution operations involve, at some level or another, discussion of the acts

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

37. Questions of Interpretation and Application of 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, 1998 I.C.J. 115, 172 (Feb. 27) (dissenting opinion of Judge Schwebel).

38. Application of Interim Accord of 13 September 1995 (Mac. v. Greece), Judgment, 2011 I.C.J. 644, 660–61 (Dec. 5).

(and the legality thereof) of individuals or organs acting as *de jure* or *de facto* organs of the State.

Third, it can be observed that outside the ICJ, the indispensable parties rule has rarely found application. It has found no application in the ECtHR, the WTO Appellate Body (AB) or the International Tribunal for the Law of the Sea (ITLOS), even though each of these tribunals has considered questions of shared responsibility.<sup>39</sup> In large part, this seems to be due to the fact that consent does not play a decisive role in these latter three tribunals since—between the parties—consent has been given in advance.<sup>40</sup> Within this category of tribunals, questions of adjudicating claims involving (legal) interests of states that cannot be brought before the court are less likely to arise.

However, even though the indispensable parties rule will thus preclude the exercise of jurisdiction only in narrow situations, in cases of intertwined action it may be difficult to consider cases against co-responsible states entirely in isolation. 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. Even if in such cases the legal position of one state does not constitute the subject matter in proceedings against the other state, it is precisely such effects that may pro-

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39. See Lorand Bartels, *Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System*, 4 J. INT'L DISP. SETTLEMENT 343, 356–57 (2013) (describing the treatment of the indispensable parties rule within the WTO dispute settlement system); den Heijer, *supra* note 18, at 375 (describing the ECtHR's treatment of the indispensable parties rule); Ilias Plakokefalos, *Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention*, 4 J. INT'L DISP. SETTLEMENT 385, 394 (2013) (describing the treatment of the indispensable parties rule within the ITLOS).

40. See Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 1, 1998, 1998 E.T.S. no. 155, 33 I.L.M. 960 (1994) (indicating that contracting parties may not hinder parties exercising their rights under the ECHR); Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 1, 1869 U.N.T.S. 3, 401 [hereinafter WTO DSU] (providing that WTO rules and procedures apply to disputes brought under WTO agreements); United Nations Convention on the Law of the Sea part XV, Dec. 10, 1982, 21 I.L.M. 1261, 1322 (1982) (allowing for states to choose their own means of dispute resolution).

vide a justification for cross-judging in situations of shared responsibility.<sup>41</sup> Indeed, as will be elaborated in Parts III and IV below, the fact that in instances of shared responsibility a court can exercise jurisdiction irrespective of the position of other co-responsible states, does not exclude the possibility that on normative grounds it would be preferable if a court could rely on factual and legal determinations pertaining to such co-responsible parties that the court itself cannot make.

### III. CONCERTED ADJUDICATION AS A RESPONSE TO CONCERTED WRONGDOING

When states, international organizations, and other actors engage in concerted action, such action may, if it results in a single harm, lead to concerted wrongdoing. Therefore, responsibility for harm caused need not lie with one single actor, but may be shared by multiple actors.

The number of situations in which the possibility of shared responsibility presents itself appears to be increasing, driven by the fact that states have increasingly become dependent on each other to protect common goods.<sup>42</sup> The underlying reasons for this dependency are both objective and subjective. The former are driven by factual effects across borders. Examples are trans-boundary pollution, state-supported trans-border crime, and refugee flows. In other areas, it is merely the perception that has changed, rather than the reality—for example, the recognition that the commission of genocide is no longer accepted.<sup>43</sup> Interdependence, whether perceived or real, leads to various forms of collaboration, sometimes in the form of what may be called “international governance networks.”<sup>44</sup> This leads to an increase in the number of situations

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41. See *infra* Part III.

42. See generally Ernst-Ulrich Petersmann, *International Economic Law, 'Public Reason', and Multilevel Governance of Interdependent Public Goods*, 14 J. INT'L ECON. L. 23 (2011) (stressing the importance of increased protection of the international public).

43. See, e.g., René Provost & Payam Akhavan, *Moving from Repression to Prevention of Genocide*, in 7 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE: CONFRONTING GENOCIDE 1, 2 (René Provost & Payam Akhavan eds., 2011) (describing efforts by the United Nations to outlaw genocide).

44. See, e.g., SEBASTIAN WIENGES, *GOVERNANCE IN GLOBAL POLICY NETWORKS* (2010).

where cooperation does not deliver what was promised, and questions of shared responsibility may arise.<sup>45</sup>

The argument in support of cross-judging in cases of shared responsibility then is grounded in the interconnected nature of the conduct of multiple actors that results in a single harmful outcome. It follows that a court adjudicating a claim against one wrongdoer may have difficulty determining the scope of responsibility and reparation, which is discussed in Part III.A. To the extent that shared responsibility is recognized in international law, concerted adjudication then also rests on the idea that the practice and procedure of international courts, including cross-judging, should facilitate and help implement the substantive law of responsibility, as elaborated in Part III.B.

### A. *Three Types of Shared Responsibility*

In order to assess how situations of shared responsibility may justify concerted adjudication, it is helpful to make a distinction between three forms of shared responsibility: uncoordinated action that has resulted in harmful outcomes; coordinated actions that can be disaggregated into individual action; and closer forms of coordination, collusion, or co-perpetration, where conduct of one actor cannot be considered as being apart from that of other actors. Particularly the latter form of shared responsibility may justify concerted adjudication.

The first category consists of uncoordinated individual action, whereby multiple individual actors each contribute to a single harm to third states or to other protected interests. An example is downstream pollution of an international watercourse by multiple upstream states. In such cases, we may speak of shared responsibility, as the responsibility for the eventual harm can be allocated to, and shared by, multiple in-

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45. See Carol Harlow, *Accountability as a Value in Global Governance and for Global Administrative Law*, in *VALUES IN GLOBAL ADMINISTRATIVE LAW* 173 (Gordon Anthony et al. eds., 2011) (noting that despite progress, the use of accountability as a means to measure public administrative conduct is not yet a normative or "constitutional" principal); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT'L AFF.* 405, 418–19 (2006) (observing that global governance institutions are new, fragile, and still forming).

dividual contributors.<sup>46</sup> However, from the perspective of international adjudication, this type of shared responsibility does not lead to particularly complicated questions. A claim against each contributor may be resolved on the basis of its own merits. In principle, the case for concerted adjudication in instances of uncoordinated individual action is weak. A determination by a court on the scope of responsibility of one responsible upstream state would not necessarily have implications for the determination by another court in relation to a second upstream state. Nonetheless, in these situations, concerted adjudication may also be helpful. For instance, if one international court rules on a claim against a state that has contributed to climate change and another court rules against another contributing state, these courts may well learn from each other's approaches—for instance, in relation to questions of evidence and causation. A dialogue between them also may be helpful for the construction of the international norms invoked in both cases.

A second category consists of concerted action, which can be disaggregated into contributions that individually are wrongful and can be treated as such. The difference is that in this case, states do not act independently from each other, but have collaborated and coordinated their conduct. As in the first situation, we say that the separate wrongful acts are complementary contributions to a single harm.<sup>47</sup> Each individual contribution is wrongful, and they complement each other in relation to a harmful outcome. An example is an illegal arrest of a person in state A, which then transfers the person to state B, where he is tortured. In this case, the illegal arrest is one wrong that both causes harm in itself and that contributes to the eventual harm of torture. The torture by state B is a separate contribution to that harm. The overall harm for the injured individual thus results from different wrongful acts. In such cases of complementary wrongful contributions, the question of responsibility does not pose particular problems. Despite the fact that this involves a concerted action, determi-

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46. BRIGITTE BOLLECKER-STERN, *LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE* 267–69 (1973); Pierre d'Argent, *Reparation, Cessation, Assurances and Guarantees of Non-Repetition*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* § 1 (André Nollkaemper & Ilias Plakokefalos eds., forthcoming 2014).

47. BOLLECKER-STERN, *supra* note 46; d'Argent, *supra* note 46, § 3.2.3.

nation of responsibility can be based on the principle according to which each entity must be responsible for the consequences of its own wrongful act, but not for the consequences of the acts of other wrongdoers.<sup>48</sup> As Crawford stated: “[T]he general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it.”<sup>49</sup>

It follows that a court can in principle adjudicate claims against the two states separately, and that the case for concerted adjudication is relatively weak. A court’s determination in relation to one state will have no legal relevance for another state. However, as in the first situation, courts may be assisted by considering judgments of other courts—for instance, in order to obtain a complete factual account of events. They may likewise consider constructions by another court in relation to a rule of international law in order to arrive at a better-justified construction of that norm.

The third category consists of concerted action, leading to a single, undivided harmful outcome, which is so intertwined that the responsibility of one state for the harmful outcome cannot be considered in isolation from the contributions by other actors. This category, which is of key significance for the present analysis, is characterized by two features.

On the one hand, it involves situations where the responsibility is relational. The contribution by the defendant state can only be understood in light of the fact that the state coluded with other actors. The relatively well-established forms of such concerted action in the law of international responsibility that fall into this category of relational responsibility are complicity,<sup>50</sup> direction and control,<sup>51</sup> and circumvention of responsibility.<sup>52</sup> We also can identify a situation that we would call co-perpetration in criminal law terms, not regulated as such in the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) or the ILC’s Articles on the Responsibility of International Organizations (ARIO), where two or more states or international organizations act in

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48. D’Argent, *supra* note 46, § 3.2.3.

49. ARSIWA, *supra*, note 26, art. 47, cmt. 3.

50. ARSIWA, *supra*, note 26, art. 16; ARIO, *supra* note 26, arts. 14, 58.

51. ARSIWA, *supra*, note 26, art. 17; ARIO, *supra* note 26, arts. 15, 59.

52. ARIO, *supra* note 26, arts. 17, 61.

concert to commit a wrong (for example, engaging in an illegal anti-terrorist operation on the territory of a third country) vis-à-vis a third state, and where the contribution of each individual state has to be assessed in relation to the other actors involved.

On the other hand, the third category involves situations where contributions to a harmful outcome are cumulative: Each contribution is causally linked to the harmful outcome, but none is by itself sufficient to produce the harmful outcome.<sup>53</sup> The harm is not severable into different harmful outcomes adding to each other, but rather is an indivisible totality that results from the addition of various contributions. If one state aids another state by providing all the materials and expertise for building a dam that causes significant harm to a third, downstream state, the separate wrongful act of aiding or assisting can be viewed as a “cumulative” cause of the harm caused by the wrongful operation of the dam. The aid or assistance does not produce any harmful outcome severable from the harm caused by the dam, yet it was a necessary condition. Thus, in this example, the two causes (aid or assistance and the building and operation of the dam) are “cumulative” rather than “complementary.”

If in this example claims against the two contributing states are adjudicated in separate courts, the case for concerted adjudication in such situations of intertwined concerted wrongdoing is significantly greater than in the first two scenarios. The relational account of concerted action justifies cross-judging between multiple courts, since judging isolated actors based on isolated conduct would fail to grasp the essentially interconnected nature of the conduct, and thereby the nature and scope of contributions to the harmful outcomes.

This becomes particularly clear if we take a closer look at the principles that apply to determinations of responsibility and reparation. The former does not necessarily present any particular problems. It would seem that each contributing state can be found responsible in this scenario. Responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.<sup>54</sup> The in-

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53. BOLLECKER-STERN, *supra* note 46, at 269; d'Argent, *supra* note 46, § 3.2.3.

54. ARSIWA, *supra*, note 26, art. 47, cmt. 1.

jured State can hold each State responsible for its wrongful conduct.<sup>55</sup> In the above example, the state that provided the aid would be responsible for its own wrongful act of aiding and assisting, whereas the state operating the dam would be responsible for its own wrongful conduct.

But this separation of the position of the two states is not as obvious with respect to reparation. Article 47 of ARSIWA and Article 48 of ARIIO stipulate that injured states or international organizations can invoke the responsibility of each of the responsible parties, and that this is “without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.”<sup>56</sup> However, what is the scope of the obligation of co-responsible parties to provide reparation? Here we can distinguish several options. A first option is that reparation should be apportioned on the basis of causation and that proportionate shares of reparation should be identified. A second option is that only the most important contribution (the “adequate cause”) should be subject to an obligation to provide reparation.<sup>57</sup> A third solution is that in such cases, all of the contributions should be treated equally, the argument being that the harm would not have occurred without each and every one of the contributions. All of the wrongdoers then would be fully responsible for the harm because no contribution can be considered as more important than another, and each was necessary to produce the harm. It would follow that the obligation to make reparation therefore has to be borne equally by each of the wrongdoers. The injured party would be free to decide to present the claim for full reparation to any one of them.<sup>58</sup>

International law does not dictate a choice between these three options—in fact, it is clearly undeveloped, in large part due to a lack of case law. However, it would seem that with respect to each of these options, an individual court that adjudicates a claim against an individual wrongdoer would wel-

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55. ARSIWA, *supra*, note 26, art. 47, cmt. 2.

56. ARIIO, *supra* note 26, art. 48(3)(b); *see also* ARSIWA, *supra*, note 26, art. 47(2)(b) (“Is without prejudice to any right of recourse against the other responsible States.”).

57. d’Argent, *supra* note 46, § 3.2.3.

58. *Id.*

come the assistance of other determinations made by other courts in parallel or prior proceedings. Determining what constitutes proportionate shares or identifying the most important contribution will rest on much firmer grounds if other courts have adjudicated claims against other co-responsible states. Moreover, it would be relevant for a court adjudicating a claim against one state to know whether other courts had determined responsibility and ordered reparation against other states, if only to prevent the problem of double dipping.<sup>59</sup>

Adjudicating a claim against individual responsible parties would be relatively easy if the relevant states had agreed on obligations of conduct, which precisely detail what each actor has to do.<sup>60</sup> It would then be unproblematic to determine whether an individual actor did or did not comply with its obligations. The *Genocide case* illustrates this point.<sup>61</sup> Because Serbia failed to comply with its individual obligation to prevent genocide, the ICJ was able to determine Serbia's responsibility for the genocide on its own terms, irrespective of the obligations or conduct of other states.<sup>62</sup> Whether that is the case will have to be determined on the basis of the nature and contents of the obligations.

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59. See *infra* Part IV.C.

60. See Constantin P. Economides, *Content of the Obligation: Obligations of Means and Obligations of Result*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 371, 371–81 (James R. Crawford, Alain Pellet & Simon Olleson eds., 2010) (comparing obligations of conduct to obligations of result); Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 *EUR. J. INT'L L.* 371, 375, 379–80 (1999) (criticizing the distinction between obligation of conduct and obligations of results in that state responsibility should focus on obligations related to state conduct).

61. *Crime of Genocide*, 2007 I.C.J. ¶ 430.

62. The Court added that:

[I]t 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.*

*Id.* ¶ 430 (emphasis added).

However, even in such situations, determining responsibility on the basis of individual obligations of conduct does not necessarily provide answers to questions of reparation for harm caused by non-performance of such obligations. States can be held responsible for their wrongdoing, but it is difficult to determine each individual obligation to provide reparation that is proportional to their responsibility for the harmful outcome. This manifested itself in the *Genocide case*, where the Court held Serbia and Montenegro responsible, but then found that it had not been shown that in the specific circumstances of the events, the influence exerted by Serbia and Montenegro “would have sufficed to achieve the result which the Respondent should have sought.”<sup>63</sup> The Court declined to order Serbia and Montenegro to issue compensation because of the collective nature of failures to prevent.<sup>64</sup>

In situations of cumulative wrongdoing and shared responsibility, the primary normative justification for cross-judging is that if a court adjudicates the responsibility of only one actor, the possibility exists that that actor may be held responsible, and be ordered to provide reparation for wrongs committed in whole or in part by another actor. This defies the fundamental principle that parties should not be held wholly responsible for harm that they did not cause by themselves. Conversely, the sheer complexity of doing this may lead a court to decline to determine *any* reparation, as in the *Genocide case*. This outcome would be unfavorable and likely unacceptable for injured parties. By attaching due weight to findings of other courts in situations of a multiplicity of wrongdoing actors, a court may prevent an actor from being held responsible for harm the actor did not commit alone, as well as prevent a situation where no responsible party is ordered to pay reparation.

### B. *The Connection Between Substance and Process*

Shared responsibility ultimately rests on a postulated connection between the process of international adjudication, on

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63. *Id.* ¶ 462.

64. *Id.* But see Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 EUR. J. INT'L L. 695, 707–12 (2007) (noting the *Crime of Genocide* Court's reluctance to address concomitant causes).

the one hand, and the underlying principles of responsibility, on the other. In other words, it presumes a connection between procedure (or process) and substance.<sup>65</sup>

Such a connection between shared responsibility and concerted adjudication would be in line with the dominant, instrumentalist, perspective on the relationship between process and substance: Procedural rules transmit and give effect to substantive law.<sup>66</sup> Their task is to facilitate the implementation of substantive law: “whatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law.”<sup>67</sup> Bentham advanced the idea that the “course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws.”<sup>68</sup> Likewise, Pound critiqued lawyers who had made adjective law an instrument for defeating or delaying substantive law and justice instead of one for enforcing them.<sup>69</sup> Hence, to the extent that one accepts the substantive law of responsibility in terms of a shared responsibility, based on cumulative contributions, it would be the task of procedural arrangements to further the cause of substantive law.

However, it should be observed that this is a somewhat simplistic account of the relationship between process and substance, which may be challenged by competing perspectives. Three aspects need to be considered. Each of these points cautions against simplistic arguments that courts should engage in procedural practices, including cross-judging, for

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65. This section is in part based on André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769, 769 (2012).

66. See LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 52 (2011) (noting that procedural rights protect substantive rights); Jens David Ohlin, *Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 82 (2009) (explaining the connection between procedure and substantive international criminal law).

67. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 329 (2008).

68. Jeremy Bentham, *Principles of Judicial Procedure with the Outlines of a Procedure Code*, in 2 THE WORKS OF JEREMY BENTHAM 5, 6 (John Bowring ed., 1843), cited in Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1022 (2008).

69. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 617 (1908), cited in Martinez, *supra* note 68, at 1023.

the mere fact that this will implement substantive principles of shared responsibility. First, a court adjudicating shared responsibility may be faced with competing substantive interests of the parties, and resorting to process may not help to choose between them; second, procedural rules (including those on cross-judging) may have a different logic and different aims than giving effect to substantive principles of (shared) responsibility; and third, the lack of procedural rules may cast doubt on the existence and contents of particular (alleged) substantive rules.

As to the first point, saying that a court should engage in concerted adjudication with a view to implement principles of shared responsibility begs the question of the direction in which such concerted adjudication should lead. Should it lead to a protection of the position of (co-)responsible states, safeguarding them against responsibility for harm caused by the conduct of others? The point here is that if there are two co-responsible parties, their interests may not be equal, and a decision by a court to engage in cross-judging to protect the interests of one party, may be to the detriment of the other. Moreover, there will be a tension between the cross-judging for the benefit of co-responsible parties, on the one hand, and injured parties, on the other. The latter may lead to a party being held responsible and ordered to pay reparation for more than it may have contributed (for instance, based on a principle of joint and several liability).

As to the second point, we can recall Franck's distinction between the substantive and procedural aspects of fairness, which "may not always pull in the same direction."<sup>70</sup> 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.

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70. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 7 (1995).

As for the third point, it can be said that procedural rules not only serve their own ends, but that they may also have an impact on the status and construction of substantive rules themselves. For instance, the fact that no procedures that allow implementation of shared responsibility have been developed does not necessarily mean that a court should initiate such procedures. Rather, the absence of such 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 co-determinative 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.<sup>71</sup>

Each of these three points suggests that the argument that courts should engage in procedural practices, including cross-judging, for the mere fact that this will implement substantive principles of shared responsibility may be simplistic. Additionally, whether or not it is appropriate to engage in cross-judging will depend on the nature and quality of judgments of other courts to which effect would be given.<sup>72</sup> While a court that is confronted with a case of shared responsibility can draw on principles of shared responsibility to justify cross-judging, the question of how much weight should be given to determinations of other courts depends on more complex assessment of all interests involved. This matter will be further considered in Part V below.

#### IV. SPECIFIC GROUNDS FOR CONCERTED ADJUDICATION

Beyond the general argument in favor of concerted adjudication that was based on the intertwined nature of conduct leading to a single harm, as discussed in Part III.A, three additional specific justifications for cross-judging in situations of shared responsibility can be identified: the jurisdiction of courts (Part IV.A), courts' access to facts (Part IV.B), and the

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71. Alexander Orakhelashvili, *Division of Reparation Between Responsible Entities*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 647, 663–64 (James Crawford et al. eds., 2010).

72. See *infra* Part V.

protection of defendant states against double dipping (Part IV.C).

A. *Justifying the Exercise of Jurisdiction*

In some concerted action adjudication cases, the absence of co-responsible parties before the court may prevent disputes about the scope of a court's jurisdiction to adjudicate a claim against one of several co-responsible parties, when other co-responsible parties are not before the court. As noted in Part II, only in a rather narrow category of cases does the indispensable parties rule preclude a court from exercising jurisdiction if co-responsible parties are not before the court. However, the scope of the indispensable parties rule has proven to be controversial, and the question whether the absence of one or more co-responsible parties affects the jurisdiction of a court has frequently given rise to disputes.<sup>73</sup>

Jurisdictional disputes in shared responsibility cases may be undesirable on several grounds. For one, they could lead to a complication and delay of the litigation and settlement of the dispute. This would hinder the effective redress to the benefit of injured parties. They also may undermine the eventual acceptance of a judgment by the defendant party, which may feel that it was held responsible in a situation where the scope of co-responsible parties could not properly be determined. Finally, they may undermine the legitimacy of courts in the eyes of non-participating states, who would have reason to criticize courts that exercise jurisdiction over them even without their consent.

In those rare cases where other courts have already addressed aspects concerning the responsibility of parties that are not before the court, cross-judging may remove (part of the) grounds for a dispute on the applicability of the indispensable parties rule. The argument that a judgment by a court against state A would prejudice the legal position of a co-responsible state B, which is not a party to the proceedings, would lose force, since that legal position would already have been determined by another court. This point may be illus-

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73. See, e.g., *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240, 255 (June 26) (disputing whether proceedings could go forward without New Zealand and the United Kingdom).

trated by the fact that before the *Genocide case* in the ICJ, individual responsibilities were already determined by the ICTY. Even leaving aside the distinction between responsibility of states and the responsibility of individuals,<sup>74</sup> which the ICJ could not determine, findings of the ICJ were immaterial to the position of persons who had already been tried by the ICTY.<sup>75</sup>

A separate question is whether, in situations where the indispensable parties rule *would* be applicable, that rule could be excluded or circumvented by the fact that the legal position of a co-responsible party that is not before the court would already have been determined by another court. The rationale of the rule is to prevent a court from ruling on the legal position of a non-party that is the very subject of the dispute. Though much would depend on the circumstances of the case, if the position of that co-responsible state has been determined with finality by another court, the argument that the jurisdiction of another court would be precluded by the absence of that co-responsible state loses weight. In this respect, cross-judging would allow a court to attach weight to the determination of responsibility by other courts, which would facilitate adjudication in relation to cases of shared responsibility, without it being limited by the indispensable parties rule.

### B. *Access to Facts*

A separate justification of concerted adjudication in situations of shared responsibility is that it may enable courts to access otherwise unavailable facts and evidence that may be crucial in determining shared responsibility cases.<sup>76</sup> Fact-finding always presents problems for international courts,<sup>77</sup> espe-

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74. *E.g.*, BEATRICE I. BONAFÈ, *THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES* (2009); Antônio Augusto Cançado Trindade, *Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited*, in *INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER* 253 (Maurizio Ragazzi ed., 2005).

75. *See supra* note 7.

76. *See generally* CHITTHARANJAN F. AMERASINGHE, *EVIDENCE IN INTERNATIONAL LITIGATION* (2005).

77. Anna Riddell, *Evidence, Fact-Finding and Experts*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 848, 849–50 (Cesare P.R. Romano, Karen J. Adler & Yuval Shany eds., 2014).

cially in cases involving third parties, including (but not necessarily limited to)<sup>78</sup> situations of shared responsibility when some, but not all, responsible parties are involved in the proceedings.<sup>79</sup> Concerted adjudication may assist courts in obtaining a fuller picture of the facts and the role of the co-responsible parties therein.

In assessing international courts' access to relevant information in shared responsibility cases, we can distinguish between the powers of courts vis-à-vis defendant (responsible) parties, and their powers vis-à-vis other responsible parties that are not before the court.

As to the former, the starting point is that parties will be obliged to cooperate with an international court and to provide it with relevant information. This obligation would seem to extend to information in their possession that relates to the relevant conduct of other, potentially co-responsible parties that are not before a court. For instance, in the *Agiza case*, the Committee Against Torture (CAT) found Sweden to have concealed information concerning its awareness of the allegations of ill-treatment in Egypt on the grounds of national security. The CAT thus held Sweden in violation of the obligation to cooperate that is embodied in the United Nations Convention against Torture.<sup>80</sup> The point seems more directly applicable.

Assuming that a party is in possession of information relating to wrongful conduct of third parties, a court could apply

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78. Paparinskis, *supra* note 31, at 307.

79. See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 83, 83–118 (2007); Markus Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 L. & PRAC. INT'L CTS. & TRIBUNALS 369, 383–84 (2006) (describing the rules of evidence of several international courts and tribunals); Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305, 329–31 (1996) (describing difficulties that arise in ICJ cases where not all allegedly responsible parties are before Court); Philip Leach, Costas Paraskeva & Gordana Uzelac, *Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads*, 28 NETH. Q. HUM. RTS. 41 (2010) (describing fact finding in the European Court of Human Rights); Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 L. & PRAC. INT'L CTS. & TRIBUNALS 119, 119–58 (2007) (describing the ICJ's ability to find facts).

80. *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 ¶ 12.34 (2005); see Sarah Joseph, *Rendering Terrorists and the Convention Against Torture*, 5 HUM. RTS. L. REV. 339, 345 (2005) (describing the Committee Against Torture's response to Sweden's effort to deliberately withhold information from the Committee).

the normal rules that allow them to make inferences concerning information that is in possession of a state but that it does not provide to the court.<sup>81</sup> For instance, the Human Rights Committee (HRC) affirmed the obligation of states to investigate any violation of the International Covenant on Civil and Political Rights (ICCPR) and disclose all available information,<sup>82</sup> and said that it will give the author's allegations full weight upon a failure to fulfill this duty.<sup>83</sup> It should not make a difference whether that information applies to the state's own conduct or to the conduct of other states, unless international obligations towards the other state would preclude it from releasing such information. But this obviously only applies when it can be firmly established that the defendant state is in possession of such information. The presumption that a state possesses information relating to its own laws or policies, or otherwise relating to events that have occurred within its jurisdiction, cannot apply to information relating to conduct of third states outside its jurisdiction.

This situation brings up the question of what other steps an international court can undertake to obtain information in the possession of third parties. International courts are generally limited in their power to obtain evidence of co-responsible parties who are not a party to the dispute before the court or tribunal in question.<sup>84</sup> However, there are significant differences in the powers and practices of various international courts. For instance, the ICJ has no power to order non-parties

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81. See, e.g., JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 169 (2d ed. 2013) (describing the relationship between facts, presumptions, and the burden of proof). For the ECtHR, see, e.g., *Tanli v. Turkey*, 2001-III Eur. Ct. H.R. 243, ¶ 142 (indicating that strong presumptions may be drawn from facts, placing a burden of proof on the party challenging the presumption to provide an explanation).

82. See Irene Bleier Lewenhoff & Rosa Valiño de Bleier v. Uruguay, Communication No. 30/1978, 15th Sess., Mar. 29, 1982, U.N. Doc. CCPR/C/OP/1 at 109, ¶ 13.3 (1985) (reasoning that because frequently only the State party has access to relevant information, the State party must furnish information available to it); Optional Protocol to the International Covenant on Civil and Political Rights art. 4(2), Dec. 19, 1966, 999 U.N.T.S. 171, 303 [hereinafter *Optional Protocol*].

83. *Optional Protocol*, *supra* note 82, at 303.

84. Manfred Lachs, *Evidence in the Procedure of the International Court of Justice: Role of the Court*, in *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 265, 270-72 (Emmanuel G. Bello & Prince Bola A. Ajibola eds., 1992); Benzing, *supra* note 79, at 383-84.

to provide information. It may, however, request information from international organizations,<sup>85</sup> which in particular situations may provide the Court with a more complete understanding of the factual and legal context of a shared responsibility situation. In the ECtHR, all Contracting Parties (also those that are not party to the case) and the applicant are obliged to assist the Court.<sup>86</sup> The Court has the power to request evidence on its own motion, from either the state party or any other source.<sup>87</sup> This may fill lacunae in the evidence concerning the conduct of non-parties to a case. The Appellate Body of the World Trade Organization (WTO AB) has particularly broad powers in this respect. Article 13(1) of the Dispute Settlement Understanding (DSU) provides that “[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate” and that members “should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.”<sup>88</sup> The WTO AB inferred from the language of Article 13 that “the discretionary authority of a panel may be exercised to request and obtain information, not just ‘from any individual or body’ within the jurisdiction of a Member of the WTO, but also from *any Member . . .*”<sup>89</sup>

To the extent that courts cannot obtain relevant information concerning various contributions to a single harm, a resulting lack of information due to the absence of co-responsible parties may adversely affect the interests of both plaintiffs and respondents. As to the former, plaintiffs may have a hard time finding out exactly who is responsible for what in cases of

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85. Article 34(2) of the ICJ Statute provides that “[t]he Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.” ICJ Statute, *supra* note 15, at 1059, 3 Bevens at 1186.

86. EUROPEAN COURT OF HUMAN RIGHTS, RULES OF THE COURT, R. A2(1), available at [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

87. *Id.* R. 44C.

88. WTO DSU, *supra* note 40, art. 13(1); Bartels, *supra* note 39, at 349–50 (discussing the importance of WTO panel evidence gathering in the context of interdependent and multiple responsible actors).

89. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 185, WT/DS70/AB/R (Aug. 2, 1999); WTO DSU, *supra* note 40, art. 13.

multiple responsible parties. That holds *a fortiori* when not all co-responsible parties are before the courts. This is illustrated by the *Saddam Hussein* case, where the impossibility of determining with sufficient certainty which of the states involved was responsible for which wrongdoing prevented the Court from even accepting admissibility of the claim.<sup>90</sup> The Court held that as long as the applicant could not identify the specific wrongful acts of the defendant states, no responsibility of any member state in connection with either the invasion of Iraq or the detention of Hussein could be found.<sup>91</sup> Additionally, rendition policy provides an example of a situation where information is spread over several states, meaning it will be difficult for plaintiffs to identify who possesses what information.

As to the latter, lack of information on the conduct of co-responsible states may adversely affect the position of defendant states. This is particularly true when a court resorts to liberal inferences of facts with a view to protect the position of plaintiffs, which is not uncommon in human rights courts.<sup>92</sup>

Cross-judging then may assist a court in getting access to relevant information, and thereby protecting both the interests of either plaintiffs and/or defendant states. Again, the ICJ's reliance on facts determined by the ICTY in the *Genocide case* is an example of this.<sup>93</sup>

### C. *Double Dipping*

A third justification for engaging in concerted adjudication in shared responsibility cases is that it may help prevent "double dipping" on the side of plaintiffs. It is an undisputed general principle that the injured party should not obtain compensation greater than the injury sustained.<sup>94</sup> If an international court were to determine an isolated claim of an in-

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90. European Court of Human Rights, *Hussein v. Albania*, App. No. 23276/04, at \*4–5 (Mar. 14, 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72789>.

91. *Id.* at \*4.

92. See *supra* note 81 and accompanying text.

93. *Crime of Genocide*, 2007 I.C.J. ¶ 206.

94. ARSIWA, *supra* note 28, art. 47(2)(a) provides the rule that "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act," but does not "permit any injured State to recover, by way of compensation, more than the damage it has suffered . . ."

jured party against one responsible party, a subsequent claim by the same plaintiff against another co-responsible party in a different court may lead to a compensation that exceeds the injury. In such a scenario, considering prior judgments by other courts with respect to the same harm may prevent this risk and thus prevent double dipping.

The point can be illustrated by the *Corfu Channel case*.<sup>95</sup> In the actual case, the ICJ did not consider Yugoslavia's possible contribution to the injury suffered by the United Kingdom, and only determined the compensation that was due by Albania. Had the United Kingdom subsequently pressed charges against Yugoslavia in a different forum, and had Yugoslavia been ordered to provide reparation, the scope of such reparation would have had to be limited by the principle that the injured State should not obtain compensation greater than the injury sustained. In such proceedings, the seized court clearly would have had to consult the determinations of the ICJ in relation to the obligation of Albania to provide compensation.

## V. THE QUESTION OF WEIGHT

When a court engages in cross-judging in shared responsibility cases on one or more of the grounds discussed above, the question of how much weight the court would have to accord to findings and determinations made by other courts with respect to co-responsible states presents itself. For instance, the arbitral tribunal in *Brandes v. Venezuela* held that while decisions of other arbitral tribunals are not decisive and not binding on the Tribunal, "this does not preclude this Tribunal from considering the substance of decisions rendered by other arbitral tribunals, and the arguments of the Parties based on those decisions, to the extent that those decisions may shed light on the issue to be decided at this stage of the proceeding."<sup>96</sup> But on what basis may a tribunal determine how much weight to attribute to other decisions?

The starting point for this inquiry is that prior judgments of other international courts are not binding on an international court charged with the determination of the (co-)re-

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95. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 1949).

96. *Brandes Inv. Partners v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/08/3, Award, ¶ 31 (Aug. 2, 2011).

sponsibility of one state. Even though courts regularly must assess the conduct of a party that is not before the court against some legal standard, they may not make binding determinations on either that party or on other courts.<sup>97</sup> The ECtHR therefore does not, and cannot, determine the responsibility of states in extradition cases concerning the protection of human rights, when the state to which a person will be extradited is not a party to the European Convention on Human Rights.<sup>98</sup>

This absence of such external legal effect follows from the principle that a decision of a court is only binding on the parties before the court, and has no legal effect for other courts.<sup>99</sup> Judicial decisions may be a subsidiary source of international law,<sup>100</sup> but do not in themselves lead to binding effects on other courts. The principle of *res judicata* (according to which final adjudication by a court or arbitral tribunal is conclusive, and an issue decided in a judgment or award may not be relitigated)<sup>101</sup> does not lead to a different outcome. The rationale for the principle is that no one should be proceeded against twice for the same cause.<sup>102</sup> This means that the principle applies only where the parties and the claim are identical.<sup>103</sup> It does not appear to apply when the defendant is not the same party, but a co-responsible party.

Apart from the lack of binding effect of judgments, a number of comments can be made on the question of how much weight should be given to prior determinations by other

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97. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 356–63 (1998).

98. Maarten den Heijer, *Shared Responsibility Before the European Court of Human Rights*, 60 NETH. INT'L L. REV. 411, 436–37 (2013).

99. *E.g.*, ICJ Statute, *supra* note 15, arts. 59–60.

100. *Id.* art. 38(1).

101. YUVAL SHANY, *THE COMPETING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS* 245, 270 (2004).

102. William S Dodge, *Res Judicata*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1670, ¶ 2 (2006).

103. *CME Czech Republic BV v. Czech Republic*, Final Award, 9 ICSID Rep. 264, 355–56, 15 WORLD TRADE AND ARB. MAT'L 83, 100–02 (UNCITRAL 2003) (holding that one of the fundamental conditions of *res judicata*, that the same parties be involved in both cases, was not present because a previous arbitration involved a controlling shareholder of a company whereas the one before the tribunal was a holding company that was part of the said company's group).

courts or other bodies. In part, this question is common to all situations of cross-judging (notably those relating to the interpretation and construction of particular international norms). However, it would seem that in this particular case of multiple wrongs, special requirements apply. These may cut two ways. On the one hand, it could be argued that the intertwined nature of the conduct, and of the underlying facts, makes a particularly compelling case for cross-judging. Thus, Wehland argues that “[w]here not only the legal issues in the previous proceedings are similar, but both actions are also linked to each other through a common factual background, the case for at least considering an earlier decision becomes overwhelming. In such a situation, there would indeed appear to be a *prima facie* assumption that the tribunal in the later proceedings should reach the same conclusion as the first one.”<sup>104</sup>

On the other hand, the fact that we are not only concerned with the question of attaching weight for the purposes of abstract interpretation of a norm, but rather with situations where findings of other courts may be co-determinative of the scope of responsibility of any particular actor, might call for more caution in attaching weight to findings of other courts.

Moreover, it follows that there is not a single, one-dimensional relationship between principles of shared responsibility and cross-judging. In fact, the principles of shared responsibility themselves may serve competing aims, as they can be relied on to protect the interests of both defendant responsible states and of injured parties. The same holds for the procedural rules pertaining to cross-judging, that either can be relied upon to further one or the other of these competing aims of principles of shared responsibility or, alternatively, serve independent aims with respect to either of those interests.<sup>105</sup>

It can be argued that where attaching weight to decisions of other courts may be used as a ground to extend the responsibility of a state beyond what a court would be able to do without such concerted adjudication, courts should tread very carefully. Paradoxically then, in situations where the need for cross-judging is particularly strong, notably in situations of governance networks, the threshold for attaching weight to judg-

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104. HANNO WEHLAND, *THE COORDINATION OF MULTIPLE PROCEEDINGS IN INVESTMENT TREATY ARBITRATION* 217 (2013).

105. *Supra* Part III.

ments of other courts is particularly high. However, it can also be argued that from the perspective of injured individuals, considering determinations made by other courts may help a court to determine the proper share of responsibility and reparation, with a view to safeguarding the interests of injured parties.

Against this background of considerations that pull in different directions, it would seem that the question of weight depends largely on three dimensions: the function of cross-judging, the existence of a common normative framework, and the nature of the court in question.

First, as indicated above, a determination of weight attributed to a judgment of another court depends in part on the purpose of cross-judging in a particular case. Attaching weight to a judgment of a different court for the purpose of preventing double dipping is a different issue, and leads to different questions of weighing, than concerted adjudication for the purpose of limiting or extending the responsibility of a defendant state.

Second, whether, and with what effect, courts should attribute weight to each other's findings depends on the existence of a common normative framework. It is relevant to this point to refer to the *Diallo case* in which the ICJ gave some indications of why it referred to the HRC in the interpretation of the ICCPR. To a certain extent, these criteria may be relevant to concerted adjudication in shared responsibility cases. The ICJ noted that

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.<sup>106</sup>

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106. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2010 I.C.J. 639, ¶ 66 (Nov. 30).

It might be inferred that the main justification for the Court to refer to interpretations of the HRC is that the HRC was specifically charged with the supervision of the treaty. The arguments of clarity, consistency and legal security seem subsidiary to, and are derived from, the supervisory role of the HRC as an independent body. This is confirmed by the fact that one paragraph later, the Court notes that “when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.”<sup>107</sup> This led the Court to grant weight to interpretations of the African Charter by the African Commission on Human and Peoples’ Rights that was established by Article 30 of the said Charter.<sup>108</sup>

The prime rationale of limiting this argument to bodies “established specifically to supervise the application of that treaty” seems to be that the interpretative authority of such bodies would be accepted both by the parties before the “other court,” and by the party before the court itself. In cases where a reference to another judicial decision would serve to somehow influence the determination of responsibility of a co-responsible state, this consideration would seem to be equally relevant. Attributing weight to judgments of other courts is relatively unproblematic in (somewhat hypothetical) cases where responsibility of two states is determined by two different courts, one of which is specifically charged with the interpretation and supervision of a treaty to which both states are party.

A somewhat comparable approach can be seen in investment arbitration, where it has been found relevant that two tribunals were operating on the same basis of jurisdiction. The arbitral tribunal in *AES Corporation v. The Argentine Republic* said that an identity of the basis of jurisdiction of these tribunals “does not suffice to apply systematically to the present case positions or solutions already adopted in these cases,” and that each tribunal remains sovereign and may retain a different solution for resolving the same problem. At the same time, it noted that “decisions on jurisdiction dealing with the same or

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107. *Id.* ¶ 67.

108. *Id.*

very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution."<sup>109</sup>

In situations where the conditions of a common jurisdictional basis are not applicable, it still could be argued that a court should accord due weight to the decision of another (international) court, since they all operate under a "common legal umbrella."<sup>110</sup> But the question is whether such an umbrella can only consist of a particular treaty, or whether international law as such can serve as such an umbrella. It might be inferred that international courts should strive towards a harmonious and consistent interpretation and application of international law, and attach due weight to determinations made by other international courts concerning questions of responsibility. Indeed, the interest of consistency and legal security to which the Court referred in *Diallo* seems to be more generally applicable, and could be based on the position of courts within a common international legal order.<sup>111</sup> In this context, one might construe a principle of comity that should govern the relations between multiple courts.<sup>112</sup>

A third set of considerations relates to the nature of the court or other body. Here, relevant distinctions may need to be drawn between international and national courts; between courts charged with determining responsibility of states and courts charged with determining individual responsibility (and within this, distinctions between various stages of criminal proceedings);<sup>113</sup> and between courts and non-judicial bodies

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109. *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 30 (Apr. 25, 2005), 12 ICSID Rep. 308 (2007).

110. SHANY, *supra* note 101, at 271.

111. *See also* Prosecutor v Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 107 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (holding that "a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice").

112. SHANY, *supra* note 101, at 271.

113. *Crime of Genocide*, 2007 I.C.J. at 47.

(such as fact-finding committees). With respect to different institutions, relevant considerations will be their independence, judicial nature, and procedural fairness, as well as the standard and burden of proof of the court or body in question.

The lack of independence of national courts will be a particularly relevant consideration—clearly, a court's determination on the lack of (co-)responsibility of a state will only carry weight if that court is sufficiently independent from the state itself. This criterion is particularly relevant in situations where responsibility of a state has been determined by a domestic court, and where there may be grounds for believing that such a court by virtue of national law or for other reasons would be limited in its ability to determine the wrongfulness of state conduct against a standard derived from international law.<sup>114</sup>

A related concern is that concerted judicial action may attribute weight to courts that have never been accepted by the relevant parties as being trustworthy of reviewing their policy decisions. The normative problems relating to the authority of courts in relation to states that *have* in principle accepted their jurisdiction<sup>115</sup> are magnified in relation to courts whose role has not been accepted by the parties. To the extent that a court's determination of the scope of (co-)responsibility indeed would rest on a prior determination by another court whose powers have not been accepted by the state in question, the practice of concerted adjudication raises normative concerns. This suggests that courts should use such external judgments cautiously, for otherwise courts will risk their own legitimacy for their constituencies.

Obviously, these criteria leave much leeway and it will be up to each individual court to determine what weight can be attached in a situation of shared responsibility. There are no hard and fast rules with respect to the weight a court engaged

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114. André Nollkaemper, *The Independence of the Domestic Judiciary in International Law*, 17 FINNISH Y.B. INT'L L. 261, 261–305 (2006).

115. See, e.g., Kanstantsin Dzehtsiarou & Alan Greene, *Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, 12 GERMAN L.J. 1707 (2011) (describing challenges towards the legitimacy of the ECtHR); Armin von Bogdandy & Ingo Venzke, *In Whose Name? Investigation of International Courts' Public Authority and its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012) (suggesting that the authority of international courts stem from domestic constitutional accommodation and the guidance of transnational and cosmopolitan citizenship).

in concerted adjudication should attach to the findings of other courts. A multiplicity of factors of quite varying nature, identified above, will be relevant, which may pull in quite different directions.

## VI. CONCLUSION

The upshot of all of this is that in cases of shared responsibility a court may, by adjudicating a single case, contribute to a resolution of a more complex wrongdoing.

This analysis leads to four conclusions. First, there are various good reasons for courts to engage in concerted adjudication on questions of shared responsibility. Most fundamentally, a justification is provided by the intertwined nature of conduct leading to single harm, which may make isolated adjudication of responsibility of a single actor an unwarranted simplification of a complex reality. An additional consideration is that cross-judging may prevent or mitigate jurisdictional disputes, allow access to evidence, and prevent double-dipping. On these grounds, but subject to the considerations below, concerted adjudication in principle can provide a positive contribution to the implementation of shared responsibility.

Second, these justifications allow a court to construe its position as part of an 'adjudicatory network.' Even without direct contacts, a process in which courts take into account and attach weight to judicial determinations against other co-responsible parties can constitute such a network. Such a network may in some respects be necessary to address the relations between states and other actors that have contributed to the harm.<sup>116</sup>

Third, the degree to which an international court indeed engages in such concerted adjudication is partly a function of the underlying substantive principles of shared responsibility. These principles in themselves are undeveloped. In this respect, concerted adjudication in shared responsibility cases is as much part of a constructivist enterprise in the normative

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116. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003); see also MULTI-LEVEL GOVERNANCE (Ian Bache & Matthew Flinders eds., 2004) (critically exploring multi-level governance); Carol Harlow & Richard Rawlings, *Promoting Accountability in Multilevel Governance: A Network Approach*, 13 EUR. L.J. 542 (2007) (commenting on accountability problems in multi-level governance).

development of the law of international responsibility, as it is a simple example of process that facilitates implementation of the substantive law.

Fourth, the question of the cases in which concerted adjudication is appropriate, and in particular what weight should be attached to determinations of other courts, is determined by a complex set of different factors, including the purpose that such cross-judging would serve, the balance struck between interests of responsible parties and those of plaintiffs, and the nature of the court that has rendered the judgment and of the judgment itself. In addition, a court engaging in concerted adjudication runs the risk of magnifying the normative problems increasingly associated with the role of international courts in reviewing national policy and law. Each of these considerations may pull in different directions and lead to a different result.

All of this exposes the fact that concerted adjudication is not a neutral process giving effect to a preset body of shared responsibility, but that courts inevitably will have to be part of the process of distribution of responsibility between different responsible parties and between responsible parties and plaintiffs. In this respect, a decision whether or not to engage in concerted adjudication is one small element in the complex and eventually deeply political problem of sharing of responsibilities between multiple parties.

