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Guiding Principles on Shared Responsibility in International Law

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Abstract

It is common in international practice that several states and/or international organizations contribute together to the indivisible injury of a third party. Examples thereof are aplenty in relation to climate change and other environmental disasters, joint military activities and cooperative actions aimed at stemming migration. Such situations are hardly captured by the existing rules of the law of international responsibility. In particular, the work of the International Law Commission, which is widely considered to provide authoritative guidance for legal questions of international responsibility, has little to offer. As a result, it is often very difficult, according to the existing rules of the law of international responsibility, to share responsibility and apportion reparation between the states and/or international organizations that contribute together to the indivisible injury of a third party. The Guiding Principles on Shared Responsibility in International Law seek to provide guidance to judges, practitioners and researchers when confronted with legal questions of shared responsibility of states and international organizations for their contribution to an indivisible injury of third parties. The Guiding Principles identify the conditions of shared responsibility (including questions

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of multiple attribution of conduct), the consequences of shared responsibility (notably, the possibility of joint and several liability) and the modes of implementation of shared responsibility. The Guiding Principles are of an interpretive nature. They build on the existing rules of the law of international responsibility and sometimes offer novel interpretations thereof. They also expand on those existing rules, backed by authoritative practice and scholarship, to address complex questions of shared responsibility.

1 Text of the Guiding Principles on Shared Responsibility in International Law

Part I: Determination of Shared Responsibility

Principle 1

Use of terms

For purposes of the present Guiding Principles:

- (a) ‘international person’ means a state or international organization;
- (b) ‘person’ means an international actor, including an international person;
- (c) ‘injury’ means material and non-material damage, and does not include legal injury;
- (d) ‘contribution to injury’ means a causal relationship between conduct and injury.⁸

Principle 2

Shared responsibility of international persons

1. The commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility.
2. Contribution to an indivisible injury may be individual, concurrent or cumulative.

Principle 3

Shared responsibility arising from a single internationally wrongful act

International persons share responsibility for a single internationally wrongful act when the same conduct consisting of an action or omission:

⁸ The Advisory Board was composed of Dov Jacobs (chair), Helmut Aust, Kristen Boon, Pierre d’Argent, Markos Karavias, Simon Olleson and Christian Tams. The Guiding Principles are based on the research carried out on shared responsibility in international law in the period 2010–2016 at the University of Amsterdam, funded by an Advanced Grant by the European Research Council granted to André Nollkaemper. The authors of the Guiding Principles are grateful to all those who have over the years contributed to the project. The Drafting Committee on the Guiding Principles on Shared Responsibility in International Law benefited from the research support of Emilie van den Hoven.

- (a) is attributable to multiple international persons; and
- (b) constitutes a breach of an international obligation for each of those international persons; and
- (c) contributes to the indivisible injury of another person.

Principle 4

Shared responsibility arising from multiple internationally wrongful acts

International persons share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct consisting of an action or omission that:

- (a) is attributable to each of them separately; and
- (b) constitutes a breach of an international obligation for each of those international persons; and
- (c) contributes to the indivisible injury of another person.

Principle 5

Circumstances precluding wrongfulness in situations of shared responsibility

1. Each of the international persons that contributed to the indivisible injury of another person may invoke a circumstance precluding wrongfulness under the rules of international responsibility.
2. A circumstance precluding wrongfulness invoked by an international person that contributed to the indivisible injury of another person does not as such preclude the wrongfulness of the conduct of other international persons that contributed to the indivisible injury.
3. The invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act(s) in question.

Part II: Specific Situations of Shared Responsibility Arising from Multiple Internationally Wrongful Acts

Principle 6

Shared responsibility in situations of aid or assistance

1. An international person shares responsibility when it knowingly aids or assists another international person in committing an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.
3. An international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

Principle 7

Shared responsibility in situations of concerted action

1. An international person shares responsibility when it knowingly acts in concert with another international person that commits an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. International persons act in concert when each of them participates in a course of conduct with a view to achieving agreed goals.
3. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.
4. An international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

Principle 8

Shared responsibility in situations of control

1. An international person shares responsibility when it knowingly controls another international person in committing an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. 'Control' for purposes of paragraph 1 includes situations of direction and control, acts of international organizations and coercion.
3. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.
4. Except in situations of coercion, an international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

Part III: Content of Shared Responsibility

Principle 9

Cessation and non-repetition in situations of shared responsibility

1. Each international person sharing responsibility is under an obligation:
 - (a) to cease the act attributable to it, if this act is continuing;
 - (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.
2. Each responsible international person is under an obligation to ensure that other responsible international persons fulfil their obligations pursuant to paragraph 1.

*Principle 10**Reparation in situations of shared responsibility*

Each international person sharing responsibility is under an obligation to make full reparation for the indivisible injury caused by the single or multiple internationally wrongful acts, unless its contribution to the injury is negligible.

*Principle 11**Forms of reparation in situations of shared responsibility*

1. Full reparation for the indivisible injury caused shall take the form of restitution, compensation and satisfaction, either singly or in combination.
2. When one or more of the responsible international persons is under an obligation to make restitution, each of the other responsible international persons are under an obligation to ensure that restitution is made.
3. In so far as the damage is not made good by restitution, each of the responsible international persons is under an obligation to compensate for the indivisible injury caused.
4. When full reparation entails an obligation to give satisfaction, this obligation is owed by each of the responsible international persons.

*Principle 12**Right of recourse*

1. An international person that has made full reparation for an indivisible injury has a right of recourse against all other international persons that share responsibility for that injury.
2. When an international organization shares responsibility with other international persons, this Principle is without prejudice to the rules of that organization.

*Principle 13**Shared responsibility for serious violations of a peremptory norm of general international law*

1. When multiple international persons commit one or more internationally wrongful act(s) that constitute a serious breach of an obligation arising under a peremptory norm of general international law and contribute to an indivisible injury, all other international persons are under an obligation:
 - (a) to cooperate to bring to an end the serious breach, and
 - (b) to not recognize as lawful a situation created by the serious breach, nor render aid or assistance in maintaining that situation.
2. For the purpose of paragraph 1, multiple internationally wrongful acts may cumulatively constitute a serious breach of an obligation arising under a peremptory norm of general international law resulting in an indivisible injury.

Part IV: Implementation of Shared Responsibility

Principle 14

Invocation of shared responsibility

1. An injured international person is entitled to invoke the responsibility of each of the international persons that share responsibility.
2. An international person other than the injured international person is entitled to invoke the responsibility of each of the international persons that share responsibility if the obligation breached is owed to a group of international persons that includes that international person or to the international community as a whole.
3. An injured person that is not an international person is entitled to invoke the responsibility of each of the responsible international persons that share responsibility if the obligation breached is owed to that person individually.

Principle 15

Countermeasures in situations of shared responsibility

An international person entitled under the rules of international responsibility to take countermeasures may take such measures against each of the international persons that share responsibility.

2 Text of the Guiding Principles on Shared Responsibility in International Law and Commentaries Thereto

Introduction

The Guiding Principles on Shared Responsibility in International Law provide guidance to judges, practitioners and researchers when confronted with legal questions of shared responsibility of states and international organizations. The Principles are of an interpretive nature as they substantiate the existing rules of the law of international responsibility reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)⁹ and the Articles on the Responsibility of International Organizations (ARIO),¹⁰ which were adopted by the International Law Commission (ILC) in 2001 and 2011, respectively. In particular, they build on the rules in the ARSIWA that address situations of shared responsibility of states and, as far as the shared responsibility of international organizations is concerned, on the

⁹ Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/10, 2(2) *ILC Yearbook* (2001) 26; Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto (Commentaries to the ARSIWA), UN Doc. A/56/10, 2(2) *ILC Yearbook* (2001) 31.

¹⁰ Articles on the Responsibility of International Organizations (ARIO), UN Doc. A/66/10, 2(2) *ILC Yearbook* (2011) 40; Articles on the Responsibility of International Organizations with Commentaries (Commentaries to the ARIO), UN Doc. A/66/10, 2(2) *ILC Yearbook* (2011) 46.

relevant rules of the ARIO. The Principles expand on those rules based on the practice of states and international organizations and by relying on subsidiary means for the determination of rules of law, such as authoritative scholarly studies and decisions by international and domestic courts and tribunals.

The Principles have been elaborated by a group of international lawyers with recognized expertise in the field of international responsibility. They draw on the findings and output generated by a major research project on shared responsibility in international law (SHARES) funded by the European Research Council (2010–2015) and conducted at the University of Amsterdam. The drafting process took place between 2016 and 2019 and included wide-ranging consultations with practitioners and international judges. During that period, earlier drafts of the Principles were the subject of extensive discussion in academic circles.¹¹ The Principles were launched at a side event of the Sixth (Legal) Committee of the United Nations (UN) General Assembly on 1 November 2019.¹²

The Drafting Committee was composed of André Nollkaemper (co-chair), Jean d'Aspremont (co-chair), Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos. The Drafting Committee was assisted by an Advisory Committee composed of Dov Jacobs (chair), Helmut Aust, Kristen Boon, Pierre d'Argent, Markos Karavias, Simon Olleson and Christian Tams, and benefited from the research support of Emilie van den Hoven.

Since the Principles and the commentaries are of an interpretive nature and build on the existing rules of the law of international responsibility that address situations of shared responsibility, they do not distinguish between the codification of existing rules of international law and the progressive development of international law.¹³ When several interpretations of the existing rules of the law of international responsibility are conceivable, the commentaries to the Principles indicate the relevant practice, the supporting authoritative scholarship and the policy considerations for preferring one interpretation rather than another.

Part I: Determination of Shared Responsibility

Principle 1

Use of terms

For purposes of the present Guiding Principles:

- (a) 'international person' means a state or international organization;
- (b) 'person' means an international actor, including an international person;

¹¹ Academic events specifically dedicated to the Principles include those that took place at the Faculty of Law of Humboldt University on 2 March 2017; at All Souls College at the University of Oxford on 1 March 2018; at the Faculty of Law of the University of Amsterdam on 19 March 2018; at the Lauterpacht Research Centre in International Law at the University of Cambridge on 6 June 2018; and at the Asser Institute in The Hague on 23 November 2018 and 28 June 2019.

¹² This side event was organized by the Permanent Mission of Brazil to the United Nations in New York.

¹³ This is in line with the working methods of the International Law Commission (ILC). See United Nations (UN), *The Work of the International Law Commission* (9th edn, 2017), vol. 1, at 47–49.

- (c) ‘injury’ means material and non-material damage, and does not include legal injury;
- (d) ‘contribution to injury’ means a causal relationship between conduct and injury.

Commentary

1. Principle 1, subparagraph (a), provides that the term ‘international person’ used in the Principles means a state or international organization. This definition aligns the Principles with the scope of the ARSIWA and the ARIIO, which apply to states and international organizations that are subject to international obligations and that may incur international responsibility. Although the term ‘international person’ refers to both states and international organizations, the Principles take into account the fundamental differences between states and international organizations.¹⁴ The Principles are without prejudice to the possibility that other actors, such as individuals or other non-state actors, bear international obligations and share responsibility in certain circumstances.
2. The Principles use the term ‘person’, as defined in subparagraph (b), to refer to situations in which international actors may invoke shared responsibility and claim reparation for injury. Such international actors may be states or international organizations as well as individuals and other non-state actors that bear rights under international law. In this respect, the Principles go beyond the scope of the ARSIWA and the ARIIO, which do not address the invocation of responsibility and claims of reparations by individuals and other persons.¹⁵ The wider scope of the Principles, which take into account that individuals and other persons may invoke responsibility, corresponds to contemporary practice in the law of international responsibility – in particular, in international human rights law and international investment law. This practice illustrates that responsibility may be shared in situations in which injured parties are not states or international organizations.
3. Principle 1, subparagraph (c), defines ‘injury’ as material and non-material damage. As generally accepted in the law of international responsibility, injury ‘includes any damage, whether material or moral, caused by the internationally wrongful act of’¹⁶ an international person.
4. The definition of injury does not include legal injury, which is understood as the injury inherent in a breach of international law.¹⁷ The reasons for

¹⁴ See generally F. Lusa Bordin, *The Analogy between States and International Organizations* (2018).

¹⁵ See the commentary to Art. 33 ARSIWA, para. 4: ‘It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility.’

¹⁶ Arts 31(2) ARSIWA and ARIIO.

¹⁷ J. Crawford, *State Responsibility: The General Part* (2013), at 487; Stern, ‘The Obligation to Make Reparation’, in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 569; Stern, ‘A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury’, in M. Ragazzi (ed.)

excluding legal injury are that the Principles limit the scope of shared responsibility to indivisible injury (Principle 2) and that one of the main legal consequences of shared responsibility is the obligation of each international person sharing responsibility to make full reparation for the indivisible injury (Principle 10). Such an obligation cannot arise as a result of legal injury alone, considering that legal injury does not give rise to an obligation of reparation.¹⁸ This definition of injury is without prejudice to the situation where the conduct of multiple international persons results solely in legal injury and engages their international responsibility.

5. Principle 1, subparagraph (d), clarifies that ‘contribution to injury’ means a causal relationship between conduct and injury.¹⁹ Different tests exist to establish such a causal relationship. No specific test of causation is prescribed by international law.²⁰ The Principles do not seek to impose a general test of causation between conduct and injury that would define when a particular conduct does or does not constitute a contribution to injury for all situations of shared responsibility. Yet they do provide guidance on the possible ways in which the causal relationship between conduct and injury can be established in situations of shared responsibility – in particular, with a view to apprehending multiple contributions to the same injury.

Principle 2

Shared responsibility of international persons

1. The commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility.
2. Contribution to an indivisible injury may be individual, concurrent or cumulative.

Commentary

1. Principle 2, paragraph 1, sets forth in which situations shared responsibility for the purpose of the Principles arises. Shared responsibility refers to situations in which two or more international persons share responsibility

International Responsibility Today: Essays in Memory of Oscar Schachter (2005) 93; Barboza, ‘Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?’, in Ragazzi, *ibid.*, 7.

¹⁸ This is consistent with the notion of injury in Art. 31 ARSIWA, which does not include legal injury.

¹⁹ The notion of contribution to injury as used in these Principles differs from the notion of contribution to injury by wilful or negligent action or omission of the injured international person, as found in Arts 39 ARSIWA and ARIO.

²⁰ D. Pusztai, *Causation in the Law of State Responsibility* (2017) (PhD dissertation on file at the University of Cambridge), at 112; Gattini, ‘Breach of International Obligations’, in A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 25, at 30–31.

for their contribution to an indivisible injury of third persons. The defining feature of shared responsibility is that multiple international persons, by committing one or more internationally wrongful acts, contribute to an indivisible injury. Shared responsibility may arise from collective conduct, in situations in which international persons engage in cooperation, such as in multinational military operations, or from independent conduct, such as multiple states independently contributing to environmental harm.²¹

2. All situations of shared responsibility involve the commission of one or more internationally wrongful acts. The Principles follow the definition of an internationally wrongful act in the law of international responsibility. An internationally wrongful act consists of conduct that is attributable to an international person and in breach of an international legal obligation of that international person. The existence of both elements – that is, attribution of conduct and breach – is determined in accordance with the existing rules of the law of international responsibility, especially Articles 4–11 of the ARSIWA and Articles 6–9 of the ARIO. A contribution to an indivisible injury that does not involve a breach of an applicable international obligation does not give rise to shared responsibility.
3. Principle 2, paragraph 1, stipulates that international persons only share responsibility when they contribute to an *indivisible injury* of another person. This Principle delimits the scope of the complex cases that the Principles address. One or more internationally wrongful acts that do not contribute to an indivisible injury do not fall within the scope of the present Principles. For the purposes of the present Principles, responsibility is only shared when one or more wrongful acts contribute to an indivisible injury.
4. International persons thus do not share responsibility pursuant to these Principles when they contribute to an injury that is *divisible*. An injury is divisible when contributions to that injury can be distinguished from each other by using a factual test of causation. This will be the case when an internationally wrongful act qualifies as the single necessary and sufficient cause of a certain injury: that injury would not have occurred but for the wrongful act (hence, it was necessary), and the wrongful act was sufficient on its own to bring about that injury. In such a situation, the international person committing that internationally wrongful act would not incur *shared* responsibility but *independent* international responsibility. Such independent responsibility would be established under the generally accepted rules of international responsibility.²²

²¹ Commentary to Art. 47 ARSIWA, para. 8.

²² Commentary to Chapter IV of Part One, ARSIWA, para. 1 ('[t]he principle that State responsibility is specific to the State concerned underlies the present articles as a whole').

5. Principle 2, paragraph 2, sets out that an indivisible injury resulting from the conduct of multiple international persons can arise in three types of situations: in the case of an *individual contribution*, in which a single contribution caused the injury by itself; in the case of *concurrent contributions*, in which each of the contributions could have caused the injury by itself; and in the case of *cumulative contributions*, in which the conduct of multiple international persons together results in an injury that none could have caused on their own.²³
6. *Individual* contribution to injury covers situations in which one contribution that is attributable to multiple international persons is sufficient to cause the injury on its own. An example can be found in the situation addressed in the *Certain Phosphate Lands in Nauru* case before the International Court of Justice (ICJ), where the conduct of the Administering Authority established by Australia, New Zealand and the United Kingdom (UK) that damaged phosphate lands in Nauru was attributable to each of the three states.²⁴ Another example can be taken from the facts of the *Gabčíkovo-Nagyymaros* case. The system of barrages originally planned jointly by Hungary and Czechoslovakia involved a project intended to be jointly implemented by two upstream riparian states. Had such a joint act resulted in harm to one or more of the downstream co-riparian states, including Serbia, Croatia, Bulgaria, Romania, Moldova and Ukraine, this could have constituted an individual contribution to an indivisible injury.²⁵
7. *Concurrent* contributions to injury concern situations in which each of the respective acts or omissions of multiple international persons would have been sufficient to cause the injury. In order to identify such concurrent contributions that engage shared responsibility, a test of causal sufficiency can be applied. In contrast, the ‘but-for’ test of causation is not helpful for identifying concurrent contributions since ‘but for’ one of the contributions, the injury would still have occurred.²⁶ If, for instance, in the context of operations carried out by Iraq and the coalition against the Islamic State led by the USA, both the USA and Iraq were to simultaneously bomb a civilian hospital in Syria, each of these actions would have been sufficient to cause the injury and would therefore qualify as a concurrent contribution to an indivisible

²³ Similar distinctions have been formulated in scholarship. See, e.g., H.L.A. Hart and T. Honoré, *Causation in the Law* (2nd edn, 1985), ch. VI, at 205–253; B. Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973), Titre III, at 265–296; Pusztai, *supra* note 20, at 180–187; see also Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur, UN Doc. A/CN.4/507 and Add.1–4, 2(1) *ILC Yearbook* (2000) 3, para. 31.

²⁴ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, paras 45–47.

²⁵ *Gabčíkovo-Nagyymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7. See McIntyre, ‘Transboundary Water Resources’, in A. Nollkaemper and I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 905.

²⁶ Pusztai, *supra* note 20, at 190; Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’, 26 *European Journal of International Law (EJIL)* (2015) 471, at 477.

injury.²⁷ In another example, in 2011, a boat with 72 persons on their way to the Italian island of Lampedusa ran out of fuel and drifted along the Libyan shore before washing up 16 days later with only 11 survivors.²⁸ As several states, including Italy and Malta, had boats in the sea area at the time and received distress signals, it could be argued that both states were in a position to take action and could be held responsible for their omission to act. Their concurrent failures to attempt rescue would each have been sufficient to produce the indivisible injury.

8. *Cumulative* contributions to injury refer to the wide variety of situations in which multiple internationally wrongful acts accumulate and jointly produce an injury. In the *Corfu Channel* case,²⁹ ‘the laying of the minefield ... could not have been accomplished without the knowledge of the Albanian Government’,³⁰ thus the laying of the mines and Albania’s failure to warn British Royal Navy ships of the presence of these mines together resulted in the injury. Similarly, under the case file system within the framework of the Berne Convention on European Wildlife and Natural Habitats,³¹ the Convention Secretariat addressed the planned construction of a tourist resort in a Moroccan national park that threatened the habitat of a bird species that was protected under the Convention. Not only did it find Morocco’s planned construction to be in breach of the Convention, it also expressly took the position that the funding provided by France for the tourist resort would engage the international responsibility of the latter state.³² If the actual construction of such a tourist resort had indeed destroyed the habitat of this endangered bird, the internationally wrongful acts of both states would have jointly produced the injury. In the case of climate change, the failure of a state to reduce carbon dioxide emissions in line with its international obligations may not be sufficient on its own to cause adverse global warming, but the combined failure to reduce carbon dioxide emissions of many states can result in such an indivisible injury.³³ The same can be said about the failure of multiple states to take necessary conservation measures with regard to their nationals engaged in fishing of fish stocks in the high seas, which results in stock depletion.³⁴

²⁷ This corresponds, in causation theory, to the classical example of the hunting cross-fire accident where multiple bullets concurrently hit and cause the death of a victim (see *Summers v. Tice*, 33 Cal. 2d 80, 199 P. 2d 1 (1948)).

²⁸ Forensic Oceanography, Report on the ‘Left-To-Die Boat’, 11 April 2012.

²⁹ *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4.

³⁰ *Ibid.*, at 22.

³¹ Convention on the Conservation of European Wildlife and Natural Habitats 1979, ETS no. 104.

³² Trouwborst, ‘Nature Conservation’, in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 987, at 1006.

³³ Peel, ‘Climate Change’, in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 1009, at 1010 and 1032.

³⁴ Takei, ‘Fisheries’, in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 350, at 353–354; Molenaar, ‘Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach’, 19(3) *International Journal of Marine and Coastal Law* (2004) 223, at 227–228.

9. In situations of cumulative contributions, it will have to be determined which conduct constitutes a contribution that engages international responsibility. Various tests have been devised to determine cumulative causes³⁵ and could be used for this purpose. One such test considers a course of conduct to be a contribution that engages responsibility when it constitutes a material contribution to the injury.³⁶ An international person accordingly materially contributes to injury when its 'wrongful conduct played a more than minimal role in a mechanism which was causally sufficient for the claimant's damage'.³⁷ An alternative test to identify cumulative contributions giving rise to shared responsibility examines whether, together with the contributions of other international persons, a course of conduct is part of a jointly sufficient set of contributions.³⁸ An application of this test may be found in the reasoning of the Arbitral Tribunal in the *Naulilaa* case, which concerned a claim for reparation following a German offensive in a Portuguese colony. Portugal claimed compensation for damage to livestock and military equipment, and for increased costs, due to the haste with which it had to launch a counter-offensive. However, Germany refuted that this damage would have occurred independently of its offensive.³⁹ The Arbitral Tribunal held that the German act of aggression caused Portugal to accelerate and redirect its forces, and, therefore, the damage resulted from the combined effect of the acceleration by Portugal and the aggression by Germany.⁴⁰ Another possible illustration is Albania's contribution to the UK's injury in the *Corfu Channel* case,⁴¹ which can be analysed in terms of jointly sufficient contributions. The injury 'was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence', and '[b]oth are efficient causes of the injury, without which it would not have occurred'.⁴²

³⁵ See examples given in Plakokefalos, 'Causation', *supra* note 26.

³⁶ See Pusztai, *supra* note 20, at 253–254 (stating that the internationally wrongful act should have contributed to the occurrence of the injury and that such contribution was major, not marginal, and also noting that this rule is supported by the jurisprudence of human rights courts, the UN Compensation Commission and the Eritrea-Ethiopia Claims Commission).

³⁷ Steel, 'Causation in English Tort Law: Still Wrong after All These Years', 31 *University of Queensland Law Journal* (2012) 243, n. 3.

³⁸ This is similar to the so-called NESS test (requiring that a course of conduct is a necessary element in a jointly sufficient set of contributions); see, e.g., Wright, 'Causation in Tort Law', 73(6) *California Law Review* (1985) 1735, at 1788–1802; Pusztai, *supra* note 20, at 110; Plakokefalos, 'Causation', *supra* note 26, at 477. A comparable test (the INUS test) enquires whether a contribution is an insufficient but necessary element of an unnecessary but sufficient set. J.L. Mackie, *The Cement of the Universe: A Study of Causation* (1974), at 59–87.

³⁹ *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne) (Naulilaa)*, Decision, 30 June 1930, reprinted in UNRIIAA, vol. 2 (2006) 1035, at 1069.

⁴⁰ *Ibid.*, at 1071; Plakokefalos, 'Causation', *supra* note 26, at 487.

⁴¹ *Corfu Channel Case*, *supra* note 29.

⁴² Third Report on State Responsibility, *supra* note 23, para. 31.

10. Situations of aid or assistance, concerted action and control, as they are addressed in Part II of the present Principles, often consist of an accumulation of acts or omissions that jointly produce the injury. For instance, in the *El-Masri* case before the European Court of Human Rights (ECtHR),⁴³ agents of Macedonia handed El-Masri over to agents of the US Central Intelligence Agency, who subsequently subjected him to torture and ill-treatment. Though the Court only expressed itself on the wrongful conduct of Macedonia, on the basis of the information available on the conduct of the USA it can be said that the conduct of Macedonia and the USA together produced the indivisible injury. Similarly, in the case of *Omar Awadh* before the East African Court of Justice, the applicants alleged that they were arrested in Kenya, illegally detained and transferred without any formal extradition process to Uganda where they were arraigned on charges of terrorism and tortured by the authorities.⁴⁴
11. Principle 2 also covers situations that involve a combination of cumulative and concurrent contributions. An example would be when the contributions of 15 states are jointly sufficient to cause marine pollution, resulting in the extinction of a particular species. Additional pollution by five other states can be seen as not necessary in light of the other contributions that were jointly sufficient to cause the species extinction. However, in the absence of some of the contributions of the 15 original polluters, the contributions of the latter five states *could have been* necessary within the jointly sufficient set of contributions.⁴⁵ In the case of climate change, individual failures to reduce carbon dioxide emissions can also be analysed in these terms. The inclusion of such supplementary contributions in the scope of shared responsibility is premised on the idea that an international person having committed an internationally wrongful act contributing to an injury should not be able to escape shared responsibility simply because others have already contributed to the same injury.

Principle 3

Shared responsibility arising from a single internationally wrongful act

International persons share responsibility for a single internationally wrongful act when the same conduct consisting of an action or omission:

⁴³ ECtHR, *El-Masri v. Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012.

⁴⁴ EACJ, *Omar Awadh Omar v. Attorney General Republic of Kenya, The Attorney General of the Republic of Uganda and the Secretary General of the East African Community*, Appl. no. 4, Decision on Jurisdiction, 1 December 2011.

⁴⁵ Puzsai, *supra* note 20, at 186 (defining contributory causation as a situation in which 'a factor is neither necessary, nor sufficient for the occurrence of the injury, but it nevertheless made a contribution to its occurrence and it could have theoretically caused the injury as a cumulative cause in a sufficient combination of causes').

- (a) is attributable to multiple international persons; and
- (b) constitutes a breach of an international obligation for each of those international persons; and
- (c) contributes to the indivisible injury of another person.

Commentary

1. Principle 3 addresses situations in which multiple international persons are responsible for a *single* wrongful act that results in an indivisible injury. As explained in the commentaries to the ARSIWA in relation to the responsibility of states, a ‘single wrongful act’ arises when two or more international persons engage in ‘a single course of conduct [that] is at the same time attributable to several [international persons] and is internationally wrongful for each of them’.⁴⁶
2. Principle 3 stipulates the necessary elements of shared responsibility for a single internationally wrongful act. Shared responsibility pursuant to this Principle arises from a single course of conduct that is attributed to multiple international persons (subparagraph (a)) and that constitutes a breach of an international obligation of those international persons (subparagraph (b)). Principle 3 further provides that the conduct should contribute to the indivisible injury of another person (subparagraph (c)). This corresponds to the definition of shared responsibility contained in Principle 2. Accordingly, situations in which international persons share responsibility in relation to a single internationally wrongful act can be construed in terms of an individual contribution to an indivisible injury.⁴⁷ This individual contribution, as defined in paragraph 2 of Principle 2, is attributable to multiple international persons.
3. The possibility of multiple attribution of conduct is based on the consideration that attribution of conduct to an international person does not preclude the possibility that the same conduct is attributed to another person. Therefore, by application of the rules on attribution of conduct of Articles 4–11 of the ARSIWA and Articles 6–9 of the ARIIO, the same conduct may be simultaneously attributed to more than one international person.⁴⁸ Multiple attribution of conduct has been acknowledged in practice.⁴⁹ It is

⁴⁶ Commentary to Art. 47 ARSIWA, para. 3.

⁴⁷ See the commentary to Principle 2, para. 6.

⁴⁸ Commentary to Art. 1 ARSIWA, para. 6, and commentary to Art. 47 ARSIWA, para. 3; commentary to Part Two, Chapter II ARIIO, para. 4.

⁴⁹ ECtHR, *Al-Jedda v. United Kingdom*, Appl. no. 27021/08, Judgment of 7 July 2011, para. 80 ([t]he Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purpose of this case – ceased to be attributable to the troop-contributing nations’; emphasis added); *Hasan Nuhanovic v. Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN:BR5388; 200.020.174/01; ILDC 1742 (NL 2011), para. 5.9; *Hasan Nuhanovic v. Netherlands*, Supreme Court (6 September 2013), ECLI:NL:HR:2013:BZ9225, para. 3.9.4.

also recognized in Article 47 of the ARSIWA and Article 48 of the ARIО in relation to the invocation of responsibility as well as in scholarship.⁵⁰

4. Principle 3 covers situations in which conduct is carried out by a person or entity acting on behalf of more than one international person at the same time – for instance, when the organ of an international person is put at the non-exclusive disposal of another. In such a situation, the lent organ has a functional or factual link with both international persons.⁵¹ This may happen in multinational military operations when states transfer operational control over their soldiers to the UN, while retaining non-transferrable elements of full command (control over organic matters such as recruitment, training and discipline). Under the test of effective control enshrined in Article 7 of the ARIО, the conduct of a peacekeeper may be attributed to both the UN and the troop-contributing state if factual circumstances show that both parties exercised control over the contingent.⁵²
5. Principle 3 also addresses situations in which a wrongful act is carried out by the common organ of multiple international persons. A common organ is an individual or entity that acts on behalf of multiple international persons and that does not have a separate international legal personality.⁵³ A common organ qualifies as the organ of each of the international persons on behalf of which it acts. Therefore, its conduct is simultaneously attributable to each of these international persons.⁵⁴ In this regard, the ILC has noted that ‘the conduct of the common organ cannot be considered otherwise than as an act of each of the [international persons] whose common organ it is’.⁵⁵ An example of a common organ that is relevant in relation to shared responsibility was the Administering Authority set up by Australia, New Zealand and the UK in Nauru.⁵⁶ As the ICJ noted in the *Nauru* case, ‘this Authority did not have an international legal personality distinct from those of the States thus designated’.⁵⁷ Rather than a separate legal person, the Administering Authority

⁵⁰ See, e.g., Besson, ‘La Pluralité d’Etats Responsables: Vers une Solidarité Internationale?’, 17 *Revue Suisse de Droit International et de Droit Européen* (2007) 13, at 21; Crawford, *State Responsibility*, *supra* note 17, at 333; Dominicić, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in Crawford *et al.*, *supra* note 17, 281; Messineo, ‘Attribution of Conduct’, in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 60; Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, 9(5) *JICJ* (2011) 1143.

⁵¹ Third Report on State Responsibility, *supra* note 23, para. 267, point 1; commentary to Art. 7 ARIО, para. 1.

⁵² B. Boutin, ‘Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control’, 18(2) *Melbourne Journal of International Law* (2017) 154, at 171.

⁵³ Commentary to Chapter IV of Part One, ARSIWA, para. 3; Crawford, *State Responsibility*, *supra* note 17, at 340.

⁵⁴ Commentary to Art. 6 ARSIWA, para. 3; Messineo, *supra* note 50, at 72; Crawford, *State Responsibility*, *supra* note 17, at 340; Dominicić, *supra* note 50, at 283.

⁵⁵ Report of the International Law Commission on the Work of Its Thirtieth Session, 8 May–28 July 1978, 2(2) *ILC Yearbook* (1978) 99.

⁵⁶ *Certain Phosphate Lands in Nauru*, *supra* note 24, paras 45–47.

⁵⁷ *Ibid.*, para. 47.

was a common organ of Australia, New Zealand and the UK.⁵⁸ Other examples include the Channel Tunnel Intergovernmental Commission,⁵⁹ the Coalition Provisional Authority set up by the UK and the USA during the occupation of Iraq,⁶⁰ the Kommandatura established by the Allied Powers to administer Berlin⁶¹ and the Force Commander of the Allied Powers in Japan.⁶² A body set up by two riparian states in order to manage a boundary river and supervise harmful discharges could also qualify as a common organ.⁶³

6. In addition, Principle 3 covers situations in which two or more international persons 'combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation'.⁶⁴ In such situations of joint conduct, when the entire operation is carried out jointly by two or more international persons, the operation is attributed to each international person, which, acting through its own organs, co-authored the wrongful act.⁶⁵ In the *Legality of Use of Force* cases, for example, Serbia and Montenegro argued that the respondent states would be jointly and severally responsible for their actions within the North Atlantic Treaty Organization (NATO) military command structure, which it argued constituted an instrumentality of the respondent states.⁶⁶ In particular, the applicant submitted that the North Atlantic Council directed the war against Yugoslavia as a joint enterprise and that '[i]t would be a legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member States. This joint and several responsibility was justified both in legal principle and

⁵⁸ Saul, 'Internationally Administered Territories', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 15, at 19.

⁵⁹ *Eurotunnel Arbitration (Channel Tunnel Group Limited and France-Manche S.A. v. Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland)*, Partial Award, PCA Case no. 2003-06, 30 January 2007, para. 179.

⁶⁰ Milano, 'Occupation', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 733, at 750; Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds), *The Iraq War and International Law* (2008) 161, at 174; Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in Shiner and Williams, *ibid.*, 185, at 203.

⁶¹ European Commission of Human Rights, *Hess v. United Kingdom*, Appl. no. 6231/73, Decision, 28 May 1975, at 73-74.

⁶² United States Court of Claims, *Anglo-Chinese Shipping Company Ltd v. United States*, 11 January 1955, at 986.

⁶³ Commentary to Art. 47 ARSIWA, para. 2.

⁶⁴ *Ibid.*

⁶⁵ I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (1983), at 190-191; B. Boutin, *The Role of Control in Allocating International Responsibility in Collaborative Military Operations* (2015) (PhD dissertation on file at the University of Amsterdam), at 106; Messineo, *supra* note 50, at 80.

⁶⁶ *Legality of Use of Force (Serbia and Montenegro v. UK)* (Oral Proceedings) (Public Sitting 12 May 1999), Verbatim Record 1999/25. See Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of Its Member States?', in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (2002) 181; Dominicé, *supra* note 50, at 282.

by the conduct of the member States'.⁶⁷ Another example of conduct that may constitute joint conduct of multiple international persons is the joint naval patrols carried out by Benin and Nigeria in the Gulf of Guinea as part of an anti-piracy operation.⁶⁸ The same could be said for a situation in which two soldiers – each belonging to a different coalition partner – jointly operate a tank that unlawfully kills a civilian.⁶⁹

7. Shared responsibility for joint conduct only arises when the wrongful act consists of a single course of conduct attributable to multiple international persons. If multiple international persons closely coordinate their action but engage in separate conduct, the situation is not one of shared responsibility for a single wrongful act but, rather, one of shared responsibility for multiple internationally wrongful acts that could concurrently or cumulatively cause the injury. Shared responsibility under Principle 3 must thus be distinguished from shared responsibility arising under Principle 4 (shared responsibility arising from multiple wrongful acts), which finds particular application in Principle 6 (shared responsibility arising from aid or assistance), Principle 7 (shared responsibility for concerted action) and Principle 8 (shared responsibility in situations of control).
8. A single wrongful act can also consist of a composite act, which is 'a series of actions or omissions defined in aggregate as wrongful'.⁷⁰ For example, the act of genocide concerns some aggregate conduct and not individual acts as such.⁷¹ Genocide is not committed 'until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent',⁷² which might be committed by a plurality of international persons. However, this does not mean that an act or omission of an international person that is *per se* lawful would be rendered unlawful on account of it having been aggregated with other acts and omissions attributable to other international persons.⁷³
9. A distinct case of shared responsibility arising from a single internationally wrongful act is the breach of an indivisible shared obligation.⁷⁴ Breaches of indivisible shared obligations always entail shared responsibility for a single internationally wrongful act. An indivisible shared obligation is a positive

⁶⁷ *Legality of Use of Force (Serbia and Montenegro)*, *supra* note 66, at 16.

⁶⁸ Papastavridis, 'Piracy', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 316, at 343.

⁶⁹ Messineo, *supra* note 50, at 79.

⁷⁰ Art. 15 ARSIWA.

⁷¹ Commentary to Art. 15 ARSIWA, para. 2.

⁷² Commentary to Art. 15 ARSIWA, para. 3.

⁷³ Gattini, *supra* note 20, at 49 (noting that 'it is inconceivable that, through the concept of a composite act, a state could be made responsible only for the fact that an act or omission which is attributable to it, and which is *per se* perfectly lawful, is in a way causally linked to other wrongful acts or omissions attributable to other states').

⁷⁴ N. Nedeski, *Shared Obligations in International Law* (2017) (PhD dissertation on file at the University of Amsterdam), at 121–125.

obligation of result that obliges all of its bearers to achieve a common result. Examples include the obligation of the European Union (EU) and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020;⁷⁵ the obligation of Australia, New Zealand and the UK to rehabilitate Nauru's worked-out phosphate lands;⁷⁶ the obligation of two riparian states to conclude a bilateral treaty regarding the protection of a transboundary lake;⁷⁷ and the obligation of the European Economic Community (EEC) and its member states to provide 12,000 million European Currency Units (ECU) in financial assistance to the African, Caribbean and Pacific Group of States, arising from the Lomé Convention.⁷⁸ Due to its indivisible structure of performance, such an obligation can only be fulfilled or breached by all international persons that bear the obligation simultaneously, regardless of what individual international persons have done in their efforts to comply with the obligation. This means that the obligation is either fulfilled by all duty-bearers simultaneously when the common performance is achieved – which, in the latter example, would entail the payment of 12,000 million ECUs – or it is breached by all duty-bearers simultaneously when the common performance is not achieved – which, in this example, would entail the failure to provide 12,000 million ECUs in financial assistance. Considering that *multiple* international persons were bound to achieve that common result, the failure to achieve that result constitutes a joint failure that is attributable to all bearers of the obligation simultaneously,⁷⁹ giving rise to the responsibility of all of them for a single wrongful act.

Principle 4

Shared responsibility arising from multiple internationally wrongful acts

International persons share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct consisting of an action or omission that:

⁷⁵ *Ibid.*, at 193–195; Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, Report on Its Seventh Session. Doc. FCCC/KP/CMP/2011/10/Add.1 (2011).

⁷⁶ Nedeski, *supra* note 74, at 183–185; *Certain Phosphate Lands in Nauru*, Memorial of the Republic of Nauru, 20 March 1990, vol. 1, para. 290; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Separate Opinion of Judge Shahabuddeen, ICJ Reports (1992) 270, at 273.

⁷⁷ Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992, 1936 UNTS 269, Art. 9; see also Tanzi, Koliopoulos and Nikiforova, 'Normative Features of the UNECE Water Convention', in A. Tanzi *et al.* (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (2015) 122, who note that '[t]he Water Convention is rather stringent with regard to the institutional aspect of cooperation ... insofar as article 9 is mandatory about the conclusion of watercourse agreements'.

⁷⁸ Nedeski, *supra* note 74, at 189–191; see also P.T. Stoll, 'Lomé Conventions', *Max Planck Encyclopedia of Public International Law* (1997), vol. 2, at 245.

⁷⁹ On the attribution of a failure to act, see d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct', 1 *Questions of International Law* (2014) 17; M. Jackson, *Complicity in International Law* (2015), at 195.

- (a) is attributable to each of them separately; and
- (b) constitutes a breach of an international obligation for each of those international persons; and
- (c) contributes to the indivisible injury of another person.

Commentary

1. Principle 4 addresses shared responsibility resulting from a situation in which international persons separately commit internationally wrongful acts and contribute to an indivisible injury. Shared responsibility pursuant to Principle 4 can arise when multiple internationally wrongful acts constitute either concurrent contributions to an injury or cumulative contributions to an injury.
2. Principle 4 sets out the elements of shared responsibility for multiple internationally wrongful acts. Subparagraph (a) states that shared responsibility arising from multiple internationally wrongful acts is based on conduct that is attributable to each of the international persons separately. This means that separate wrongful acts are committed by each of those international persons.
3. Subparagraph (b) confirms that the qualification of such acts as internationally wrongful requires the breach of an international obligation. A course of conduct that is lawful as such cannot engage the responsibility of the author of the act on account of the fact that, in combination with the wrongful conduct of other international persons, it contributes to the injury of a third person. Accordingly, in order to establish shared responsibility for the indivisible injury of climate change, violations of applicable international obligations incumbent on each of the responsible international persons need to be established, for instance, under international environmental law⁸⁰ or international human rights law.⁸¹
4. Shared responsibility pursuant to Principle 4 arises irrespective of whether international persons breach different obligations or the same obligation. Multiple international persons breach the same obligation when they each breach an obligation with the same normative content. For example, the European Commission has made determinations of non-compliance by multiple flag states with the same prohibition of transshipment by non-registered

⁸⁰ See, e.g., Peel, *supra* note 33, at 1031; Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics', 19 *Asia-Pacific Journal of Environmental Law* (2016) 79.

⁸¹ See 'Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States', submitted by S. Watt-Cloutier with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Regions of the United States and Canada, 7 December 2005, available at www.ciel.org/Publications/ICC_Petition_7Dec05.pdf; 'Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada', submitted by the Arctic Athabaskan Council on

vessels under the International Commission for the Conservation of Atlantic Tunas Recommendation 06-11.⁸² Multiple international persons breach different obligations when they each breach an obligation with a different normative content. In the *Rantsev* case, the ECtHR found Cyprus and Russia responsible with respect to the death, in Cyprus, of a Russian national and probable victim of trafficking. While each state had violated different obligations under the European Convention of Human Rights (ECHR), the Court found that both of them had contributed to the indivisible injury to the victim.⁸³

5. In exceptional cases, a breach committed by two or more international persons of the same obligation will not result in shared responsibility for multiple wrongful acts but in shared responsibility for a single wrongful act, governed by Principle 3. That is the case when the obligation in question is a so-called indivisible obligation.⁸⁴ However, in most cases, international obligations are structured in such a way that they oblige each duty-bearer to perform its own share and are hence 'divisible'.⁸⁵ A breach of these obligations will commonly result in shared responsibility for multiple wrongful acts. This is the case for the example given above regarding the violations by multiple flag states of their obligations in relation to transshipment of unregistered vessels. The same will hold for the obligation of multiple riparian states to refrain from polluting a river or the obligation of the USA and the UK as joint occupying powers 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources' in Iraq.⁸⁶ Due to their structure, such obligations are performed or breached by each duty-bearer independently. A breach of a divisible obligation by one international person does not necessarily entail a breach by all other international persons that bear the obligation. But where two or more international persons do breach the same obligation and indivisible injury occurs, they will share responsibility for multiple wrongful acts.

behalf of all Athabaskan Peoples of the Arctic Regions of the United States and Canada, 23 April 2013, available at http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf; *The Netherlands v. Stichting Urgenda*, Supreme Court of the Netherlands (20 December 2019), ECLI:NL:HR:2019:2007, available at <http://deplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2007>.

⁸² ICCAT Recommendation 06-11; see Takei, *supra* note 34, at 370. Such recommendations are binding pursuant to Art. 8(2) of the International Convention for the Conservation of Atlantic Tunas 1966, 673 UNTS 63.

⁸³ ECtHR, *Rantsev v. Cyprus and the Russian Federation*, Appl. no. 25965/04, Judgment of 7 January 2010. See Gallagher, 'Human Rights and Human Trafficking', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 556, at 560.

⁸⁴ See the commentary to Principle 3, para. 10.

⁸⁵ Nedeski, *supra* note 74, at 125–128.

⁸⁶ Milano, *supra* note 60, at 741; Talmon, *supra* note 60, at 206.

6. Subparagraph (c) specifies, in line with Principle 2, that shared responsibility pursuant to Principle 4 only arises if several international persons contribute to the indivisible injury of another person. Comparable to the situation of single internationally wrongful acts,⁸⁷ it will need to be determined in each individual case whether a particular injury is divisible or indivisible. If a particular injury is divisible, two or more international persons may still incur international responsibility, but such responsibility would not be shared responsibility as defined in the present Principles.
7. The indivisibility of a particular injury may not always be obvious. An example that illustrates different approaches to the determination of whether multiple internationally wrongful acts caused indivisible injury is provided by several judgments of Dutch courts in the case brought by the 'Mothers of Srebrenica' against the state of the Netherlands for the conduct of the Dutch battalion of UN peacekeepers in Srebrenica. The District Court held the Netherlands fully responsible for the deaths of 350 men who were not allowed by the Dutch battalion to stay in the UN compound and were subsequently killed by the Bosnian Serb forces.⁸⁸ The holding of the District Court that the Netherlands was fully responsible can be understood as a determination that the injury, which in fact was caused by more than one actor, was indivisible. The Court of Appeals took a different approach and held that 'the surviving relatives of the men who stayed in the compound on 13 July 1995 are entitled to a compensation of their loss in proportion to the probability that these men would have had to safely escape and survive had the Dutchbat not acted wrongfully, that is, for the Court, thirty per cent of the loss incurred'.⁸⁹ The Dutch Supreme Court upheld the finding of a responsibility of the Dutch state but reduced the chance that the male refugees would have escaped the Bosnian Serbs to 10 per cent.⁹⁰
8. The reasoning was exclusively based on Dutch law – in particular, applicable domestic law doctrines of apportioning responsibility on the basis of risk that have no equivalent in international law. If the situation that gave rise to the *Mothers of Srebrenica* case were to be approached from an international law perspective, it would be covered by Principle 4. The injury consisting of the deaths of the Bosnian men could qualify as indivisible, and it resulted from acts or omissions of several (international) persons, including the Netherlands, the UN and the Bosnian Serb Republic. Although it should be noted that the Bosnian Serb Republic was a non-state actor whose contribution to the injury is formally not within the scope of the present

⁸⁷ See the commentary to Principle 3, paras 3–4.

⁸⁸ District Court of The Hague, C/09/295247/HA ZA 07-2973, 16 July 2014, paras 4.330, 4.338.

⁸⁹ Court of Appeals of The Hague, 200.158.313/01 and 200.160.317/01, 27 June 2017, para. 69.1.

⁹⁰ Supreme Court of the Netherlands, ECLI:NL:HR:2019:1284, 19 July 2019, para. 5.1.

Principles, Dutchbat's cooperation in the evacuation of the male refugees who were present inside the compound, in combination with the Bosnian Serbs' acts of genocide, contributed to the deaths of 350 refugees. While the Court of Appeal and the Supreme Court apportioned responsibility between the Netherlands and the Bosnian Serbs, the UN was likely also responsible for failure to prevent the deaths of the Bosnian men. These cumulative contributions to the injury cannot be distinguished using a factual test of causation.⁹¹

9. Principles 6–8 in Chapter II below are particular applications of Principle 4 and therefore subject to its conditions. Principles 6–8 may be understood as presupposing a corresponding primary obligation under international law: the obligation not to aid or assist in the commission of a wrongful act (Principle 6), the obligation not to engage in concerted action in the commission of a wrongful act (Principle 7) and the obligation not to control another international person in the commission of a wrongful act (Principle 8). The breach of that specific obligation constitutes one of the multiple internationally wrongful acts that give rise to shared responsibility pursuant to Principle 4. As far as Principle 6 is concerned, the primary nature of the obligation not to aid or assist is commonly accepted.⁹² Principles 7 and 8, for their part, are premised respectively on the view that international law prohibits concerted action and control of other international persons in the commission of a wrongful act, which finds support in scholarship.⁹³ This idea that responsibility for aid or assistance, concerted action and control is shared by virtue of a breach of a primary obligation is the expression of one of the main paradigms underlying the rules of international responsibility – namely, that responsibility results from one or more internationally wrongful acts.

⁹¹ See the commentary to Principle 2, para. 4.

⁹² Commentary to Chapter IV of Part One, ARSIWA, para. 7; commentary to Art. 16 ARSIWA, para. 9; Crawford, *State Responsibility*, *supra* note 17, at 399; Graefrath, 'Complicity in the Law of International Responsibility', 2 *Revue Belge de Droit International* (1996) 371, at 372; Lanovoy, 'Complicity in an Internationally Wrongful Act', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 134, at 139; Lowe, 'Responsibility for the Conduct of Other States', 101 *Kokusaiho Gaiko Zasshi* (2002) 1, at 4.

⁹³ Dominicé, *supra* note 50, at 289; G. Gaja, 'The Relations between the European Union and Its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations', SHARES Research Paper no. 25 (2013), at 7; Nedeski and Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"', 9 *International Organizations Law Review* (IOLR) (2012) 33, at 44; Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization', 8 *IOLR* (2011) 291, at 301; Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?', 7 *IOLR* (2010) 9.

Principle 5

Circumstances precluding wrongfulness in situations of shared responsibility

1. Each of the international persons that contributed to the indivisible injury of another person may invoke a circumstance precluding wrongfulness under the rules of international responsibility.
2. A circumstance precluding wrongfulness invoked by an international person that contributed to the indivisible injury of another person does not as such preclude the wrongfulness of the conduct of other international persons that contributed to the indivisible injury.
3. The invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act(s) in question.

Commentary

1. The rules of international responsibility provide a basis for the preclusion of the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the international person(s) concerned. The circumstances precluding wrongfulness that can be invoked in situations of shared responsibility include those codified in Articles 20–25 of the ARSIWA and Articles 20–25 of the ARIO. Principle 5 specifies how these circumstances precluding wrongfulness apply in the specific situations covered by the present Principles in which two or more international persons, by committing one or more internationally wrongful act(s), contribute to an indivisible injury incurred by another person.
2. Principle 5, paragraph 1, stipulates that each international person that contributed to an indivisible injury may individually invoke a circumstance precluding wrongfulness under the rules of international responsibility. Each international person that invokes such a circumstance has to establish that the specific criteria for that circumstance precluding wrongfulness are fulfilled in relation to its conduct. Considering that the rules on circumstances precluding wrongfulness, as codified in the ARSIWA and the ARIO, are geared towards bilateral situations (involving one responsible state or international organization and one injured state or international organization), it may be presumed that those existing rules work, in principle, to the benefit of international persons that can individually satisfy the relevant requirements of a circumstance precluding wrongfulness.⁹⁴
3. Principle 5, paragraph 2, formulates the default principle that a circumstance precluding wrongfulness that is individually invoked by an international person does not automatically extend to the other international persons with

⁹⁴ See also Aust, 'Circumstances Precluding Wrongfulness', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 169, at 199.

which responsibility is shared. This is without prejudice to the situation in which an international person with which responsibility is shared and that is separately invoking the same or a distinct circumstance precluding wrongfulness meets the requirements thereof.

4. Notwithstanding the default principle articulated in Principle 5, paragraph 2, the preclusion of wrongfulness for the conduct of an international person may, in certain situations, extend to the wrongfulness of the conduct of other international persons that contributed to the indivisible injury. This may be due to the possible consequences of characterizing a particular circumstance precluding wrongfulness as a justification or an excuse. In its commentaries to Articles 20–27 of the ARSIWA and Articles 20–27 of the ARIIO, the ILC employed both the term ‘justification’ and the term ‘excuse’. This suggests that the ILC did not take a position on whether the circumstances precluding wrongfulness in these provisions operate as justifications or excuses,⁹⁵ and the present Principles follow this approach. Justifications would render an act lawful and might more readily extend to other international legal persons that contributed to the injury.⁹⁶ Excuses would shield an international person from the legal consequences of an act that remains unlawful⁹⁷ and, hence, could be considered as more individualized to the particular international person.⁹⁸
5. The potential effects of this distinction may be illustrated by the example of an international person aiding or assisting, acting in concert with or controlling another international person in the commission of an internationally wrongful act, which are situations covered by Principles 6, 7 and 8. In all of these instances, conduct is rendered wrongful ‘because it constitutes a form of participation in the wrongful act of another’.⁹⁹ If the wrongfulness of the act of the principal actor were to be precluded because the circumstance precluding wrongfulness invoked operates as a justification, this may bear upon the possibility of establishing responsibility of the international person(s) that participated in that act. An international person’s provision of aid or assistance to an act that is lawful cannot in principle result in its responsibility for aid or assistance.¹⁰⁰ Hence, when Libya claimed that the UK had acted wrongfully when it granted the USA the use of air bases on the UK’s territory for the launching of air strikes on targets in Tripoli and Benghazi in 1986,

⁹⁵ For an overview of the discussion within the ILC on this issue, see F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 37–52; see also Second Report on State Responsibility, by Mr James Crawford, Special Rapporteur, UN Doc. A/CN.4/498, 2(1) *ILC Yearbook* (1999), at 58–60, 86, paras 223–231, 355.

⁹⁶ Paddeu, *supra* note 95, at 31–32.

⁹⁷ Aust, ‘Circumstances’, *supra* note 94, at 176; see also Lowe, ‘Precluding Wrongfulness or Responsibility: A Plea for Excuses’, 10 *EJIL* (1999) 405, at 410; Paddeu, *supra* note 95, at 37–51.

⁹⁸ Paddeu, *supra* note 95, at 288.

⁹⁹ *Ibid.*, at 68–69.

¹⁰⁰ *Ibid.*, at 69.

the UK argued that its conduct was lawful since it had assisted the USA in its lawful exercise of self-defence.¹⁰¹

6. Similar considerations apply in situations of shared responsibility arising out of a single internationally wrongful act, which are covered by Principle 3. If two or more international persons commit a single wrongful act, the successful invocation of a circumstance precluding wrongfulness by one of the international persons may also preclude the wrongfulness of that single course of conduct in relation to other international persons to which the conduct can be attributed. Principle 5, paragraph 3, addresses a specific consequence of invoking a circumstance precluding wrongfulness relevant to situations of shared responsibility. The invocation of a circumstance precluding wrongfulness by an international person does not prejudice the question of compensation for any material loss caused by the conduct concerned. This paragraph reflects the rule stipulated in Articles 27(b) of the ARSIWA and the ARIO. In situations of shared responsibility, this rule entails that if one or more responsible international person(s) successfully invokes a circumstance precluding wrongfulness, they may still be under an obligation to provide compensation to injured (international) persons.

Part II: Specific Situations of Shared Responsibility Arising from Multiple Internationally Wrongful Acts

Principle 6

Shared responsibility in situations of aid or assistance

1. An international person shares responsibility when it knowingly aids or assists another international person in committing an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.
3. An international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

Commentary

1. Principle 6 concerns the sharing of responsibility between an international person that commits an internationally wrongful act and one or more international persons that provide aid or assistance in the commission of

¹⁰¹ Statement of the UK representative to the Security Council, UN Doc. S/PV.2679 (1986), at 26–28; Paddeu, *supra* note 95, at 69; H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 112.

that wrongful act. The Principle is based on Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO, respectively.

2. Practice is replete with situations in which aid or assistance is provided in a way that jointly contributes to an indivisible injury. Examples include aid or assistance in the form of providing military equipment,¹⁰² allowing the use of territory or air space or military bases,¹⁰³ contributing to rendition schemes,¹⁰⁴ allowing reconnaissance missions, aerial refuelling, sharing information used for targeting¹⁰⁵ and informing and facilitating interdiction at sea.¹⁰⁶ Over recent years, domestic courts have recognized that such aid or assistance can engage the responsibility of the aiding or assisting state – generally without expressing themselves on questions of shared responsibility, since no claims have been brought against the principal wrongdoing international person.¹⁰⁷
3. Principle 6, paragraph 1, indicates that aid or assistance gives rise to shared responsibility of several international persons when the respective conduct of all of those persons contributes to an indivisible injury. In situations of aid or assistance, contributions to injury will typically consist of cumulative contributions, which often means that the aid or assistance provided is part of a set of acts or omissions that jointly caused the injury. The nature of contribution that is required before the responsibility of the aiding or assisting international person is engaged is a matter of some uncertainty. The commentary to Article 16 of the ARSIWA states that the aid or assistance must facilitate the commission of the wrongful act:¹⁰⁸ ‘There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.’¹⁰⁹ However, the ILC also recognized that ‘assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered’.¹¹⁰ The level of contribution required for aid or assistance ultimately depends on the circumstances of the particular case.¹¹¹

¹⁰² See Principle 2(2) and commentary. Boutin, ‘Responsibility in Connection with the Conduct of Military Partners’, 56 *Military Law and the Law of War Review* (2018) 57, at 59.

¹⁰³ Strauss, ‘Territorial Leases’, in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 65, at 77.

¹⁰⁴ Duffy, ‘Detention and Interrogation Abroad: The “Extraordinary Rendition” Programme’, in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 89, at 123.

¹⁰⁵ *Ibid.*, at 116.

¹⁰⁶ Papastavridis, *supra* note 68, at 342.

¹⁰⁷ See, e.g., *General Prosecutor at the Court of Appeals of Milan v. Adler and Ors*, Final Appeal Judgment, No. 46340/2012; ILDC 1960 (IT 2012), 29 November 2012; *Belhaj and Another (Appellants) v. Director of Public Prosecutions and Another (Respondents)*, 4 July 2018, [2018] UKSC 33.

¹⁰⁸ Commentary to Art. 16 ARSIWA, paras 3, 5.

¹⁰⁹ *Ibid.*, para. 5.

¹¹⁰ *Ibid.*, para. 10.

¹¹¹ *Ibid.*, para. 10; see also Principle 11(3).

4. Principle 6, paragraph 2, provides that the knowledge requirement in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act. It makes explicit that the object of the required knowledge is the fact that the aid or assistance would facilitate the commission of an internationally wrongful act.¹¹² Paragraph 2 also states that knowledge of circumstances is to be understood as *constructive knowledge*. As a result, the Principle covers situations in which the aiding or assisting state should have known that its conduct would aid or assist another international person to commit a wrongful act.¹¹³ An example of the constructive knowledge standard is the *Chixoy Dam* case before the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.¹¹⁴ In that case, the Petitioners, *inter alia* based on Article 14 of the ARIIO, argued that the World Bank and the Inter-American Development Bank either knew or should have known that the dam project they had largely financed would violate the economic, social or cultural rights of the local residents in Guatemala.¹¹⁵
5. The criterion of constructive knowledge provided by Principle 6 is premised on the view that, when information is available to them, aiding or assisting international persons cannot invoke ignorance of the circumstances.¹¹⁶ Hence, if an international person shares intelligence on nationals from a third state with another state that has a record of carrying out unlawful targeted killing by drone strikes in the third state, the aiding or assisting international person cannot claim absence of knowledge of the circumstances of the wrongful act.¹¹⁷ Although the *Corfu Channel* case did not address aid or assistance, it provides a relevant precedent. The ICJ inferred that Albania ‘must have known’¹¹⁸ of the mine laying in its territorial waters on the basis of available circumstantial evidence. This element of constructive knowledge is firmly supported by the case law of human rights courts on the provision of assistance to human rights violations (for instance, in the context of

¹¹² Art. 16(a) ARSIWA; Commentary to Art. 16 ARSIWA, paras 3–4.

¹¹³ Lowe, ‘Responsibility’, *supra* note 92, at 10. During the drafting negotiations, the Netherlands suggested introducing constructive knowledge into Art. 16 ARSIWA (see 2(1) *ILC Yearbook* (2001) 52).

¹¹⁴ Inter-American Commission of Human Rights, Report no. 86/10, Case no. 12.649, 14 July 2010; IACtHR, *Case of the Rio Negro Massacres v. Guatemala*, Judgment, 4 September 2012, in which the Court held Guatemala responsible for its own wrongful acts.

¹¹⁵ See IACtHR, *Sobrevivientes de la Comunidad de Rio Negro y otras comunidades similares en Guatemala (The Chixoy Dam Case)*, Petition no. P-894-04, Guatemala, 7 December 2011 (unreported case), at 18, brief filed by the Global Initiative for Economic, Social and Cultural Rights, Rights Action and the International Human Rights Clinic at Western New England University School of Law; see also N. Voulgaris, *Allocating International Responsibility between Member States and International Organisations* (2019), at 198–201.

¹¹⁶ Moynihan, ‘Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission’s Articles on State Responsibility’, 67 *International and Comparative Law Quarterly* (2018) 455, at 461–462.

¹¹⁷ See also Lanovoy, *supra* note 92, at 153.

¹¹⁸ *Corfu Channel Case*, *supra* note 29, at 19.

extraordinary renditions)¹¹⁹ and is also deemed relevant in relation to the obligation not to aid or assist in case of violations of international humanitarian law.¹²⁰

6. Pursuant to paragraph 2 of Principle 6, intent to facilitate the wrongful act of another international person is not required. In this regard, the interpretation of the knowledge requirement as constructive knowledge is preferred to the interpretation found in the commentary to Article 16 of the ARSIWA, which stipulates that ‘the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’.¹²¹ The ICJ in the *Bosnian Genocide* case referred to the knowledge of the intent of the assisted person in relation to complicity in genocide but did not pronounce on the intent of the aiding or assisting state.¹²² The interpretation of the knowledge requirement proposed by Principle 6 is justified by the difficulties associated with demonstrating subjective intent.¹²³ Indeed, a standard of intent comes with considerable drawbacks.¹²⁴ Establishing that an international person had actual intent may prove impossible in situations characterized by secrecy and lack of transparency, such as in the practice of extraordinary renditions,¹²⁵ and, in many cases, would make the notion of aid or assistance ‘unworkable’.¹²⁶
7. Principle 6, paragraph 3, restates the general condition of the ARSIWA and the ARIO in relation to situations of aid or assistance that the international person providing aid or assistance only incurs international responsibility when it is bound by the obligation that is breached by the person benefiting from the aid or assistance. This condition, sometimes referred to as the ‘opposability’ requirement, is intended to ensure the application of the *pacta tertiis* rule. It has been said that the condition would be undesirable since international law should not allow states to incur no responsibility when they clearly assist another state in causing injury to a third state.¹²⁷ However,

¹¹⁹ See, e.g., Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication no. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para. 13.2; *El-Masri*, *supra* note 43, para. 217; Duffy, *supra* note 104, at 114.

¹²⁰ International Committee of the Red Cross (ICRC), Commentary on the First Geneva Convention (2016), para. 161; see also Sassöli, ‘State Responsibility for Violations of International Humanitarian Law’, 84 *International Review of the Red Cross* (2002) 401, at 413.

¹²¹ Commentary to Art. 16 ARSIWA, para. 5.

¹²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, at 218, paras 421–422; see also Dominčić, *supra* note 50, at 286.

¹²³ Graefrath, *supra* note 92, at 375; Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’, 57 *British Yearbook of International Law* (1986) 77, at 111; see also d’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’, 9 *IOLR* (2012) 15.

¹²⁴ See, e.g., Aust, *Complicity*, *supra* note 94, at 236.

¹²⁵ Duffy, *supra* note 104, at 114.

¹²⁶ Quigley, *supra* note 123, at 111.

¹²⁷ Lowe, ‘Responsibility’, *supra* note 92.

the combination of the wider standard of knowledge applied in Principle 6 and a lack of an opposability requirement would overly broaden the possibility of sharing responsibility in situations of aid or assistance. The adoption of the ‘opposability’ requirement in Principle 6 is also informed by the common idea underlying responsibility for aid or assistance that an international person ‘cannot do by another what it cannot do by itself’.¹²⁸

8. In certain circumstances, Principle 6 covers situations in which an international organization authorizes an international person to commit an act that is wrongful for both of them.¹²⁹ When the requirements discussed above are met, the authorization of a wrongful conduct will result in shared responsibility of that international organization and the other international person(s).

Principle 7

Shared responsibility in situations of concerted action

1. An international person shares responsibility when it knowingly acts in concert with another international person that commits an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. International persons act in concert when each of them participates in a course of conduct with a view to achieving agreed goals.
3. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.
4. An international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

Commentary

1. Principle 7 addresses the situation in which international persons act in concert in the commission of one or several internationally wrongful acts and contribute to an indivisible injury. Concerted action may become a ground of shared responsibility, as defined by the Principles, when two or more international persons participate in a course of conduct that involves one or more internationally wrongful act(s) with a view to achieving agreed goals. Principle 7 is based on the view that international law prohibits international persons from engaging in concerted wrongful action that causes an injury to third parties.¹³⁰ The term ‘concerted action’ is understood as a term of art, which may include both actions and omissions.

¹²⁸ Commentary to Art. 16 ARSIWA, para. 6.

¹²⁹ See, e.g., Voulgaris, ‘Rethinking Indirect Responsibility’, 11 *IOLR* (2015) 5, who argues that in some cases Art. 17(2) ARIO overlaps with Art. 14 ARIO on aid or assistance.

¹³⁰ See the commentary to Principle 4, para. 9.

2. The main rationale of shared responsibility for concerted action is that the injured party should not be put in a position of having to prove which parts of the injury are attributable to each of the responsible international persons. Another rationale for including a Principle providing for responsibility based on concerted action is that in some situations the wrongful act by an international person, and the injury resulting therefrom, only come about because other international persons acted in concert with one or more other international persons. By engaging in concerted wrongful action, the actors involved can produce results that they could not have brought about on their own. Principle 7 makes clear that, in such situations, the international persons acting in concert would not be able to evade international responsibility. This Principle also creates incentives for such international persons to refrain from acting in concert when they are aware that this could result in injury to a third person.
3. Although the ARSIWA and the ARIO do not include a provision on responsibility for concerted action, and international judicial pronouncements on concerted action are rare, Principle 7 is not without precedent. The principle echoes the notion of ‘common adventures’ referred to by Special Rapporteur James Crawford in his Third Report in which he observed: ‘Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants.’¹³¹
4. Principle 7 also covers situations that fall within the scope of Articles 17 and 61 of the ARIO on the circumvention of international obligations.¹³² Like in the situations of circumvention as understood in Articles 17 and 61 of the ARIO, Principle 7 allows for the allocation of responsibility to international persons that try to circumvent their international obligations by working with or through others. It extends the principle of circumvention, as stipulated in the ARIO, to a wider group of international persons, including states. The main novelty of Principle 7, thus, is that it applies not only to states acting through international organizations and *vice versa* but more broadly to all international persons attempting to evade their international obligations by working with or through other international persons.

¹³¹ Third Report on State Responsibility, *supra* note 23, para. 276(c): ‘Existence of special rules of responsibility for “common adventures”. Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants, on the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of them. International tribunals have reached similar results by reference to considerations of “equity” or by requiring a State responsible for wrongful conduct to show what consequences flowing from the breach should not be attributed to it.’

¹³² The ILC uses the concept of circumvention to address situations in which one international person uses the legal personality of another legal person to avoid compliance with its own obligations. See the commentary to Art. 17 ARIO, para. 1, and Art. 61 ARIO, para. 1. See generally Murray, *supra* note 93.

5. There may be a certain overlap between shared responsibility based on aid or assistance in Principle 6, on the one hand, and shared responsibility for concerted action in Principle 7, on the other. In some situations, one course of conduct may fall within the scope of both Principles. Nonetheless, the scope of these two Principles is not identical. In particular, responsibility for aid or assistance requires that the contribution to the internationally wrongful act of another international person reaches a particular threshold. Responsibility for concerted action, however, arises as soon as international persons participate in a course of conduct that involves one or more internationally wrongful act(s) with a view to achieving agreed goals. This difference between concerted action and aid or assistance with regard to their material threshold can be illustrated by the invasion of Iraq in 2003 by a coalition of states. This military action may amount to concerted action under the definition in Principle 7. However, not all of the conduct of states acting in concert may qualify as aid or assistance. As situations of concerted action cannot always be captured by other principles on shared responsibility, a separate principle on concerted action is warranted.
6. Principle 7, paragraph 1, introduces the principle of shared responsibility based on concerted action. The Principle indicates that an international person shares responsibility for concerted action only when it acts in concert with another international person that commits an internationally wrongful act and the conduct of each of those international persons contributes to the indivisible injury of another person. Accordingly, Principle 7 addresses situations where a set of connected, yet separate, wrongful acts are committed that contribute to the indivisible injury of another person. It is a particular application of Principle 4 and should therefore be distinguished from situations of shared responsibility for a single wrongful act (resulting from a single course of conduct attributable to multiple international persons), which is covered by Principle 3.¹³³
7. Principle 7, paragraph 2, provides a definition of concerted action. The defining feature of concerted action is that two or more international persons actively participate in a course of conduct with a view to achieving agreed goals. Concerted action necessarily involves some form of coordination of conduct between participating actors. This may be in the form of an agreement between actors, but typically is of a more informal nature. Situations covered by Principle 7 include collaboration between international financial institutions; concerted military action involving the UN, NATO and the EU; cooperation between the Food and Agriculture Organization, regional fisheries institutions, individual states and private parties to ensure sustainable use of natural resources; and cooperation between the EU, its member states and non-EU states in the context of migration controls and joint cross-border

¹³³ See the commentary to Principle 3, para. 7.

police activities. In each of these situations, multiple actors coordinate their conduct with a view to achieving a common aim. The air strikes conducted in Libya in 2011 by the USA, the UK, France and Canada, acting through their own organs before NATO took command of the operations, can be considered an example of concerted action.¹³⁴ Another example is the bombing of Iraq carried out by coalition partners, where, although only certain states carried out the actual bombings, multiple other states participated in the decision-making and execution processes.¹³⁵

8. The definition of concerted action under Principle 7, paragraph 2, does not require that the goal that is pursued by two or more international persons as such is in contravention of international law. What is required is that a wrongful act is committed in the course of that concerted action. In the 'EU-Turkey Statement', which was agreed on by the member states of the EU and Turkey,¹³⁶ it was declared that '[i]n order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk', the decision had been made to 'end the irregular migration from Turkey to the EU'.¹³⁷ As such, this agreed goal is not in contravention of international law. In order to achieve this goal, all EU member states, together with Turkey, agreed to return new irregular migrants crossing from Turkey into Greece as of 20 March 2016 to Turkey. The Statement was negotiated and published at a time when it was well known that detention conditions in Greece and deficiencies in its asylum procedure were in violation of the ECHR.¹³⁸ The implementation of the above action point in the EU-Turkey Statement put further pressure on the already overburdened Greek asylum system, and various reports indicated that the Greek asylum system remained deficient, and refugees and migrants in camps were exposed to inhumane conditions.¹³⁹ Accordingly, this is an example of multiple international persons pursuing an agreed goal through concerted action that is itself lawful, but during which one or multiple wrongful acts may have been committed.

¹³⁴ SC Res. 1973 (2011); S. Erlanger, 'Confusion over Who Leads Libya Strikes, and for How Long', *New York Times* (21 March 2011).

¹³⁵ Tondini, 'Coalitions of the Willing', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 701.

¹³⁶ On 28 February 2017, the General Court of the European Union ruled that the EU-Turkey Statement was not concluded by the European Union (EU) but, rather, by all of the individual EU member states together with Turkey (Case T-192/16, *NF v. European Council*, Order of the General Court (EU:T:2017:128), para. 69).

¹³⁷ European Council, 'EU-Turkey Statement', Press release no. 144/16, 18 March 2016.

¹³⁸ In 2011, the European Court of Human Rights (ECtHR) ruled that detention conditions in Greece and deficiencies in its asylum procedure were in violation of the European Convention on Human Rights. See ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011. As a result of this ruling, Greece was excluded from the EU's Dublin system, and EU member states could no longer deport asylum seekers to Greece. In March 2016, Greece was still excluded from the Dublin system.

¹³⁹ See, e.g., Council of Europe Parliamentary Assembly, Resolution 2109 (2016): 'The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016'; Amnesty International, 'A Blueprint for Despair: Human Rights Impacts of the EU-Turkey Deal', February 2017.

9. Principle 7, paragraph 3, like Principle 6, provides that responsibility for concerted action requires constructive knowledge about the circumstances of the internationally wrongful act. The considerations that justify applying a standard of constructive knowledge in relation to aid or assistance also apply with regard to concerted action.
10. Principle 7, paragraph 4, provides that international persons involved in the concerted action incur responsibility only if the wrongful act that is committed as a part of the concerted action would also have been wrongful if committed by them. Therefore, those international persons must be bound by an obligation that in substance is the same as the obligation breached by the wrongdoing international person. An exception to this opposability requirement may apply when member states act in concert in the framework of an international organization. In such situations, this Principle applies irrespective of whether the act in question is internationally wrongful for the international organization. In this regard, the Principle follows Article 61 of the ARIIO, which states that member states shall not use an international organization to circumvent their international obligations.¹⁴⁰ The provision finds support in the case law of the ECtHR on ‘equivalent protection’.¹⁴¹ As the Court stated in the *Bosphorus* case, the ECHR does not prevent the contracting parties from transferring sovereign powers to an international organization, but ‘[t]he State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention’.¹⁴²

Principle 8

Shared responsibility in situations of control

1. An international person shares responsibility when it knowingly controls another international person in committing an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. ‘Control’ for purposes of paragraph 1 includes situations of direction and control, acts of international organizations and coercion.
3. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.

¹⁴⁰ Art. 61(2) ARIIO provides: ‘Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.’

¹⁴¹ Commentary to Art. 61 ARIIO, paras 4–5.

¹⁴² ECtHR, *Bosphorus v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005, para. 154; see also ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999, para. 67; ECtHR, *Matthews v. United Kingdom*, Appl. no. 24833/94, Judgment of 18 February 1999, para. 31; European Commission of Human Rights, *M. & Co. v. Germany*, Appl. no. 13258/87, Decision, 9 January 1990.

4. Except in situations of coercion, an international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

Commentary

1. Principle 8 provides for shared responsibility in situations in which an international person controls another international person in the commission of an internationally wrongful act. This Principle addresses, but is not limited to, situations of responsibility in connection with the internationally wrongful act of another international person that are covered by Articles 17 and 18 of the ARSIWA as well as Articles 15, 16, 17(1), 59 and 60 of the ARIO. The notion of control in this Principle thus refers to situations as various as direction and control or coercion as these notions are understood in the ARSIWA and the ARIO. Principle 8 is not limited to those rules as it recognizes the possibility of other situations of control, such as normative control, which, albeit not excluded, are not explicitly addressed in the ARSIWA and the ARIO.¹⁴³
2. Principle 8, paragraph 1, provides for the possibility that responsibility is shared in situations in which an international person controls another international person in committing a wrongful act. Situations covered by Principle 8 presuppose that the international person(s) that is subject to the control simultaneously incurs responsibility with the controlling international person. As the commentary to Article 17 of the ARSIWA states, '[a]s to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under Chapter V of Part One'.¹⁴⁴ A possible exception in this regard may be a situation of coercion because the coerced international person may invoke coercion as a circumstance precluding wrongfulness.¹⁴⁵
3. By defining 'control' broadly as including 'direction and control, acts of international organizations, and coercion', paragraph 2 extends the application of Principle 8 to a wide range of situations. In particular, the paragraph refers to 'acts' of international organizations to capture the wide variety of terms used in the decision-making processes of international organizations, such as resolutions and decisions, that allow those organizations to control their member states or organizations. In the *Bosphorus* case, the ECtHR, while acknowledging that member states may act under the

¹⁴³ On normative control, see A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011), at 40; Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', 21 *EJIL* (2010) 741; see also d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 4 *IOLR* (2007) 91.

¹⁴⁴ See the commentary to Art. 17 ARSIWA, para. 9.

¹⁴⁵ See the commentary to Art. 18 ARSIWA, para. 4.

normative control of the European Community (EC) when implementing EC law, noted that '[i]t remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations'.¹⁴⁶

4. The application of Principle 8 to such situations entails that an international organization shares international responsibility if it adopts an act that requires another international person to commit an act that would be internationally wrongful if committed by the organization. This Principle thus covers cases in which an international organization adopts a binding decision that requires an international person to commit an act that would be internationally wrongful if committed by the organization. This reflects the ground of responsibility in connection with the internationally wrongful act of another international person envisaged by Article 17(1) of the ARIO. Unlike Principle 8, however, the application of Article 17(1) of the ARIO would also require 'an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation'.¹⁴⁷
5. Principle 8, paragraph 3, indicates that the situations of responsibility in connection with the internationally wrongful act of another international person covered by this Principle are conditioned by the requirement of knowledge of the circumstances of the wrongful act. Principle 8(3) provides for the possibility of knowledge being understood as constructive knowledge, in the same way as the constructive knowledge for aid or assistance covered by Principle 6 and Principle 7 on concerted action.
6. Principle 8, paragraph 4, restates the opposability requirement, which is also contained in Article 17 of the ARSIWA and Articles 15 and 59 of the ARIO. The opposability requirement is applicable to all forms of control except for coercion because an act of coercion is so serious that responsibility could be engaged even if the act would not be internationally wrongful if committed by the coercing international person. Moreover, as the coerced international person could invoke coercion as a circumstance precluding wrongfulness, no international person would otherwise incur responsibility if the coercing state was not bound by the relevant obligation.¹⁴⁸ This position mirrors the distinct treatment of coercion in other doctrines of international law¹⁴⁹ and is in conformity with the position of the ILC.¹⁵⁰

¹⁴⁶ *Bosphorus v. Ireland*, *supra* note 142, para. 157.

¹⁴⁷ See the commentary to Art. 17 ARIO, para. 4.

¹⁴⁸ Coercion of another international person might thus lead to independent responsibility of the coercing international person, depending on the degree of coercion.

¹⁴⁹ See, e.g., Vienna Convention of the Law of Treaties 1969, 1155 UNTS 331, Arts 51, 52 and 69(3).

¹⁵⁰ Art. 18 ARSIWA; Arts 16 and 60 ARIO.

Part III: Content of Shared Responsibility

Principle 9

Cessation and non-repetition in situations of shared responsibility

1. Each international person sharing responsibility is under an obligation:
 - (a) to cease the act attributable to it, if this act is continuing;
 - (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.
2. Each responsible international person is under an obligation to ensure that other responsible international persons fulfil their obligations pursuant to paragraph 1.

Commentary

1. Principle 9 states that the obligation of cessation and the obligation to offer assurances and guarantees of non-repetition, as provided for in Articles 30 of the ARSIWA and the ARIIO, may arise for multiple international persons in situations of shared responsibility. The obligations of cessation and assurances and guarantees of non-repetition extend to each international person sharing international responsibility in accordance with the present Principles.
2. In line with the rules of the law of international responsibility, Principle 9, paragraph 1, provides that an international person responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. As the obligation of cessation is attached to the wrongful conduct and not to the injury, each responsible international person that shares international responsibility as defined in the present Principles must cease the conduct that is attributed to it.¹⁵¹
3. When multiple international persons are responsible for a single internationally wrongful act, as stated in Principle 3, conduct consisting of an act or omission is attributable to multiple international persons. If that single wrongful act is of a continuing character, it follows that all responsible international persons are under a shared obligation to cease that act.¹⁵² When international persons share responsibility for multiple wrongful acts, whether or not all responsible states actually are under an obligation to cease the conduct depends on the circumstances of the case. In *M.S.S. v. Belgium and Greece*, Belgium had violated its obligations under the ECHR by transferring the applicant to Greece, whereas Greece had breached its obligations by subjecting the asylum seeker to inhumane detention conditions. Both states

¹⁵¹ D'Argent, 'Reparation, Cessation', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 208, at 215; Boutin, 'Responsibility', *supra* note 102, at 85.

¹⁵² Nedeski, *supra* note 74, at 205.

shared responsibility, but given that Belgium had already transferred the applicant, the obligation to cease the wrongful act only applied to Greece.¹⁵³

4. Principle 9, paragraph 2, provides that in situations of shared responsibility, as covered by the present Principles, the obligation of cessation entails an obligation of conduct to take appropriate measures to ensure that other responsible international persons cease their respective wrongful conduct. In situations in which shared responsibility arises out of collective rather than independent conduct,¹⁵⁴ which includes the situations covered by Principles 6–8, responsible parties may be able to exert some influence over their partners and induce them to cease their wrongful conduct. Therefore, the obligation to take measures to ensure cessation by other responsible international persons requires more effort from international persons that have means at their disposal to exert influence over the conduct of others.
5. The obligation stated in paragraph 2 of Principle 9 finds support in practice in different fields of international law. In the context of multinational military operations, international persons have an obligation to ‘exert their influence, to the degree possible, to stop violations’.¹⁵⁵ In a case brought before British courts by the Campaign against Arms Trade, it was held that ‘[a]rms producing and exporting states can be considered particularly influential in “ensuring respect” for international humanitarian law’ and ‘should therefore exercise particular caution to ensure that their export is not used to commit serious violations’.¹⁵⁶ In the *Eurotunnel* arbitration, the Tribunal ruled that both the UK and France were responsible for a breach of the obligation to maintain conditions of normal security and public order in and around the Coquelles terminal, which was incumbent on both states.¹⁵⁷ Even though the UK did not have the competence to authorize actions in any form in and around the Coquelles terminal, which was situated on French territory, the Tribunal noted that it could have ‘undertaken certain actions to try to induce France to comply with the obligations resting on both respondents’.¹⁵⁸ An obligation of cessation in this situation would entail that the UK take appropriate measures to induce France to cease its wrongful conduct

¹⁵³ *M.S.S. v. Belgium and Greece*, *supra* note 138. See den Heijer, ‘Refolement’, in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 481, at 504.

¹⁵⁴ See the commentary to Principle 2, para. 1.

¹⁵⁵ M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), vol. 1, at 509 (Rule 144); see also Boutin, ‘Responsibility’, *supra* note 102.

¹⁵⁶ *R. (Campaign against Arms Trade) v. Secretary of State for International Trade* [2017] EWHC 1726 (Admin), [2019] EWCA Civ 1020, para. 21.

¹⁵⁷ *Eurotunnel Arbitration*, *supra* note 59.

¹⁵⁸ Baetens, ‘Invoking, Establishing and Remediating State Responsibility in Mixed Multi-Party Disputes: Lessons from Eurotunnel’, in C. Chinkin and F. Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015) 437. The Tribunal noted that the United Kingdom (UK) had failed to show that it had done ‘everything within its power to bring a clearly unsatisfactory situation promptly to an end’ (para. 318).

and to maintain public order around the Coquelles terminal on French territory. Other examples may be found in the practice of wrongful extradition by one state to another state where an individual will be subjected to treatment contrary to international human rights law.¹⁵⁹ In *Israil v. Kazakhstan*, the Human Rights Committee requested Kazakhstan 'to put in place effective measures for the monitoring of the situation of the author of the communication, in cooperation with the receiving State [China]',¹⁶⁰ and in *Kalinichenko v. Morocco*, the Committee against Torture urged Morocco to establish 'an effective follow-up mechanism to ensure that the complainant is not subjected to torture or ill-treatment' in Russia.¹⁶¹ Finally, in *Ng v. Canada*, the Human Rights Committee requested Canada to 'make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the [USA] to ensure that a similar situation does not arise in the future'.¹⁶²

Principle 10

Reparation in situations of shared responsibility

Each international person sharing responsibility is under an obligation to make full reparation for the indivisible injury caused by the single or multiple internationally wrongful acts, unless its contribution to the injury is negligible.

Commentary

1. Principle 10 provides that each international person sharing responsibility has an obligation to provide full reparation for the indivisible injury caused by all of them. An obligation to provide full reparation entails an obligation to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.¹⁶³ Principle 10 extends this obligation, as codified in Articles 31 of the ARSIWA and the ARIO, to an injury caused by multiple responsible international persons.
2. Under Principle 10, the shared obligation to provide full reparation is borne equally by each of the responsible international persons. This indicates that

¹⁵⁹ See Constantinides, 'Extradition', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 128, at 150–151.

¹⁶⁰ Human Rights Committee, *Israil v. Kazakhstan*, Communication no. 2024/2011, UN Doc. CCPR/C/103/D/2024/2011 (2011), para. 11.

¹⁶¹ Committee against Torture, *Kalinichenko v. Morocco* (Decision), Communication no. 428/2010, UN Doc. CAT/C/47/D/428/2010 (2011), para. 17.

¹⁶² Human Rights Committee, *Ng v. Canada*, Communication no. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994), para. 18.

¹⁶³ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 9, at 47; see also, commentary to Art. 31 ARSIWA, para. 3.

the injured party can claim full reparation from any of these international persons. The obligation of each responsible international person to provide full reparation is complemented by Principle 12, according to which any international person that has made full reparation for an indivisible injury has a right of recourse against all other international persons that share responsibility for that injury.

3. The ILC has not clearly recognized the possibility of claiming full reparation from each responsible international person in situations of shared responsibility. In its commentaries to Article 47 of the ARSIWA, the ILC emphasizes that ‘terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal systems and analogies must be applied with care’.¹⁶⁴ The possibility of claiming full reparation from each responsible international person in situations of shared responsibility provided by Principle 10 does not contradict the established rule that international persons must provide full reparation for the injury caused by their internationally wrongful act. Moreover, in its commentaries, the ILC does suggest that ‘international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault’.¹⁶⁵ In the words of the ILC, ‘unless some part of the injury can be shown to be severable in causal terms’,¹⁶⁶ reparation should be provided for the whole injury caused.
4. While the present Principles do not transpose common domestic law doctrines of ‘joint’, ‘joint and several’ or ‘solidary’ liability for indivisible damage¹⁶⁷ to international law, the rationale for such a principle in domestic legal systems – in particular, to offer the victim of the harm the maximum possible chance of having his harm properly and fully compensated’,¹⁶⁸ – is comparable to the rationale behind Principle 10. The primary justification for the obligation to make full reparation for all responsible international persons in situations of shared responsibility is the protection of injured persons that, given the limited access to international courts, would otherwise have no remedy. In situations of shared responsibility, it should not be for the injured

¹⁶⁴ Commentary to Art. 47 ARSIWA, para. 3.

¹⁶⁵ Commentary to Art. 31 ARSIWA, para. 12.

¹⁶⁶ Commentary to Art. 31 ARSIWA, para. 13.

¹⁶⁷ See European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (2005), Art. 9:101; C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009), Art. 4:103(2); Commission on European Contract Law, *Principles of European Contract Law*, Part III (2003), Art. 10:102(2); Alford, ‘Apportioning Responsibility among Joint Tortfeasors for International Law Violations’, 38 *Pepperdine Law Review* (2011) 233, at 245; Noyes and Smith, ‘State Responsibility and the Principle of Joint and Several Liability’, 13 *Yale Journal of International Law* (1988) 225, at 251–254; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, paras 66–72, Separate Opinion of Judge Simma.

¹⁶⁸ Noyes and Smith, *supra* note 167, at 254; see also Commission on European Contract Law, *supra* note 167, at 64; von Bar and Clive, *supra* note 167, at 978: ‘[I]n order to protect the victim of damage caused by several people ... the obligation of reparation arising out of damage is solidary.’

person to ‘prove how much damage each did, when it is certain that between them they did all’.¹⁶⁹ The injured person also ‘should not be required to prove which particular elements of damage were attributable to each’.¹⁷⁰ The obligation of each responsible international person sharing responsibility to make full reparation contributes to the securing of the remedial function of international responsibility. Although the protection of the rights of injured persons is not the only purpose of the law of international responsibility,¹⁷¹ it is one of its primary functions.

5. The protection of the position of injured persons is particularly important in light of the practical hurdles often present in situations of shared responsibility, such as the possibility that a claim may not be brought against all responsible international persons. Moreover, an obligation of full reparation for all responsible international persons that share responsibility can contribute to the protection of the interests of injured parties by inducing international persons to agree on the apportionment of responsibility *ex ante*.¹⁷² The practice of the EU provides an illustration in this regard. In particular, the possibility of joint and several responsibility may have been one of the reasons why the EU has developed a practice of attaching special ‘declarations of competence’ to international agreements to which both the EU and/or its member states are parties.¹⁷³
6. The obligation stated in Principle 10 finds support in practice and doctrine. In situations of shared responsibility for a single internationally wrongful act, the application of the established rules on reparation results in an obligation of each responsible person to provide full reparation. The obligation of reparation in Articles 31 of the ARSIWA and the ARIO requires a responsible international person to ‘make full reparation for the injury caused by its internationally wrongful act’. When a single wrongful act for

¹⁶⁹ *Summers v. Tice*, 33 Cal. 2d 80 (1948), at 85–86; see also *Earnshaw & Others Case (Zafiro Case) (U.K. v. U.S.)*, 30 November 1925, reprinted in UNRIIAA, vol. 6 (2006) 160, at 164: ‘[W]e do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the Zafiro.’

¹⁷⁰ Third Report on State Responsibility, *supra* note 23, para. 276(c).

¹⁷¹ See the discussion on the private and public law dimensions of international responsibility in Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, 34 *Michigan Journal of International Law* (2013) 359, at 400–403.

¹⁷² See, e.g., Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3, Art. 6, Annex IX, which is the result of firm opposition by EU member states at the Law of the Sea Conference to a proposed general rule of joint and several liability. See J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (2001), at 150.

¹⁷³ Ahlborn, ‘To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States’, 88 *Die Friedenswarte – Journal of International Peace and Organization* (2013) 45, at 64; see also Kuijper and Paasivirta, ‘Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations’, 1 *IOLR* (2004) 111, at 120, who assert that the threat of joint and several liability in UNCLOS, *supra* note 172, Art. 6, Annex IX ‘is a good incentive for the Community and its Member States to provide prompt and truthful information on demand’ about where responsibility lies.

which multiple actors are responsible caused the whole (indivisible) injury, all responsible actors are under an obligation to make full reparation for the whole injury.¹⁷⁴ In situations of shared responsibility for multiple internationally wrongful acts, when each contribution would be by itself sufficient to cause the whole damage (concurrent contributions), an obligation of full reparation of each responsible person can also be inferred from the above-mentioned established rules on reparation because each conduct could have caused the whole injury. In situations of cumulative contributions, Principle 10 is justified by the need to protect injured persons, and finds support in practice.

7. In the *Corfu Channel* case, the ICJ did not reduce the reparation owed by Albania to the UK even though it was evident that Albania's conduct was only one of the factors that led to the explosions (the other one being the laying of the mines by a third state).¹⁷⁵ Likewise, the UN Compensation Commission considered that Iraq had to fully compensate the damage caused concurrently by Iraq's invasion and occupation of Kuwait and by the trade embargo and related measures.¹⁷⁶ In his dissenting opinion to the *Oil Platforms* case, Judge Bruno Simma found 'no objection to holding Iran responsible for the entire damage even though it did not directly cause it all'.¹⁷⁷ Moreover, based on a 'modest study of comparative tort law', he concluded that the principle of joint and several liability (which would allow for Iran to be held responsible for the full damage) 'can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1(c) of the Court's Statute'.¹⁷⁸
8. In the *Nauru* case, Nauru instituted proceedings against Australia for the way Nauru had been administered, which had resulted in the mining out of Nauru's phosphate lands. Since the territory of Nauru had been administered through a common organ of Australia, New Zealand and the UK, Australia had 'raised the question whether the liability of the three states would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority'.¹⁷⁹ In his separate opinion, Judge Mohamed Shahabuddeen supported Nauru's contention that the three

¹⁷⁴ Third Report on State Responsibility, *supra* note 23, para. 277; Talmon, *supra* note 60, at 211; d'Argent, 'Reparation, Cessation', *supra* note 151, at 238.

¹⁷⁵ Third Report on State Responsibility, *supra* note 23, para. 34.

¹⁷⁶ UN Compensation Commission, Governing Council Decision, Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were Also a Cause, UN Doc. S/AC.26/1992/15_*/, 4 January 1993, at 4, para. 9: '[T]he full extent of a loss, damage, or injury may be attributed both to Iraq's unlawful invasion and occupation of Kuwait and to the trade embargo and related measures; they are parallel causes.' See Pusztai, *supra* note 20, at 211.

¹⁷⁷ *Oil Platforms*, *supra* note 167, para. 73, Separate Opinion of Judge Simma.

¹⁷⁸ *Ibid.*, para. 74.

¹⁷⁹ *Certain Phosphate Lands in Nauru*, *supra* note 24, para. 48.

- states were bound to joint and several obligations and could be held jointly and severally responsible for the way Nauru had been administered.¹⁸⁰
9. In a number of cases before international courts and tribunals, one of the parties to proceedings has based its argument on the notion of joint and several liability.¹⁸¹ In *Aerial Incident of 27 July 1955*, the USA referred to Article 38(1)(c) and (d) of the ICJ Statute when it asserted in its pleadings: '[I]n all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage.'¹⁸² In *Treatment in Hungary of Aircraft and Crew of United States of America*, the USA asked the ICJ to decide that Hungary and the Soviet Union were jointly and severally responsible for the damage caused to the US,¹⁸³ and in the *Legality of Use of Force* cases brought by Serbia and Montenegro against 10 different states, Serbia and Montenegro argued that the respondent states were jointly and severally responsible for the actions of the NATO military command structure.¹⁸⁴
 10. In the *Eurotunnel* arbitration, the claimants argued that joint and several liability of France and the UK 'followed from the fact that the [relevant] Instruments contemplate the Governments cooperating and coordinating their actions in making appropriate provisions in those fields'.¹⁸⁵ The Tribunal rejected the argument that joint and several liability resulted *per se* from the cooperative character of the obligations in the field of security and frontier controls, though it did eventually rule that both France and the UK were responsible for their failure to maintain conditions of normal security and public order in and around the Coquelles terminal. The claimants were therefore entitled to recover the losses resulting directly from this breach, to be assessed in a separate phase.¹⁸⁶ In another example, the International Tribunal for the Law of the Sea's (ITLOS) Seabed Disputes Chamber affirmed that multiple sponsoring states can incur joint and several liability when they contribute to a common damage.¹⁸⁷ In this case, this conclusion was

¹⁸⁰ *Ibid.*, paras. 283–286, Separate Opinion of Judge Shahabuddeen.

¹⁸¹ Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', in E. Rieter and H. de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2012) 199.

¹⁸² *Aerial Incident of 27 July 1955 (USA v. Bulgaria)*, Merits – Memorial submitted by the United States Government, 2 December 1958, Part I, 229.

¹⁸³ *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People's Republic; United States of America v. Union of Soviet Socialist Republic)*, Application Instituting Proceedings, 16 February 1954, ICJ Reports (1954) 10.

¹⁸⁴ *Legality of Use of Force (Serbia and Montenegro)*, *supra* note 66, at 40.

¹⁸⁵ *Eurotunnel Arbitration*, *supra* note 59, para. 165.

¹⁸⁶ *Ibid.*, at para. 319. This next phase, concerned with the determination and allocation of damages, was terminated when the parties reached a settlement, the precise terms of which are not publicly available. See Baetens, *supra* note 158.

¹⁸⁷ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, para 201. See Plakokefalos, 'Environmental Protection of the Deep Seabed', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 380, at 393.

also based on Article 139(2) of the Convention on the Law of the Sea, which explicitly provides for joint and several liability when international persons act together.

11. Principle 10 also finds considerable support in scholarship. Many scholars have advocated in favour of an obligation to provide full reparation incumbent on each responsible international person in situations of shared responsibility or have argued that international law provides bases for such an obligation.¹⁸⁸
12. Principle 10 stipulates an exception to the obligation of each responsible international person to provide full reparation for the indivisible injury caused in situations in which the contribution of the international person to the injury is negligible. Whether a contribution to indivisible injury is negligible depends on the circumstances of the case as well as on the relative importance of the contribution in relation to the injury. For instance, if an international person provided only minor logistical support to a major military operation conducted by other international persons, its contribution may be negligible for the purposes of establishing the obligation of reparation. This is in line with the ILC commentary to Article 16 of the ARSIWA, which recognizes that where ‘the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered [an international person] should not necessarily be held to indemnify the victim for all the consequences of the act’.¹⁸⁹ On the other hand, in the *Urgenda* case, the Supreme Court of the Netherlands rejected the argument of the Dutch State according to which, because its contribution to climate change through emissions of greenhouse gases was minor, it should not bear responsibility at all in relation to climate change. While this statement appears to refer to the primary obligations of the Netherlands, it would seem to be equally relevant for the determination of responsibility in terms of secondary rules.¹⁹⁰
13. When no obligation of full reparation arises because the contribution to injury is negligible, the international person concerned may still be under an obligation to provide partial reparation for the indivisible injury caused,

¹⁸⁸ Noyes and Smith, *supra* note 167, at 225; B. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (1988), at 59–62; Graefrath, *supra* note 92, at 380; Yee, ‘The Responsibility of States Members of an International Organization for Its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership’, in Ragazzi, *supra* note 17, 435; Steinberger, ‘The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member States’ Membership of the WTO’, 17 *EJIL* (2006) 837; Chinkin, *supra* note 60, at 181; Voigt, ‘State Responsibility for Climate Change Damages’, 77 *Nordic Journal of International Law* (2008) 1, at 19–20; Orakhelashvili, ‘Division of Reparation between Responsible Entities’, in Crawford *et al.*, *supra* note 17, 647; d’Argent, ‘Reparation, Cessation’, *supra* note 151; Vandenhole, ‘Shared Responsibility of Non-State Actors: A Human Rights Perspective’, in N. Gal-Or, C. Ryngaert and M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (2015) 75.

¹⁸⁹ Commentary to Art. 16 ARSIWA, para. 10.

¹⁹⁰ See *The Netherlands v. Stichting Urgenda*, *supra* note 81.

which would be apportioned based on an estimation of its contribution to the injury.¹⁹¹ The extent of the obligation of reparation for injury in case of negligible contribution may be decided on a case-by-case basis, taking into account the nature of the injury and of the respective contributions as well as standards of remoteness of damage, foreseeability, fault and reasonableness.

Principle 11

Forms of reparation in situations of shared responsibility

1. Full reparation for the indivisible injury caused shall take the form of restitution, compensation and satisfaction, either singly or in combination.
2. When one or more of the responsible international persons is under an obligation to make restitution, each of the other responsible international persons are under an obligation to ensure that restitution is made.
3. In so far as the damage is not made good by restitution, each of the responsible international persons is under an obligation to compensate for the indivisible injury caused.
4. When full reparation entails an obligation to give satisfaction, this obligation is owed by each of the responsible international persons.

Commentary

1. Principle 11 concerns the different forms of reparation in situations of shared responsibility. It is based on Articles 34 of the ARSIWA and the ARIO as well as on how these provisions are further specified in Articles 35–37 of the ARSIWA and the ARIO, and it extends those provisions to situations in which multiple international persons cause an indivisible injury.
2. Principle 11, paragraph 1, spells out the forms of reparation as they are established in the law of international responsibility. They consist of restitution, compensation and satisfaction and can be used either singly or in combination with one another in order to achieve full reparation.¹⁹² Paragraph 1 of Principle 11 is premised on the view that international persons sharing responsibility may be under an obligation to provide distinct forms of reparation.
3. In situations of shared responsibility, only some of the responsible international persons may be in a position to make restitution in kind. For instance, an individual can only be released by the international person that has custody of him or her. As restitution must be provided when materially possible,¹⁹³ an international person in a position to provide restitution has an

¹⁹¹ See, e.g., *Lliuya v. RWEAG*, District Court Essen, 15 December, 2016, where a Peruvian farmer argued that 0.47 per cent of his climate change related damages should be compensated by the German Energy company RWE because it contributed to a degree of 0.47 per cent to global greenhouse gases emissions.

¹⁹² Commentary to Art. 34 ARSIWA, para. 2.

¹⁹³ Arts 35 ARSIWA and ARIO.

obligation to do so. Pursuant to Principle 11, paragraph 2, other international persons sharing responsibility that are not in the position to provide restitution have an obligation to ensure that restitution is made by those international persons that are in a position to do so. As with the obligation to seek cessation stated in paragraph 2 of Principle 9, the conduct required by such an obligation may vary based on the degree of influence that the international persons can exert over the conduct of each other.¹⁹⁴

4. The obligation formulated in paragraph 2 of Principle 11 has been recognized in various cases. One example is the case of *Sayadi and Vinck v. Belgium* before the Human Rights Committee. Belgium had communicated personal information concerning two Belgian nationals to the relevant UN Sanctions Committee, on the basis of which they were unjustly placed on the corresponding UN sanctions list. The Human Rights Committee concluded that Belgium's conduct had resulted in a violation of the right to private life of Sayadi and Vinck,¹⁹⁵ with the consequence that Belgium should provide them with an effective remedy. The Human Rights Committee considered that even though Belgium itself was unable to remove their names from the Sanctions Committee's list, it was under the obligation 'to do all it can to have their names removed from the list as soon as possible, ... to make public the requests for removal ... [and] to ensure that similar violations do not occur in the future'.¹⁹⁶ Similarly, in the case of *Serrano Sáenz v. Ecuador*, the Inter-American Commission on Human Rights concluded that Ecuador had illegally detained Serrano Sáenz, had held him incommunicado and in inhumane conditions and had later illegally and summarily deported him to the USA, where the victim had been sentenced to death. The Commission recommended Ecuador 'take the necessary and timely measures, legal and diplomatic, with a view to the return of said person to his country of birth, from where he was arbitrarily deported'.¹⁹⁷ Another example of an obligation to make efforts to ensure that another international person provides restitution can be found in the case of *Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs* in which UK forces in Iraq had captured Rahmatullah and transferred him to the custody of US forces. The British Court of Appeal held that the UK had 'an international legal obligation to demand the return of the applicant'.¹⁹⁸
5. Principle 11, paragraph 3, provides for an obligation of compensation in situations in which restitution in kind is materially impossible or not sufficient

¹⁹⁴ ICRC, *supra* note 120, para. 164.

¹⁹⁵ Human Rights Committee, *Sayadi and Vinck v. Belgium*, Communication no. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (2008), para. 10.13.

¹⁹⁶ *Ibid.*, para. 12.

¹⁹⁷ Inter-American Commission on Human Rights, *Serrano Sáenz v. Ecuador*, Case 12.525, Report no. 84/09, 6 August 2009, para. 80(1).

¹⁹⁸ *Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs & Another* [2011] EWCA Civ 1540, 14 December 2011, para. 35.

to wipe out all of the consequences of the wrongful act(s).¹⁹⁹ Each of the responsible international persons is then under an obligation to compensate for the indivisible injury caused. In situations in which an international person can provide restitution but is unwilling to do so, other international persons will be under an obligation to provide compensation for the indivisible injury pursuant to paragraph 3 of Principle 11. In the case of *Al-Jedda v. United Kingdom*, the ECtHR ordered the UK to provide monetary compensation for the wrongful detention of Al-Jedda in Iraq,²⁰⁰ although the USA, as a joint occupying power, also contributed to the injury.²⁰¹ In the *Mothers of Srebrenica* case, the Dutch Supreme Court ruled that the Netherlands should compensate for the damage caused by not giving the male refugees inside the UN compound the option of staying in the compound and thus denying them the 10 per cent chance of not being exposed to the inhumane treatment and executions by the Bosnian Serbs.²⁰² While the UN was likely also responsible for not preventing the deaths of the male refugees, the Netherlands alone was held to compensate.²⁰³

6. As the *Al-Jedda* and *Mothers of Srebrenica* cases illustrate, the performance of the obligation to provide full compensation can be claimed from each international person that shares responsibility. This is of particular relevance if international proceedings are instituted against only one of the responsible international persons – for example, as a result of jurisdictional hurdles that make it impossible to bring all of the responsible international persons before a particular international court or tribunal. In the case that multiple international persons are brought before an international court or tribunal, full reparation can be claimed from all of them together. In such a situation, the court itself may choose to apportion compensation between the responsible international persons, so that they jointly provide full reparation to the injured person. Such an approach can be observed in the case law of the ECtHR when cases are brought against multiple states parties to the ECHR.²⁰⁴ For example, in *M.S.S. v. Belgium and Greece*, both Belgium and Greece were found responsible in relation to the injury of the asylum seeker who Belgium had transferred to Greece, where he was subjected to inhumane detention conditions. The ECtHR apportioned compensation of non-pecuniary damages on an uneven basis between Greece and Belgium, the latter being obliged to pay a considerably larger sum.²⁰⁵ Also in the *Rantsev* case, involving

¹⁹⁹ Arts 36 ARSIWA and ARIO.

²⁰⁰ *Al-Jedda v. United Kingdom*, *supra* note 49, para. 114.

²⁰¹ *Ibid.*, para. 67.

²⁰² Supreme Court of the Netherlands, ECLI:NL:HR:2019:1284, 19 July 2019, para. 5.1.

²⁰³ See also the commentary to Principle 4, para. 8. The applicants had initially brought claims against the UN before the Dutch courts, but the Dutch Supreme Court, as the final instance, upheld the immunity of the UN (Supreme Court of the Netherlands, Case no. 10/04437, 13 April 2012, paras 4.3.6–4.3.14).

²⁰⁴ Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights', 4 *Journal of International Dispute Settlement* (2013) 361, at 378–381.

²⁰⁵ *M.S.S. v. Belgium and Greece*, *supra* note 138, paras 402–423; den Heijer, 'Refoulement', *supra* note 153, at 504.

shared responsibility of Cyprus and Russia, the ECtHR apportioned the obligation to pay compensation unevenly.²⁰⁶

7. Principle 11, paragraph 4, indicates that when full reparation entails an obligation to provide satisfaction, this obligation is owed by each of the responsible international persons and is borne equally by each of them. Satisfaction may consist of an acknowledgement of the breach, an expression of regret or a formal apology.²⁰⁷ After the destruction of the Chinese embassy in Belgrade by bombings by NATO states in 1999, the British prime minister apologized to the Chinese government even though the missiles had not been fired by a British plane.²⁰⁸ In the case of *Nada v. Switzerland*, the ECtHR found that ‘there has been a violation of Article 13 of the Convention taken in conjunction with Article 8’,²⁰⁹ after a prior finding that the relevant Security Council Resolution 1390 (2002) imposed an obligation on UN member states to take measures capable of breaching human rights.²¹⁰ This finding of a violation of the ECHR could be considered satisfaction as a form of reparation to be borne by both Switzerland and the UN.²¹¹

Principle 12 *Right of recourse*

1. An international person that has made full reparation for an indivisible injury has a right of recourse against all other international persons that share responsibility for that injury.
2. When an international organization shares responsibility with other international persons, this Principle is without prejudice to the rules of that organization.

Commentary

1. Principle 12 states that an international person that has provided full reparation to an injured person has a right to seek contribution from other

²⁰⁶ *Rantsev v. Cyprus and the Russian Federation*, *supra* note 83, paras 341–343; see also Gallagher, *supra* note 83, at 560.

²⁰⁷ On the different modalities by which satisfaction may be expressed, see the commentary to Arts 37 ARSIWA and ARIO.

²⁰⁸ *Legality of Use of Force (Serbia and Montenegro)*, *supra* note 66, at 16; Nollkaemper, ‘Issues of Shared Responsibility’, *supra* note 181.

²⁰⁹ ECtHR, *Nada v. Switzerland*, Appl. no. 10593/08, Judgment of 12 September 2012, para. 214.

²¹⁰ *Ibid.*, para. 172.

²¹¹ The applicants in the *Nada* case had not submitted any claim in respect of pecuniary or non-pecuniary damage, which is why the Court did not award any further reparation (*ibid.*, paras 239–240). On declaratory judgments as a form of satisfaction, see the commentary to Art. 37 ARSIWA, para. 6 (referring to the *Corfu Channel* case).

responsible international persons. The other international persons that share responsibility are under a corresponding obligation to compensate the international person that has made full reparation.

2. The possibility of a right of recourse in situations of shared responsibility has been acknowledged in the work of the ILC on the law of international responsibility and, to a certain extent, in practice. In his Third Report, Special Rapporteur Crawford mentioned that '[w]here two or more [international persons] engage in a common activity and one of them is held responsible for damage arising, it is natural for that [international person] to seek a contribution from the others on some basis'.²¹² An express provision has been adopted in the Convention on Liability for Damage Caused by Space Objects, which stipulates that:

In all cases of joint and several liability ... the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.²¹³

A specific example is the payments made by the UK and New Zealand to Australia in respect of its settlement in relation to the *Nauru* case, even though Australia never formally accepted legal responsibility when it agreed to pay Nauru.²¹⁴

3. Where the obligation of full reparation for each responsible international person that shares responsibility safeguards the interests of injured persons, a right of recourse protects a responsible international person from having to bear the entire burden of reparation for damage caused by a plurality of actors. In that sense, 'the possibility to subsequently sue the other wrongdoers for their individual contributions ... reduce[s] the costs of shared responsibility for the co-responsible actors'.²¹⁵ In domestic legal systems, a right of recourse is sometimes recognized 'on the basis of mandate, negotiorum gestio or unjustified enrichment'.²¹⁶
4. Pursuant to Principle 12, it is for the international person seeking recourse to justify that it is entitled to partial compensation by one or more of the other international persons sharing responsibility and to determine the extent thereof. The extent of such compensation depends on the circumstances

²¹² Third Report on State Responsibility, *supra* note 23, para. 276(d). In the *International Tin Council* case, Lord Templeman noted that '[a]n international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice'. UK, House of Lords, *Maclaine Watson & Co Ltd v. International Tin Council* (26 October 1989), [1990] 2 AC 418, at 480.

²¹³ Convention on Liability for Damage Caused by Space Objects 1972, 961 UNTS 187, Art. IV(2).

²¹⁴ Third Report on State Responsibility, *supra* note 23, para. 276(d), with references to the Settlement Agreement of 10 August 1993, 32 ILM 1471 (1993).

²¹⁵ Ahlborn, 'To Share or Not to Share?', *supra* note 173, at 69.

²¹⁶ Commission on European Contract Law, *supra* note 167, at 69.

of the case, including the nature of the obligation and the extent of the contribution to the injury, and other relevant factors in the determination of responsibility such as remoteness of damage, foreseeability, fault and reasonableness.²¹⁷ In the case of concurrent contributions, where the equivalent conduct of each responsible person could have alone caused the injury, an international person that has provided full reparation may not be able to justify a claim of contribution against others because its conduct would have been sufficient to bring about the whole injury. However, the fact that indivisible damage has been caused by concurrent contributions could also be an argument for proportionate allocation among the responsible international persons, considering that each is equally at fault in such a situation.

5. Principle 12, paragraph 2, provides that when an international organization shares responsibility with other international persons, this Principle is without prejudice to the rules of the organization.²¹⁸ Those rules may contain a right of recourse and the modalities for determining the extent of the compensation due by the other international persons that share responsibility.

Principle 13

Shared responsibility for serious violations of a peremptory norm of general international law

1. When multiple international persons commit one or more internationally wrongful act(s) that constitute a serious breach of an obligation arising under a peremptory norm of general international law and contribute to an indivisible injury, all other international persons are under an obligation:
 - (a) to cooperate to bring to an end the serious breach, and
 - (b) to not recognize as lawful a situation created by the serious breach, nor render aid or assistance in maintaining that situation.
2. For the purpose of paragraph 1, multiple internationally wrongful acts may cumulatively constitute a serious breach of an obligation arising under a peremptory norm of general international law resulting in an indivisible injury.

Commentary

1. Principle 13 restates the specific consequences that arise when multiple international persons commit a serious violation of a peremptory norm of general international law. It reflects Articles 40 and 41 of the ARSIWA and Articles 41 and 42 of the ARIIO, as applied in situations of shared responsibility. Principle 13 extends the scope of those provisions by including

²¹⁷ Commentary to Art. 31 ARSIWA, para. 10.

²¹⁸ On the legal nature of the rules of the organization, see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', 8 *IOLR* (2011) 397; see also Yee, *supra* note 188, at 442–443, discussing the internal allocation of responsibility between international organizations and their member states.

obligations for international organizations in relation to serious breaches of peremptory norms by states.²¹⁹ Accordingly, international organizations are under an obligation to seek to bring an end to serious violations of peremptory norms committed by states and not to recognize as lawful a situation created by the breach nor to render aid or assistance in maintaining that situation.

2. Principle 13, paragraph 1, makes explicit that the obligations of all other international persons are due in relation to each of the international persons that have committed a serious violation of a peremptory norm and share responsibility. This is the case when a single internationally wrongful act engages the responsibility of multiple international persons under Principle 3. For instance, a joint military operation that constitutes an unlawful act of aggression engages the shared responsibility of each state to which the wrongful conduct is attributed. When multiple internationally wrongful acts are involved, as stated in Principle 4, Principle 13 applies when each contribution to injury individually reaches the threshold of a serious violation as is understood by the existing rules on international responsibility.
3. Article 40(2) of the ARSIWA and Article 41(2) of the ARIO define a breach as serious 'if it involves a gross or systematic failure by the responsible State to fulfil the obligation'. In practice, breaches of peremptory norms can consist of an accumulation of wrongful acts (such as discrimination and abuse) that, taken individually, do not qualify as gross or systematic but that, cumulatively, can reach the required threshold of gravity to qualify as a serious breach.²²⁰ This is why Principle 13, paragraph 2, provides that in situations of shared responsibility a serious breach of a peremptory norm may also consist of the wrongful conduct of multiple international persons that cumulatively constitutes a serious breach of a peremptory norm of international law, but which would not reach the threshold of a serious breach when considered independently. Paragraph 2 of Principle 13 thus extends the existing rules of international responsibility, which could be considered 'too narrow in scope to cover serious breaches reached by multiple actors cumulatively'.²²¹
4. The failure to comply with the obligation to cooperate to bring a serious breach to an end, or the obligation not to recognize nor to render aid or assistance in maintaining a situation created by a serious breach, may lead to shared responsibility for international persons that fail to comply with those obligations.

²¹⁹ Art. 41 ARSIWA provides for obligations of states in relation to serious breaches by states, and Art. 42 ARIO provides for obligations of states and international organizations in relation to serious breaches by international organizations.

²²⁰ Wyler and Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 284, at 291.

²²¹ *Ibid.*

Part IV: Implementation of Shared Responsibility

Principle 14

Invocation of shared responsibility

1. An injured international person is entitled to invoke the responsibility of each of the international persons that share responsibility.
2. An international person other than the injured international person is entitled to invoke the responsibility of each of the international persons that share responsibility if the obligation breached is owed to a group of international persons that includes that international person or to the international community as a whole.
3. An injured person that is not an international person is entitled to invoke the responsibility of each of the responsible international persons that share responsibility if the obligation breached is owed to that person individually.

Commentary

1. Principle 14 concerns the invocation of shared responsibility. Subject to a few exceptions provided for below, the principles relating to invocation of shared responsibility are largely patterned after those relating to invocation of responsibility in general. The entitlement to invoke the responsibility of each responsible international person reflects the rules laid down in Article 47 of the ARSIWA and Article 48 of the ARIO.
2. The right to invoke the responsibility of each of the responsible persons is without prejudice to the questions of whether a single claim is brought against a plurality of responsible states as such²²² or whether multiple claims are brought against each of multiple responsible international persons.²²³ Whether a single claim or multiple claims are brought depends on the injured persons and may be influenced by the applicable procedural law of the relevant court or tribunal.
3. Principle 14, paragraph 1, indicates that an injured international person, as defined in Article 42 of the ARSIWA and Article 43 of the ARIO, is entitled to invoke the responsibility of each international person that shares responsibility. In accordance with Principles 9 and 10, this entails that an injured international person may be entitled to claim cessation and assurances and guarantees of non-repetition from each responsible international person as well as full reparation for the indivisible injury it has suffered.
4. Principle 14, paragraph 2, provides that an international person other than an injured international person, as defined in Article 48 of the ARSIWA

²²² See, e.g., *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, ICJ Reports (1954) 19.

²²³ See, e.g., the *Legality of Use of Force* cases, where the Federal Republic of Yugoslavia brought claims against 10 North Atlantic Treaty Organization (NATO) member states separately.

and Article 49 of the ARIО, is entitled to invoke the responsibility of each of the international persons that share responsibility. Under the law of international responsibility, such international persons are entitled to claim cessation and assurances and guarantees of non-repetition and full reparation on behalf of the injured person.²²⁴ While the ARSIWA and the ARIО do not explicitly make clear that invocation under Article 48 of the ARSIWA and Article 49 of the ARIО is possible against a plurality of responsible persons, they do not exclude such invocation.²²⁵ Paragraph 2 of Principle 14 makes this possibility explicit for situations of shared responsibility.

5. Principle 14, paragraph 3, addresses the invocation by injured individuals and other persons, which is not dealt with in the ARSIWA and the ARIО.²²⁶ The scope of the present Principles is limited to states and international organizations as actors that may incur shared responsibility, but the entitlement to invoke responsibility under the Principles extends to all persons that have rights under international law. In many cases involving shared responsibility, obligations are not only owed to states or international organizations but also to individuals or other entities, such as corporations. This is particularly relevant for persons that have rights under human rights law and international investment law.
6. Principle 14, paragraph 3, restricts the possibility of invocation by individuals and other persons to situations in which a state or an international organization owes obligations to such persons and acts in breach of such obligations. Article 42(b) of the ARSIWA and Article 43 of the ARIО, which address the invocation of responsibility in relation to obligations owed to a group of states or international organizations, are deemed to have no legal relevance in relation to individuals. Moreover, the situations addressed in Article 48 of the ARSIWA and Article 49 of the ARIО do not apply to invocation of shared responsibility by persons other than states or international organizations. There is no practice that would support an extension of those provisions to non-injured persons that are not states or international organizations. Furthermore, the policy rationale underlying Article 48 of the ARSIWA and Article 49 of the ARIО – namely, the protection of a collective interest – does not necessarily apply to persons other than states or international organizations.
7. While under Principle 14 an injured (international) person may bring claims against multiple responsible persons, it cannot recover, by way of compensation, more than the injury it has suffered.²²⁷ If an injured person has recovered full reparation in the form of compensation from one responsible

²²⁴ Art. 48(2) ARSIWA and Art. 49(4) ARIО.

²²⁵ Vermeer-Künzli, 'Invocation of Responsibility', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 251, at 252.

²²⁶ Art. 33(2) ARSIWA and Art. 33(2) ARIО.

²²⁷ Art. 47 ARSIWA and Art. 48 ARIО.

international person, it can no longer claim compensation from other international persons that share responsibility. The prohibition of double recovery is justified by the fact that the obligation to make reparation and the right to obtain full reparation ‘is limited by the damage suffered’.²²⁸

8. The invocation of responsibility according to Principle 14 must be compliant with the conditions and procedures provided by Articles 43–46 of the ARSIWA and Articles 44–47 of the ARIO as well as those conditions and procedures applicable in special regimes. In the specific context of shared responsibility, however, such conditions and procedures can constitute an impediment to the implementation of shared responsibility. For instance, in cases of diplomatic protection, the local remedies rule may require that the state that invokes the responsibility of multiple other states can only do so after local remedies in all responsible states are exhausted. The requirement of the exhaustion of local remedies in several jurisdictions may apply in cases brought under human rights instruments.²²⁹ In situations of shared responsibility, it should be considered whether this requirement is ‘contrary to the notion of reasonableness on which the rule arguably relies and which limits exhaustion to remedies that are reasonably available to the injured individual’.²³⁰
9. Moreover, the rules of jurisdiction and admissibility of international courts and tribunals may frustrate the invocation of responsibility in situations of shared responsibility. In particular, the ‘necessary third party’ rule, as articulated by the ICJ, can void the ability of an injured person to claim full reparation from any of the responsible international persons in accordance with Principle 10 and can therefore be an insurmountable obstacle for the implementation of these Principles.²³¹ This can be illustrated by the *East Timor* case in which the ICJ found that it could not exercise jurisdiction in relation to the claim brought by Portugal against Australia in view of the absence of Indonesia from the proceedings. While the Portuguese claim was not formulated in terms of shared responsibility, the alleged Australian wrong consisted of the conclusion of a treaty with Indonesia, which potentially could have resulted in a situation of shared responsibility. The Court’s finding that it could not exercise jurisdiction in view of the absence of Indonesia²³² effectively precluded a finding of shared responsibility.

²²⁸ Commentary to Art. 47 ARSIWA, para. 9; *Case Concerning the Factory at Chorzów*, *supra* note 163.

²²⁹ But see the draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47 + 1(2013)008rev2, Strasbourg, 10 June 2013, para. 40 (noting that the newly introduced Art. 36, para. 4, of the Convention ‘ensures that an application will not be declared inadmissible as a result of the participation of the co-respondent, notably with regard to the exhaustion of domestic remedies within the meaning of Article 35, paragraph 1, of the Convention’). The Court of Justice of the European Union rejected the Draft Agreement in Opinion 2/13, 18 December 2014 (EU:C:2014:2454).

²³⁰ Vermeer-Künzli, *supra* note 225, at 267.

²³¹ See, e.g., *Case of the Monetary Gold*, *supra* note 222.

²³² *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports (1995) 90, para. 34.

10. The effective implementation of the present Principles calls for a restrictive interpretation of the ‘necessary-third-party’ rule in situations of shared responsibility. The mere fact that a court could make a determination of responsibility in relation to one state, in a situation where that state may share responsibility with another state that is not party to the proceedings, in principle should not be a reason to abstain from the exercise of jurisdiction.²³³ This is supported by the fact that in the *Nauru* case the Court did not find that the necessary-parties rule presented a bar to the exercise of jurisdiction against Australia since ‘the interests of New Zealand and the UK do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s application’.²³⁴ The ‘necessary-third-party’ rule should be applied only when the responsibility of a state that is absent from the proceedings would form the very subject matter of a judgment, as was the case in *Monetary Gold*.²³⁵ Also, in the context of shared responsibility, the ‘necessary-third-party’ rule should not apply in relation to international persons that are formally outside the jurisdiction of the dispute settlement mechanism concerned, for the latter cannot be deemed to be able to pronounce on the responsibility of the third party excluded from its jurisdiction.²³⁶ This implies, for instance, that the necessary-parties rule does not apply to situations where an injured party institutes proceedings only against a responsible state that shares responsibility with an international organization, given that the court by definition could not exercise jurisdiction in relation to the international organization.²³⁷

Principle 15

Countermeasures in situations of shared responsibility

An international person entitled under the rules of international responsibility to take countermeasures may take such measures against each of the international persons that share responsibility.

Commentary

1. Principle 15 provides that an international person entitled to take countermeasures may do so against all international persons that share responsibility pursuant to Principle 2. As the commentary to Article 22 of the ARSIWA

²³³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 392, para. 88.

²³⁴ *Certain Phosphate Lands in Nauru*, *supra* note 24, para. 55.

²³⁵ *Case of the Monetary Gold*, *supra* note 222.

²³⁶ Nollkaemper and Jacobs, *supra* note 171.

²³⁷ Nollkaemper, ‘Issues of Shared Responsibility’, *supra* note 181, at 217–218; see also Palchetti, ‘Litigating Member State Responsibility: The Monetary Gold Principle and the Protection of Absent Organization’, 12 *IOLR* (2015) 468. See *Application of the Interim Accord of 13 September 1995 (the former Yugoslavia)*

provides, '[a]s a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State'.²³⁸ In situations of multiple responsible international persons, it may be warranted to take countermeasures against each of them. The objectives of restoring legality through the cessation of the wrongful act as well as the implementation of the obligation to provide full reparation similarly apply to countermeasures against the international persons that share responsibility pursuant to the present Principles.

2. It is possible for countermeasures to be taken against all responsible international persons in situations of shared responsibility that arise either from a single wrongful act under Principle 3 or from multiple wrongful acts under Principle 4.²³⁹ In the *Airbus* case, the World Trade Organization's (WTO) Appellate Body authorized the USA to take countermeasures against the EU and Airbus-producing countries Britain, France, Germany and Spain in response to illegal EU subsidies to Airbus.²⁴⁰ The authorization to take such countermeasures could be construed as relating to a single internationally wrongful act attributable to multiple international persons – that is, the payment of European subsidies that had adverse effects under Article 7.8 of the Agreement on Subsidies and Countervailing Measures.²⁴¹
3. An example of countermeasures in reaction to an indivisible injury caused by separate internationally wrongful acts may be found in the EU system to prevent, deter and eliminate illegal, unreported and unregulated fishing. On the basis of Regulation 1005/2008,²⁴² the EU can decide to subject multiple flag states, coastal states, port states and market states to sanctions for failing to comply with their international obligations in relation to fisheries conservation. In November 2013, the European Commission considered Korea and Curacao to be in breach of their obligations as flag states in relation to fishing by their vessels in the territorial waters of Ghana, whereas Ghana itself

Republic of Macedonia v. Greece), Judgment, 5 December 2011, ICJ Reports (2011) 644, paras 42–44 (in which the Court decided not to apply the indispensable third parties rule to NATO).

²³⁸ Commentary to Art. 22 ARSIWA, para. 4; see also commentary to Art. 49 ARSIWA, para. 4, and commentary to Art. 22 ARIQ, para. 2, indicating that this applies by analogy to international organizations.

²³⁹ Tams, 'Countermeasures against Multiple Responsible Actors', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility*, *supra* note 20, 312, at 323: 'It is perfectly possible to treat the two breaches as self-standing, each triggering its own consequences, and each triggering a right of the injured actor to implement responsibility, including by means of countermeasures.'

²⁴⁰ WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, 2 October 2019, WT/DS316/ARB.

²⁴¹ See also Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', in Nollkaemper and Plakokefalos, *Practice of Shared Responsibility*, *supra* note 25, 849, at 870 (noting that in the factual situation that led to the decision of the Appellate Body in *Turkey-Textiles*, Turkey and the EU both were responsible and that India could have taken countermeasures against both Turkey and the EU). Agreement on Subsidies and Countervailing Measures 1994, 1867 UNTS 14.

²⁴² Council Regulation (EC) no. 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Amending Regulations (EEC) nos 2847/93 (EC), 1936/2001 and 601/2004 and repealing Regulations (EC) nos 1093/94 and 1447/1999, OJ 2008 L 286/1.

was considered to have breached its obligations as a coastal state in relation to such fishing.²⁴³ The European Commission issued a formal warning to the states concerned, which could have resulted in trade sanctions against all of them if the situation had not improved.²⁴⁴

4. In principle, countermeasures against multiple states that share responsibility are subject to the conditions that apply under the ARIO and the ARSIWA to the taking of countermeasures.²⁴⁵ In the context of shared responsibility, additional considerations are warranted. First, the condition that an injured international person may only take countermeasures against a responsible international person to induce that international person to comply with its obligations as provided for in Principles 9 and 10 may lead to a differentiation of countermeasures against international persons sharing responsibility. The ability of multiple responsible international persons to cease the wrongful conduct or to provide reparation may differ, and this may have consequences for the legality of countermeasures in situations of shared responsibility. For instance, when the Security Council lists an individual on a counter-terrorism sanctions list, the implementing member state is individually not able to delist the individual but may be in a position to provide compensation.²⁴⁶ The legality of countermeasures in situations of shared responsibility will thus depend on an assessment of the extent to which each responsible international person is capable of complying with obligations under Principles 9 and 10.
5. Second, the principle of proportionality might have relevance for countermeasures in relation to situations of shared responsibility. Under Article 51 of the ARSIWA and Article 54 of the ARIO, countermeasures 'must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. While shared responsibility for indivisible injury will generally not allow an injured party to differentiate between different degrees of responsibility, it is conceivable that an injured party might be able to distinguish between the gravity of an internationally wrongful act. This is particularly the case when shared responsibility is engaged by multiple wrongful acts under Principle 4. In that case, the principle of proportionality may require a differentiation in the type of countermeasures taken in relation to responsible international persons.²⁴⁷

²⁴³ Takei, *supra* note 34, at 367–370.

²⁴⁴ European Commission, 'European Commission Intensifies the Fight against Illegal Fishing'. Press release IP-13–1162, 26 November 2013.

²⁴⁵ Arts 49–54 ARSIWA and Arts 51–57 ARIO.

²⁴⁶ See Tzanakopoulos, *supra* note 143, at 146–147; see also the discussion of the *Nada* case in the commentary to Principle 11, para. 8.

²⁴⁷ On the application of proportionality in situations of shared responsibility, see generally Tams, *supra* note 239, at 329.

6. Finally, when countermeasures are taken against several responsible international persons, it may be that such countermeasures are successful in inducing one or more responsible international persons, but not all such persons, to comply with their obligations of cessation and reparation. In that situation, the principles contained in Article 49, paragraph 2,²⁴⁸ and Article 53 of the ARSIWA,²⁴⁹ as well as Article 51, paragraph 2, and Article 56 of the ARIO, require that the countermeasures are discontinued against those international persons that have complied with their obligations, but they may be continued against the other international persons.

²⁴⁸ Art. 49, para. 2 ARSIWA provides: 'Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.'

²⁴⁹ Art. 53 ARSIWA provides: 'Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.'