Power and responsibility

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UN DIRITTO SENZA TERRA?
FUNZIONI E LIMITI DEL PRINCIPIO DI TERRITORIALITÀ
NEL DIRITTO INTERNAZIONALE E DELL'UNIONE EUROPEA

276/I

UNIVERSITÀ DI CATANIA
PUBBLICAZIONI DELLA FACOLTÀ DI GIURISPRUDENZA
Nuova Serie 276/I

UN DIRITTO SENZA TERRA?
FUNZIONI E LIMITI DEL PRINCIPIO DI TERRITORIALITÀ NEL DIRITTO INTERNAZIONALE E DELL'UNIONE EUROPEA

A LACKLAND LAW?
TERRITORY, EFFECTIVENESS AND JURISDICTION IN INTERNATIONAL AND EU LAW

Atti e contributi del X Incontro di Studio fra i giovani cultori delle materie internazionalistiche Catania, 24-25 gennaio 2013

a cura di **Adriana Di Stefano**

I

G. GIAPPICHELLI EDITORE – TORINO

Il volume raccoglie i contributi dell'iniziativa promossa dal Dipartimento di Giurisprudenza dell'Università di Catania in occasione del X Incontro di Studio fra i giovani cultori delle materie internazionalistiche sul tema *Un Diritto senza terra? Funzioni e limiti del principio di territorialità nel diritto internazionale e dell'Unione europea*, (Catania, 24-25 gennaio 2013).

La raccolta propone inoltre una selezione di scritti e interventi, presentati negli anni accademici 2012/2013 e 2013/2014, che abbracciano ambiti disciplinari diversi degli studi giuridico-internazionali e costituiscono riferimenti indicativi a partire dai quali avviare una riflessione comune sulla rilevanza dell'elemento territoriale nella ricostruzione teorica dell'ordine internazionale. Gli sviluppi più recenti della prassi interna e internazionale mostrano l'accentuarsi della tendenza al superamento della dimensione esclusivamente territoriale nell'applicazione del diritto ed interrogano a vario titolo gli studiosi del diritto internazionale pubblico e privato e del diritto dell'Unione europea.

Le questioni affrontate riguardano, in particolare, profili tradizionali e consolidati della rilevanza dell'elemento territoriale nell'evoluzione della regolazione giuridica internazionale e sovranazionale cui si affiancano analisi relative a questioni genericamente riconducibili sotto la rubrica della "deterritorializzazione" degli assetti giuridici.

Ne emerge un quadro composito tra vecchio e nuovo, tra passato e futuro, all'interno del quale la fondazione territorialista della legittimità del potere rimane ancora un tratto caratterizzante di sicuro rilievo.

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Funzioni e limiti del principio di territorialità nel diritto internazionale e dell'Unione europea

CONTRIBUTI E INTERVENTI

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Act. dr., *Actualités du droit*
AFDI, *Annuaire français de droit international*
Afr. HRLJ, *African Human Rights Law Journal*
Afr. JICL, *African Journal of International and Comparative Law*
Afr. YbIL, *African Yearbook of International Law*
AJCL, *American Journal of Comparative Law*
AJIL, *American Journal of International Law*
Am. U. L. Rev., *American University Law Review (The)*
Annual Survey of Int'L & Comp. Law, *Annual Survey of International & Comparative Law*
Arb. Int., *Arbitration International*
Arch. nuova proc. pen., *Archivio della nuova procedura penale*
Arch. pen., *Archivio penale*
Arch. phil. dr., *Archives de philosophie du droit*
ARIO, *Articles on the Responsibility of International Organizations*
ARSIWA, *Articles on the Responsibility of State for Internationally Wrongful Acts*
As. JIL, *Asian Journal of International Law*
ASIL Ins., *American Society of International Law Insights*
ASIL Proc., *ASIL Proceedings (The)*

Baltic YbIL, *Baltic Yearbook of International Law*
Bank. Fin. Law Rev., *Banking and Finance Law Review*
Boston U. Int'l L.J., *Boston University International Law Journal*
Brit. J. Pol. Sci., *British Journal of Political Science*
Brook R.J.Int'l L., *Brooklyn Jornal of International law*
BYbIL, *British Yearbook of International Law*

Cah. dr. eur., *Cahiers de droit européen*
Cardozo JICL *Cardozo Journal of International and comparative Law*
Case W. Res. J. Int'l L., *Case Western Reserve Journal of International Law*
Cass. pen., *Cassazione Penale*
CBJ, *Central Banking Journal*
CCAEL, *Collected Courses of the Academy of European Law*

CDA, *Les Cahiers de l'Arbitrage /The Paris Journal of International Arbitration*
CDT, *Cuadernos de Derecho Transnacional*
CETS*, Council of Europe Treaty Series* / STCE*, Série des Traités du Conseil de l'Europe*
Chi. J. Int'l L., *Chicago Journal of International Law (The)*
Chin. JIL, *Chinese Journal of International Law*
CI, *La Comunità Internazionale*
CIG, *Corte Internazionale di Giustizia*
Clim. Law, *Climate Law*
CMLR, *Common Market Law Review*
Columbia J. Transnat'l L., *Columbia Journal of Transnational Law*
Columbia JEL, *Columbia Journal of European Law*
Corr. mer., *Corriere del merito*
Crim. Just. Policy Rev., Criminal Justice Policy Review
Crim. L. Rev., *Criminal Law Review*
Crim. L.F., *Criminal Law Forum*
Critica pen., *Critica Penale*
CS*, Comunicazioni e Studi dell'Istituto di Diritto Internazionale e Straniero dell'Università di Milano*

Dem. dir., *Democrazia e Diritto*
Denver JIL, *Denver Journal of International Law*
Development and Society, *Development and Society*
DG, *Diritto & giustizia*
Dig. disc. pubbl., *Digesto delle discipline pubblicistiche*
Dir. com. sc. internaz., *Diritto comunitario e degli scambi internazionali*
Dir. comm. internaz., *Il Diritto del commercio internazionale*
Dir. e giust., *Diritto e Giustizia*
Dir. e società, *Diritto e società*
Dir. imm. citt., *Diritto, Immigrazione e Cittadinanza*
Dir. mar., *Il Diritto marittimo*
Dir. pen. cont., *Diritto penale contemporaneo*
Dir. pen. e proc., *Diritto penale e processo*
Dir. pubbl. comp. eur., *Diritto pubblico comparato ed europeo*
Dir. trasporti, *Diritto dei trasporti*
Documenti giustizia, *Documenti giustizia*
Dr. fam., *Droit de la famille*
DUCB, *I Diritti dell'Uomo. Cronache e Battaglie*
DUDI, *Diritti umani e Diritto Internazionale*
DUE, *Il Diritto dell'Unione Europea*
Duke CILR, *Duke Comparative and International Law Rev*iew

ECHR, *European Convention for the Protection of Human Rights and Fundamental Freedoms*

Econ. pubbl., *Economia Pubblica*
ECR, *European Court Reports*
ECtHR, *European Court of Human Rights*
EHRLR, *European Human Rights Law Review*
EJIL, *European Journal of International Law*
ELR, *Erasmus Law Review*
Emory ILR, *Emory International Law Review*
Enc. dir., *Enciclopedia del diritto*
Estud. const., *Estudios constitucionales*
Eucrim, *Eucrim*
Eur. Bus. LR, *European Business Law Review*
Eur. Const. L. Rev., *European Constitutional Law Review*
Eur. J. Int'l Relations*, European Journal of International Relations*
Eur. Jour. Educ., *European Journal of Education*
Eur. Jour. Health Law, *European Journal of Health Law*
Eur. Jour. Leg. St., *European Journal of Legal Studies*
Eur. Jour. Migr. Law, *European Journal of Migration and Law*
Eur. L.J., *European Law Journal*
Eur. L.R., *European Law Review*
Eur. Pub. L., *European Public Law*
Eur. Rev. Contract Law, *European Review of Contract Law*
Eur. Rev. Private Law, *European Review of Private Law*
Eur. Sec., *European Security*

FA, *Foreign Affairs*
Finnish YbIL, *Finnish Yearbook of International Law*
Ford. ILJ*, Fordham International Law Journal*
Foreign Policy, *Foreign Policy*
Foro it., *Foro italiano*
Forum DI, *Forum du Droit International*

Gaz. Pal., *Gazette du Palais*
GCYbILJ, *Global Community Yearbook of International Law and Jurisprudence (The)*
German LR, *German Law Review*
German YbIL, *German Yearbook of International Law*
Giur. cost., *Giurisprudenza costituzionale*
Giur. it., *Giurisprudenza italiana*
Giur. merito, *Giurisprudenza di merito*
GR2P, *Global Responsibility to Protect*
Groningen JIL*, Groningen Journal of International Law*
GSP, *Genocide Studies and Preventions*
G.U.C.E., *Gazzetta Ufficiale delle Comunità Europee*
G.U.U.E., *Gazzetta Ufficiale dell'Unione Europea*

G.U.R.I., *Gazzetta Ufficiale della Repubblica Italiana*
Guida dir., *Guida al diritto*

Harv. HRJ, *Harvard Human Rights Journal*
Harv. ILJ, *Harvard International Law Journal*
Hastings Int'l & Comp. L. Rev., *Hastings International and Comparative Law Review*
HRC, *Human Rights Committee*
HRLJ, *Human Rights Law Journal*
HRLR, *Human Rights Law Review*
HRQ, *Human Rights Quarterly*

IACtHR, *Inter-American Court of Human Rights*
IAR, *International Affairs Review*
ICANN, *Internet Corporation for Assigned Names and Numbers*
ICC, *International Criminal Court*
ICJ, *International Court of Justice*
I.C.J. Reports*, International Court of Justice Reports of Judgments, Advisory*
ICLQ, *International and Comparative Law Quarterly*
ICSID Rev., ICSID Review - Foreign Investment Law Journal
I.J. Const. Law, *International Journal of Constitutional Law*
ILM, *International Legal Materials*
ILR, *International Law Reports*
Ind. pen., *Indice Penale*
Indian JIL, *Indian Journal of International Law*
Int. Spectator, *The International Spectator: Italian Journal of International Affairs*
Int'l Affairs, *International Affairs*
Int'l Comm. L. Rev., *International Community Law Review*
Int'l Crim. L. Rev., *International Criminal Law Review*
Int'l Ins. Rev., *International Insolvency Review*
Int'l J. L. Pol. & Fam., *International Journal of Law, Policy and the Family*
Int'l J. Refugee L., *International Journal of Refugee Law*
IO, *International Organization*
IOLR, *International Organizations Law Review*
IRRC, *International Review of the Red Cross* / RICR, *Revue Internationale de la Croix-Rouge*
Israel LR, *Israel Law Review*
IYbIL, *Italian Yearbook of International Law*

J. Agr. Ch., *Journal of Agrarian Change*
JAL, *Journal of African Law*
JCSL, *Journal of Conflict & Security Law*
JDI, *Journal du Droit International*
JEPP, *Journal of European Public Policy*

J. Hist. Int'l L., *Journal of the History of International Law*
J. Peasant St., *Journal of Peasant Studies (The)*
J. Pol. Phil., *Journal of Political Philosophy*
J. Priv. Int. L., *Journal of Private International Law*
JICJ, *Journal of International Criminal Justice*
JIEL, *Journal of International Economic Law*
JIML, *Journal of International Maritime Law (The)*
JMLC, *Journal of Maritime Law and Commerce (The)*
JöRG, *Jahrbuch des öffentlichen Rechts der Gegenwart*
JT, *Journal des Tribunaux*
JTDE, *Journal Trimestrielle des Droits de l'Homme*
JTLP, *Journal of Transnational Law and Policy*
JUFIL, *Journal on the Use of Force and International Law*
JWIT, *Journal of World Investments and Trade*

Law & Contemp. Probs., *Law & Contemporary Problems*
Law & Eth. Hum. Rts., *Law & Ethics of Human Rights*
Leg. Iss. Econ. Integr., *Legal Issues of Economic Integration*
Legisl. pen., *Legislazione Penale*
LJIL, *Leiden Journal of International Law*
Loy. L.A. Int'l C.L.R., *Loyola of Los Angeles International and Comparative Law Review*

Maastricht JECL, *Maastricht Journal of European and Comparative Law*
Mar. sec. rev., *Maritime Security Review*
Melb. J. Int'l L., *Melbourne Journal of International Law*
Mich. J. Int'l L., *Michigan Journal of International Law*
Millenn. J. Int. Stud., *Millennium – Journal of International Studies*
Minn. JGT, *Minnesota Journal of Global Trade*
Minn. L. Rev., *Minnesota Law Review*
Mod. L. Rev., *The Modern Law Review*
MPEPIL *Max Planck Encyclopedia of Public International Law*
MPYbUNL, *Max Planck Yearbook of United Nations Law*

Nat. L. F., Natural Law Forum
Neth. I.L.R., *Netherlands International Law Review*
Neth. QHR, *Netherlands Quarterly of Human Rights*
New J. Eur. Crim. L., *New Journal of European Criminal Law*
New L.J., *New Law Journal*
NJIL, *Nordic Journal of International Law*
Notic. UE, *Noticias de la Unión Europea*
Notre. Dame L. Rev., *Notre Dame Law Review*
Nuove leggi civili comm., *Nuove leggi civili commentate (Le)*
N.Y.U. Rev. L. & Soc. Ch., *New York University Review of Law and Social Change*

Ocean Dev. IL, *Ocean Development & International Law*
Oss. pol. intern., *Osservatorio di politica internazionale*

PCIJ, Recueil, *Publications of the Permanent Court of International Justice / Publications de la Cour Permanente de Justice Internationale – Recueil des Arrêts, série A*
Persona e mercato, *Persona e mercato*
Pol. Theory, *Political Theory*

QRI*, Quaderni di Relazioni Internazionali*
Quaderni Cost., *Quaderni Costituzionali?*
Quaderni eur., *Quaderni europei (I)*

Raccolta, *Raccolta della giurisprudenza della Corte e del Tribunale di primo grado*
RBDI, *Revie Belge de Droit International*
RD, *Recueil Dalloz*
RDE, *Rivista di Diritto Europeo*
RDI, *Rivista di Diritto Internazionale*
Recueil des Cours, *Recueil des Cours de l'Académie de Droit International de La Haye*
REDC, *Revista española de derecho constitucional*
REDI, *Revista Española de Derecho Internacional*
REDP, *Revue Européenne du Droit Public*
Reports, *ECHR*, *Reports of Judgments and Decisions*
Rev. adm. públ., *Revista de administración pública*
Rev. Aff. Eur., *Revue des Affaires Européennes*
Rev. African Pol. Econ., *Review of African Political Economy*
Rev. arbitrage, *Revue de l'arbitrage*
Rev. Col. Der. Inter., *Revista Colombiana de Derecho Internacional*
Rev. Cort. Gen., *Revista de las Cortes Generales*
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Rev. dr. pén. crim., *Revue de droit pénal et de criminologie*
Rev. dr. pol*., Revue de droit politique*
Rev. estud. intern., *Revista de estudios internacionales*
Rev. gen. der. eur., *Revista General de Derecho Europeo*
Rev. Int'l St., *Review of International Studies*
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Rev. jur. pol. Et. franc., *Revue juridique et politique des Etats francophones*
Rev. Lamy dr. civ., *Revue Lamy Droit Civil*
Rev. mar. comm. UE, *Revue du marché commun et de l'Union européenne*
Rev. pén. suisse, *Revue pénale suisse*
Rev. sc. crim dr. pén. comp., *Revue de Science Criminelle et de Droit Pènal Comparé*
Rev. Un. Eur., *Revue de l'Union Européenne*

RGDIP, *Revue Générale de Droit International Public*
RIAA, *Reports of International Arbitral Awards*
RIDP, *Revue Internationale de Droit Pénal*
Riv. coop. giur. int., *Rivista della cooperazione giuridica internazionale*
Riv. di polizia, *Rivista di polizia,*
Riv. dir. ind., *Rivista di Diritto Industriale*
Riv. dir. int. priv. proc., *Rivista di diritto internazionale privato e processuale*
Riv. dir. proc., *Rivista di diritto processuale*
Riv. dir. sic. soc., *Rivista del diritto e della sicurezza sociale*
Riv. giur. ed.*, Rivista giuridica dell'edilizia*
Riv. giur. lav., *Rivista Giuridica del Lavoro*
Riv. it. dir. proc. pen., *Rivista italiana di diritto e procedura penale*
Riv. it. dir. pubbl. com., *Rivista italiana di diritto pubblico comunitario*
Riv. pol. soc., *Rivista delle politiche sociali*
Riv. trim. dir. proc. civ., *Rivista trimestrale di diritto e procedura civile*
Riv. trim. dir. pubbl. com., *Rivista trimestrale di diritto pubblico comunitario*
RTDE, *Revue trimestrielle de droit européen*
RTDH, *Revue trimestrielle des droits de l'homme*
Rutgers LR, *Rutgers Law Review*

S. African L.J., *South African Law Journal*
San Diego ILJ, *San Diego International Law Journal*
Santa Clara JIL*, Santa Clara Journal of International Law*
SC, *Security Council*
South Afric. JHR, *South African Journal of Human Rights*
South. California LR, *Southern California Law Review*
Span. YbIL, *Spanish Yearbook of International Law*
St. int. eur.*, Studi sull'integrazione europea*
St. sen., *Studi senesi*
Stranieri (gli), *Gli Stranieri*

Texas ILJ, *Texas International Law Journal*
Texas LR, *Texas Law Review*
TLCP, *Transnational Law & Contemporary Problems*
U. Chi. L. Rev., *University of Chicago Law Review (The)*
U. Penn. L. Rev., *University of Pennsylvania Law Review*
UNTS, *United Nations Treaty Series*
Utrecht LR, *Utrecht Law Review*

Vanderbilt J. Trans. L., *Vanderbilt Journal of Transnational Law*
Virginia JIL,*Virginia Journal of International Law*

Wisconsin ILJ, *Wisconsin International Law Journal*

Yale HRDLJ, *Yale Human Rights and Development Law Journal*
Yale JIL, *Yale Journal of International Law*
Yale J. L. & Tech., *Yale Journal of Law and Technology*
YbEL, *Yearbook of European Law*
YbIHL, *Yearbook of International Humanitarian Law*
YbILC, *Yearbook of the International Law Commission*
YbPIL, *Yearbook of Private International Law*

ZaöRV, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*
ZöR, *Zeitschrift für öffentliches Recht*

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Volume Primo

ATTI DEL X INCONTRO DI STUDIO FRA I GIOVANI CULTORI DELLE MATERIE INTERNAZIONALISTICHE

Sezione I
POWER AND RESPONSIBILITY

ANDRÈ NOLLKAEMPER

POWER AND RESPONSIBILITY*

CONTENTS: 1. Introduction. – 2. The general proposition: power breeds responsibility. – 3. The ambiguities of power. – 4. The relational nature of power. – 5. The mutual influences of power and responsibility. – 6. Conclusion.

1. *Introduction*

Clyde Eagleton famously claimed that «power breeds responsibility» [1]. The phrase is frequently quoted with apparent approval in international legal scholarship [2]. The notion is also framed in other terms but with the same underlying idea, for instance in the argument that responsibility originates in control [3]. There is also a strand of literature that trans-

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[1] C. EAGLETON, *The Responsibility of States in International Law,* New York University Press, 1928, p. 206.

[2] E. PAASIVIRTA, *Responsibility of a Member State of an International Organization: Where Will It End?*, in 7 *International Organization Law Review*, 2010, p. 49, at p. 51; C. AHLBORN, *The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste Approach*, in 9 *IOLR* 2012, p. 53 ff., at p. 63; L. CLARKE, *Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships*, in 12 *Chinese Journal of International Law*, 2012, p. 55 ff., at p. 65.

[3] C. EAGLETON, *International organization and the law of responsibility*, in *Recueil*

forms the idea into a normative proposition, for instance to the effect that responsibility should reflect power (or capacity, which is a, but related concept) [4].

Assigning responsibility to States on the basis of power makes sense [5]. Power refers to the ability of a State to influence or control other actors, and thereby get another actor to do what it wants, if needed even against its will [6]. In this sense power is essentially a relational phenomenon [7]. In the context of responsibility, a State can exercise power in relation to another person, by making that author to engage in a particular wrongful act. If so, it can be said that it then should be this State that should bear responsibility for the harm, rather than (only) the author of an act. Tracing responsibility to the actor that wields power also is justified on the basis of remedial considerations. If harm is to be prevented, those wielding the power in relation to harmful conduct, should be addressed, rather than those that execute commands. For only the former actors can terminate the wrong or ensure that it is not repeated [8].

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des Cours, 1950, pp. 385-386; W. FRIEDMAN, *The Growth of State Control over the Individual and Its Effect upon the Rules of International State Responsibility*, in 19 *British Yearbook of International Law*, 1938, p. 118 ff., at p. 149.

[4] J. PATTISON, *Jus Post Bellum and the Responsibility to Rebuild*, in *British Journal of Political Science*, 2013, pp. 1, 20, 22-23; D. MILLER, *Distributing Responsibilities*, in 9(4) *Journal of Political Philosophy*, 2001, pp. 453-471.

[5] For present purposes, I limit myself primarily to the responsibility of States.

[6] M. WEBER, *Economy and Society*, University of California Press, Berkeley, 1978, at p. 53. See also M.S. MCDOUGAL, *Law and Power,* in 46 *American Journal International Law*, 1952, p. 102 ff., at pp. 107-108; C. TAYLOR, *Foucault on freedom and truth*, in 12 *Political Theory*, 1984, p. 152 ff., at p. 158 (the notion of power or domination «requires some notion of constraint imposed on someone»). Of course, power can be conceptualized in different ways. See e.g. A. BALLESTEROS-S. NAKHOODA-J. WERKSMAN-K. HURLBURT, *Power, responsibility, and accountability: Rethinking the legitimacy of institutions for climate finance*, in 1 *Climate Law*, 2010 p. 261 ff., at p. 265 (referring to power as the capacity to determine outcomes).

[7] D.A. LAKE, *Authority, Coercion and Power in International Relations*, in M. FINNEMORE-J. GOLDSTEIN (eds.), *Back to Basics: State Power in a Contemporary World*, Oxford University Pres, Oxford 2013; D.A. BALDWIN, *Power and International Relations* in W. CARLSNAES-T. RISSE-B.A. SIMMONS (eds.), *Handbook of International Relations*, Sage, London, 2013, pp. 285-286; S. STRANGE, *International Economics and International Relations: A Case of Mutual Neglect*, in 46(2) *Int'l Affairs*, 1970, p. 304 ff.

[8] D. MILLER, *Distributing Responsibilities*, *supra*, note 4); P.J. KUIJPER-E. PAASIVIRTA, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in M. EVANS-P. KOUTRAKOS (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Hart Publishing, Oxford, 2013.

The proposition that power breeds responsibility is particularly relevant in situations where responsibility rests with multiple actors and is thus shared [9]. Such situations increasingly occur as boundaries and territory grow less relevant. As States and other actors engage more and more in concerted action to address global problems across borders, it becomes more difficult to assign responsibility when such concerted action results in harmful outcomes. On what basis do we determine who, out of a multiplicity of involved actors, is to be held responsible, for instance, for harm caused by peace-keeping missions, the global financial crisis, or global environmental problems? While the law of international responsibility provides some answers [10], it is not well adjusted to situations of shared rather than individual responsibility [11]. The power-breeds-responsibility proposition suggest that power should be a relevant, perhaps even decisive, consideration in allocating responsibility in situations where multiple actors contribute to harm.

The concept of power is well suited for application in multi-party settings. Power can even be conceptualized as «a complex form of organization in which we are all involved» [12]. To be useful for analytical (and legal) purposes, it still needs to be connected to human agency. Taylor rightly notes that the notion of power or domination «requires some notion of constraint imposed on someone by a process in some way related to human agency. Otherwise the term loses all meaning» [13]. However, this certainly need not imply that power is only located in *one* actor; power can, and often is, exercised by multiple actors at the same time. In legal practice, this is illustrated by a string of cases adjudicated before the European Court of Human Rights (ECtHR), such as *Ilascu*

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[9] A. Nollkaemper and D. Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, in 34 *Mich. J. Int'l L.*, 2013, at p. 359.

[10] Articles on the Responsibility of State for Internationally Wrongful Acts, *ILC Yearbook*, 2001/II(2) (ARSIWA); Articles on the Responsibility of International Organizations, *ILC Yearbook* 2011/II(2) (ARIO). See for a comprehensive discussion of the answers provided by the existing law of responsibility, A. Nollkaemper-I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the state of the Art*, Cambridge University Press, Cambridge, 2014.

[11] A. Nollkaemper-D. Jacobs, *supra*, note 9.

[12] C. Taylor, *supra*, note 6, at p.158.

[13] *Ibidem*, at p. 172.

and others v. Moldova and Russia[14], *Al-Jedda v UK*[15], and *Jaloud v the Netherlands*[16].

However, despite its apparent allure, it is not immediately obvious that the proposition that power breeds (shared) responsibility is helpful for understanding, let alone solving questions of shared responsibility. Saying that power informs or triggers responsibility is begging the question what type of power trigger what type of responsibility in what way.

Moreover, we need not only distinguish between particular forms of power, but also between particular dimensions of responsibility. The relationship between power and responsibility may appear in different forms if we focus on particular conditions of aspects of responsibility, such as jurisdiction, wrongfulness, and attribution. It will appear that rather than talking about power in relationship to responsibility as a generic concept, it may be helpful to break that concept down in more specific concepts, each having a particular relationship with power.

It is the aim of this paper to refine our understanding of the proposition that power breeds responsibility in the particular context of shared responsibility. After first detailing how power indeed can «breed responsibility» (§ 2), this paper will highlight three dimensions in which refinement and qualification are necessary.

First, the paper highlights the ambiguity of the concept of "power". The concept has a variety of possible dimensions and meanings that may or may not point in the same direction. This paper will use a broad concept of power, that covers such notions as control and coercion and possibly, though more controversially, even influence[17]. But it is obvious that such terms as control, coercion and influence differ[18], and that this difference can matter in relation to the law of responsibility. There are also forms of power that seem to lack legal significance in the context of responsibility, though they surely may have legal relevance in

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[14] *Ilascu and others v. Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004).

[15] *Al-Jedda v. UK*, App. no. 27021/08 (ECtHR, 7 July 2011).

[16] *Jaloud v. the Netherlands*, App. No. 47708/08 (ECtHR, 6 October 2008).

[17] BALDWIN, *supra*, note 7. It seems that it was also in this broad sense that Eagleton used the concept, see EAGLETON, *International organization and the law of responsibility*, *supra*, note 3, pp. 385-386.

[18] See P. MORRISS, *Power: A Philosophical Analysis*, Manchester University Press, Manchester, 1987, at p. 8, who argues against collapsing such terms.

other contexts, such as "soft" power [19] or the power to shape the development of international rules (I will refer to this below as productive power). Moreover, there are relevant distinctions between legal and factual forms of power. For instance, the legal power of the United Nations (UN) seems a relevant consideration in determining responsibility for an act of a person formally acting under UN command; this power may coexist with factual power exercised by another person. Understanding when and how power does or does not breed responsibility requires, first of all, that we recognize the multiple meanings of power and their different implications (§ 3).

Second, in situations of (potentially) shared responsibility, where multiple actors contribute to harmful outcomes, the power of one actor needs to be understood in relation to the power of the other actors involved. In certain cases, the power of one actor can co-exist with the power of others, while in other cases it may override it. In the latter case, responsibility should only be assigned to the former actor. In other words, the power of one actor may render irrelevant, for legal purposes, the power of another actor in relation to the author of a wrongful act. If so, the power of the latter actor does not breed responsibility at all. Understanding when and how power does or does not breed responsibility, requires that we acknowledge the relational and relative nature of power (§ 4).

Third, power itself may be constituted or influenced by the law of responsibility. The relationship between power and responsibility is characterized by a fundamental duality [20]. While the law of responsibility seeks to curtail power, it also is an instrument by which States exercise power and that protects power [21]. The law of responsibility may help a

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[19] J. NYE, *Soft Power: The Means to Success in World Politics*, Public Affairs, New York, 2005.

[20] C. REUS SMIT, *The Politics of International Law*, in C. REUS SMIT (ed.), *The Politics of International Law,* Cambridge University Press, Cambridge, 2004; see also C. REUS SMIT, *Politics and International Legal Obligation* in 9 (4) *European Journal of International Relations*, 2003, p. 591.

[21] This is the standard realist account of the relation between international politics and law. See O.A. HATHAWAY, *Between Power and Principle: An Integrated Theory of International Law*, in 72 *University of Chicago Law Review*, 2005, pp. 469, 478 and the sources cited there. See further on the relationship between power and international law, D. KENNEDY, *Speaking Law to Power: International Law and Foreign Policy*, in 23 *Wisconsin International Law Journal*, 2005, at p. 173; P.W. KAHN, *American*

State in getting other actors to do what it wants [22]. It also may legitimize such efforts. For instance, the law of responsibility leaves States much space to exercise power without engaging their international responsibility, thereby legitimizing such exercise of power [23]. One example of many is that it allows States to exercise power in the decision-making process of international organisations without engaging their international responsibility [24]. In this respect, not only can power be used to allocate responsibility to all actors that actually contribute to the harmful outcomes, but it can also lead to, and justify, blame-shifting (§ 5).

Paragraph 6 concludes that while generally speaking power indeed is highly relevant in explaining the allocation of responsibility between multiple parties, the proposition that «power breeds responsibility» hides many nuances and complexities. Power is best considered as a compound concept that can take different forms, which may pull in different directions, depending on the perspective from which power is analysed and the context in which it is applied. Occasionally, it also may shield actors from responsibility rather than subject them to such responsibility, and thereby impede rather than enables the determination of shared responsibility. In this sense, the proposition that power breeds (shared) responsibility is somewhat question-begging, as the real question is what type of power triggers what type of responsibility in what situations.

Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order, in 1 *Chicago Journal of International Law*, 2000, p. 1; N. KRISCH, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, in 16(3) *European Journal of International Law,* 2005, p. 369; O. SCHACHTER, *The Role of Power in International Law*, in 93 *ASIL Proceedings*, 1999, p. 200.

[22] See *supra*, note 6.

[23] P. ALLOTT, *State Responsibility and the Unmaking of International Law,* in *Harvard International Law Journal,* 1988, 1. See for an illustration of how international law may shield powerful actors (in this case the World Bank) from responsibility, J. HANLON, *Power without responsibility: the World Bank & Mozambican cashew nuts*, in *Review of African Political Economy,* 2000, p. 29.

[24] See for a critical assessment S. YEE, *Member Responsibility and the ILC Articles on the Responsibility of International Organizations: Some Observations*, in M. RAGAZZI (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, The Hague, 2013, pp. 325-336.

2. *The general proposition: power breeds responsibility*

The connection between power and responsibility is essentially a moral statement which can be transposed to the legal sphere. The moral proposition is that when someone has power, responsibility should be assigned to that person for bringing (or failing to bring) about certain outcomes [25].

The proposition that power breeds (or should breed) responsibility seems to underlie much of international law. According to the dominant perspective, international law seeks to curb the unrestrained exercise of power. This idea is inherent in the notion of the international rule of law [26]. In the law of responsibility, this idea is reflected in the fact that a state that effectively controls, directs, or coerces another actor, in principle can be held responsible for harm caused by other such actors [27].

To understand the power-breeds-responsibility proposition in the context of international law, power needs to be conceptualized as a relational concept [28]. The concept of power then refers to the ability of a state to get another actor to do what it wants, if needed even against its will [29]. This conceptualization, shared in a large body of social and political science theory [30], obviously is only one of many ways to under-

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[25] T. Ball, *Review of S. Lukes, Power and J. Nagel, The Descriptive Analysis of Power*, in *Political Theory,* 1976, pp. 246-249; P. Morriss, *supra*, note 18, at. p. 38. See also M. Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View*, University of Chicago Press, Chicago, 1992.

[26] E.g. A. Watts, *The International Rule of Law*, in 36 *GYIL* 1993, p. 15; S. Chesterman, An *International Rule of Law*? in 56 *American Journal of Comparative Law,* 2008, pp. 331-361. Also see on the ambition of law to overcome the world of politics based on power, P.W. Kahn, *supra*, note 21, at p. 9.

[27] See ARSIWA, *supra*, note 10, arts. 8, 17, 18.

[28] Lake, *supra*, note 7; Baldwin, *supra*, note 7, pp. 285-286; Strange, *supra*, note 7.

[29] See *supra*, note 6.

[30] M. Barnett-R. Duvall, *Power in global governance*, in M. Barnett-R. Duvall (eds.), *Power in Global Governance*, Cambridge University Press, Cambridge, 2005, pp. 3, 8; B. Barry (ed.), *Power and Political Theory: Some European Perspectives*, Wiley, London, 1976, pp. 41-43, 58-59, 103,143, 176-177, 250-254; L. Hagstrom, *Japan's China Policy: A Relational Power Analysis,* Routledge, London-New York, 2005, pp. 19-21; S. Lukes, *Power: A Radical View,* 2nd ed., Palgrave Macmillan, Basingstoke-New York, 1974/2005; M. Weber, *The Theory of Social and Economic Organization,* Free Press, New York, 1947; Lake, *supra*, note 7; Baldwin, *supra*, note 7, pp. 285-286; Strange, *supra*, note 7.

stand power [31]. However, in situations of shared responsibility reliance on this relational concept seems particularly justified.

State responsibility in international law by definition presumes a relationship between a state and an actual author of an act, which necessarily is a natural person. It then can be said that the state that exercises power in relation to that author, makes that author to commit the wrong. It is on that ground that the state should then bear the responsibility for the harm, rather than (only) the author of the act. It can be observed in this context that there is a close connection between the power-causation connection, on the one hand [32], and the responsibility-causation connection, on the other [33]. Through the exercise of power, an actor can cause another person to act in a particular way. It is precisely that causal relationship that underlies much of the law of responsibility, even though nowadays causation has mostly been incorporated into the normative notion of attribution [34].

The relational nature of power takes a different form in situations of shared responsibility, at least in those cases where such responsibility arises out of concerted action [35]. What matters in such cases is not only the relation between a state and the author of an act, but also the relation between one state and another state (or international organization, as the case may be), that also stands in a relation to the author of a wrongful act. In this sense, we can speak of a doubling of power relationships that underlie the assignment of responsibility. The complications that derive therefrom will be further examined in § 4.

In this relational perspective, a key ground for assigning responsibility is that one actor may reduce the freedom to act of another actor. Here the concepts of power and responsibility converge. While the social and political science literature on power as a relational concept, on

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[31] See for a comprehensive overview BALDWIN, *supra*, note 7 and MORRISS, *supra*, note 18.

[32] See on the relationship power-causation R.A. DAHL, *The Concept of Power*, in 2 *Behavioral Science*, 1957, p. 201; BALDWIN *supra*, note 7, at p. 501.

[33] See generally H.L.A. HART-A.M. HONORÉ, *Causation and Responsibility*, in L. MAY-J. BROWN (eds.), *Philosophy of law: classic and contemporary readings,* Wiley-Blackwell, Chichester, 2010, p. 307.

[34] See for a general discussion L. CASTELLANOS-JANKIEWICZ, *Causation and International State Responsibility*, in *SHARES Research Paper*, 07, 2012, ACIL 2012-07.

[35] NOLLKAEMPER-JACOBS, *supra*, note 9, at p. 368.

the one hand, the legal literature on responsibility, on the other, have developed along seemingly unconnected, this idea is strikingly common to both strands of literature. For instance, in his discussion of power, Weber refers to «the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance» [36]. There is a direct connection to the well-established idea that freedom is a basis for responsibility [37]. This is also quite close to Ago's idea that responsibility is directly related to the (loss of) freedom of a state to determine its own course of action. If a state would remove such freedom of another state, the former state's responsibility would remove the responsibility of the latter [38].

The general proposition that power breeds responsibility is reflected in several dimension in which the concept of responsibility can be "debundled": jurisdiction, wrongfulness and attribution. Jurisdiction is relevant to responsibility since it is can be "a threshold criterion" in relation to the applicability of obligations and responsibility [39]. If so, power is critical for determining whether or not that threshold is passed, in particular when a state acts extra-territorially [40]. This has been a constant in the practice of the ECtHR [41] and to a lesser extent the Human

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[36] M. Weber, *The Theory of Social and Economic Organization*, *supra*, note 30, at p. 152.

[37] See e.g. D.K. Nelkin, *Making Sense of Freedom and Responsibility,* Oxford University Press, Oxford, 2011.

[38] R. Ago, Special Rapporteur, *Eighth Report on State Responsibility*, 31st session (1979) UN Doc A/CN.4/318 and Add. 1-4 (F), para. 45. See also C. Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility*, in J. Crawford-A. Pellet-S. Olleson (eds.), *The Law of International Responsibility,* Oxford University Press, Oxford, 2010, pp. 284-288.

[39] *Issa and others v. Turkey*, App. No. 31821/96 (ECtHR, 16 November 2004), para. 66.

[40] M. Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, in 8(3) *Human Rights Law Review*, 2008, pp. 411, 423. Note that the requirement of jurisdiction does not apply to all human rights regimes, nor is it upheld as a general proposition by the ICJ. See R. Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, in 12 *Chin. JIL*, 2013, p. 639 ff., pp. 663-666.

[41] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) *CETS* 5, art. 1 (ECHR); S. Besson, *The Extraterritoriality of the European Convention on*

Rights Committee (HRC) [42]. For instance, a state exercises jurisdiction if State's agents use force against particular individuals outside its territory [43] or if it exercises effective control (and thus power) over a particular territory [44]: the ECtHR's holding that human rights obligations abroad can be "divided and tailored" to reflect the nature of the state's control [45] indicates that the degree of relational power is key to the applicability and scope of obligations, and thereby potentially for responsibility [46].

Power also can be relevant for determining whether and how states fail to perform a (due diligence) obligation in relation to other actors, whether private persons or other states. Power informs what a state should do or not do in order to perform an international obligation. What can be required from a state in a particular situation will depend on the power of a state in that situation in particular on its capabilities [47].

Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to, in 25(4) *Leiden Journal of International Law*, 2012, at p. 857; M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011; O. DE SCHUTTER, *Globalization and Jurisdiction: Lessons from the European Convention on Human Rights*, in 6 *Baltic Yearbook of International Law*, 2006, pp. 185, p. 198.

[42] Human Rights Committee, Eightieth Session, 29 March 2004, *General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 12 May 2004 (HRI/GEN/1/Rev.7) para. 10. This was also true for *Lopez Burgos v Uruguay*, Communication No. R.12/52, UN Doc Supp. No. 40 (A/36/40) (1981).

[43] *Al-Skeini* v. *UK*, App. no. 55721/07 (ECtHR, 7 July 2011).

[44] *Ibidem*, para. 138. This principle echoes the statement of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports*, 1971, p. 16 ff., at p. 54, para. 118, that physical control of territory is the basis of state liability.

[45] *Al-Skeini* , *supra,* note 43, para. 137.

[46] See also Y. SHANY, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, in 7(1) *Law & Ethics of Human Rights*, 2013, p. 47.

[47] See e.g. P.-M. DUPUY, *Due Diligence in the International Law of Liability*, in Organisation for Economic Co-operation and Development (OECD) (ed.), *Legal Aspects of Transfrontier Pollution,* OECD, 1977, pp. 369-379; R.P. BARNIDGE, *The Due Diligence Principle under International Law*, in 8 *ICLR*, 2006, p. 81 ff.

Thus, the ICJ held that the Democratic Republic of the Congo (DRC) lacked control over the relevant territory and was for those reasons excused from engaging in significant preventive action [48]. It should immediately be observed, though, that here power plays quite a different role – it involves a potential control over other actors rather than an actual control (see further § 3).

The power-breeds-responsibility connection can also be seen in the context of attribution. One aspect is that since the state as a collective body cannot act by itself, but can act only through human beings [49], the responsibility of the state by definition presumes a relationship between the state and the persons through which it acts. For state organs this relationship now is doctrinally hidden in and replaced by the formal concept of attribution of state organs [50]. It is hardly useful for legal purposes to rely here on notions of power or causation. However, it is certainly possible to construe this relationship in terms of a relationship between a state that (from the perspective of international law) through factual means makes a person act in a particular way [51]. This is in any case clear in situations of complete dependence, which transforms non-state actors into state organs [52]. This is even clearer for acts by private persons, which may be attributed to the state if the state exercises factual (effective) control in relation to that other person [53]. Relational power may, for instance, be relevant when a state exercises authority in relation to secessionist entities in the state concerned [54].

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[48] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* Judgment, *I.C.J. Reports*, 2005, p. 168, paras. 301-304.

[49] *Settlers of German Origin in Poland,* Advisory Opinion, *PCIJ, Recueil*, 1923, ser. B, no. 6, 10 September, p. 22.

[50] 'Third Report on State Responsibility', in *ILC Yearbook*, 1971/II(1), p. 218.

[51] G. Arangio-Ruiz, Special Rapporteur, *Second Report on State Responsibility*, in *ILC Yearbook* 1989/II(1), paras. 169, pp. 170-172. See further references in note 409. See also, critically, J. Crawford, *State Responsibility*, Cambridge University Press, Cambridge, 2013, p.114.

[52] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, *I.C.J. Reports*, 2007, p. 43, para. 400.

[53] ARSIWA, *supra*, note 10, art 8.

[54] S. Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, in 58 *ICLQ*, 2009, p. 493.

Finally, it is quite clear that the prime forms of attribution of responsibility as these apply both to states and international organizations, such as direction and control, coercion and circumvention, depend, in some form, on power [55]. It is precisely the power relationship that justifies attributing responsibility not (only) to the author of an act, but to the state or organization exercising power.

It appears from the above that the power-responsibility interface has multiple dimensions. In the subsequent sections I will explore this diversity further, by focussing on the ambiguity of the concept of power (§ 3), on the relational nature of power (§ 4), and on the mutually constitutive relation between power and responsibility (§ 5).

3. *The ambiguities of power*

Any quick reading of international relations literature reveals that the discipline lacks a common conception of power [56]. This is bound to affect the understanding and application of the power-breeds-responsibility proposition. Even if we have made a choice for a relational concept of power, excluding rivalling concepts, within this relational concept there is a wide diversity of meanings.

For instance, we can differentiate between the *sources* of power. Power may stem from material resources and economic wealth, as highlighted in the traditional "elements of national power" approach [57], but also from information, norms, the law (e.g. the right to make laws) [58] decision making rules [59], institutional positions [60], and so on. We also can

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[55] J.D. Fry, *Attribution of Responsibility* in A. Nollkaemper-I. Plakokefalos (eds), *Principles of Shared Responsibility* cit.

[56] Baldwin, *supra*, note 7; S. Guzzini, *The Concept of Power: a Constructivist Analysis*, in 33 *Millennium – Journal of International Studies*, 2005, at pp. 495, 503.

[57] H.J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 3rd ed., Alfred A. Knopf, New York, 1960.

[58] R.A. Dahl, *Modern Political Analysis*, 5th ed., Prentice Hall, Englewood Cliffs, N.J., 1991, at p. 35.

[59] R.A. Dahl, *Power,* in *International Encyclopedia of the Social Sciences*, vol. 12, Free Press, 1968, p. 412.

[60] P. Bachrach-M.S. Baratz, *Two Faces of Power*, in 56 *American Political Science Review*, 1962, p. 947 ff.

differen-tiate between the *means* of power, such as economic coercion, sanctions, provision of information, and the adoption of rules [61].

Relying on a typology developed by Barnett and Duvall, I will systematize the diverse forms of power that are relevant to responsibility along two dimensions [62]. Other typologies are of course possible, but for present purposes this typology suffices to illustrate the diversity of power in its relationship to legal responsibility.

The first distinction concerns the different ways in which power is expressed. Here we can distinguish between, on the one hand, power expressed in the relations between actors (power of one actor vis-à-vis another actor), and, on the other hand, power of actors to do something, which is grounded, for instance, in capability. This latter form can be labelled constitutive power. Analytically, the latter form precedes the former, since the power expressed in relations between actors presumes, and is based on, a constitutive power to do something. However, it will appear that power as expressed in interactions is more directly relevant to the operation of the law of responsibility than constitutive power.

The second distinction concerns degrees of specificity in which power is exercised. Here we can distinguish between, on the one hand, the exercise of specific power in a particular instance (for instance, direction of a particular conduct) and, on the other hand, more general and diffuse power (for instance overall control over a particular actor). International law has tended to attribute more weight to the former exercise of power [63], but that may have come with the neglect of underlying, more general and diffuse dimensions of power.

Incorporating both dimensions in a matrix, we can identify four forms of power.

How power works	*Degree of specificity*		
		Direct	*Diffuse*
	In interactions	Compulsory power	Institutional power
	Constitutive	Structural power	Productive power

[61] BALDWIN, *supra*, note 7.

[62] BARNETT-DUVALL, *supra*, note 30, at p. 12. The following typology is largely based on this work, but applies to the specific context of international responsibility.

[63] *Bosnian Genocide*, *supra*, note 52, paras. 402-412.

Applied to the context of responsibility and more generally international law, the four resulting forms of power can be described as follows.

Compulsory power allows one actor to determine in a concrete situation the conduct of another [64]. In the law of responsibility, effective control, direction and control and coercion are examples [65]. These exercises of power are recognized in international law, but they need not be grounded in international law. Indeed, the exercise of for instance coercion may be in violation of international law. The ECtHR has said many times that a State's responsibility for conduct abroad may be engaged as a consequence of military action abroad «whether lawful or unlawful» [66]. However, in particular cases legality may be a relevant component of the exercise of such power [67].

Institutional power relates to the more diffuse forms by which one actor can exercise power over another actor [68]. In the law of responsibility, examples are the notion of overall control [69] and the complete dependence of one actor in relation to another actor [70]. These forms of power do not see to control in a particular instance. Another possible example is the somewhat controversial concept of power to prevent as a basis for attribution. In the *Srebrenica* case, the Netherlands Supreme Court accepted that for determining whether the state had effective control over an act it was relevant whether «the UN or the State had the power to prevent the conduct concerned» [71] Thus, the removal of Nuhanovi? and Mustafi? from the compound could be attributed to the Netherlands, if the Netherlands *was able to prevent that removal* [72]. This

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[64] BARNETT-DUVALL, *supra*, note 30, at p. 13.

[65] ARSIWA, *supra*, note 10, arts. 8, 17, 18.

[66] *Ilascu* cit., *supra*, note 14, para. 314. See also *Issa* cit., *supra*, note 39, para. 69.

[67] In *Al-Skeini*, the Court observed that whether a state lawfully engages in conduct in another state can be relevant to the applicability of exceptions of territorial jurisdiction, *Al-Skeini* cit., *supra*, note 43, para. 135.

[68] BARNETT-DUVALL, *supra*, note 30, at p. 15.

[69] *Prosecutor v Tadic*, Judgment, ICTY-94-1 (26 January 2000).

[70] *Bosnian Genocide* cit., *supra*, note 52, para. 400.

[71] *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Nuhanovic*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, Supreme Court, 6 September 2013.

[72] See also T. DANNENBAUM, *With Power Comes Responsibility – Joint Ventures,*

could be construed as a form for institutional power in relation to another actor, which may, in particular case, be transformed into compulsory power.

Structural power entails the constitutive relation that defines what particular actors can do [73]. This power generally will be both of a factual and a legal nature. From the perspective of international law, we can place in this category jurisdiction (or "legal power"). Indeed, in international law, the normal meaning of jurisdiction relates precisely to legal power: the «lawful power to act» [74]. Legal power may help a state to get others to do what it wants [75], but, in principle, in itself does not trigger its responsibility (even though it may be relevant for determining the obligations of a state and may carry a presumption of control) [76]. However, legal power will be only one dimension of structural power, and generally factual constellations will be more important. This already follows from the fact that the jurisdiction of the state emanates from, and is a manifestation of, statehood that in turn will rest on some form of effective, and thus factual, power over territory [77]. Also in this category belongs the notion of capability, as that is relevant for the performance of (due diligence) obligations [78].

Attribution, and Morality in International Law, in P.A. NOLLKAEMPER-D. JACOBS (eds.), *Distribution of Responsibility in International Law*, Cambridge University Press, forthcoming.

[73] BARNETT-DUVALL, *supra*, note 30, at p. 20.

[74] B.H. OXMAN, *Jurisdiction of States*, in *MPEPIL*, 1436. F.A. MANN, *The Doctrine of Jurisdiction in International Law*, in 111 *Recueil de Cours*, 1964, pp. 1-162. W.M. REISMAN, *Jurisdiction in International Law,* Ashgate Aldershot, Dartmouth, 1999. V. LOWE, *Jurisdiction* in M.D. EVANS (ed.), *International Law,* Oxford University Press, Oxford, 2006, pp. 335-360; M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties*, cit., *supra*, note 41, at p. 26.

[75] See e.g. D. BODANSKY, *Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, in 93 *AJIL*, 1999, p. 596.

[76] DE SCHUTTER, *supra*, note 41, p. 218.

[77] *Al-Skeini*, *supra*, note 43, para. 138. This principle echoes the statement of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra*, note 44, p. 54, para. 118, that physical control of territory is the basis of state liability.

[78] See on in capacity as a foundation for an actor's role in protection (and thus also as a normative basis for condemnation for failures to protect): A. ORFORD, *International Authority and the Responsibility to Protect,* Cambridge University Press, Cambridge, 2011, at p. 16; J. PATTISON, *Assigning Humanitarian Intervention and the*

Finally, productive power, closely related to structural power, relates to the bases on which a state can exercise longer term and more diffuse forms of control in relation to others [79]. In international law, one could think of the power of states over international lawmaking or over particular international institutions, that more generally impact on other actors. This form of power is in particular relevant, as it may shape the specific legal rules that determine whether or not the exercise of a particular type of power in a concrete instance (coercion, soft power, influence) does or does not engage the responsibility of a state. In this sense, structural and productive power underlie the principles that link compulsory and diffuse power to responsibility.

Distinguishing between these different forms of power is more than a purely analytical exercise. The distinctions matter, in the sense that different forms of power may lead to different relationships with responsibility. Distinguishing between them yields analytic clarity on the conditions for each form of power, how these form relate to responsibility, and on how multiple forms can operate in complementary ways [80].

This latter point (complementarity) is key to shared responsibility. It follows from the above distinction that multiple forms of power may apply in, or be relevant to, any particular situation. That is certainly the case when multiple actors are involved. For instance, effective control of territory (that to a certain degree may be a facet of structural power) by one state [81], may co-exist with use of force against a particular victim (compulsory power) by another [82], Likewise, attribution based on institutional power may coexist with attribution based on compulsory power.

Responsibility to Protect in J. HOFFMANN-A. NOLLKAEMPER (eds), *Responsibility to Protect: From Principle to Practice,* Amsterdam University Press, Amsterdam, 2012, at p. 176; J.M. WELSH-M. BANDA, *International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?*, in 2 *Global Responsibility to Protect*, 2010, pp. 213, 218-219; D. MILLER, *The Responsibility to Protect Human Rights*, in *Working Paper Series SJ006* (May 2007), Department of Politics and International Relations, Oxford University, pp. 2-13.

[79] BARNETT-DUVALL, *supra*, note 30, at p. 18.

[80] Compare BALDWIN, *supra*, note 7.

[81] *Al-Skeini*, *supra*, note 43, para. 138. This principle echoes the statement of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra*, note 44, p. 54, para. 118, that physical control of territory is the basis of state liability.

[82] *Al-Skeini*, *supra*, note 43.

There is ground for accepting that, in such cases, dual attribution is possible [83], but the apportionment may well be influenced by the different forms of power.

The distinction between the boxes are not watertight, however, and some cases can be seen from two perspectives. The *Bosnian Genocide* case is an example [84]. In the Court's interpretation, the existence and application of states' obligations to prevent genocidal acts by other actors depended in part on the power of the state in relation to the relevant actors [85]. To some extent this may be a reflection of the structural power of a state "to do something" [86]. But it also can be considered in terms of a diffuse power in relation to another actor (institutional power). The same can be said for comparable international obligations relating to other actors, as accepted by the ICJ [87], the Inter-American Court of Human Rights (IACtHR) [88] and the ECtHR [89].

The picture that emerges is that between different dimensions of responsibility, considerable differences exist in terms of the nature of the power-responsibility relationship, and that these distinctions matter for determining and apportioning shared responsibilities. None of this refutes that power breeds responsibility, but it does suggests that a refinement of the proposition is useful. In any particular context, it will be needed

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[83] F. Messineo, *Attribution of Conduct*, in A. Nollkaemper-I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law*, cit.; B. Boutin, *Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanovi? and Mustafi?: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping*, in 25 *LJIL*, 2012, pp. 521-535; P.A. Nollkaemper, *Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica*, in 9, *JICJ*, 2011, pp. 1143-1157; *Nuhanovi?*, *supra*, note 71, para. 3.11.2; see also para. 3.9.4.

[84] *Bosnian Genocide*, *supra*, note 52.

[85] That also holds for the Court's statement that the Genocide Convention imposes an obligation upon all states party «to employ all means reasonably available to them, so as to prevent genocide so far as possible», *ibidem,* para. 461 (emphasis added).

[86] *Ibidem*, para. 430.

[87] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports*, 2004, p. 136, para. 159; *Armed Activities*, *supra*, note 48, paras. 178-80, 219-229, 248-250.

[88] *The Mapiripán Massacre v. Colombia*, Inter-American Court of Human Rights, Series C, No. 134 (15 September 2005), para. 114.

[89] *Loizidou v. Turkey*, App. no. 15318/89 (ECtHR, 23 March 1995).

to inquire into the nature of power, the possible interactions between different forms of power, and the combined impact on responsibility.

4. *The relational nature of power*

A second aspect in which the power-breeds-responsibility needs to be refined, concerns situations in which multiple states exercise power in relation to a particular person. In such cases we should inquire not only into the relation between a state and the author of an act, but also into the relation between one state and another state (or international organization), that both exercise power in relation to one or more authors of a wrongful act.

In these situations, it becomes clear that power is a relative phenomenon. The question is not so much whether a particular state holds power, but what the scope of its power is in relation to another actor. For instance, does the power of one actor in relation to the author of a wrongful act renders irrelevant, for legal purposes, the power of another actor in relation to that act? If so, the power of the latter actor does not breed responsibility at all as it is overruled by the power of the former actor. This perspective may enrich the rather simple power-breeds-responsibility proposition.

How power of multiple actors interacts, may differ between the different forms of power identified in the previous section. For instance, the exercise of institutional power or productive power by one state vis-à-vis another state is less likely to generate responsibility of the former state than compulsory power. Also, structural power of one state in relation to another state in itself may be unlikely to serve as a basis for attribution, but surely will underlie and help to understand compulsory power, and moreover is relevant in terms of jurisdiction and the performance of obligations.

A few examples illustrate the diversity of situations that may arise. In relation to jurisdiction, multiple states can exercise jurisdiction over a victim of a wrongful act. This holds for a situation where multiple states exercise extra-territorial jurisdiction, such as in the case *Jaloud v. the Netherlands* where both the Netherlands and the United Kingdom exercised jurisdiction in Iraq, and the question of assignment of responsibility was contingent on the relative power between these states. The

extraterritorial jurisdiction by one state also may coexist with the jurisdiction by the territorial state. Whether shared jurisdiction and shared responsibility result, depends on the relative power of the two states. In some cases, the exercise of power by the former state is such that the state that has territorial jurisdiction cannot exercise its jurisdiction. In *Ilascu and others v. Moldova and Russia* [90] the Court held that «a State not in effective control of part of its territory could not really exercise territorial jurisdiction and sovereignty» [91]. In that case, there would be no shared jurisdiction, let alone shared responsibility. Whether or not this is the case, in the final analysis is a factual question, that depends on «whether, at the time of the conduct complained of, the State authorities did or did not exercise effective control over the alleged victims» [92].

As to wrongfulness, the notion of relative power seems less relevant. In situation where multiple states have an obligation to perform a due diligence obligation in relation to private actors or other states, both states could be responsible, quite irrespective of the distribution of power. This can be illustrated by the Judgment of the ICJ in the *Bosnian Genocide* case [93]. In the Court's interpretation, all states can have an obligation to prevent, and potentially can be responsible for failing to prevent, genocidal acts committed by other actors. The Genocide Convention imposes an obligation upon *all states party* «to employ all means reasonably available to them, so as to prevent genocide so far as possible» [94]. In this approach, the capacity of states to influence effectively the action of persons likely to commit, or already committing, genocide [95] will differ between states, but, in principle, the power of one state need not affect the power of another.

However, in situations where the jurisdiction of two states overlaps, the question whether they can perform obligations may depend on an

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[90] *Ilascu*, *supra*, note 14.

[91] *Ibidem*, para. 300.

[92] *Ibidem*.

[93] *Bosnian Genocide*, *supra*, note 52.

[94] *Ibidem*, para. 430.

[95] See on in capacity as a foundation for an actor's role in protection: ORFORD, *supra*, note 78, at p. 16; PATTISON, *Assigning Humanitarian Intervention and the Responsibility to Protect*, cit., *supra*, note 78, at p. 176; WELSH-BANDA, *supra*, note 78, pp. 218-219; MILLER, *The Responsibility to Protect Human Rights*, cit., *supra*, note 78, pp. 2-13.

assessment of relative power. The ECtHR in *Ilascu and others v. Moldova and Russia*[96] appeared to adopt a relative concept of jurisdiction, in which jurisdiction would be a matter of degree determining the scope of the obligations of the State concerned[97]. This seems problematic, since either a state exercises jurisdiction or it does not[98]. But what could be said is that different degrees of power, in relationship to each other, determine what in any case can be required from a state. The fact that Moldova (only) had to «endeavor, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organizations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention»[99] surely was based on assessment of relative power.

Finally, power also has an essentially relative nature in relation to attribution. In cases where a state is not responsible for its own acts, but can be responsible in connection with the wrongful act of another state[100], responsibility of the former state may or may not exclude responsibility of the latter state. Whether or not this is the case, essentially turns on the form and scope of power vis-à-vis that actor. For instance, in case of a state directing or controlling another state (compulsory power)[101], the question may arise of whether the directing state is solely responsible, or whether this responsibility is shared with the dependent state. The question was answered in the former way by Ago[102], and later Dominicé, who argued that it is only the controlling state that is responsible, «for it is either that the state is responsible for the act of another carried out under its direction or control, or the dependent state maintains a certain degree of freedom, in which case it is responsible for its own conduct»[103]. The ILC seems to have decided otherwise[104], but in the case of coercion, it found that only the coercing state would be

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[96] *Ilascu*, *supra*, note 14.

[97] De Schutter, *supra*, note 41 at p. 222.

[98] Besson, *supra*, note 41, at p. 878.

[99] *Ilascu, supra*, note 14, para. 300.

[100] ARSIWA, *supra*, note 10, arts. 16-18.

[101] ARSIWA, *supra*, note 10, art. 18.

[102] Ago, *supra*, note 38, para. 45.

[103] Dominicé, *supra*, note 38, pp. 284-288.

[104] ARSIWA, *supra*, note 10, art. 19.

responsible [105], even though it may well be argued that even a coerced state has a degree of freedom that would justify the consideration of its international responsibility [106].

None of this leads to the conclusion that the power-breeds-responsibility proposition is wrong. It does mean, however, that in the context of shared responsibility the proposition needs to be refined. Within this context the question is not so much whether power counts, but whose power counts, and how the power of one actor relates to, and is influenced by, the power of another actor. Just like responsibility, power is a relational phenomenon which, precisely as a result of its relational nature, has to be understood in relative terms.

5. *The mutual influences of power and responsibility*

The proposition that power breeds responsibility presumes a one-way relationship. In this respect too, the proposition needs to be refined to take account of a more complex, dialectical situation. This involves two aspects. The first is that power does not only breed responsibility, but also shapes the law that determines when exactly the exercise of power in any particular case triggers responsibility. The second aspects is that (the law of) responsibility feed back on, and influence of power of relevant actors.

On the one hand, the assessment so far has focussed on how and on what grounds the exercise of power can lead to responsibility. But there is a another dimension to this relationship. Power also shapes the underlying law that determines in which situations, which forms of power trigger responsibility. This relates to what in the matrix in section 3 was labelled "productive power". The question whether a state accepts an obligation, or a particular principle of responsibility, in the first place, and what that obligation or principle entails, depends in part on such productive power. The general point then is that responsibility in any

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[105] This is at least suggested by the fact that coercion is a circumstance precluding wrongfulness under article 18 of ARSIWA.

[106] J.D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility,* in 40(3) *Vanderbilt Journal of Transnational Law*, 2007, p. 611 ff., at p. 639.

given society is structured by the power relations that exist within that society [107]. This certainly also holds for the international society.

On the other hand, responsibility, and the law in which it is embedded, feed back and may co-constitute power in the first place. As a general proposition, politics does not only underlie (and operate outside) the law, but also operates within, and is itself partially constituted by the law [108]. This holds direct relevance for the power-responsibility relationship. We need to recall that power may stem not only from material resources such as military means or wealth, but also from an institutional position as well as from the normative framework in which a state is embedded [109]. Such institutions and norms may feed back on power itself. Power then may be partially constituted by law. This would in particular seem relevant for what in the matrix was labelled "constitutive power".

Here there are two points to make. First, the very assignment of responsibility to an actor may influence the distribution of roles and power between actors. The idea is that judgments on the responsibility of a particular actor for harmful conduct can lead these actors in the future to take into account the interests and actors that were affected, and alter its future role vis-à-vis such actors [110]. A related point is that the distribution of responsibility underlies and can inspire political action and thereby the exercise of power [111]. Of course, in international law this proposition rests on more than a few presumptions, and surely will not hold in each and every case, but the premise that responsibility can shape future conduct, roles and relations seem fundamental to the very existence and justification of this body of law.

The second point is that the law of responsibility, itself the product of power, feeds back to constitute and legitimize particular exercises of power. We have to recall that particular obligations do not only prohibit but also legitimize doing what is not prohibited [112]. This applies equally

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[107] SMILEY, *supra*, note 25, at p. 96.

[108] REUS SMIT, *The Politics of International Law*, cit., *supra*, note 20, at p. 14; ID., *Politics and International Legal Obligation, supra*, note 20.

[109] BACHRACH-BARATZ, *supra*, note 60.

[110] See SMILEY, *supra*, note 25, at p. 96.

[111] This idea is developed in A. LANG, *Shared Political Responsibility* in P.A. NOLLKAEMPER-D. JACOBS (eds), *Distribution of Responsibility* cit.

[112] D. KENNEDY, *The Dark Sides of Virtue: Reassessing International Humanitarianism,* Princeton University Press, Princeton, 2005.

to rules of responsibility. The prohibition on aid and assistance with regards to the commission of a wrongful act may, for instance, legitimize more than it prohibits [113].

The point also can be illustrated by the principles of jurisdiction in relation to extra-territorial conduct. The concept of jurisdiction is not an innocent intermediate variable between power and particular obligations that just renders these obligations applicable. Seen from another angle, jurisdiction functions as a hurdle that can break the otherwise applicable link between power and obligations, and that can have the effect of making it lawful for a state to engage in conduct abroad, infringing individual rights, when such conduct would be prohibited if the state were to act within its own territory. When the jurisdiction threshold is not met, the requirement of jurisdiction may shield the relevant actors from responsibility. Such a territorial distinction may be justified in relation to positive obligations, but it is problematic to introduce it to negative obligations [114]. The ECtHR itself confirmed as much when it said that «Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory» [115]. Yet, in other judgements, the Court construed requirements of jurisdiction in a way that had precisely the effect of shielding states from a responsibility that they would otherwise incur. *Bankovic* remains a noteworthy example [116].

Another example of the legitimizing and constitutive effect of the principles of responsibility is the state-agent exception in the context of extra-territorial jurisdiction (that is: extra-territorial conduct need not be sufficient to bring a victim within the jurisdiction of a state, but that may be different in case of state-agent conduct vis-à-vis a victim). The

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[113] V. Lanovoy, *Complicity in an Internationally Wrongful Act* in A. Nollkaemper-I. Plakokefalos (eds.), *Principles of Shared Responsibility*, cit., p. 134 ff.

[114] O. De Schutter, *supra*, note 41 at p. 203; Talmon, *supra*, note 54 (noting that there is no cogent reason to impose the jurisdiction threshold on a negative State obligation to refrain from doing harm). See also J. Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context*, in 40 *Israel Law Review*, 2007, p. 396 ff., at p. 416.

[115] *Issa*, *supra*, note 39, para. 6.

[116] *Bankovic and others v. Belgium and others*, App. No. 52207/99 (ECtHR, 12 December 2001).

cases brought to the ECtHR led the Court to articulate the State agent exception in the rather peculiar context of use of force. But surely the example of a State agent using force against a civilian is only one of many forms of power, and it is not at all obvious why this particular form of power rather than other forms would be required [117]. In effect, the narrow category defined by the Court legitimizes other forms.

Where the threshold is not met, a state exercising power (that falls short of what is required for the exercise of jurisdiction) may in effect shift responsibility to one or more other states. In this respect the notion of jurisdiction can both enable determinations of shared responsibility, and justify the practice of blame-shifting.

Finally, also in the context of attribution we can observe that power may not only breed responsibility, but that a reverse relationship applies. The relatively high threshold that needs to be met before power actually engages responsibility in effect shields a wide diversity of exercises of power which impact on authors of wrongful acts. This surely holds for the exercise of soft power, defined as the ability to affect others «through the effective means of framing the agenda, persuading, and eliciting positive attraction in order to obtain preferred outcomes» [118]. Also positive sanctions can surely represent an effective means to shape the conduct of others [119], yet do not lead to responsibility. The same holds for more diffuse forms of power, such as overall control. It was precisely the concern over the range of power not covered by effective control that prompted the International Criminal Tribunal for Yugoslavia (ICTY) to opt for the less demanding standard of overall control in *Tadic* [120]. The fact that the ICJ in the *Bosnian Genocide* reconfirmed effective control as the appropriate standard [121], confirms the shielding function of the standard of attribution, working against the proposition that power breeds responsibility. The high thresholds set by the ARSIWA and the ARIO make it perfectly possible that a state exercises (soft)

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[117] See for a critical reflection on the scope of this criterion, J. Cerone, *supra*, note 114, pp. 435-436.

[118] J.S. Nye, *The Future of Power*, Public Affairs, New York, 2011, pp. 20-21.

[119] M. Ninic, *Getting What You Want: Positive Inducements in International Relations*, in 35(1) *International Security*, 2010, p. 138 ff.

[120] *Tadic*, *supra*, note 69, paras. 120, 122, 131, 145.

[121] *Bosnian Genocide*, *supra*, note 52, paras. 402-406.

power to influence private actors or other states, without this leading to attribution of such acts to the state and thus without leading to (shared) responsibility [122].

All of this will affect the application of the proposition that power breeds responsibility in the context of shared responsibility. International law has formulated the standards for jurisdiction, wrongfulness and attribution in such a way that power may be trigger, but that power also may be legitimized. In a multiparty setting, this may well mean that the power of some states may be legitimized, even though they contribute to the harmful outcome. The result may be that responsibility is shifted to other actors.

6. *Conclusion*

Generally speaking power is an important concept in explaining the allocation of responsibility between multiple parties. The concepts of jurisdiction, wrongfulness and attribution, all enable the possibility that multiple states may exercise power in relation to the author of wrongful act and that, via these concepts, the responsibility of these multiple states is engaged.

However, the proposition that «power breeds responsibility» hides many nuances and complexities. Power can have multiple meanings, and these meanings may moreover differ for different dimensions of responsibility, such as jurisdiction, wrongfulness, and attribution. Differentiation is necessary and indeed can be helpful in articulating grounds for the distribution of responsibility among multiple actors.

It also was noted that the relational nature of power means that, in any case, in a shared responsibility setting, we need to understand power, in relative terms. Where one state exercises significant power, this may preclude the possibility that another state exercises jurisdiction, that that state can perform its obligations, or that conduct can be attributed to the latter state. Even though that latter state may still exercise some power, that power will not breed responsibility since it is trumped by the superior power of another state. The question is not so much whether

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[122] C. CHINKIN, *A Critique of the Public/Private Dimension*, in 10(2) *EJIL*, 1999, p. 387 ff.

power breeds responsibility, but whose responsibility, and how the power of multiple states interact.

Finally, while power may influence determinations of shared responsibility, we have observed that power can also work the other way. Power functions at two quite different levels (one, labelled here as productive power, pertaining to the establishment of the regimes of primary and secondary norms and one, for instance compulsory power, pertaining to the exercise of power within such regimes). Power may not only enable shared responsibility, but may also be constituted and legitimized by international law, thus shielding actors from responsibility, and thereby justifying blame-shifting.

It follows that power is best considered as a compound concept whose various dimensions may pull in different directions, and may differ in its meaning in relation to particular aspects of responsibility. In this respect, the proposition that power breeds responsibility may be valuable as both an explanatory and normative proposition, but needs to be refined if it is to be relevant for understanding the principles of international law pertaining to shared responsibility.

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