LUISS

Dipartimento
di Giurisprudenza

Cattedra: Diritto Internazionale

# A study on shared responsibility

## Legal roots and projected avenues for the doctrine of shared responsibility

Prof. Christopher Michaelsen
RELATORE

Prof. Pietro Pustorino
CORRELATORE

Vittorio Lago - Matr. 147333
CANDIDATO

Anno accademico: 2020/2021

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# INTRODUCTION

The law of international responsibility, since its dawn, has carried the role of a mitigator in the context of sovereign powers - a role which is exemplified by the classic conception of responsibility as a 'necessary corollary' of the equality of States.[1] The absolute pre-eminence of the concept and role of sovereignty, furthermore, responded to the needs of the Westphalian system, in which States controlled the puzzle of international relations and stood as solitary players in the international law field.[2] Despite such solitude has been progressively vanished in favor of the insurgence of new international actors, with the most notable mention of international organizations, States have been able to maintain their character as central subjects of international law, but have had to accept a number of changes in their position. For instance, there has been a historical switch from the function of international law as the guardian of the independence of States, to that of international law as the system that organizes the coexistence between entities that populate the global field.[3] One of the multiple elements that have contributed to this evolution has been the gradual realization of the interconnectedness between the spheres of competence of sovereign States, both in terms of active and passive conduct. In time, notions such as "cross-border solidarities", began to acquire consistence, in terms of sovereign States that, as a group, can be affected by a certain harmful event and, equally, States began to break the walls of absolute independence to establish more or less durable unions of States. In this context, the birth and diffusion of international governmental organizations can be seen as one of the most important developments of the last centuries.[4]

Among the numerous consequences that have been arising from the growing interconnectedness between international actors, a suggestion began to make space for itself that international responsibility - a historically paradigmatic ambit for the individuality and absolute independence of States to find concreteness[5] - could be shared between States, whenever numerous contributions by different actors could have been linked to a single wrongful conduct.[6] This suggestion is almost a revolutionary one, considering

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[1] Charles de Visscher, "La responsabilité des États", in *Bibliotheca Visseriana*, Brill (1924); p. 90.

[2] Alain Pellet, "The Definition of Responsibility in International Law", in *The Law of International Responsibility,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 3-17; p. 5.

[3] *Ibid.*, p. 10.

[4] Matthias Hartwig, "International Organizations or Institutions, Responsibility and Liability", in *Max Planck Encyclopedia of Public International Law*, 2011, para. 2.

[5] André Nollkaemper and Dov Jacobs, "Shared Responsibility in International Law: A Conceptual Framework", *Michigan Journal of International Law*, Vol. 34, No. 2 (2013): 360-441; p. 381.

[6] International Law Commission, Special Rapporteur James Crawford, *Second Report on State Responsibility,* 1999, A/CN.4/498, para. 159.

that the general approach to international responsibility has consolidated, in time, an approach which considers responsibility an exclusive relationship between claimant and defendant. This tendency is rooted in multiple causes, among which are the above mentioned principle of State sovereignty, which would suggest that no State would accept, in principle, to be subjected to responsibility for conducts that have been put into place by other actors[7] and, more generally, the normative difficulties that would arise in holding a State responsible for a conduct other than their.[8] Nonetheless, it can be argued, on opposite terms, that if sovereignty does not impair State responsibility, it does not impair shared responsibility, either. It has been rightly asserted that the ability by States to discharge binding obligations and, thus, to be able to claim responsibility whenever these obligations are not fulfilled is a necessary corollary to the ability by States to assert rights.[9] If, therefore, responsibility is inextricably linked with the ability of States to enforce their rights, nothing should prevent these from asserting their rights against all actors which have contributed to infringing them.

Overall, the practical recognition of the fact that wrongful conducts can, indeed, be the result of contributions originating from multiple actors should be sufficient for the system of exclusive responsibility to be overturned. Even more so, when considering that aggregate action by multiple States has largely increased over the years, with the addition of other international actors, as has already been mentioned, the dawn of a proposal of shared responsibility was almost an inevitable step. Except extraordinary cases, it is an obvious conception that the "formal legal truth" should, in principle correspond to the "substantive legal truth".[10] The main argument in favor of shared responsibility, thus, ascends from the legal *adagio* that if numerous States have significantly contributed to a harmful conduct, these States should share responsibility for said conduct. If, on the contrary, the legal international system of responsibility was to be rigidly set on a model of exclusive responsibility, the substantive reality would be at threat of being misrepresented in judicial decisions, ultimately endangering the benefits of the law on responsibility.[11]

A part of scholarship has individuated a number of social and political dynamics that could favor the establishment of such principle in the present legal framework.[12] Among these, the phenomenon of

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[7] Nollkaemper and Jacobs, note 5, p. 386.

[8] André Nollkaemper, "The duality of shared responsibility", *Contemporary Politics*, Vol. 24, No.5 (2016): 524-544; p. 527.

[9] International Law Commission, Special Rapporteur Roberto Ago, *Third Report on State Responsibility,* 1971, A/CN. 4/246 and Add.1-3, para. 33.

[10] Robert S. Summers, "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding -- Their Justified Divergence in some Particular Cases", *Law and Philosophy,* Vol. 18 (1999): 497-511; p. 500-504.

[11] Nollkaemper, note 8.

[12] Nollkaemper and Jacobs, note 5.

"interdependence"[13]: it was argued that international actors do not stand in a relationship of mere coexistence, but that the puzzle of international relations has brought its pieces to be connected by a relationship of proper "complex interdependence".[14] The progressive grow in consciousness of the existence of common goods - the most notable of which the environment[15] - and common goals - an example of which can be the recent pandemic[16] - has rendered almost inevitable instances that bring numerous States together in cooperative actions, therefore increasing the possibility for scenarios that include cooperative responsibility. This process inevitably emphasizes the necessity for international relations to be represented faithfully in international law, thus including the law on responsibility. Equally important, for the doctrine of shared responsibility, has been the process of "moralization" in international law.[17] The term refers to a progressive acknowledgment of the existence of a series of norms that protect the international community in general and that can be considered hierarchically superior to others, with effects that can also extend to the law on responsibility.[18] In particular, human rights law has been a leading subject in this sense, given the consolidated position that "[human rights'] protection and promotion is the first responsibility of Governments".[19] Human rights law has experienced a process of revolution concerning the establishment of a "responsibility to protect" communities from mass human rights violation,[20] which conveys the positive obligation to take active measures to prevent the violation of human rights, rather than the classic obligation not to violate them. This diffusion of responsibility inevitably renders the national borders insufficient to delimitate the shares of the obligation to protect human rights.[21] With reference to this subject, then, it may occur that the responsibility may be shared among a number of States that had a particular relation with the violation of human rights, without necessarily having to choose a single actor as responsible.[22]

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[13] *Ibid.*, p. 370-372.

[14] Robert O. Keohane and Joseph Nye, "Power and Interdependence", *Survival,* 1973, pp. 158-165.

[15] Arild Vatn, "The Environment as a Commodity", *Environmental Values*, Vol. 9, No. 4 (2000): 493-509.

[16] Thomas J. Bollyky and Chad P. Bown, "The Tragedy of Vaccine Nationalism: Only Cooperation Can End the Pandemic", *Foreign Affairs*, Vol. 99, no. 5 (2020): 96-109.

[17] Nollkaemper and Jacobs, note 5, p. 373-375.

[18] *Ibid.*

[19] *Vienna Declaration*, World Conference on Human Rights, Vienna, 14-25 U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

[20] Nienke Van der Have, *The Prevention of Gross Human Rights Violations Under International Human Rights Law*, Springer, 2018, pp. 6-9.

[21] Toni Erskine, "'Coalitions of the Willing' and the Shared Responsibility to Protect", in *Distribution of Responsibility in International Law*, edited by Nollkaemper and Jacobs, Cambridge University Press (2015): 227-264; p. 231.

[22] Monika Hakimi, "Distributing the Responsibility to Protect", in *Distribution of Responsibility in International Law*, edited by Nollkaemper and Jacobs, Cambridge University Press (2015): 256-289; p. 279.

The human rights protection framework is only illustrative[23] of a process that is much wider in scope and encompasses international law as a whole: that the conducts of numerous States may be contributive to a single result and that the contributions by these States - in terms of both actions and inactions - may also be considered wrongful and may engender responsibility upon each of them. In this analysis, the focus will drive precisely on whether the international legal framework can be considered as welcoming, or hostile to a insurgence of the doctrine of shared responsibility.

In sum, the subject-matter of the present thesis, shared responsibility, roots its foundations in a rich combination of social and historical factors. The primary aim of this thesis, however, is to investigate the normative substrate of the doctrine, in the attempt to verify whether the suggestion of a future in which responsibility can be shared is a realistic one, or not. The reason behind a normative analysis moves from a juridical mindset in which it is essential for any modification in the realm of law to be grounded in a specific source of law. For this very reason, indeed, much of the attention will be given to the analysis of the relevant norms regulating international responsibility. Furthermore, special effort was invested to interpret these rules in a way that can be considered adherent to the preparatory works around the sources, or to the literal interpretation of the texts. The aim has been to produce an outcome that can be considered realistic and independent from *a priori* favor, or disfavor towards the shared responsibility discipline. For the same reason, social, political and economic reasons have been generally excluded from the present analysis, except when these considerations were indispensable for a satisfying depiction of facts, despite the acknowledgment that these factors do inevitably play an important role in the ambit of such a revolutionary suggestion.

A second objective of this thesis, although necessarily collocated in close connection with the first, is that of suggesting what the projected avenues are for the doctrine of shared responsibility. It goes without saying that the answer to such enquiry depends largely on the outcome of the analysis of the normative framework. Equally, however, it goes without saying that a merely legal analysis would unsatisfactory to delineate the future of the doctrine. Hence, the present thesis will take into consideration relevant jurisprudence on the matter of shared responsibility and some sector-specific observations on the fields of climate change law and humanitarian law, to attempt to offer a more specific answer to the question of projected avenues. There is no ambition to offer a definitive answer to the question whether shared responsibility will establish itself in international law - a question which has no answer, at the current stage - and the objective of the present work is to offer the reader the sufficient factual instruments to draw its conclusions. Nonetheless, however, the thesis will not shy to draw the attention, along the course, towards some of the more viable future avenues for the doctrine, with the objective to demonstrate that shared

[23] Brigitte I. Hamm, "A Human Rights Approach to Development," *Human Rights Quarterly* Vol. 23, no. 4 (2001): 1005-1031.

responsibility should not be dismissed as a utopian scholarly insight, but that, for how complex, a normative ground for the doctrine to find application could exist. At the same time, however, it will be shown that the small amount of practice and clarity represent concrete threats for the doctrine and that there might be an important gap between the theoretical support to the doctrine and the practical backing that a concrete application would require.

The analysis will proceed from Chapter One, in which the theoretical framework of the law on international responsibility will be posed under analysis. Shared responsibility does not receive any formal regulation in international law. Therefore, the analysis will draw on the existent law on international responsibility in general, with the aim at individuating dispositions that may serve for shared responsibility. In Chapter Two, instead, the focus will be drawn to the observation of judicial outcomes in cases related to shared responsibility. It can already be anticipated that there have been very limited instances where the responsibility of multiple international actors has been affirmed by an international tribunal. Nonetheless, there have been numerous cases where some clarity was made in regards to specific sections of the doctrine of shared responsibility. Finally, Chapter Three has been dedicated to the relationship between climate change law and international responsibility. As will be seen, a large portion of scholarship has suggested that one of the ambits of application which could prove most welcoming for the doctrine of shared responsibility may be that of climate change law, where multiple actors revolve around a global phenomenon. This final part will be, thus, an attempt to specify this analysis to one particular sector, which will include a brief observation of the primary rules that regulate the subject.

# CHAPTER ONE: A THEORETICAL DEPICTION OF SHARED RESPONSIBILITY

## Introduction

Almost ironically, one of the most stand out features of the doctrine of shared responsibility is the little space it receives in the international legal discussion. To an extent, this is quite paradoxical, given that, at first glance, the notion of shared responsibility can be understood as a very straightforward and logical concept. Indeed, even after a more in depth-analysis, the idea of shared responsibility would still make a lot of sense, if one were to estrange itself from the international law environment for a second. Nevertheless, this doctrine has received very little practice in international courts[24] and its normative regulation, scholarly attempts aside,[25] is in many aspects absent.

In its essence, the doctrine of shared responsibility is one which is inherently contradictory. On one side, it embodies a very straightforward idea, as has been just said: that of holding a number of actors responsible for a fact has been committed by them. On the other side of the coin, however, between the principle in theory and its practical application stands, as its arch rival, "the fundamental principle […] on which the whole of international law rests",[26] the principle of States' sovereignty. As a matter of fact, the innate tension between the necessity to create a supranational legal order and the divergent need to respect the historical preeminence in the international field of the figure of the State has tipped the scales in favor, as a functional rule, of a model of exclusive responsibility, rather that one of shared responsibility,[27] resting on the assumption that States are not willing to be held responsible for the conduct performed by other States.[28] Adding on to the conflictualities residing in the notion of sharing responsibility, the most notable legal source on the responsibility of States, the International Law Commission's (ILC) Draft Articles on State

[24] see John E. Noyes and Brian D. Smith, "State Responsibility and the Principle of Joint and Several Liability," *The Yale Journal Of International Law* 13, no. 2 (1988): pp. 225-267, p. 225; or, more recently: André Nollkaemper, "Chapter 41: Conclusions," in *The Practice of Shared Responsibility in International Law*, edited by André Nollkaemper and Ilias Plakokefalos, Cambridge University Press (2017): 1098-1115.

[25] An undoubtedly remarkable attempt to set up a framework was made by: André Nollkaemper et al., "Guiding Principles on Shared Responsibility in International Law", *The European Journal of International Law*, Vol. 31 no. 1 (2020): 15-72.

[26] International Court of Justice, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; Judgment, Merits, 27 June 1986, para. 263.

[27] Nollkaemper and Jacobs, note 5, p. 385-393.

[28] *Ibid.*, p. 385-393.

Responsibility for Wrongful Acts (ARSIWA), which arguably represents the most authoritative source serving as a basis for the doctrine to find application, almost explicitly admits the existence of shared responsibility, as a principle, but at the same time does not shy to repeatedly underline its rare practical application and, in the end, provides very little guidance as to how to solve any question that would emerge from the practical application of the doctrine of shared responsibility in international courts.[29] Further elements of existential conflict reside in the fact that, on one side, the roots that form the basis of this doctrine can be traced in the well-established joint liability principle, which finds application in the large majority of domestic tort law systems,[30] but that, at the opposite side, there exists no *lex posita* that regulates, for example, the eventual apportionment of responsibility among a plurality of actors.[31] A famous passage by Judge Simma, in his separate opinion to the *Oil Platforms* case, with reference to the question of attribution of a number of attacks against neutral vessels in the scope of the Iraq-Iran war[32] even went as far as trying to demonstrate, by the comparative analysis of a number of domestic law systems, the possibility for the joint-and-several liability principle to be considered as a "general principle of law within the meaning of Article 38, paragraph 1 (c), of the Statute of the Court",[33] in the resounding silence of official legal sources on matters like the apportionment of responsibility. Given all these uncertainties, it comes as no surprise that the analysis of the doctrine of shared responsibility will be a tumultuous road. Given that the doctrine in itself, from the points of view mentioned above, presents itself as an oxymoron, it is necessary that, even at the first stages of definition, we adopt a stratified and prudent approach, as for how things can appear fluent on the surface, the roadblocks laying below the silk-smooth appearance are numerous.

Before beginning, however, some reflections upon the sources of law on which the analysis will be mostly concentrated are due, for the purpose of further justifying the non-linearity of the subject that is going to be considered in the following chapters. The law on international responsibility constitutes a field that vastly builds on customary practices, which has codified in the remarkable, decades-long effort by the International Law Commission (ILC) and one which has received some general regulation only in relatively recent times, after decades in which legal writing on responsibility had been limiting itself to drawing rules

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[29] André Nollkaemper, "Introduction", *Principles on Shared Responsibility in International Law,* edited by André Nollkaemper and Ilias Plakokefalos, Cambridge University Press (2017): 1-24; p.3.

[30] Roger P. Alford, "Apportioning Responsibility Among Joint Tortfeasors for International Law Violations", *Pepperdine Law Review*, Vol. 38 (2011): 233-256; p. 241.

[31] Maarten den Heijer, "Procedural Aspects of Shared Responsibility in the European Court of Human Rights", *Journal of International Dispute Settlement,* Vol. 4, No. 2 (2013): 361–383; p. 379.

[32] International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America*, Merits, 6 November 2003. p. 175, paras. 23-24.

[33] International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 6 November 2003, Separate Opinion of Judge Simma, paras. 65-74.

specific to circumscribed fields.[34] The effort mentioned found concreteness with the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), the result of a process that began in 1953,[35] and that culminated in a practical outcome only in 2002.[36] It is intuitive, if not else because of the lengthy period it took, that the process in object was a complex one, abounding in debates.[37] The ARSIWA were followed by another effort of codification in the Draft Articles on the Responsibility of International Organizations (ARIO), a body of law that largely draws from its predecessor and seeks to address, with the relative distinctions, the same rules to international organizations. This second text was welcomed with much less enthusiasm than its predecessor, causing mixed reactions[38] between disillusioned scholars who accused the ILC of both ignoring the differences between States and international organizations[39] and of having attempted to reach an impossible target, given the absence of relevant practice on the subject,[40] and other more encouraging thoughts, downplaying the negative aspects of the instrument[41] and even praising the similarities between the two bodies of law.[42] All of these considerations on the law of international responsibility, in general, translate the idea of the complexities that also surround the doctrine of shared responsibility.

Returning to our thesis, the first Chapter will elaborate in an analytical sense on the concept of shared responsibility, leaning heavily and primarily, for the deconstruction and study of all its components, on the ARSIWA and ARIO (hereinafter, when referred to indistinctly, "the Articles"). Part I will offer an elucidative

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[34] James Crawford et al., "Towards An International Law Of Responsibility: Early Doctrine", in: *International Law and the Quest for its Implementation,* edited by Marcelo Kohen and Laurence Boisson De Charnouzes, BRILL (2010): 373-4.

[35] UN General Assembly, Resolution 799 (VIII), *Request for the codification of the principles of international law governing State responsibility,* 7 December 1953.

[36] UN General Assembly Resolution 56/83, *Responsibility of States for internationally wrongful acts*, A/RES/56/83, 28 January 2002.

[37] James Crawford, *State Responsibility,* Cambridge University Press, 2013, pp. 38-9.

[38] A satisfactory summary of the major points of debate can be found in: Mirka Möldner, "Responsibility of International Organizations – Introducing the ILC's DARIO", *Max Planck Yearbook of United Nations Law*, Vol. 16 (2012): 281-328.

[39] Alain Pellet, "International Organizations Are Definitely Not States. Cursory Remarks On The ILC Articles on the Responsibility of International Organizations" in *Responsibility of International Organizations : Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, BRILL (2013): 41-54.

[40] J.E. Alvarez, "Memo to the State Department Advisory Committee: ILC's Draft Articles on the Responsibility of International Organizations", Meeting of June 21, 2010, p. 2.
Available at: https://www.law.nyu.edu/sites/default/files/ECM_PRO_066900.pdf

[41] Chittharanjan Felix Amerasinghe, "Comments on the ILC's Draft Articles on the Responsibility of International Organizations", *International Organizations Law Review,* vol. 9, no. 1 (2012): 29-31.

[42] Christiane Ahlborn, "The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations -An Appraisal of the 'Copy-Paste Approach'", *International Organizations Law Review,* vol. 9, no. 1 (2012): 53-66.

explanation of the choices made by the ILC in defining responsibility for an internationally wrongful act, which constitutes the stepping stone for the construction of the doctrine of shared responsibility. Part II will delve, then, into the rules that regulate the determination of the responsible actors, illustrating the difference between attribution of conduct and attribution of responsibility, also focusing on the possible actors that can render themselves jointly responsible for a wrongful conduct. Part III will finally consider a different and more practical perspective to the doctrine of shared responsibility, elaborating on the rules that regulate the invocation of responsibility by the injured subject and the rules on allocation of responsibility and on the content of responsibility.

### 1.1. Responsibility and wrongfulness

To begin, it is important to explain how the term "responsibility" is used in the relevant legal sources and how it will be used hereafter. The ARSIWA and the ARIO utilize the term "responsibility" without operating any distinction, applying to it both a merely normative and, in this sense, quite abstract meaning, describing with it the linkage between the wrongfulness of a conduct and an international subject,[43] both a less abstract one, describing the content of responsibility, intended as the concrete reparations owed by the responsible actor, or how the duty to owe reparation should be apportioned between the responsible actors. Clearly, there is continuous interplay between the set of rules individuated in these two different meaning, which attempt to cover the entire spectrum of secondary rules of international responsibility. In this Section, despite the two fields being closely correlated, the initial perspective will be that of focusing on the first typology of responsibility, describing the rules that regulate attribution of responsibility *in abstracto,* focusing in the analysis around the central notion of "wrongful conduct". This choice, adherent to the ILC terminology in ARIO and ARSIWA,[44] pays respect to a willingness to avoid excessive detachment from the literary interpretation of the legal instruments that guide our analysis. It is for this reason that the choice fell on revolving around the notion of "wrongfulness of conduct" to describe the basic features of shared responsibility, rather than on the scholarly popular notion of "harmful outcome", courtesy of Nollkaemper

[43] similarly, Dionisio Anzilotti: "responsibility [is the] legal relationship between the State to which the act is imputable, which is obliged to make reparation, and the State with respect to which the unfulfilled obligation existed, which can demand reparation", *Cours de droit international,* trans Gidel, 1929, reprinted by: Panthéon-Assas/LGDJ (1999), p. 467.

[44] see Article 1 of the *Draft Articles on State Responsibility for a Wrongful Act* (2001) and Article 3 of the *Draft Articles on the Responsibility of International Organizations* (2011) in: International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10) (hereinafter, "ARSIWA", or "ARSIWA with commentaries" for the version with the commentaries by the International Law Commission) and International Law Commission, Draft Articles on the Responsibility of International Organizations, December 2011, (A/RES/66/100) (hereinafter, "ARIO", or "ARIO with commentaries).

and Jacobs,[45] which will be later discussed. The doctrine of shared responsibility is undeniably still in development and, to an extent, largely uncertain. Therefore, in the elaboration of the basic definition of responsibility it appears preferable to adopt a perspective which is close to the work of the International Law Commission in the ARSIWA and the ARIO, which represent the most authoritative sources in the subject. The choice wants to be one of prudence. Despite being welcomed by mixed reactions in scholarship,[46] these two sources have grown to become a central element in judicial practice related to responsibility in international law,[47] ascertaining their position as an obvious initial gateway for academic debate on the matter.

In this Chapter, we have used an artificial expedient to separate two different facets of shared responsibility: this thesis, indeed, distinguishes between *ex ante facto* and *ex post facto* responsibility. The two terms' literal meaning is "before the facts" and "after the facts"[48] and have been employed in legal theory predominantly with reference to law-making, in which the possibility exists to regulate a specific conduct before it has happened and, therefore, in abstract, or to adopt a regulation phase posterior to the event, having had knowledge of the factual circumstances that have surrounded the event.[49] For obvious reasons, the *ex post facto* approach is prohibited when operating in reference to the elaboration of rules that justify the violation of rights, as for example criminal law that regulate punishments.[50] For reasons of methodological clarity, it is argued that the theoretical explanation of the doctrine of shared responsibility can be divided into two separate phases by a specific boundary: the moment of the invocation of responsibility. The first part of the Chapter deals, indeed, with "*ex ante facto* rules", referencing the abstract, normative rules on attribution of conduct.

Before any invocation of responsibility has taken place, in fact, only a theoretical elaboration of the concept of shared responsibility – i.e. the "purest" version of the concept - can exist . At this stage, the

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[45] Nollkaemper and Jacobs, note 5, p. 365 and p. 367.

[46] An fierce position is held by Allott, who claims that the ILC rules determine a mere empowerment of international governments, in disfavor of the "*salus populi",* in: Philip Allott, "State Responsibility and the Unmaking of International Law," *Harvard International Law Journal* Vol. 29, No. 1 (1988): 1-26; see also: Alain Pellet, "International Organizations Are Definitely Not States. Cursory Remarks On The ILC Articles on the Responsibility of International Organizations" in *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, BRILL (2013): pp. 41-54.

[47] An exhaustive enumeration of international tribunals recognizing the authoritativeness of the source is catalogued in the Report of the Secretary-General, on 30 April 2013: UN General Assembly, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General', UN Doc. A/68/72.

[48] Kim A. Kamin and Jeffrey J. Rachlinski, "Ex Post ≠ Ex Ante", *Law and Human Behavior,* Vol. 19 (1995): 89-104; p. 90.

[49] *Ibid.*

[50] Christopher Hutton, "Meaning, Time and the Law: Ex Post and Ex Ante Perspectives", *International Journal for the Semiotics of Law,* Vol. 22 (2009): 279-292; pp. 287-290.

relevant rules only consider the process of attribution of conduct, attribution of responsibility and identify the potential international actors involved. In the second part of the chapter, the emphasis will shift to a more factual observation of the phases of the process that occur during and after an invocation of responsibility has taken place. However, after responsibility has been invoked, the general, abstract rules adjust to the concrete facts that have taken place and, after one or more actors have been found responsible, the questions that assume relevance become the allocation of responsibility among the authors and the reparations owed for the damage caused, which render responsibility an "*in concreto*" matter, one that envisions a proper judgment and a specific obligation to repair the damage resting with the responsible actors.[51] From a conceptual point of view, these two categories encounter a further major difference that distinguishes them. In the first part, the rules concerning responsibility are completely independent from the notion of "injury". Conversely, when invocation occurs, the focus shifts onto the injured international actor and the rules begin revolving around the event of the "injury". This is visible in the reading of the Articles, too, which can be theoretically subdivided in two parts: the first pertaining to the rules that determine *how* and *whom to* allocate responsibility, while the second pertaining to the effective content of responsibility, which is, with good approximation, what the allocation of responsibility *entails.*

Our observation begins with Part One of the Articles, related to the rules governing the allocation of responsibility. A selected observation of the Articles will be conducted in the following paragraphs, with an aim to explicit how and why each article can be useful to add pieces to the puzzle of shared responsibility.

#### 1.1.1. Articles 1 and 2 ARSIWA, Articles 3 and 4 ARIO

Article 1 of the ARSIWA is entitled: "Responsibility of a State for its internationally wrongful acts" and affirms that:

*"Every internationally wrongful act of a State entails the international responsibility of that State"*[52]

The most important element of this disposition lies in the fact that the International Law Commission chooses to anchor the notion of responsibility of States to the "neutral" commission of a wrongful act. Seemingly an obvious choice, it certainly is not so. The notion of responsibility is a very vast one,

[51] for the interdependence of the two notions, see generally: Joel P. Trachtman, "*Ex Ante* and *Ex Post* Allocation of International Legal Responsibility", SHARES Research Paper 55 (2014).

[52] ARSIWA with commentaries, Article 1.

encompassing more "subjective" elements, like the intentions of the responsible States, the injury suffered by the victim, or the harm caused by the conduct. This "objective" vision of responsibility, for which each and every wrongful act in international law entails responsibility, regardless of the "subjective" right of the injured State to require reparations,[53] is affirmed by the ILC as an explicit choice and the reasons behind it are explained in the commentary to Article 1.[54] The Commission, indeed, justifies its decisions by referencing *erga omnes* obligations, quoting the definition provided in the *Barcelona Traction* case, whereby *erga omnes* obligations were defined as those duties that are owed to "the international community as a whole".[55] In the commentary, it is stated how a definition of responsibility too much dependent on the role of the injured States would risk to be deficient, when dealing with obligations *erga omnes*, for it would unreasonable to restrict the hypothesis of responsibility to cases in which an entity has suffered a material injury, thus excluding all claims which did not have a specific recipient party that could be damaged by an eventual failure to comply. Special Rapporteur James Crawford has also expressed himself specifically on the matter, indicating how limiting the responsibility of States to the responsibility *vis-à-vis* other entities would have proven excessively restrictive of the possible obligations being covered by the notion.[56]

This point, particularly with reference to the part of *erga omnes* obligation, is largely debatable from a theoretical standpoint. An easy counterargument, in fact, would be that these types of obligations, specifically for the fact that their *ratio* lies in the interest of the international community to protect certain rights, regardless of a direct damage, may as well be recognized as those rights the violation of which can more easily be invoked in front of a tribunal, given the larger number of, even if only indirectly, States affected by their violation. It appears, however, that the ILC has adopted a pragmatic take, in making the choice, to avoid any possible *locus standi* dispute, which would have been likely to have surfaced, had the notions of harm or injury been chosen as the central feature of international responsibility. In this sense, the effort shown by the Commission, along with the recognition, in Article 48 ARSIWA, of the conditions for which a State other than an injured one could invoke the responsibility of another State breaching an obligation,[57] can also be recognized as having been of great importance for the establishment of *erga omnes* obligations, a typology of norms that has, in time, established itself in international practice, with the *East Timor* judgment first, where the Court recognized that protection from slavery and racial discrimination were

[53] A view whose most notable exponent shall be considered Dionisio Anzilotti, also referred to in the Commentary to Article 1 of the International Law Commission's ARIO.

[54] ARSIWA with commentaries, Article 1, para. 4.

[55] International Court of Justice, *Barcelona Traction Heat, Light, and Power Co (Belgium v Spain),* Second Phase, I.C.J. Reports 1970, p. 3, para. 33.

[56] James Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts", United Nations Audiovisual Library of International Law (2012): p. 3.

[57] ARSIWA, Article 48.

to be considered as rights owed to everyone[58] and, more recently, in the *Whaling in the Antarctic* dispute, where an indication regarding the possibility of the right to the protection of environment to become an *erga omnes* rule was given.[59]

Returning to the Articles, it would appear that, for purposes of shared responsibility, for two states to be responsible, they would have to be taking part in a single "internationally wrongful conduct", which is defined in Article 2 ARSIWA as "the breach of an international obligation", a notion that will be more extensively defined below. This is a necessary corollary of the linkage between the notions of responsibility and of "wrongful conduct". It is quite obvious that, if responsibility can only arise following the determination of a conduct as internationally wrongful, then, in order to have shared responsibility, there also must be a shared wrongful conduct. The Commentary to Article 1 also openly acknowledges this idea, by stating that:

> "the fact that under Article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible *for the conduct* in question, or *for the injury caused* as a result".[60]

While these words appear to open a pathway in direction of an affirmation of the possibility of shared responsibility, the commentary also adds, rapidly after, that, despite the mentioned possibility, "the basic principle of international law is that each State is responsible for its own conduct".[61] It must be therefore inferred that, if existent, the possibility to attribute responsibility to more than an actor, on the basis of these words, will be a marginal one. To sum up, then, limitedly to the purposes of understanding what the ILC envisions as shared responsibility, after an analytical reading of Article 1, we know that, generally, responsibility is consequential to the commission of a wrongful act and that the possibility for a plurality of states to be held responsible for a single conduct is admitted to exist, despite not representing the ordinary rule.

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[58] International Court of Justice, *Case Concerning East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, paras. 28-9.

[59] International Court of Justice, *Whaling in the Antarctic (Australia v Japan)*, Judgment, ICJ Reports 2014, p 226; on the possibility and importance of the protection of the environment obtaining the status of an *erga omnes* obligation: Nicholas A. Robinson, "Environmental Law: Is an Obligation Erga Omnes Emerging?", Panel Discussion at the United Nations, 4 June 2018.

[60] ARSIWA with commentaries, Article 1, para. 6.

[61] *Ibid*.

In reading the passage quoted above, it can be wondered whether the commentary, in mentioning the possible responsibility of several states for "*the same injury*", is implying that shared responsibility, other than for the carrying out of the same wrongful conduct, can also apply to the cases in which multiple actors cause a single injury, or "harmful outcome"[62] by means of a multiplicity of wrongful conducts.[63] The interpretation of the article which pays more respect to the literal reading of the text seems to deny this possibility. The text of the Draft Articles, commentaries excluded, mentions the word "injury" for the first time only in Part Two,[64] which disciplines the "Content of Responsibility of a State".[65] It can be therefore presumed that the absence of said notion in Part I, where responsibility and attribution are disciplined, means that the notion of "injury" has to be considered non relevant for the determination of responsibility in abstract and, therefore, the same reasoning applies to shared responsibility. The commentary to Article 2 ARSIWA is also decisive in this sense, in explicitly excluding that the notion of "injury" can be considered as a necessary component of shared responsibility.[66] An argument opposing the reasoning just attempted, however, could be that it would be unreasonable for the commentary to Article 1 to merely be enumerating the possibilities that a number of States are responsible for the same wrongful act, *or* for the same injury caused. If both "conduct" and "injury" refer to the same situation, in which only a single wrongful conduct is being carried out, why would the Commission be listing them both?

In this sense, our previous division in the *ex ante* and *ex post* notions of responsibility comes in handful to explain the possible reading operated by the ILC. As has already been said, the Commission develops, in the above mentioned Part Two of the ARSIWA, a series of notions related to reparations following an injury suffered by a State in consequence of a wrongful act. In this sense, the sentence mentioned in the commentary to Article 1 could be implicitly acknowledging the possibility for a number of States to be found responsible both in the phase of allocation of responsibility, both in the reparations *post facto* phase.[67] The sentence in exam would then have to be read intending that more than one State can be responsible for the carrying out of a wrongful conduct, or can be liable to pay reparations for an injury caused by a wrongful act.

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[62] Nollkaemper and Jacobs*,* note 5, p. 367-8.

[63] This view is widely considered to be the most popular in doctrine, as advocated by: Nollkaemper and Jacobs, note 5; see also: Andrea Gattini, "Breach of International Obligations," in *Principles of Shared Responsibility*, edited by André Nollkaemper and Ilias Plakokefalos, Cambridge University Press (2014), pp. 25-59.

[64] Precisely: ARSIWA, Article 31.

[65] ARSIWA, Part Two, Articles 28-39.

[66] ARSIWA with commentaries, Article 2, paragraph 9.

[67] Francesco Messineo, "Attribution of Conduct", in *Principles of Shared Responsibility,* edited by André Nollkaemper and Ilios Plakokefalos, Cambridge University Press (2014): pp. 60-96; p. 84.

To think otherwise, and to favor the broader interpretation that admits the insurgence of shared responsibility for a multiplicity of wrongful acts, would contradict the very definition of responsibility enshrined in Article 1 of the Draft Articles and later specified in Article 2, which clearly expresses the sole indispensable linkage as being that between "responsibility-wrongful act", explicitly excluding[68] a reading that favors the linkage "responsibility-damage (or injury)". Summing up what results from the reasonings above, we can define shared responsibility as the attribution, to more than one actor, of a *single* wrongful conduct and as the possibility to have more than one actor involved in the reparations process after the eventual consequences of the damage. On the contrary, if a multiplicity of actors were to commit a number of wrongful acts, which resulted in a single injury, each actor would be responsible only for its own wrongful act. Yet, it is important, for the purposes of understanding the inferences that will be made in the present thesis, to frame the pairings: "internationally wrongful conduct - responsibility" and "injury - reparations", by which shared responsibility *ex ante* can arise only when two or more entities are deemed responsible for the commission of the *same* wrongful conduct, while numerous states can be held responsible to repair a single damage that was caused by their own wrongful conducts, in a situation of *ex post* shared responsibility.

#### 1.1.2. The notion of "wrongful conduct"

Having solved this issue, a further question arises: in the first paragraph of the commentary to Article 1, the Commission asserts that "an internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both".[69] We have explained how shared responsibility necessarily involves the commission of a single wrongful conduct, but a single wrongful conduct can comprise itself of a multiplicity of acts and omissions. In such cases, what criteria can be adopted to distinguish between multiple actions or omissions that constitute *one* wrongful conduct, from a number of actions or omissions that constitute a *plurality* of wrongful conducts?

The most logical explanation can be derived from the reading of Article 2, which lists the elements constituting a wrongful act. These are:

1) the attribution of an act, or omission to a State;
2) the fact that the State, acting in such way, has breached an international obligation;[70]

[68] ARSIWA, Article 2, paragraph 9.

[69] ARSIWA, Article 1, paragraph 1.

[70] ARSIWA, Article 2.

Having validated, via the words in the commentary to Article 1 above, that a wrongful conduct might consist of different actions or omissions by a number of actors, we can exclude that the criterion as a possible answer to the question. Inevitably, attention must be turned to the requirement of the "breach of an international obligation". Aware that shared responsibility necessitates the adoption of a single wrongful conduct and that a wrongful conduct can be composed of many actions or omissions, the only practicable avenue, reading Article 2, is that the actions or omissions by the various states all occur in breach of the same international obligation. This conclusion is supported when reasoning that, owing to principles of sovereignty and equality, it is difficult to imagine that states could be held responsible for actions or omissions which are not directly attributable to them: each State, in order to be responsible, has to have breached an obligation and, to share responsibility, numerous States have to have breached the *same* obligation.[71]

On the contrary, however, to recognize the existence of shared responsibility in every instance on which two or more international actors have breached, each in the exercise of its own powers, the same obligation, would lead to unacceptable results. If, drawing an extreme example, an obligation arising from a single treaty which States A, B, C and D are parties to, were to be breached by State A and State B and said breach were to result in an injury suffered limitedly by State C and State D respectively, it would only create confusion if States A and B were to be considered jointly responsible for separate claims made by States C and D. At this point, two avenues can be envisioned, in order to clarify what shall be intended with the phrasing: "in breach of the same obligation" and to avoid the consequences here depicted.

The first possibility is to emphasize on the actors involved and their intentions, considering that the insurgence of shared responsibility requires that the two actors have violated the same obligations in a concerted intention, or at least conscious of each other's conduct.[72] Certainly, in the scope of responsibility, the intention of actors, or the relationship that exist between the actors can play a relevant role in terms of relative influence and in terms of causation,[73] but, at the same time, it is intuitive that to judicially demonstrate a commonality of intents between sovereign States would prove a very challenging task, in addition to the fact that such a criterion would be theoretically hard to justify, given the fact that international entities act through a number of individuals whose intentions and subjectivities are hard to assume

[71] Andrea Gattini, "Breach of International Obligations", in *Principles on Shared Responsibility in International Law,* edited by André Nollkaemper and Ilios Plakokefalos, Cambridge University Press (2014): 25-59; p. 26.

[72] Nollkaemper and Jacobs have referred to this as "Cooperative Responsibility", see note 5, pp. 368-9.

[73] Larry May, *Shared Responsibility,* University of Chicago Press, 1996, pp. 36-38.

coincident to that of the international entity to which responsibility will be attributed.[74] A second possibility is to draw emphasis, on the contrary, on the *concrete interest* protected by the obligation breached.

As a matter of fact, to restrict the scope of responsibility limitedly to the identity of the injured subject, by assessing that shared responsibility arises when various wrongful conducts contribute to a single harmful outcome, would be an inadequate method, where read in accordance to the ARSIWA, as explained above. On the other side, to limit cases of shared responsibility to those situations in which the obligations breached by the different acts or omissions protect the same interest in general, would be a requirement too ephemeral and hard to frame. Thirdly, to focus on the conduct required by the norm is a legitimate criterion only for what concerns the case of a responsibility to protect, in which a positive conduct is requested to avoid incurring in responsibility. If, however, these three criteria are read comprehensively and the protected interest is understood both from the perspective of the general interest protected by the primary obligation, both from the perspective of the subjects that are most affected by the damage caused by the breach, a reasonable compromise can be found. To establish if two wrongful conducts affect the same concrete interest, then, one will have to both examine whether the act is in breach of the same protected interest, analyzing the sources from which the obligations stem, and look at who are the subjects of law that have been affected by the breach. In this regard, the establishment of would require not merely that the breach of the obligations by the international actors involved has determined an injury to the same group of affected subjects, but also that, in abstract, the obligations breached can be superimposable, by evaluating the source from which the obligation stems, the conduct that the obligation requires (or prohibits) and whether the obligations protect the same interest. It will be irrelevant, for instance, if two subjects are bound by analogous obligations, arising from different kinds of sources, such as customary law and treaties respectively, provided that the two obligations maintain an identical content.[75] The rule evoked here finds even more support when applied to cases concerning international organizations. Indeed, international organizations and States are only very rarely bound by the same obligations arising from the same treaties. In fact, international organizations are usually not bound by treaty law at all.[76] In this way, despite these requirements depict an unarguably restrictive criteria, sufficient importance is attributed to the injured parties, which are the subjects, as will be explained, who determine the insurgence of responsibility *ex post*

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[74] A cornerstone publication on the issue of the subjective element of the responsibility of States is: Dionisio Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto intemazionale (General theory of state responsibility in international law)*, Firenze, Lumachi ed., 1902.

[75] Gattini, note 63, p. 37-38.

[76] Terry D. Gill and Dieter Fleck, "International Responsibility and Military Operations", Chapter 30 in *The Handbook of the International Law of Military Operations,* ed. Dieter Fleck, First Edition, Oxford Scholarly Authorities on International Law (2015): 559-577; p. 560.

*facto,* but at the same time respect is also paid to the framework construed by the Articles, which require, for the insurgence of responsibility, the breach of an obligation, more than the causing of an injury.

To exemplify, then, if States A and B were to violate a same obligation stemming from a treaty and said obligation were to affect the same subjects, then shared responsibility may incur upon the two responsible actors. On the opposite, if State A was to violate a norm deriving from Treaty A, and State B was to violate a norm that derived from Treaty B, the two could not be sharing responsibility for an injury occurring to State C, even if the injury had been concurrently caused by the breaches by States A and B. In this case, both actors would be exclusively responsible for their own conduct.

In sum, shared responsibility can only take place when a number of international actors engage in a single wrongful conduct. Such wrongful conduct can itself be constituted either of a joint single action or omission, attributable to a number of international entities, or by a number of different actions or omissions, committed by a number of states, provided that these actions or omissions are in breach of the same international obligation, defined both on the basis of the primary source from which the obligation stems, both on the basis of the affected States. Following this reasoning, naturally, in the case of an interest protected by *erga omnes* obligations, the requirement of the "affected subjects" would always be fulfilled, given that the interest is common to the entire community. It would thus be sufficient that the obligation breached were stemming from the same primary source, for shared responsibility to arise.

Before turning the attention towards the attribution of conduct and attribution of responsibility, a comparison to the rules expressed in the ARIO will be made. In the commentaries to Articles 3 and 4, which are twin provisions to Articles 1 and 2, there is not much to signal. The ILC substantially duplicates the indications given the the commentary to the ARSIWA. In particular, mention shall be made to paragraph 6, of the commentary to Article 2, in which the ILC specifies that the responsibility of an international organization for a wrongful act "does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances".[77] It can therefore be read, here, a further opening towards the possibility of shared responsibility, also among numerous international organizations, or States and international organizations.[78]

### 1.2. *Ex ante facto* regulation

[77] ARIO, Article 2, paragraph 6.

[78] Gattini*,* note 63, p. 50.

Article 2 ARSIWA disciplines attribution of a wrongful conduct as one of the necessary elements for insurgence of responsibility on behalf of a State and, specularly, so does Article 4 of the ARIO.[79] Both instruments, despite very similar, take clear positions on how conduct carried out by an individual or by a group of individuals should be attributed to an international entity and on how this process differs radically from that of attribution of responsibility. The framework adopted in these two legal instruments will drive the order of the present Section and the attempt to envision and to analyze any provision that can prove useful to describe shared responsibility.

From the start, it is important to operate some methodological specifications. The following paragraph will be divided into three subparagraphs. First, a brief introduction on the notion of attribution will be displayed, also explaining what are the essential reasons for the subdivision of the arguments that will follow in different sections and the differences that exist between attribution of conduct and attribution of responsibility. Subparagraph 1.2.2., in fact, will deal specifically with "direct attribution" and with its potentialities in terms of shared responsibility. In this section, an important part will be reserved to the concept of "dual attribution", which will be addressed again below, when analyzing some case law. Subparagraph 1.2.3., instead, will address the topic of "indirect attribution", or "attribution of responsibility".

### 1.2.1. An introduction to the notion of attribution

The ARSIWA depict attribution as "the operation of attaching a given act or omission to a State".[80] It must be specified that the term "attribution" is used in the Articles merely to describe the process of attribution of conduct, albeit this process ultimately serves the purpose of attributing responsibility.[81] Indeed, Chapter II of the ARSIWA (and its twin chapter in ARIO for international organizations) is entitled: "Attribution of Conduct to a State" and describes the normative links that connect the conduct perpetrated by an individual or group of persons to a State or to an international organization.[82] Despite the brevity of the Chapter, comprehensive of seven articles in the ARSIWA and just four in the ARIO, the rules pertaining to the attribution of conduct have been divided, in doctrine, in accordance to the typology of the link that exists between the physical person or persons that act and the State or international organization to which conduct

[79] ARSIWA, Article 2; ARIO, Article 4.

[80] ARSIWA, Commentary to Article 2, paragraph 12.

[81] ARSIWA, Commentary to Chapter 2, paragraph 4.

[82] Messineo, note 67, p. 65.

is attributed. The attribution process can be distinguished then into three categories: "institutional linkage", "factual linkage" and "*ex post facto* linkage".[83] The following examination will be a very general one, attempting to provide a useful overview for the discussions regarding shared responsibility, but omitting an extensive enumeration of the possible concrete cases that can be found in each category.

The first category comprehends all situations in which the subjects' conduct is institutionally linked to the state or international organization. An institutional linkage can be found whenever the individual who carries out a conduct is acting as an organ of a State, in governmental capacity, or as an organ of an international organization. This can happen either in virtue of a *de jure* connection*,* or of a *de facto* one. In these cases, we can say that attribution of conduct to the State or international organization is governed by *ex ante facto* rules.[84] The dispositions of reference, for this first category, are Article 4 ARSIWA and Article 6 ARIO, which admit, as sources for the linkage to the entity of reference to emerge, both internal law and international law rules. The institutional linkage, which will be more broadly discussed in the following section, is valid limitedly to the conduct performed while acting in the official functions of the entity to which conduct is attributed. It can appear contradictory to refer to *de facto* organs as institutionally linked organs, but, as is correctly asserted by the ILC, in some systems the status and functions of governmental organs are not decided by means of legislation, but via practice.[85] In this sense, this category will also include the persons indicated in Articles 5 and 6 ARSIWA and Article 7 ARIO, who are linked to a state for their exercise of its the governmental authority, even where such link is not specifically regulated in internal legislation. For instance, Article 5 ARSIWA and Article 7 ARIO attribute responsibility for the conduct carried out by an individual who has no *de jure* links to the international entity (State or international organization), for exercising governmental authority of a State,[86] or for being under the "effective control" of an international organization,[87] while Article 6 concerns the responsibility of an organ of a State that is put at the disposal of another State.[88] As will be elaborated later on, this Article will prove interesting for the purposes of understanding questions of shared responsibility, as two States are necessarily involved here: the sending one, to which the organ is institutionally linked *de jure* and the receiving one, to which the organ is institutionally linked *de facto.* Admitting that these linkages are not mutually exclusive would mean to admit the possibility of multiple attribution of conduct. Articles 8 ARSIWA and ARIO, related to *ultra vires* acts,

[83] *Ibid.,* p. 65-66.

[84] *Ibid.*

[85] ARSIWA with commentaries, Article 4, paragraph 11.

[86] ARSIWA, Article 5.

[87] ARIO, Article 7.

[88] ARSIWA, Article 6.

also belong to this first category, as the attribution of conduct to the international entity is based on the institutional link between the actor and the entity.

The second category, instead, identified by the existence of a "factual link",[89] concerns situations where a person, or group of persons are acting under the instructions, directions or control of a state or an international organization.[90] Curiously, a similar rule can not be found in the ARIO, which do not operate the distinction between "effective control" and "exercise of governmental authority", but distinguish the two fields using alternatively the words "agents" and "organs".[91] Compared to the *de facto* "institutionally linked" organs in the first category, the difference here lies in the fact that the link to the government is more extemporaneous and *ad hoc.* There is no continuative link that connects the persons to the government, if not the factual situation of being instructed, or being under the "effective control"[92] of the state or of the international organization in the exercise of the wrongful conduct.[93] Furthermore, "institutionally linked" *de facto* organs do have an institutional link *de jure* to a State or an international organization and, precisely due to that link, have been transferred under the governmental authority of a different State. The "person or group of persons" in Articles 10 ARSIWA and 9 ARIO, on the opposite, are devoid of such *de jure* linkage.

The third category, ultimately, distinguishes itself from the above for a chronological reason. Article 11 ARSIWA and Article 9 ARIO, for instance, envision the case in which a wrongful conduct is acknowledged by a state or by an international organization as having been committed by them after the act has been committed.[94] The peculiarity is the fact that attribution, here, is triggered not only *ex post facto*, as opposed to the rules above which operate on the basis of *ex ante facto* relationships between state organs, agents, or any person involved in the commission of the act in the occasion of an institutional link, but is triggered by a positive acknowledgement on part of the State or international organization interested, which, normatively, generates the link. While both previous categories rely on rules that were generated before the

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[89] Messineo, note 67, p. 65.

[90] ARSIWA, Article 8.

[91] Christine Ahlborn, "The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations -An Appraisal of the 'Copy-Paste Approach", *International Organizations Law Review*, Vol. 9 (2012): 1-14; p. 6-7.

[92] For the meaning to attribute to the concept of "control", reference is made to the seminal judgment of *Bosnian Genocide*, delivered by the ICJ, where the inadequateness of the "overall control". elaborated in *Tadic* was explicitly affirmed.
see: International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Merits, 26 February 2007, para. 406.

[93] Some doubts as to whether "effective control" is the correct meaning to attribute to the notion of "control" are manifested by Cassese in: Antonio Cassese, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia",*The European Journal of International Law,* Vol. 18, No. 4 (2007): 649-668; p. 664.

[94] ARSIWA, Article 11; ARIO, Article 9.

conduct occurred, independently of their *de jure* or *de facto* nature, in the this case the insurgence of the linkage is *ex post facto*.

There is, then, a different facade to the field of responsibility, which will be elaborated in Section III and goes by the name of "attribution of responsibility". The notion refers to the rules that two sets of Articles have elaborated on the possibility to attribute to a certain party the responsibility for a conduct that was performed by a different party. In particular, the ARSIWA explore this possibility in Chapter IV, named "Responsibility of a state in connection with the act of another state" and the ARIO reproduce closely the scope of these provisions in its Chapter IV as well. The ILC describes the dispositions contained in this section as pertaining to "derived responsibility".[95] Essentially, the rules in Chapter IV envision an alternative way in which an entity can be considered responsible for a wrongful conduct, circumventing the requirement that has been explained in the previous Part, that of attributability of the wrongful conduct. Essentially, it acknowledges the possibility that an actor is responsible for a conduct which is not *directly* attributed to it.[96] It shall be hinted already that the issue of "derived responsibility" is intrinsically close to the topic of shared responsibility, for two reasons: 1) its mere existence implicitly (and explicitly, as will be seen) requires that a wrongful act can be the result of a conduct perpetrated by a number of parties; 2) despite being correlated, in terms of function, to attribution of conduct, it can operate independently from it, providing a different route to envision possible situations in which to apply shared responsibility, even where the conduct could not be attributed to more than a party under the rules contained in Chapter II.[97] Briefly summarizing, the provisions in Chapter IV of ARIO and ARSIWA envision the possibility that a party could be considered responsible for aid and assistance,[98] direction and control[99] and coercion[100] over another party, which has materially committed the wrongful conduct. In these cases, the Articles allow for the possibility of the assisting, directing, or coercing party to be made responsible for the wrongful conduct, yet without automatically excluding the responsibility of the second party.[101]

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[95] ARSIWA Commentaries, Chapter IV, Paragraph 9.

[96] Messineo, note 67, p. 64.

[97] James D. Fry, "Attribution of Responsibility", in *Principles of Shared Responsibility in International Law,* edited by André Nollkaemper and Ilios Plakokefalos, Cambridge University Press (2014): 98-133; p. 105.

[98] ARSIWA, Article 16; ARIO, Article 14.

[99] ARSIWA, Article 17; ARIO, Article 15.

[100] ARSIWA, Article 18; ARIO, Article 16.

[101] ARSIWA, Article 19.

### 1.2.2. Attribution of conduct

Chapters II in the ARIO and ARSIWA set the conditions by which states or international organizations can be attributed the commission of a wrongful act. The foundational basis of the Chapter and the foundational basis of rules concerning attribution of conduct in general is that a State, as an entity, becomes an agent endowed with a juridical personality limitedly because of the general perception of it as such. MacCormick has described the state as a "personification",[102] of an abstract entity and the exact same reasoning is also valid for international organizations. Kelsen was one of the most lucid authors in describing the process of attribution of any conduct to a State as a *fictio juris,* functional to the objectives of international law, yet a fiction. In Kelsen's view, the State, as a juridical subject, exists insofar, and merely in as much, as a conduct can be attributed to it. In this sense, the norm of attribution that connects an action to a State is itself the foundation of the existence of the State as such.[103] All of the above must be understood accordingly with the fact that the State is, ultimately, an aggregation of individuals. An act of a State is an act which has been put into place by an individual, who, in turn, following the Kelsenian logic, is bound to the state by a rule that constitutes the existential basis of the State. Rules on attribution of conduct are rules that regulate these fictitious processes and that turn them into conducts productive of juridical effects. It is the rule of attribution that, limitedly to the purposes of responsibility, transforms the individual into an international actor, into a juridical entity that can bear responsibility for its conduct. In this sense, "attribution" in international law can be more plainly defined as the operation by which a conduct can be attached to an international entity.[104] Internal rules of attributions are decisive for the international rules to apply.[105] Under Italian law, scholars have developed the concept of "organic identification" to describe the relationship that exists between a juridical entity, like a State, and its officials.[106] It presupposes a dual process. First of all, the individual, stipulating a contract with the state or the international organization, gives birth to a relationship of coincidence between the individual and the office, or organ to which it has been located. The office and the organ are two centers of allocation of responsibility, by means of which the

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[102] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth,* Oxford Scholarship Online, 2010; p. 40.

[103] Hans Kelsen, *Pure Theory of Law* (Italian edition), Piccola Biblioteca Einaudi, Torino, 2000, p. 142-3.

[104] Marko Milanović, "Special Rules of Attribution of Conduct in International Law", *International Law Studies,* Vol. 96 (2020): 296-395; p. 296.

[105] ARISWA with commentaries, General commentary to Chapter II, paras. 4-7.

[106] See, for example: Clarich, *Manuale di Diritto Amministrativo*, il Mulino, 2019; Cassese, *Istituzioni di Diritto Amministrativo,* Giuffré, 2004 and also, without explicitating the principle of "organic identification", whilst still, in substance, maintaining the same thesis: Chieppa and Giovagnoli, *Manuale di Diritto Amministrativo,* Giuffré, 1992; Corso, *Manuale di diritto amministrativo*, Giappichelli, 2008.

international entity can maintain external relationships. Secondly, the organ and the office are confused into the international entity, giving birth to a second relationship of organic identification: by means of the person that is responsible of the organ, it is the entity itself that carries out the conduct. The official is, limitedly to the conduct carried out in his official functions, incardinated in the organ or office and the organ is acting as the international entity. In this sense, exemplifying, the physical person becomes the organ and the organ *is* the State.[107] These internal relationships lay the foundations for the applicability of international rules as well, as is specified in the commentary of the ARSIWA.[108] Attribution of conduct to a State rests on these internal mechanisms to allocate to an entity a conduct that the entity, as such, would not be able to carry out. As mentioned in the paragraph above, the rules that will be analyzed in the following lines only relate to the normative process of determining the author of a conduct, which does not also imply automatically that said author may be considered responsible. It is important that the processes of attributing conduct and the process of ascribing responsibility are kept independent. Indeed, while it is true that the entity to which an internationally wrongful conduct is attributed will often the same entity on which responsibility is also attributed for the commission of the act, but said pathway is not the only possible.

The central question that guides this Section is: does the legal framework of the ARIO and ARSIWA constitute a suitable territory for the emergence of shared responsibility? The main objective is that of understanding whether a single conduct may be attributed to more than one international entity at the same time. Although this would not automatically imply that more than an actor would be responsible, as already mentioned, it definitely sets good bases for a situation of shared responsibility to arise. Consequently, a rephrasing of the question above could be: do the rules of the Articles admit that a single conduct is attributed to more than an international actor?

In keeping with the position expressed by the ILC in the Articles, the answer would appear to be in the affirmative, at least in certain circumstances. Despite the ARIO and the ARSIWA formulate their rules concerning attribution of conduct in a way that envisions an exclusive trait of attribution, there are explicit arguments in favor of the affirmative answer in two passages, respectively from the ARSIWA and the ARIO. The first can be found in the commentary to Article 6 ARSIWA. The disposition describes the situation in which an organ of a State is put at the disposal of another State and carries out a wrongful conduct. Where the general rule is that the responsible State is the one exercising governmental authority over the organ at the moment in which the conduct was performed, the ILC depicts in the commentary the hypothesis in which:

[107] Marcello Clarich, *Manuale di Diritto Amministrativo,* 4th Ed., il Mulino, Bologna, 2019. p. 314-7.

[108] ARSIWA with commentaries, Chapter II, paragraph 6.

> "situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States [...] In these cases, the conduct in question is attributable to *both* States under other articles of this chapter".[109]

The second argument, instead, can be recovered reading the general commentary at the beginning of the ARIO, in which the ILC pushes the possibilities evoked by the paragraph above even further, suggesting that "dual or even multiple attribution of conduct cannot be excluded"[110] and that "attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization".[111] There is no doubt that these words convey an explicit opening, by the Commission, to the possibility of dual attribution and, indirectly, to an attitude of non-hostility towards instances of shared responsibility. Indeed, despite having affirmed that the mistake of considering attribution and responsibility as inextricably connected has to be avoided, the fact that a conduct can be attributed plurality of international entities has to be considered at least facilitative for the establishment of the doctrine of shared responsibility. On the basis of the commentary to Article 6, some authors have gone as far as affirming that multiple responsibility shall be considered the "default answer" when more than a state or international organization is acting.[112] An analytical study of the rules contained in Chapter II of ARIO and ARSIWA will allow us to determine if such view can be endorsed. Having already operated a brief description of the content of the articles on the attribution of conduct in the introductory section, the following analysis will omit punctual explanation of each article, to concentrate only on the elements that may be important for shared responsibility.

#### 1.2.2.1. The commentary to Article 6 ARSIWA

Article 6 ARSIWA, as already mentioned, regulates the conduct of an organ of a State that is put at the disposal of another State, stipulating that the conduct may be attributed to the latter if it took place under

[109] ARSIWA with commentaries, Article 6, paragraph 3.

[110] ARIO with commentaries, Chapter II, paragraph 4.

[111] *Ibid.*

[112] Messineo, note 67, p. 62.

the governmental authority of this latter State.[113] The disposition, in itself, in truth, clearly disciplines a situation of exclusive responsibility of the "disposing" state. Nevertheless, in the commentary, one can perceive an opening to the possibility that both the sending, both the receiving State are attributed the conduct, reading the sentence that has been quoted in the previous paragraph. In the commentary, direct reference is also made to Article 47 ARSIWA, which disciplines invocation of responsibility against multiple actors, and thus belongs to the *ex post facto* facet of international responsibility, as defined above. The fact that the ILC operates a connection between these two Articles is not without meaning, in the opinion of the author. Article 47 ARSIWA expressly considers the possibility that responsibility can be invoked against multiple actors and the reference just mentioned seems to be an implicit admission by the ILC of the correlation between multiple attribution and invocation of responsibility against multiple actors.

The fact that, among all Chapter II articles, a reference to multiple attribution of conduct is only made in Article 6 ARSIWA may be interpreted as a reason to consider the specific scenario depicted in that disposition as the only field of applicability for instances of multiple attribution of conduct. The truth, however, is exactly the opposite. Leaving aside attribution of conduct *ultra vires* regulated in Articles 8 ARIO and 7 ARSIWA, as well as the provisions on insurrectional movements in Article 10 ARSIWA, and Articles 6 ARSIWA and 7 ARIO,, all of the provisions contained in Chapter II of the Articles enumerate various relationships of power that can lead to attribution of conduct of an individual to an international actor.[114] In the abstract, these rules are not mutually exclusive: imagine the case in which an organ of a State acts under the instructions of another State. In this and in many other cases, two are the possible pathways. In the first hypothesis, both States are attributed the conduct, for both have contributed to the wrongful act. In the second hypothesis, either the instructing State, either the State institutionally linked to the persons performing the conduct will be attributed the conduct. The choice will essentially lay on the State that had control over the wrongful conduct performed. The question that arises would then be whether any criteria exist guiding this choice between exclusive attribution, or joint attribution and the answer to this question can be implied in Article 6 ARSIWA itself.

To trigger the application of Article 6 ARSIWA, in fact, the threshold requested is explicitly asserted and is is much higher than that of mere appointment of mansions, or direction and control, which apply to the other dispositions of this Section. For exclusive attribution under Article 6, indeed:

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[113] ARSIWA, Article 6.

[114] for a brief summary: in ARSIWA, Article 4 disciplines the attribution of conduct to a *de jure* or *de facto* organ of the State, Article 5 the conduct of persons exercising governmental authority of the State, Article 8 the conduct performed by persons or group of persons under the direction, instructions, or control of the State, Article 9 the conduct carried out in the absence or default of the State, Article 11 the conduct acknowledged *ex post facto.* In ARIO, Article 6 disciplines the attribution of conduct to organs or agents of the State, Article 9 the conduct acknowledged *ex post facto.*

“ the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control”[115]

It is clear that, therefore, in all cases that fall below this threshold, Article 6 is not activated and it must be then implied that in all cases in which direction and control are joint between two States, the wrongful conduct of these States may be considered attributable to both. Multiple attribution of conduct can then occur in all cases, but that envisioned in Article 6 ARSIWA. When the threshold is sufficient for an organ to be considered “at the disposal” of the receiving State, attribution is exclusive for the State that disposes of the organ, regardless of the fact that said organ is institutionally linked to a different State. Of course, one can say that there is yet another possibility: that whenever the threshold for the application of Article 6 ARSIWA has not been reached, conduct is attributed to the entity that is institutionally linked to the persons performing the conduct, regardless of the contribution in terms of authority by the directing and controlling States. In a sense, *aut* direction and control are “exclusive” and justify attribution to the directing and controlling State, *aut* the conduct is attributed by means of institutional linkage. This thesis, however, appears less convincing than that opening to multiple attribution, for two reasons.

The first argument is the express reference in Article 6 ARSIWA to Article 47 ARSIWA, which enshrines a general norm regulating invocation of responsibility of multiple actors *vis-à-vis* an injured party. Neither Article 47, nor its commentary draw any specific links to the issue of multiple attribution, but at the same time, in describing the situations in which invocation of more than one responsible actor can take place, said disposition draws a generic reference to “circumstances where [States] may be regarded as acting jointly in respect of the entire operation”.[116] It is easy to think that, if a joint action could justify multiple invocation of responsibility, so would all the situations that fall between the conduct of a single State and the conduct exclusively directed or controlled by a different State.

Secondly, the sentences in the general commentary to Chapter II ARIO explicitly admit that multiple attribution can, indeed, be a general feature in the scope of attribution of conduct. The commentary, in fact, asserts that:

[115] ARSIWA with commentaries, Article 6, paragraph 2.

[116] ARSIWA with commentaries, Article 47, paragraph 2.

> "Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded"[117]

The statement, however general, leaves little doubts as to which position to adopt over the admissibility of multiple attribution of conduct. The fact that it is present only in the ARIO, however, may bring to surface some questions as to its applicability also to the attribution rules that operate when only States are concerned. On this very point, it is controversial whether there would any reason to set the ARSIWA apart from the ARIO.[118] It is true that the mentioned paragraph in the commentary to the ARIO never mentions multiple attribution to States only, but the fact that it never specifies any peculiarity of international organizations that would justify a differential treatment leads to conclude that the absence of a specific reference to multiple State attribution finds its justification in the fact that the ARIO have no competence over the question of the responsibility of States only. At the same time, however, relationships between two sovereign States, or between a State and an international organizations may differ in terms of "hierarchy", opening to the possibility that a situation of control over a joint entity, for example in peacekeeping operations, has more blurred boundaries, compared to what can happen between two States. Still, there is a provision, in the commentary to the ARSIWA, which asserts that rules of attribution are to be understood merely as normative links, which can be applied with cumulative effect.[119] There is, however, a degree of uncertainty as to whether said provision makes reference to the possibility that more than a norm of attribution in ARSIWA can apply at the same time, (e.g. a conduct attributed to State because carried out by an organ of that State under Article 5 and also to another State because of subsequent acknowledgement of conduct as their own, under Article 11), or whether the reference to cumulative rules should be read in reference to the possibility that personal responsibility of the individual arises along with the responsibility of the State, or else.

#### 1.2.2.2. Article 7 ARIO

Does this, however, differ in the scope of the ARIO? It has been mentioned before that, with reference to the hierarchical relationships involved, the situations involving two or more States can differ

[117] ARIO with commentaries, Chapter II, paragraph 4.

[118] On the applicability *per* analogy of the rules of each set of Articles for situations that would fall under the scope of the other: Ray Murphy and Siobhàn Wills, "United Nations Peacekeeping Operations", in *The Practice of Shared Responsibility in International Law,* edited by Nollkaemper and Plakokefalos, Cambridge University Press (2017): 585-612; p. 596.

[119] ARSIWA with commentaries, Chapter II, paragraph 4.

from those involving both States and international organizations. Indeed, also the criteria for attribution of conduct set forth respectively in the ARSIWA and in Article 7 ARIO differ. For instance, whereas the criterion to attribute responsibility in Article 6 ARSIWA is that of the exercise of "governmental authority",[120] in the ARIO the focal point is the existence of "effective control".[121] Article 7 ARIO specifically deals with the situation where State organs are seconded to international organizations, but where the contributing State still detains a margin of control over the conduct of the seconded persons. In these instances, the problem with attribution relies on which of the two controlling entities is to be held responsible for the wrongful conduct. As discussed above for Article 6 ARSIWA, there is little scope to try and argue for any opening towards situations of multiple attribution where the commentary makes it very clear that "exclusive direction and control" constitutes the very requirement for the application of the Article. On the opposite, however, the criterion adopted in the ARIO is a "factual" one.[122] In particular, the ILC states that the conduct performed by the international organization shall be attributed to the entity that exercises effective control over the organ who performs the wrongful conduct, without, in honesty, ever taking an explicit position, either in favor, either contrary to the insurgence of instances of multiple attribution. The question, once again, will essentially be whether effective control can be exercised by more than one international actor at a time, or whether it implies some form of exclusive control.

It is no mystery that Article 7 ARIO is one that is almost specifically forged to regulate UN peacekeeping operations,[123] where national troops are put at the disposal of an international organization. At the same time, it is obvious that these operations are already regulated by internal rules, both emerged by custom, both by positive law. Essentially, while operational control is vested in the hands of the UN, strategic level command and control over the troop is remitted to the contributing State.[124] In average conditions, therefore, the wrongful conduct may be attributed to each entity on the basis of whether the failure resided in the mansions of the international organization, or in those of the contributing State. It has been suggested that this ambivalence of duties could justify the attribution, where no different agreements

[120] ARSIWA, Article 6.

[121] ARIO, Article 7.

[122] ARIO with commentaries, Article 7, paragraph 4.

[123] *Ibid.*, paragraph 1.

[124] Patrick C. Cammaert and Bert Klappe, "Authority, Command, and Control in United Nations Peace Operations" in *The Handbook of the International Law of Military Operations*, edited by: Terry D. Gill and Dieter Fleck, OUP (2010): 159-163.

are made, or where the failure is not exclusively attributable to the scope of mansions of one of the entities involved, that multiple attribution should be the general rule.[125]

A strong indication in this sense was given by Special Rapporteur Giorgio Gaja, in his Second Report on the Responsibility of International Organizations, where it is specifically stated that to understand the criterion of "effective control" as only allowing for exclusive attribution would be an interpretation too restrictive. He states:

> "conduct does not necessarily have to be attributed exclusively to one subject only. Thus, for instance, two States may establish a joint organ, whose conduct will generally have to be attributed to both States. Similarly, cases can be envisaged in which conduct should be simultaneously attributed to an international organization and one or more of its members".[126]

Understandably, if the criterion adopted were a merely factual one, disregarding any formal rule of attribution, it may well be that control over a specific conduct could be causally linked both to the indications received by the State, both to those received by the international organization. In the same way, if control was placed entirely over the contributing State, the troop's conduct would be attributable solely to that State, even where the troop was formally seconded to an international organization.[127]

The commentary to Article 7 offers yet another indication, this time discouraging a favorable interpretation for the purposes of multiple attribution:

> "[control] does not concern the issue whether a certain con- duct is attributable at all to a State or an international organization, but rather to which entity—the contributing State or organization or the receiving organization—conduct has to be attributed."[128]

It would appear, reading these words, that the choice was vested in an *aut-aut* situation, where either one entity, or the other, were attributable the conduct. On the other hand, it is notable that the commentary

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[125] Cedric Rygnaert, "Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after *Behrami"*, *Israel Law Review* vol. 45, no. 1 (2012): 151–78; p. 157.

[126] International Law Commission, Special Rapporteur Giorgio Gaja, *Second Report on Responsibility of International Organizations*, Document A/CN.4/541, 2 April 2004, para. 6; (hereinafter, "A/CN.4/541").

[127] ARIO with commentaries, Article 7, paragraph 5.

[128] *supra,* note 99.

also cites the Dutch Appeal Court and Dutch Supreme Court's reasoning in the *Hašan Nuhanović v. the Netherlands* judgment, where the rigid exclusive attribution paradigm was expressly criticized, in favor of a dual attribution model.[129] The reference to the relevant case-law, operated by the ILC in the last part of the commentary, reveal that a satisfying answer to the issue of whether the application of the "effective control" principle can allow for situations of dual attribution will only be given via jurisprudential practice. An establishment of any strong indication, however, seems to be far away in time, since the attitude of courts has been diversified over the more recent years.

#### 1.2.2.3. Article 5 ARSIWA

It shall be added, then, that it has also been suggested that Article 5 ARSIWA could also trigger a situation that could be envisioned as a case for shared responsibility.[130] For instance, where the entity exercising governmental authority was an international organization delegated by the State, in such instance there would be a wrongful act concretely committed by an international organization, but attributed to the State. The assumption, however, leaves some questions. For instance, the fact that international organizations could be encompassed in the interpretation of the word "entity" appears controversial. It is true that the ILC use the term to intend "the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority",[131] but it is also true that international organizations do not figure in the brief enumeration of possible entities which is present in the commentary.[132] There is no doubt that international organizations can be considered generically as entities that can be empowered by a State to act and that would therefore fall under the category of entities described above. However, it is also true that, due to the particular role that international organizations play in the international framework of relations, it appears curious that these would not be mentioned specifically in the commentary to the Articles. On the contrary, the enumeration privileges attention to the situations of "parastatal" entities, or private-public partnerships,[133] which due to their particular configuration would not fall under the scope of application of Article 4 as "organs of the State".[134] For this particular reason, the trace

[129] ARIO with commentaries, Article 7, paragraph 14.

[130] Dan Sarooshi, "International Organizations and State Responsibility", in *Responsibility of International Organizations : Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, BRILL (2013): 79-87; p. 82.

[131] ARSIWA with commentaries, Article 5, paragraph 2.

[132] *Ibid.*

[133] ARSIWA with commentaries, Article 5, paragraphs 1 and 2.

[134] ARSIWA, Article 4(2).

that could lead to discussions of shared responsibility arising from Article 5 ARSIWA appears too uncertain to be followed, at the state of the art.

#### 1.2.2.4. Attribution of the conduct performed by a joint organ

Another relevant situation, recently emerged and more and more frequent over the last century, is the scenario whereby States and international organizations give birth to a joint entity, often *ad hoc,* for the performance of certain functions and/or in relation to specific projects.[135] The growing establishment of this phenomenon of cooperation between States and international organizations, however, has not been matched with equally established rules on their responsibility. A primary distinction when dealing with joint organs is to separate those endowed with a legal personality of their own, from those that do not possess such personality.[136] The general rule for entities that possesses independent legal personality is that responsibility for a wrongful conduct shall be held by the entity itself,[137] leading to no issues of multiple attribution of conduct. Where a joint organ is lacking international legal personality, however, responsibility for the wrongful conducts carried out by the entity can fall on its members, admitting for situations of multiple attribution of conduct and, consequently, of shared responsibility.

The normative linkages that guide attribution of conduct are slightly different than those which have been analyzed so far. The international actors that are attributed the conduct experience a situation that resembles a case of "derived responsibility", for the conduct from which responsibility stems was put in place by a different entity, but was attributed to them in reason of the absence of legal personality of such an entity. The difference with the instances of "derived responsibility" contained in Chapter IV ARSIWA and ARIO is that responsibility for states or international organizations, in those cases, resides solely in the aid, assistance, direction, control over another actor and not in the wrongful conduct in itself. In the present situation, instead, the members of the joint organs, despite being held responsible for a conduct that was not concretely carried out by them, are still responsible for that conduct, rather than for the creation of the joint entity.

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[135] Tom Dannenbaum, "Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Ventures", in: *Distribution of Responsibilities in International Law,* edited by Nollkaemper and Jacobs, Cambridge University Press (2015): 192-226; pp. 193-5.

[136] Crawford, note 37, p. 340.

[137] see Court of Appeal, *Maclaine Watson & Co. Ltd v. Department of Trade and Industry; JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry and ors*., 27 April 1988, para. 175: "There is no trace in either of any indication that actions might be brought against the member states concurrently with the I.T.C. […] there could be no possibility of any concurrent liability in the members."

Nevertheless, the responsibility for wrongful conduct by joint organs has been object of some, albeit scarce, judicial practice. The most notable cases decided with reference to these entities are undoubtedly the *Nauru* case at the International Court of Justice[138] and the *Eurotunnel* arbitration.[139] While the first case, which will be extensively examined below, has not proceeded to the merits, the *Eurotunnel* arbitration was concluded with a settlement between the two parties, the content of which has not been publicly revealed.[140] Both France and Germany, however, who had constituted the joint entity of Channel Tunnel Intergovernmental Commission, were considered liable for their failure to meet the duties that their shared responsibility over the joint organ implied.[141] In general, there appears to be little contention over the fact that the conduct of a joint organ which has no independent legal personality will be attributed to its members. The finding has been made explicit also by Special Rapporteur Giorgio Gaja, in the part where he affirms that: "two States may establish a joint organ, whose conduct will generally have to be attributed to both States".[142] Crawford, further, suggests that the joint responsibility of the members constitutes a corollary to Article 5 ARSIWA, which disciplines the attribution to a state of the conduct performed by an entity that exercises elements of governmental authority.[143] This line of reasoning does not go without significant consequences: if, indeed, the responsibility of the members of the joint entity flows from the contemporaneous application of Article 5 ARSIWA, this would constitute a further argument also in favour of the cumulative application of rules that regulate attribution of conduct, opening the doors to numerous combinations of rules by means of which international actors are attributed a wrongful conduct and therefore increasing the possible scenarios in which shared responsibility can be envisioned.

#### 1.2.2.5. Concluding remarks

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[138] International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment,* I.C.J. Reports 1992, p. 240.

[139] *Eurotunnel, Channel Tunnel Group Limited and France-Manche S A v Secretary of Transport of the United Kingdom and Secretary of Transport of France, Partial Award,* ICGJ 369 (PCA 2007), 30th January 2007, Permanent Court of Arbitration [PCA].

[140] Freya Baetens, "Invoking, establishing and remedying responsibility in mixed-multi party disputes" in *Sovereignty, Statehood and State Responsibility,* edited by Chinkin and Baetens, Cambridge University Press (2015): 421-441; p. 432.

[141] *Eurotunnel*, para. 317.

[142] International Law Commission, Special Rapporteur Giorgio Gaja, *Second report on responsibility of international organizations*, 2 April 2004, A/CN. 4/541, para. 6.

[143] Crawford, note 37, p. 340.

Ultimately, situations of multiple attribution of conduct can be theoretically divided into two categories.[144] In the first case, one single person or one single entity may act under the direction, instructions, control (Article 8 ARSIWA), or in the exercise of governmental authority (Article 5 ARSIWA) of more than one state at the same time. In sum, a single entity (for example, "entity X", which could represent, for example, a joint military venture) carries out a wrongful conduct, representing the "authority" of a number of international actors (for example, "State A" and "organization B"). In the second case, a wrongful conduct may also be carried out by numerous persons or entities, representing, via the rules in Articles 5 and 8 ARSIWA above, the "authority" of a number of international actors. In this second example, "entity X" and "entity Y" carry out a wrongful conduct, respectively representing "State A" and "organization B". In this case, the provisions from the previous Part have to be applied, attaining to the fact that the actions or omissions of the two actors will have to constitute a single wrongful conduct. In both of the above situations, multiple attribution can arise. Moreover, these two situations, although said eventuality is very rare, could even coexist: for instance, in our second example, "entity X" might be representing not only "State A", but also "State C", in which case we would have two entities acting jointly, the first representing two states and the second representing an international organization, for a total of three international actors to which the wrongful conduct can be attributed. This may be seen as a consequence of the above-mentioned provisions of the ILC, where it is indicated that rules on attribution of conduct are to be understood cumulatively.[145]

Finally, another topic worth of discussion consists in the fact that a number of authors have suggested that the principle of independent responsibility can constitute an obstacle to multiple attribution of conduct.[146] Expressly established in the commentary to Chapter IV ARSIWA, by "principle of independent responsibility" reference is made to the general rule that envisions each State as responsible for its own wrongful conduct. It must be admitted that, as Nollkaemper and Jacobs argue, the Articles explicitly privilege a model where responsibility lies onto a single actor[147] and, therefore, this perception could lie at the core of the very limited practice of multiple attribution in international courts. The fact that the skeleton of the legal document revolves around a notion of exclusive responsibility is obviously a deterrent for judicial interpretations to deviate from this general principle, as has been exemplified by some recent notable judgments.[148] However, on the matter of independent responsibility, it is important that the fields of

[144] *Ibid.,* pp. 67-83.

[145] ARSIWA with commentaries, Chapter II, paragraph 4.

[146] Nollkaemper and Jacobs, note 5, pp. 331-5.

[147] *Ibid.*

[148] see, as a notable example: App. Nos. 71412/01 & 78166/01, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway* [GC] (dec.), Judgment, 2 May 2007.

responsibility and attribution are kept separate. The “principle of independent responsibility”, firstly, has to be understood as a general principle that operates in ordinary conditions and, secondly, applies to the rules that govern the invocation of responsibility. Even here, despite the principle representing the criteria of choice for attribution of responsibility in most cases of collaborative actions, one must assume that there are also situations in which said principle does not find application. If this were not the case, it would be hard to explain why exceptions, for how limited, are explicitly considered in the Articles.[149] This interpretation finds support in the commentary to Article 47, where the ILC expressly indicates the principle of independent responsibility as the road of preference, in the absence of different agreements, but where, as said above, it also allows for a “situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them”.[150]

In conclusion, on a final overview of this section, there seems to exist the possibility for a single conduct to be attributed to multiple parties, even though both in the ARSIWA[151] and in the ARIO,[152] the basic layout is understood to be that of individual attribution. The only question that remains unanswered is whether dual attribution can find application unrestrictedly, in any hypothesis in which more than a State carries out a conduct, or whether this possibility is merely restricted to the scenario of a State organ put at the disposal of another State, as is depicted in Article 6 ARSIWA. Such an interpretation would not be justified by the general approach, also compared with the commentary to the ARIO, but further clarifications on the subject will be provided when some case-law is taken into account, in Chapter II. Multiple attribution of a wrongful conduct, as elaborated in Section I, requests that a number of entities act in breach of a same obligation, which is an eventuality that occurs with less frequency, where compared with the breach of an obligation by a single State. The choice of defining attribution of responsibility in the Articles focusing on the rule of attribution to a single state or international organization seems a reasonable choice, given the primary objective of the ILC to transpose into positive law[153] a number of customary principles on the responsibility of states for wrongful acts.[154] On the same line of reasoning, though, this choice does not seem to imply that different avenues, like dual or multiple attribution, are to be necessarily precluded,[155] all the more given the indirect reference that was made to them in the points mentioned above.

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[149] ARSIWA with commentaries, Chapter IV, paragraph 2.

[150] ARSIWA with commentaries, Article 47, paragraph 3.

[151] *ibid.,* paragraph 3.

[152] ARIO Commentary, Article 7, paragraph 1.

[153] Crawford, note 37, p. 43.

[154] David D. Caron, “The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority”, *American Journal of International Law,* Vol. 96, Issue 4 (2002): 857-873; p. 859-860.

[155] Noyes and Smith, note 24; p. 228.

Nevertheless, it would be desirable that the ILC took into account with more attention the possibility of a multiple attribution of conduct, which, in areas like that of peacekeeping operations,[156] has been finding increasingly frequent situations susceptible of applicability. In this sense, a clear position on multiple attribution and shared responsibility would guarantee certainty on a doctrine, that, until now has been receiving much more attention from creative interpretation and scholarly debate, than it has from international courts, or the ILC itself.

### 1.2.3. Attribution of responsibility

Borrowing the lucid words used by Fry, one of the best ways to differentiate rules on the attribution of conduct, from those related to the attribution of responsibility, is the fact that the former sets the conditions for which a part could potentially be responsible, while the latter set the conditions under which a party *is* responsible.[157] In their Commentary to Chapter II, the ARIO specifically distinguish between the field of attribution of conduct and that of attribution of responsibility, affirming that: "responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization".[158] The rules on attribution of responsibility operate on the basis of the normative linkage between the individual and the institution, while attribution of responsibility belongs to a different theoretical landscape, operating on the basis of a transfer of authority over the conduct. Further differentiating, in the phase pertaining to the attribution of conduct, it has not yet been defined whether there has been a breach of an international obligation, as the rules on attribution of responsibility belong to the subsequent phase.[159] In this way, the outcome of the application of rules that discipline attribution of conduct between the subject that has acted and the international institution to whom responsibility can be attributed may even differ, if compared with the outcome of rules that define the international institution that has had authority over the wrongful conduct. For example, if the organ of a State A, that has performed the wrongful conduct, has been coerced in adopting the wrongful behavior by State B, the rules of attribution of conduct will attribute the act to State A, in reason of the institutional linkage described above, but the rules on

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[156] *supra* Johnson, note 45; Nicholas Tsagourias, "The Responsibility of International Organisations for Military Missions", in *International Military Missions and International Law,* edited by Odello and Piotrowicz, BRILL (2011): 245-265; Paolo Palchetti, "International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution", Seqüência (Florianópolis), n. 70 (2015): p. 19-56.

[157] Fry, note 97, p. 102-3.

[158] ARIO with commentaries, Chapter II, paragraph 2.

[159] *Ibid.*

attribution of responsibility will envision State B as the responsible actor, as we will better understand in the following paragraphs.

On a methodological note, the usage of the word "authority" in the following section assumes a specific meaning: the three possibilities for "derived responsibility" proposed by the ILC are very much different from one another and encompass relationships between the two or more international institution involved in the attribution of responsibility that can be significantly varied. For instance, situations of "aid and assistance", of "direction and control" and finally, of "coercion" can be understood as salient grades of a hierarchical relationship between the actors involved, where, in the case of aid and assistance, these can be intended as exercising equal manifestations of authority; in the case of direction and control, despite a subordination of the directing party, the directed party can still be said to retain a margin of authority; and finally, in the case of coercion, by definition, the coerced party is subtracted of all its independent authority in favor of the coercing party.[160] The use of the term "authority" aims to translate the relationships of intentions and aims between international parties. As has just been described, the autonomy that each sovereign State enjoys can be threatened by the diverse typologies of relationships that build. In this sense, in the situation of aid and assistance, the two actors involved both exercise their authority, one in assisting the commission of a wrongful conduct and the other in committing the conduct, whereas in the case of coercion, the coercing State transfers its authority entirely over the coerced, which is fully deprived of its autonomy over the adoption of the wrongful conduct. In this latter case, for the purposes of this paragraph, it will be said that there is a full transfer of authority.

#### 1.2.3.1. Chapter IV of the Articles: the responsibility of a State in connection with the act of another State

Returning to the content of this section, the ARSIWA introduce the provisions contained in Chapter IV by expressly considering the possibility that "internationally wrongful conduct results from the conduct of several States".[161] Three examples are then described: the first depicts a wrongful conduct which results from the independent contributions by States, the second addresses the wrongful conduct of a single organ, that has been set up by a plurality of States and the third example is that of an organ of a State acting on behalf of another State.[162] On the basis of what has been argued so far, these three examples would appear to

[160] ARSIWA with commentaries, Article 18, paragraph 2: "…no effective choice but to comply with the wishes of the coercing State".

[161] ARSIWA with commentaries, Chapter IV, paragraph 1.

[162] *ibid.*

all represent scenarios which can allow for a case of shared responsibility to be made. In the third example, it is intuitive that, in order for shared responsibility to be triggered, the State which the acting organ belongs to has to maintain some degree of authority in the decision to act, otherwise responsibility would incur exclusively in the state at whose disposal the organ is put. The ILC, in their reasoning, arrive to the point of exemplifying shared responsibility with the description of the facts in the *Nauru* case in front of the ICJ,[163] where a single joint organ was created for the administration of the territory of Nauru, by Australia, New Zealand and the United Kingdom, and such organ was considered responsible for an internationally wrongful act. The case, unfortunately, never proceeded to the merits and stripped the legal scholarship of a jurisprudential example of the application of shared responsibility. The ILC, nevertheless, appears wanting to recover this lost opportunity, implicitly recognizing the judgment that would have been. It is asserted, indeed, that the acts of the "joint" administrative authority in Nauru, in that they were acts conducted on behalf of each State party, should be understood as being "in contrast" to situations of individual responsibility, which occur when an organ acts on behalf of a single state,[164] implicitly affirming that the solution that would have had to be adopted was that of recognizing the shared responsibility of the involved States.

#### 1.2.3.2. Shared responsibility for commonality of substantive obligations

A question necessarily arises when refocusing on the requirement of the breach of a single obligation for the affirmation of a case of shared responsibility: how would the responsibility issue be regulated in the case in which, for example, Party A is under an obligation, which Party B is not subjected to and Party B controls Party A in the commission of a breach to said obligation. Who is responsible? The answer is present in both Articles 16 and 17 ARSIWA (and corresponding Articles 14 and 15 ARIO), in the part in which one of the two requirements for responsibility is that the conduct adopted constitutes a wrongful act for the controlling State and, therefore, that such State is in breach of an obligation. In the example above, therefore, there could not be shared responsibility. At this point, the question which arises is: should both parties, in order for shared responsibility to be established, be in breach of the *same* obligation? In other words, if the two obligations are formally different (e.g. stem from different legal instruments), but have the same content, can there still be shared responsibility?

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[163] International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, I.C.J. Reports 1992, 240 (Nauru).

[164] ARSIWA with commentaries, Chapter IV, paragraph 3.

Articles 16 and 17 ARSIWA do not mention the answer to this question in the text, but the commentary to Article 16, in explaining the *ratio* of the limitations to the applicability of the Article, refers to the obligation that has to be breached as one "by which both States are bound",[165] which would suggests complete univocity of the obligation, even from a formal standpoint. Also from a functional point of view, the more reasonable interpretation would be the one that requires both parties to be in breach of the *same* obligation, as it could be reasonably expected that different sources of law would come with different rules and, in some cases, this could also cause notable procedural difficulties to the finding of shared responsibility between parties. A rule on shared responsibility requiring the allegedly breached obligations to stem from compatible sources of law would give rise to a high degree of uncertainty on the practical side of the doctrine. It would be difficult to support the solidity of a doctrine which could find application only in cases where there are no procedural distinctive features between the various legal instruments violated, while it could not where the legal sources involved presented notable procedural differences.

On the opposing side, however, the definition contained in Article 12 of a "breach of an international obligation" contains the words "regardless of its origin".[166] While it could appear that this might mean that attention to the agreement from which the obligation arises should be irrelevant for the application of the Articles on international responsibility in general, thus including also questions of shared attribution, this interpretation can not be supported. Article 12 never makes any reference to hypotheses concerning a joint action between multiple sovereign States and the commentary to said disposition specifically explains that the mentioned formula has the sole aim of reinforcing the general applicability of the Articles in any instance of international responsibility.[167] To induce, by the phrasing of Article 12, a general rule of indifference towards the source of obligations would be an exaggerate assumption.

The question of applicability of shared responsibility, in reference to the identity of the obligation breached is even more problematic with reference to those binding international organizations. Mixed agreements aside,[168] international organizations and states are generally bound by different agreements, each with its own specific rules. This means that the occurrences in which both these institutions are bound by a same obligation are considerably rarer than instances in which two states are bound by a same obligation. As was indicated above, the Articles in ARIO which discipline the matter are specular, in terms of text, to those

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[165] ARSIWA with commentaries, Article 16, paragraph 6.

[166] ARSIWA, Article 12.

[167] ARSIWA with commentaries, Article 12, paras. 3-4.

[168] Also with reference to mixed agreements, the amount of variables to consider before admitting joint responsibility is not irrelevant. See, for example, the analysis by Ruka of the *EC - Asbetos* case in front of the ECJ in: Plarent Ruka, *The International Legal Responsibility of the European Union in the Context of the World Trade Organization in Areas of Non-Conferred Competences*, Springer (2017): 10-25.

in ARSIWA. To clear any doubt, the Commentary acknowledges explicitly the necessary confluence of obligations between those of the international organization and those of the aided, assisted, controlled or directed State or international organization, in order for the former to be considered responsible.[169]

A perspective to solve this problem is that of using jointly, as parameters to categorize between obligations, the substantive content of the obligations and the formal sources from which they arise, using the notion of *concrete interest,* introduced in the paragraph 1.1.2. [170]This approach allows for more elasticity, where compared to an approach that only considers the rigid formal coincidence of sources. This theory can undoubtedly work for what concerns the overlapping between customary international law and treaty law: whenever the two obligations are equal in content it can happen that two States can be considered bound by the same obligation, for the purposes of shared responsibility.[171] It may be equally suggested otherwise that, for sake of efficacy, shared responsibility among international organizations and states should arise independently of the source. Fry suggests that States and international organizations may not have to be bound by the same obligations to be able to share responsibility, arguing that this position is a natural consequence of the fact that the two types of institutions do not have equal scopes of competence.[172] Said induction results convincing. Undoubtedly, if States and international organization, being bound by different instruments which often explicitly exclude the application to one another, could only incur in shared responsibility when they are bound by the *same* formal obligation, this would denote a *vacuum legis* and a strong threat to the efficacy of the doctrine in terms of applicability. The interpretation that appears to be more adherent to the text of the Articles is the narrower one, that has been argued above, but is equally clear that, *de jure condendo*, some more clarity will have to be made.

The problem of a narrow scope of application for shared responsibility between states and international organizations is, in reality, less stringent than it could appear. This typology of collaboration often occurs in the scope of peacekeeping missions, which is widely regulated by customary law rules and *erga omnes* obligations, that are widely understood as binding States and international organizations in the same way.[173]

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[169] ARIO with commentaries, Article 14, paragraph 5.

[170] see paragraph 1.2.2., pp. 11-13.

[171] Gattini, note 64, p. 26.

[172] *Supra,* Fry, note 97.

[173] Gill and Fleck, note 76.

#### 1.2.3.3. Circumvention

Moreover, other rules that may find application in cases in which member States and international organizations are bound by different obligations are Articles 17 and 61 ARIO, regulating situations of "circumvention". These two dispositions constitute one of the most important distinctive features that differentiate the ARIO from the ARSIWA, enshrining the responsibility for the international organization that "uses" a State to perform a conduct which would be unlawful if committed by the organization itself and vice versa.[174] Clearly, this rule has more value for the purpose of replenishing accountability voids, than for the purpose of envisioning situations of shared responsibility. It essentially has the objective to ensure that an international organization would not avoid incurring in responsibility by acting through its member States.[175] Nonetheless, it can find application and finds application even in cases in which both the State and the international organization are bound by the obligation.[176] The Commentaries to the ARIO do not specifically discipline this hypothesis, but it could be imagined that, in this case, both the circumventing and the circumvented state would be held responsible for the breach of the obligation, plus the wrongfulness inherent in acting in the way described in Article 17 for the circumventing actor. The ILC has in fact asserted that responsibility from Article 17 can arise even for the mere adoption of a binding decision by the international organization, without requiring the member State to concretely adopt the conduct object of the decision.[177] In this particular hypothesis, obviously, no case of shared responsibility could ever arise, for the wrongful act by the member State would not take place and the international organization would only be guilty of circumvention.

It has been argued that the approach adopted by the ILC in the instance of circumvention conflicts with the principles of "wrongfulness" which the ARSIWA and ARIO are built on, for the fact that the responsibility of the international organization would not arise as a consequence of a wrongful conduct, intended as a breach of a primary obligation, but would rely on the mere attempt to circumvent.[178] The point made is convincing, specifically for the fact that the ARIO, like the ARSIWA, explicitly avoid creating

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[174] ARIO, Article 17 and Article 61.

[175] Pavel Sturma, "The Responsibility of International Organizations and Their Member States", in *Responsibility of International Organizations : Essays in Memory of Sir Ian Brownlie*, edited by Maurizio Ragazzi, BRILL (2013): 313-324; p. 315.

[176] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, Hart Publications, Portland, 2016, p. 20.

[177] ARIO with commentaries, Article 17, paragraph 5.

[178] Nataša Nedeski and André Nollkaemper, "Responsibility of International Organizations 'in connection with acts of States'", *International Organizations Law Review,* Vol. 9 (2012): 33–52; p. 45.

primary obligations,[179] concentrating their scope of observation on the secondary rules. In this case, instead, it could be said that international actors are being held responsible for a rule of "non-circumvention", which stems directly from the Articles themselves. Furthermore, an identical reasoning could be made with regards to the Articles which discipline aid or assistance, direction or control and coercion.[180] For aid and assistance, in fact, shared responsibility for the wrongful conduct in itself arises only when the contribution by the assisting actor was determinant for the causation of such act, whereas, if this was not the case, the aiding or assisting organ would only incur in responsibility for the aid and assistance. The Articles are then setting, also in this case, a primary rule, more than a secondary.[181] It is clear that to set a straight boundary between production of primary rules and secondary rules becomes uncertain and it must also be recognized that to stumble over and across the blurred border of the, itself artificial and theoretical,[182] distinction between primary and secondary obligations is almost inevitable, given the ambitious effort of codification operated by the ILC.

#### 1.2.3.4. Coercion

The rules concerning coercion do not play a role in the present discussion for two fundamental differences that distinguish them from to the observed situations of derived responsibility. The first is that, in cases of coercion, the coerced actor does not incur in responsibility,[183] automatically excluding the possibility for shared responsibility to arise. The second is that it is irrelevant that the act would be wrongful if committed by the coercing state. The only two requirements are the unlawfulness of the conduct of the coerced state and the awareness, by the coercing state, of such unlawfulness. The case of coercion, then, implies the responsibility of the coercing state in two directions: *vis-a-vis* the coerced state, for the sole act of coercion and *vis-a-vis* the (eventual) third state which is injured by the coercion.[184] The intensity required by the Articles, for the state or for the international organization that commits the wrongful conduct to be

[179] International Law Commission, *Report of the International Law Commission of its Thirty-second Session*, *ILC Yearbook 1980*, Vol II(2), 27 (para. 23); ARSIWA with commentaries, General Commentary, paragraph 1.

[180] Christian 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,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 282-289; pp. 282-284.

[181] Nollkaemper and Jacobs, note 5, p. 409.

[182] Eric David, "Primary and Secondary Rules", in *The Law of International Responsibility,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 27-33.

[183] ARSIWA with commentaries, Article 18, paragraph 4.

[184] ARSIWA with commentaries, Article 18, paragraph 1.

exonerated from responsibility, is equated to *force majeure,* meaning that the coerced state must be left with no choice, but to comply.[185]

In the scope of the reasoning on shared responsibility that has been conducted until now, there is another element of interest that occurs in the mechanism of coercion. It has been utterly stressed that for responsibility to arise, there must be a wrongful act by an international actor, meaning that its conduct has to breach an obligation to which the actor is bound. In the case of coercion, however, this never happens.[186] To exemplify: for Article 18 to apply, State A (coercing state) has to coerce State B (coerced state) to breach obligation X, to which State B is bound, while it is irrelevant that said obligation also binds State A. In this case, the Articles consider that State B is to be considered "deprived of his sovereign capacity of decision"[187] and, as such, can not be deemed responsible, while State A will be considered responsible for the breach of obligation X, by which, in theory, it was not bound. What the ILC does, here, despite reasonable in terms of common sense, is hard to justify in terms of the principles underlying the Articles, which require the relationship "wrongful conduct of a State - responsibility of that State". It can be suggested that the ILC operates a *fictio juris,* by which, in reason of the coercion, State A transfers its authority[188] into the empty shell of sovereignty left by State B, creating a separation between the phenomenological and the noumenal[189] components of the international actor: formally, the acting subject is State B, but substantially, the actor is State A. Still, however, persisting with our metaphor, the empty shell would still have to be able to maintain its own primal obligations, which persist after the temporary impersonation created by coercion. If, in fact, the coerced state temporarily loses its sovereignty and, therefore, its legal personality, how can its obligations *vis-à-vis* third states survive, considering that legal personality is defined by the ability to be "bearer of rights and duties"?[190] The only possible answer to this question is that international law can not sacrifice the rights that could be claimed by third states, even when symmetrically corresponding to obligations that are owed by an entity deprived of its legal personality. The necessity to avoid that legitimate

[185] *Ibid.*, paragraph 2.

[186] James D. Fry, "Coercion, Causation, and the Fictional Elements of Indirect State Responsibility ," *Vanderbilt Journal of Transnational Law* 40, no. 3 (2007): 611-642; p. 630.

[187] International Law Commission, *Report of the International Law Commission on the work of its Thirty-first Session*, U.N. Doc. A/34/10, Supp. No. 10, 1979, para. 25.

[188] To be understood in the meaning explained in the Introduction to this Chapter (pp. 5-6).

[189] These two terms have their origin in Greek philosophy, but have been used in express counterposition most notably by Immanuel Kant, in his *Critique of Pure Reason.* Very summarily, the word "phenomenological", deriving from the Greek word "*phainomai*", which means "to manifest oneself", is used to describe something in the forms which appears to the external world. At the opposite, the "Noumenon" comes from the Greek verb "*noeo",* which means "to think", and is used to describe the reason behind the appearance, not perceptible sensitively, but only on a theoretical level. In the discourse above, the two words are used to distinguish the coerced entity that is acting formally (the phenomenon), from the coercing entity that acts substantially (the noumenon).

[190] Bryant Smith, "Legal Personality." *The Yale Law Journal* ,Vol. 37, no. 3 (1928): 283-299; p. 283.

rights come unsatisfied for the cancellation of the legal personality of the entity that owed them, has brought the ILC to admit a short-circuit between the general provisions that discipline responsibility and those that discipline coercion.

### 1.2.4. Non-State Actors

Another relevant element for the matter of attribution concerns who are the actors to whom international responsibility can be allocated. The ARIO and ARSIWA, which are the legal sources that have predominantly been taken into consideration until this point, are designed to transcribe rules that attain specifically to States and international organizations,[191] which represent the most notable actors in international law. However, in an ever-more globalized world, non-State actors such as non-governmental organizations, multinational corporations and even, at times, individuals, can play an important role and take active part in the performance of conducts that would result in a breach of an obligation by a State or international obligations.[192] The responsibility of private actors has been, under the ARSIWA and ARIO, treated limitedly to its possible linkage to a State, or an international organization, which would ultimately be responsible for the wrongful conduct.[193]

This does not come as a surprise, given that difficulties with holding non-State actors responsible under the general international law of responsibility are numerous. NSAs are generally not bound – with only a few exceptions – by primary rules of international law.[194] Private actors are bound primarily by multilateral agreements that impose obligations onto them and usually these agreements are either bilateral contractual agreements, or self-contained systems that elaborate internal accountability mechanisms. Even when NSAs enter mixed agreements, which welcome both public actors and private actors, these two categories will usually not be bound by the *same* obligations, with the result that NSAs can not be held jointly responsible with States for the violations of their obligations. Even adopting the more flexible criterion of intending the substantive identity of obligations applying the *concrete* interest criterion, it is hard to envision a coincidence of obligations that are binding for both NSAs and traditional actors.

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[191] It is important to specify that “international organizations” is in this Section understood in the meaning of “intergovernmental organizations”.

[192] See, generally: Carlos M. Vazquez, "Direct vs. Indirect Obligations of Corporations under International Law," *Columbia Journal of Transnational Law* ,Vol. 43, no. 3 (2005): 927-960.

[193] ARSIWA with commentaries, Chapter II, paras. 3-5.

[194] Jean D’Aspremont et al., “Sharing Responsibility Between Non-State Actors and States in International Law: Introduction”, *Netherlands International Law Review 62,* (2015): p. 49-67; p. 54.

Limitedly to the perspective of envisioning cases of shared responsibility between public and private actors, then, procedural obstacles firmly stand in the way: States and non-State actors are hardly ever parties to the same proceedings: most international courts, such as the International Court of Justice, do not have jurisdiction over private actors, while for many domestic courts, which would, on the contrary, be entitled to adjudicate over these actors, immunities pose an important obstacle for States and international organizations to be a party in front of them.[195]

However, affirming that NSAs are extraneous to the scope of consideration – in any circumstance – of international public law is not true. A preliminary remark to make is that there are some non-State actors that, by virtue of their resonance, or of their internal structure, can be said to have a legal international personality.[196] This suggestion arose from the *Reparations* Advisory Opinion, where the ICJ suggested that there may coexist in a legal system several entities, other than States, with different levels of juridical personality.[197] Also, private parties can possess a status under the international law on responsibility as victims,[198] with reference to the possibility of obtaining redress whenever the wrongful conduct of a State or international organization causes them a damage. It has been suggested that, given the incremental presence of private parties in the international relations' ambit, there may exist some sectors in which their personality may be declined as that of a potential responsible, other than that of a potential victim.

#### 1.2.4.1. Some attempts to include NSAs in the law on international responsibility

Environmental law, particularly in the form of multilateral environmental agreements (MEAs) have been amongst the instruments that have most relied on the participation of NSAs. A special role is possessed

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[195] Gill and Fleck, note 76, p. 574

[196] Barbara K. Woodward, "Non-State Actor Responsibilities: Obligations, Monitoring and Compliance", in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place,* ed. Gal-Or et al., BRILL, Leiden (2015): 31-34; see also: J. E. Alvarez, "Are corporations 'subjects' of international law", *Santa Clara Journal of International Law,* Vol. 9 (2011): 1–35.

[197] International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion of 11 April 1949, p. 178

[198] Emmanuel Roucounas, "Non-State Actors: Areas of International Responsibility in Need of Further Exploration," in *International Responsibility Today: Essays in Memory of Oscar Schachter*, edited by Maurizio Ragazzi, BRILL, (2005): 391-404; p. 399.

by NGOs,[199] for example, as a means to ensure compliance by State Parties,[200] or to enhance transparency of the enforcement mechanisms.[201] The role embodied by NGOs, however, is often that of a supervision onto State Parties, without being bound as addressees of the same rules and obligations. For this reason, under the framework of the ARSIWA, centered around wrongfulness of conduct to establish attribution of responsibility to international actors, as opposed to the notions of "injury", or "damage", it is almost impossible to think of scenarios in which these NGOs share responsibility for a wrongful act under these Articles.

An attempt to include NSAs in the conversation of responsibility was also made by human rights scholars. It has been sometimes argued that the framework designed by the Articles is unsuitable for the exigencies of accountability that the matter of human rights requires,[202] with claims that the proposed notion of responsibility is a very objective one, distant from a "victim-based" system and that accountability for human rights violations perpetrated by private actors is a sector neglected by the ILC effort.[203] It is uncontested that overlooking the decisive role that non-State actors can have in the context of gross violations of human rights is hiding a part of the story. Some attention to NSAs, in the scope of armed conflicts, can be found in the report by the Commission of Enquiry on Gaza, which specifically addresses "non-State actors that exercise control over a territory [as] obliged to respect human rights".[204] This passage may be used, therefore, to argue that some non-State actors appear to be bound at least by human rights obligations that  possess status of customary law.[205]

#### 1.2.4.2. The case of armed opposition groups

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[199] Generally: Nicholas Chan, "Beyond delegation size: developing country negotiating capacity and NGO 'support' in international climate negotiations", *International Environmental Agreements,* Vol. 21 (2021): 201–217.

[200] Astrid Epiney, "The role of NGOs in the process of ensuring compliance with MEAs" in Beyerlin et al., *Ensuring Compliane with Multilateral Environmental Agreements: Academic Analysis and Views from Practice,* BRILL (2006): 319-352; p. 323-5.

[201] Katharina Glaab et al., "Religious NGOs at the UNFCCC", in: *Religious NGOs at the United Nations,* edited by Claudia Baumgart-Ochse and Klaus Dieter Wolf, Routledge (2018): 47-63; p. 48

[202] Wouter Vandenhole, "Shared Responsibility of Non-State Actors: A Human-Rights Perspective" in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place,* Noemi Gal-Or et al., BRILL (2015): 55-78; p. 56

[203] Bhupinder S. Chimni, "The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective", *The European Journal of International Law*, Vol. 31 no. 4 (2020): 1211-1221; p. 1216.

[204] United Nations Human Rights Council, *Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict, Doc. No. A/HRC/29/CRP.4,* 24 June 2015, para. 17

[205] Roucounas, note 198; p. 398.

The question is, at this point, whether these NSAs can be held responsible in international law for the breaches of their obligations and whether they may share responsibility with States or international organizations when these actors fail to comply with the same obligations. From a procedural point of view, this question is likely to be answered negatively, for the vacancy of courts entitled to adjudicate over these so diverse international actors. Furthermore, as we have by now demonstrated, the majority of the problems derives from the fact that there are almost no primary obligations of general international law that address both NSAs and public actors. Contained in that "almost", however, there are some situations that evade the general rule. In particular, the applicability of shared responsibility to non-State actors has been suggested as possible, without overwhelming changes to the layout of the Articles, in the context of armed conflicts.[206]

A particularly relevant category of NSAs is that of armed opposition groups ("AOGs"), which encompass a very wide array of actors. Given that there is no strict definition of what an AOG is, these entities can present themselves with very different internal structures, or with a very different role in their territory. An argument was made that whenever AOGs act in the political global environment, effectively control a territory and present some internal infrastructure, there exists no substantive reason for them to be treated differently from States and international organizations.[207] An essential difference that distinguishes AOGs from the majority of the NSAs observed above is the fact that armed groups are considered to be bound to at least respect of one particular rule enshrined in an official general international law legal instrument, which also binds states and international organizations: Common Article 3 of the Geneva Conventions,[208] which applies in occasion of non-international armed conflicts. The text of the Article, despite not explicitly mentioning NSAs, generally refers to "each Party to the conflict", thereby also implicitly including AOGs. The commentary to the Article erases all doubts, explaining that the aim of the disposition is that of extending the rules contained in the conventions also to non-international conflicts that

[206] Veronika Bílková, "Armed Opposition Groups and Shared Responsibility", SHARES Research Paper 62, University of Amsterdam (2015); Chia Lehnardt, "Private Military Contractors", in *The Practice of Shared Responsibility in International Law,* Cambridge University Press (2017): 761-781.

[207] Veronika Bílková, "Armed Opposition Groups and Shared Responsibility", SHARES Research Paper 62, University of Amsterdam (2015), p. 6.

[208] Article 3, International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

also envision the participation of NSAs.[209] The interpretation is endorsed by the Inter-American Commission in the *Tablada* judgment:

> "Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government *and dissident forces*." [210]

This passage is even more important than a recognition by legislative dispositions, as it implies the existence of a will, by international tribunals, to include NSAs in the scope of responsibility that may arise from Common Article 3.[211] The question is, then, whether "dissident forces" can be bound to the respect of the obligation in the same way as States. The first remark that can be made is that, customary law and *erga omnes* obligations aside, the insurgence of an obligation onto a subject of international law lies on a consensual basis. Despite the Geneva Conventions can be considered universally applicable and despite claims have been made arguing that its dispositions can be attributed the status of customary law,[212] consent to be bound by the Geneva Conventions is absent, with reference to AOGs.[213] Thus, the question is: can an AOG be considered bound to the provisions of a treaty to which they have never consented to be bound? The answer is not an easy one, as it involves a vast ground of considerations, the first of which could be whether the rule of necessary consent, which finds its main reason in the respect of States' sovereignty,[214] should apply also for armed groups. Article 96.3, in Protocol I to the Geneva Conventions, sets a rule for opposition groups to submit a unilateral declaration to be bound to the obligations.[215] If AOGs were automatically

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[209] International Committee of the Red Cross (ICRC), *2016 Commentary on Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention),* Article 3, para. 388.

[210] Inter-American Commission, Report No 55/97, Case No 11.137 (Argentina), para. 174 (30 October 1997).

[211] Lisbeth Zegveld, *Accountability of Armed Opposition Groups in International Law,* Cambridge University Press, 2009, p. 12.

[212] for a discussion over the customary status of the Geneva Conventions, see: Meron, Theodor. "The Geneva Conventions as Customary Law." *The American Journal of International Law,* Vol. 81, no. 2 (1987): 348-70. Accessed May 22, 2021. doi:10.2307/2202407.

[213] with the notable exception of rebel group Polisario Front's accession via Article 96.3 of Additional Protocol I to the Geneva Conventions on 21 June 2015.

[214] Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization." *The Yale Law Journal* 53, no. 2 (1944): 207-20. Accessed May 22, 2021. doi:10.2307/792798.

[215] Article 96, paragraph 3, International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

bound to the rules because of the reference to "each Party" in Common Article 3,[216] there would not be the need for any unilateral declaration by internal groups.

On the other hand, it is unacceptable that *jus cogens* crimes committed by AOGs went unaccounted for.[217] It would be paradoxical if responsibility could be allocated only to private individuals under the international criminal law courts and to public international entities by the other international tribunals, with all shades of grey in between being left out. In this sense, the remarks made by the International Court of Justice, that: "the lawfulness or otherwise of such acts of the United States is a question different from the violations of international humanitarian law of which the contras may or may not have been guilty",[218] seems to recognize the possibility for non-State actors to be bearers of duties and responsibilities.[219]

The responsibility of a non-State actor for a wrongful conduct, however, has never been adjudicated. On paper, the abstract hypothesis that a mixed group of soldiers, in a non-international armed conflict, receiving orders both from a State and an AOG, commits a wrongful act that violates Common Article 3 would, indeed, form a case of shared responsibility. The actors involved would both be bound by the same obligations, both would violate that same obligation and both should be attributed the act. Under the secondary rules of responsibility explained in the Articles, all requirements are met, but the question remains whether the provisions of the Articles themselves can also be extended to non-State actors.

In conclusion, the position of AOGs in international law is a disputed one. Whenever AOGs possess legal personality and participate to an internal armed conflict, it can be argued that they are bound to Common Article 3, but there are still two problems with their responsibility: AOGs have never formally consented to be bound by the Geneva Conventions and neither the ARIO, nor the ARSIWA are addressed to them. If one accepts the submission that the Geneva Conventions should enjoy the status of "general international law",[220] its content representing "the expression of fundamental principles of international law",[221] a case for shared responsibility could indeed be made also for this very specific category of NSAs. In general, however, it can not be said the same for the other categories. For shared responsibility to

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[216] *supra*, note 208.

[217] on the matter, see: Alain Pellet, "Can A State Commit a Crime? Definitely, Yes!" *European Journal of International Law,* vol. 10, no. 2 (1999): 425-434.

[218] *Nicaragua,* para. 116.

[219] Bílková, note 207, p. 9.

[220] International Court of Justice, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* Judgment, 24 May 1980, p. 31, para. 62.

[221] With their content representing "the expression of fundamental principles of international law", as affirmed by the ICJ in: *Nicaragua,* para. 218.

materialize, we have seen, more than an international actor has to be breaching the same obligation and this can hardly ever happen when "official" international subjects and NSAs are concerned. These actors are often bound by entirely different and mutually exclusive sources of law, or by bilateral or multilateral agreements, which often will decide autonomously the rules on responsibility for the contractual deficiencies of the actors.[222]

### 1.3. *Ex post facto* regulation

Once it has been established that a multiplicity of actors have engaged in a wrongful conduct, it is necessary to determine how responsibility should be distributed among them and, in case of injury, how to adjust the rules concerning the invocation of responsibility and those concerning the reparations owed to the presence of numerous actors. On a methodological note, the following Chapter will be divided into the phases of the invocation of responsibility by the injured subject and of the decision over the subsequent reparations owed by the responsible actors. As has been extensively explained, the Articles do not adopt a subjective approach to the issue of responsibility, favoring a more normative linkage between a wrongful conduct and its responsible actor and, presumably, one less prone to factual considerations. When responsibility has been established, however, the focus moves onto a wholly different dimension: that of reparation of damage.

It has already been explained that the lexical and methodological choice of separating this Chapter of the thesis into *ex ante* and *ex post* was guided by reasonings related to the content of the rules involved, in that the former revolve around to the element of attribution, which is a largely normative one, and in that the latter revolve around the moments of invocation of resposnibility and that of attribution of responsibility to the actors involved. Both of these phases, subsequent to the individuation of the responsible entities, add some layers of concreteness to the perspective of shared responsibility: the invocation of responsibility in that it involves a formal move by an international actor[223] and represents the ignition of the practical judicial process that will lead to concrete reparations of damage, the allocation phase, in that it refers to the decision over the *quantum* of responsibility owed by each actor and the reparations phase, in that they represent the practical consequence to the establishment of responsibility.

The difference with the rules observed in the *ex ante facto* phase is equally underlined by a shift in the perspective that will be adopted: in paragraphs above, the starting point of each analysis was the

[222] Clearly, nothing prevents that a specific agreement can provide for rules of shared responsibility.

[223] ARSIWA with commentaries, Article 42, paragraph 2.

wrongfulness of the conduct, around which the notions of attribution and responsibility revolved. At the opposite, in the present Part, the starting point will be the injury suffered by the damaged entity. It has been exhaustively explained that the Articles do not consider 'injury' as a necessary element for the determination of responsibility[224] and this rule still remains valid here. The considerations that will follow, despite adopting a different perspective, do not impair what has been developed in terms of the theoretical definition of shared responsibility. As will be seen, in fact, not in all instances in which more actors are liable for the reparations succeeding an injury, responsibility will be shared.

Proceeding to the substantial analysis of the rules governing the various *ex post facto* moments, it will be explained that a number of problems beset the perspective of the doctrine of shared responsibility to consolidate its role in judicial tribunals, due to the under-regulamentation of the subject. Indeed, when more than one actor is responsible, some doubts necessarily arise. By way of example, against which actor should invocation of responsibility be directed? Can responsibility be invoked against a number of actors comprehensively, in a single process, without the necessity to invoke responsibility to the international courts against every single actor? If responsibility can be invoked against more than one actor, is the injured country entitled to obtain compensation for each? Should the actor owe compensation amounted only to its causal contribution to the damage, or should it cover the whole damage? The analysis below will attempt to answer these questions, in a chronological order, focusing firstly on the invocation of responsibility.

#### 1.3.1. Invocation of responsibility

The question of invocation of responsibility against multiple actors is, not without surprise, specifically disciplined by the ILC in Article 47 ARSIWA and Article 48 ARIO. The two articles open with the consideration of the case in which several States or international organizations are responsible for the "same internationally wrongful act".[225] In said instance, "the responsibility of each [actor] can be invoked in relation to that act".[226] The provision appears as a natural prosecution of the considerations over shared responsibility that have been examined until this moment, given the emphasis attributed to the fact that the multiple invocation of responsibility is linked to the participation to a *same* wrongful act and this remains the case. The phase concerning invocation of responsibility, however, adds another layer to the responsibility analysis, concerning the subject who can invoke responsibility.

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[224] ARSIWA with commentaries, Article 2, Paragraph 9.

[225] ARSIWA, Article 47(1); ARIO, Article 48(1).

[226] *Ibid.*

#### 1.3.1.1. Substantial issues concerning invocation

Article 42 ARSIWA and Article 43 ARIO explain that the legitimation to invoke responsibility is attributed to an injured State or international organization, both in the cases in which the obligation was owed to that entity, both in the case in which the obligation is owed to a wider group of subjects. In this second case, without detailing excessively the requirements elaborated in Article 42 ARSIWA, under which an entity can be formally considered an "injured actor", it can be summarily reported that for an entity to be entitled to invoke responsibility, said entity shall embody a differentiated position in comparison to the rest of the community, a position whereby it is inevitably affected in a different and more intense manner than the other subjects.[227] The ILC also recognizes a right for non-injured parties in Article 48, but these considerations exceed from the present scope of research.[228]

The commentary to the Articles quickly explains that, by using the terminology "*each* State or or organization", the ILC meant to reinforce, once more, the general principle that each international actor is separately responsible for the conduct attributed to it and to establish a series of independent bilateral relationships which involve the injured subject and, one by one, all the responsible actors. Despite coherent with the rest of the Articles, this statement gives rise to a series of important questions, as for example by which criteria responsibility should be distributed among the various actors where shared responsibility were to be dealt with independently for each of them. On this point, the commentaries to the Articles take a very generic approach and almost appear evasive.[229] The ILC, in fact, avoids setting any rigid standard, underlining how: 1) it can well happen that the responsibility of multiple actors for a single wrongful act arises, with good peace of the principle of independent responsibility; 2) that this shared responsibility will yet have to be invoked singularly against each responsible actor.

In doing so, the ILC also cites the Nauru case, excluding the existence of a "joint and several liability" principle, to demonstrate that the presence of other responsible actors does not prevent the invocation of responsibility against a single actor. The explicit interpretation of the joint and solidary liability of the Court limits itself to the question of invocation, leaving questions of allocation unanswered, as will briefly be seen. The Nauru example, however, appears somewhat out of place: the ILC, in citing the

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[227] ARSIWA with commentaries, Article 42, Paragraph 12

[228] A good summary on the question is provided by: Edith Brown Weiss, "Invoking State Responsibility in the Twenty-First Century", *The American Journal of International Law*, Vol. 96, No. 4 (2002): pp. 798-816.

[229] Annemarieke Vermeer-Kuenzli, "Invocation of Responsibility", in *Principles of Shared Responsibility,* edited by André Nollkaemper and Ilios Plakokefalos, Cambridge University Press (2014): pp. 251-284; p. 253-4.

example, draws attention to the passage in which the ICJ excluded the existence of a principle that denied, in itself, a possibility for separate invocation of responsibility. Australia had been claiming that, in owe to the principle of "joint and several responsibility", Nauru was not entitled to open proceedings against one State for the conduct of a joint entity, without also opening proceedings against the other states that took part in the conduct. The Court rejected the argument, simply stating that the question of "joint and several" responsibility is independent of the question whether each state can be sued alone. Returning to the usage of the example in the Articles, one may legitimately ask why the principle was brought up in the first place. If the Commission had the intent of asserting the existence of a principle that established separate invocation as the general rule, it does not appear as much of an argument to mention the existence of a judgment that does not exclude said principle. At best, one could look at the Nauru judgment as one that envisions a certain elasticity, in that it would be admitted that both separate, both multiple invocation of responsibility can take place in cases of joint conduct. The following part of the commentary insists on the question of "separate responsibility", but we are guided to think that the Commission refers to the conduction of the proceedings, rather than merely to the issue of invocation.

Indeed, the European Court of Human Rights not only admits the possibility for an applicant to invoke responsibility against more than one actor simultaneously,[230] but it also explicitly opens to the possibility of reunion of different cases as a decision of the President of the Chamber.[231] For what concerns the International Court of Justice, despite the matter being dealt less directly with by the procedural rules of the tribunal, there have been cases in which one party has filed an application which was directed to a number of actors, of which the *Monetary Gold* case is a notable example,[232] but there appear to be no provision addressing the possibility for the Court to join applications directed to different actors. Overall, however, the question whether the general rule of separate responsibility implies necessarily separate invocations of responsibility seems to be ill-founded. While it is true that in Article 42, related specifically to the question of "invocation of responsibility", the insisted usage of the term "one State" could suggest that claims should be directed to a single entity, it is our opinion that such interpretation has already been excluded by the practice of the Courts. In general, however, the reasoning by the Commission in this part of the Articles is challenging, especially for the decisions that concern allocation of responsibility among the numerous actors. If the question of invocation is not that rigidly addressed, however, the extrinsecations of the principle of separate responsibility are to be found somewhere else and all roads point to the course of the process.

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[230] European Court of Human Rights, Rules of the Court, Rule 42(1).

[231] European Court of Human Rights, Rules of the Court, Rule 42(2).

[232] International Court of Justice, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 19 June 1954, I.C.J. Reports 1954.

#### 1.3.1.2. Procedural issues concerning invocation

As explained above, the correlation operated by the Commission between substantial questions, such as the principles governing allocation of responsibility, and procedural questions, such as the rules governing invocation of responsibility, imposes to treat these issues in a unitary way. There are, however, some merely procedural and very important elements that suggest that proceedings against a number of actors are conducted jointly, regardless of the question of invocation that was addressed here above and despite the continuously mentioned principle of separate responsibility. From the *Nauru* example the question would appear to concern invocation, but the following indications by the Commission seem to suggest that Article 47 deals conjointly with the question of invocation, of conduction of proceedings and of apportionment of responsibility.

For what concerns the procedural issues, however, the ILC seems to be strongly suggesting that even in cases of shared responsibility, the rule is that joint proceedings are generally excluded. At the same time, it is asserted that, where a *lex specialis* admits the possibility of joint invocations of responsibility, the general rule is prevaricated and the most specific provision can apply.[233] The example that the Commission presents, however, is once again confusing. The mention is made to the Convention on International Liability for Damage Caused by Space Objects, where a specific rule of joint and solidary liability is established. Said rule, however, seems to address in larger part the question of the allocation of responsibility between the different actors, than any question related to the procedure concerning joint processes. For this reason, it is difficult, to contextualize it as a practical example that lies in contrast, as the commentary would suggest, to the *Nauru* case above.

All the more when considering that the principle of separate responsibility in itself is also explained in a non-linear fashion. In paragraph 2 of the commentary, the ILC envisions a situation in which two States act "jointly in the entire operation" in carrying out a wrongful conduct and explains that, in these situations, each State can be called to account for the whole wrongful conduct. It is likely that the Commission intended this point in merely procedural terms, meaning that responsibility may be invoked singularly against each actor, regardless of the fact that the wrongful conduct was the result of a joint action. However, it can not be ignored that judicial determination of responsibility will generally externalize in a decision over the consequences of such responsibility, such as reparations owed to an injured State, and from the assertion by the Commission one could easily infer that the Committee is also admitting that reparations can be entirely

[233] ARSIWA, Article 55.

demanded to a single State. In line with this reasoning is the formulation of the "general principle" in the following paragraph, which assesses that "in case of a plurality of responsible States, each is separately responsible".[234]

*a) fragmentation of proceedings*

This choice by the International Law Commission opens the gate to a series of problems. First of all, if the sentence is to be intended also in the procedural context, initiating separate proceedings against each internationally responsible actor entails an obvious expenditure in judicial and economic resources. As we have seen, the majority of the international courts[235] accept the possibility that a claim is brought simultaneously against multiple actors and the ICJ even has elaborated a rule that declares inadmissible a claim that may entail a determination of responsibility of a subject which is not present in front of the Court, in owe to the well-established *Monetary Gold* precedent.[236] These considerations allow to consider that there is a discrepancy between the indications contained in the Articles and the most basic procedural necessities. For instance, the separation of proceedings also causes significant hurdles, intuitively, from the point of view of the collection of memorials and facts that could be relevant for an adjudication of responsibility. Having by now understood that shared responsibility entails a breach of the same obligation by multiple actors, it is beyond any doubt that the facts relevant for the determinations of the tribunal will be very likely to involve all, or at least a number of the other parties against which joint responsibility has been invoked. Although there are no procedural hurdles for the invested tribunal, where necessary, to access data or memorials that are being examined in a different case by that same tribunal, denying the possibility of a joint proceeding would trace an unnecessarily complex road.

*b) the Monetary Gold principle*

Secondarily, while there are no express limitations to the pooling of memorials and documents among different cases, there sure is an enormous hurdle in terms of the admissibility of claims in front of courts: namely, the *Monetary Gold* principle. Said principle, emerged in the case-law of the International

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[234] ARSIWA with commentaries, paragraph 3.

[235] Vermeer-Kuenzli, note 229, pp. 271 and onwards.

[236] International Court of Justice, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, I.C.J. Reports 1954, p 19.

Court of Justice, finds its *ratio* in ensuring the full respect of the principles of fair hearing and procedural guarantees. It has increasingly established its status as a procedural rule into domestic and international legislations,[237] to the point in which the discussion has moved onto its possible recognition as a principle of customary law.[238] Essentially, the *Monetary Gold* rule entails that a tribunal is not entitled to deliver a decision where the subject-matter of that decision affects a third party which is not present in the judgment.[239] In its later formulations, the principle was, in a way, restricted to operating only when the legal interest of the third party was "truly indispensable to the pursuance of the proceedings".[240] Even read in this more stringent version, however, the *Monetary Gold* principle still poses very serious difficulties for the adjudicability of the responsibilities of the single actors in the context of a situation of shared responsibility. It is obvious, as has been ascertained in the *East Timor* judgment,[241] that an assessment of the wrongfulness of a conduct constitutes a legal interest of the third state. In this sense, if the Court were to adjudicate over the responsibility of State "A" that has acted under a joint venture with State "B", in order to be entitled to deliver a judgment, it would have to determine the responsibility of the first State without mention to the responsibility of the latter. Let us depict an imaginary scenario where soldiers of a joint venture, belonging both to State A and State B are contravening the obligation of refraining from torturing citizens of State C. They are operating under the direction of State A, but a sufficiently wide margin of control. If State C was to bring a case against State B, it would be absolutely inevitable that the Court would be also recognizing the responsibility of State A. In this case, however, the *Monetary Gold* principle would be preventing the tribunal to decide the matter, for the determination of a legal interest of the third party, State A, is almost implicit in the judgment. The example we have adopted may appear a very far-reaching one, but it has been adopted to exemplify difficulties that may emerge even adopting the narrowest possible reading of the *Monetary Gold* principle, in which a tribunal would be obliged to affirm the responsibility of one State, in order to adjudicate on the other. The principle, however, is recognized as being triggered even on the basis of a much lower threshold: the judgment in *East Timor* has demonstrated that it would be sufficient to imply the responsibility of a third State, for a case to be precluded to proceed to the merits phase. The *Monetary Gold* principle would thus be applying to the entire realm of possibilities of shared responsibility, creating enormous damages in terms of applicability.

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[237] See generally: Ori Pomson, "Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?", *Journal of International Dispute Settlement,* Vol. 10 (2019): 88–125.

[238] *Ibid*., pp. 119-125

[239] *Supra*, note 236.

[240] *Nicaragua*, para. 88.

[241] International Court of Justice, *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, para. 31.

The immediate consequence would be that an applicant, in order to invoke the responsibility of an international actor, would have to reduce significantly their claim to avoid that determinations over the responsibility of a third actor might be triggered.[242] Assuming that it can even happen, it would result detrimental to the substance of the claim most of the times: often, the primary damage arising from international wrongful acts results from the combination of conducts carried out by numerous subjects and to separate the conduct in many partial conducts for procedural necessities can result as a failure to represent faithfully the damage suffered.[243]

Another possible solution would be that the courts, as suggested also above, operated a gathering of the various claims. Such solution does not seem to pose any procedural problems for what concerns three of the most important international tribunals[244] - the ICJ, the ECtHR and the WTO dispute settlement mechanism - but still, the establishment of a rule that needs to be circumvented by the practical efforts of the judiciary in order for claims to be admissible seems a strange choice by the Commission.

### 1.3.2. Apportionment of responsibility

The largest black hole, in terms of shared responsibility, has to do with the apportionment of responsibility between the authors of the conduct in object and, more concretely, with the *quantum* of reparations that each of the responsible actors is requested to recognize to the victim. The International Law Commission has been silent on the question of apportionment in the ARSIWA and ARIO, even if in the latter some more implicit indications are offered. The reason for this silence, probably, lies in the fact that the Articles are structured as rules that concern individual responsibility, where a punctual determination of rules that guide apportionment of responsibility is unnecessary. Moreover, the general approach adopted by the Articles is one of absolute support to a normative, objective approach to the matter, while questions of apportionment of responsibility notably can touch upon questions that have a lot to do with the factual circumstances of each case, such as reasonings of fault, or causation. Despite this, however, the mere existence of Article 47 ARSIWA and Article 48 ARIO are an obvious indication that situations that request the application of rules regulating apportionment of damage may occur.

What renders this matter interesting, however, is that choice of ignoring any determinations pertaining to the allocation of responsibility by the ILC is a very explicit and deliberate one, although

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242 Vermeer-Kuenzli, note 229, p. 275.

243 *ibid.*

244 Vermeer-Kuenzli, note 229, p. 271-283.

seemingly aware of the fact that the absence of guidance may pose serious difficulties when a concrete question that involves numerous actors is brought in front of tribunals. Silence on a specific matter by primary, or secondary sources of international law suggests necessary resort to general principles of international law,[245] "which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character".[246] In turn, general principles of international law can draw from the diffusion of practice by municipal legislations, even though opinions of this matter are diverse.[247] The ICJ has expressly admitted, in the *Barcelona Traction* case, the "important and extensive role in the international field" of national legislations[248] and there is scholarly consensus over the fact that a careful transposition of principles that receive widespread application in domestic legal systems can also be transposed in international law, when compatible with the rest of the legal framework.[249] If, indeed, it is true that a general principle is the rule with the "maximum level of agreement"[250] among those at hand, a case can be in favour of the principle of joint and several liability, common to most national legislations.[251] Nevertheless, this solution appears not to be a viable one, as will be observed, in light of the commentary to Article 47 ARSIWA.

We will now proceed to a rapid observation of the possible avenues that could be taken in the absence of different indications, trying to condense suggestions that emanate from municipal traditions, or general principles of law with the rules contained in the black letter of the law of the Articles. An in-depth observation of all possible situations that concern shared responsibility would be out of place, for the purpose of the present thesis, which will limit itself to briefly observing some of the possibilities that have been suggested by practice and scholarship.

Essentially, when a question of shared responsibility arises, in abstract, there are four possibilities as to who can be considered responsible: the first is that no actor is responsible for the conduct, the second is that only one actor is fully responsible, the third is that each actor is jointly and severally responsible, the

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[245] United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38 (1)(c); (hereinafter, "ICJ Statute").

[246] Hersch Lauterpacht, *International Law: Collected Papers - 1. General Works,* edited by: E. Lauterpacht, Cambridge University Press, 2009, p. 69.

[247] a brief overview of some of the most eminent scholars is offered in: Cherif Bassiouni, "A Functional Approach to "General Principles of International Law"", *Michigan Journal of International Law,* Vol. 11, No. 3 (1990): 768-820; p. 770-2.

[248] *Barcelona Traction,* note 48*,* para. 38.

[249] Charles de Visscher, *Theory and Reality in Public International Law,* Éditions Bruylant, 3rd edition, 1968, p. 400.

[250] Wolfgang Friedmann, "The Uses of "General Principles" in the Development of International Law", *American Journal of International Law,* Vol. 57, No. 2 (1963): pp. 279-299; p. 284.

[251] Alford, note 25, p. 240

fourth is that each actor is only responsible for its contribution.[252] The first two hypotheses produce unreasonable outcomes, in terms of absolute unaccountability in the first case, and consequential unfair treatment for the victims and in terms of unfair treatment on tortfeasors, in the second case and are therefore contrary to an effective redress and, ultimately, to an effective protection of the effectiveness of the obligations that have been breached.[253] Both avenues, anyway, present no practice whatsoever in international courts. The question, then, reduces itself to a choice between "several only" liability and "joint and several" liability.[254] On the issue, a great degree of importance is attributed to the type of concrete damage, or harm, that has been provoked and that needs to be repaired. It has already been explained that in the *ex post facto* facade to the question of shared responsibility, the central notion is constituted by the injury suffered by the invoking party. Indeed, when responsibility is invoked by a single subject against a multiplicity of actors, the decisive factors that guide the choice of rules for the apportionment of damage amongst the various tortfeasors are, in the absence of punctual *lex specialis*: first, whether the contributions to the wrongful conduct can be divided into acts or omission individually attributable to each actor and, second, whether also the final harm suffered is, in itself, divisible on the basis of how each part of the wrongful conduct has contributed to the damage.

Intuitively, when each separate contribution to the wrongful conduct is distinguishable and can be also connected to a portion of the damage, the choice would fall on a "several only" regime of responsibility, as each actor can be called to account for his own conduct.[255] The solution is relatively straightforward, provided that the criteria that are adopted to separate the contributions and the different parts of the injury are clear and objective for all parties.[256] Conversely, where various conducts contribute to a single injury and there is no clearance as to how each contribution has participated to the final damage, the rules that can be adopted to allocate responsibility amongst the various actors can grow more complex.

So far, however, a relatively clear scheme has been framed, which sees "joint and several" responsibility applied whenever the harm can not be clearly apportioned and linked to the various conducts by each state, or simply when a wrongful conduct can not be distinguished in the singular contributions by

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[252] Anne van Aaken, "Shared Responsibility in International Law: A Political Economy Analysis", in *Distribution of Responsibilities in International Law,* ed. Nollkaemper and Jacobs, Cambridge University Press (2015): 153-191; p. 156

[253] Alexander Orakhelashvili, "Division of Reparation Between Responsible Entities" in *The Law of International Responsibility,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 647-665; p. 647.

[254] Lewis A. Kornhauser, "Incentives, Compensation and Irreparable Harm", in *Distribution of Responsibilities in International Law,* ed. Nollkaemper and Jacobs, Cambridge University Press (2015): 120-153; p. 132-136.

[255] *ibid.*

[256] Noyes and Smith, note 24, p. 247.

each actor (e.g. the act of a joint venture composed by more states that operates unitarily from the beginning to the end of the wrongful conduct). Opposed to this, there is the hypothesis by which each contribution by each singular actor is identifiable and distinguished in the context of a wrongful conduct, where also the rules of "several only" responsibility can find application, so that each tortfeasor would respond only for its share of conduct. However, there are some points that still require some clarity: for what concerns "joint and several" responsibility, the approach by the ILC in the Articles deserves some observation, while for what concerns "several only" responsibility, some analysis is requested as to the cases in which said principle can be applied and as to the parameters that can be adopted for the subdivision of the shares of responsibility.

#### 1.3.2.1. Joint and several responsibility

The principle of joint and several responsibility represents one of the most important and popular civil law rules for the decision over the distribution of responsibility between several actors. Essentially, it entails that each of the respondents can be called to repair in full the injury made and that it becomes duty of the respondents to internally settle each their own share of responsibility.[257] Nonetheless, despite its popularity, an explicit usage of the principle hardly ever occurs in international law.[258] Indirectly, however, the Commission appears to fall prey of the popularity of said principle, as it is the only one to be actually mentioned in the commentaries to Article 47 ARSIWA and it also can be implicitly inferred in the framing of Article 48 ARIO.

Although having explained just above how the ILC had excluded the operativity of the "joint and several" liability principle with reference to the *Nauru* case at the International Court of Justice, some other remarks ought to be made. As a matter of fact, the commentaryindeed excluded that the "joint and several" responsibility principle can be used to render inadmissible the claim of responsibility against one actor when responsibility is shared, but it also specifically recognized that "The Court was careful"[259] *(sic!)* not to settle whether the responsible State at stake had to be considered fully liable for the entire damage, or only for its part. The passage is noteworthy because the ILC never settle the question themselves either. Once again shielding itself with the distinction between primary and secondary rules,[260] the ILC remits the problem of

[257] Legal Information Institute, "Joint and Several Liability", found online at: https://www.law.cornell.edu/wex/joint_and_several_liability.

[258] van Aaken, note 252, p. 168.

[259] ARSIWA with commentaries, Article 47, paragraph 4.

[260] an extremely complex approach to maintain without falling in contradictions, as observed by: Jure Vidmar, "Some Observations on Wrongfulness, Responsibility and Defences in International Law", *Netherlands International Law Review*, Vol. 63 (2016): 335–353; pp. 343-9.

defining any rule regarding the allocation of responsibility to the legal source that has been violated, citing the provisions of the Convention on International Liability for Damage Caused by Space Objects, in which the principle of joint and solidary responsibility is indeed affirmed, but due to a *lex specialis*,[261] which has the power to derogate the general rules, in reason of Article 55 ARSIWA.[262] The confusion increases when reading subparagraph *(b)* to the second paragraph of Article 47, which affirms that none of the rules in the Articles shall impair a right of recourse exercisable by the actor against whom responsibility is invoked, onto the other responsible actors. The right to recourse is a basic features of systems of joint liability[263] and once again, the commentary explicits the elusive intention of the ILC, expressly stating that the provision does not entail that the problem of allocation is in any way addressed by the Articles, but merely entails that, if the circumstances allow it, a right of recourse between the responsible parties is possible.[264]

To sum up, Article 47 ARSIWA sets the general principle that responsibility is to be invoked singularly against each single party, that there exists no general principle of "joint and several" responsibility, but also that, where provided by a *lex specialis*, such principle may find application. In regards to the *quantum* of the responsibility of the single actor against which responsibility is invoked, no rules are mentioned, and the ILC explicitly specifies that no rule has been developed by the International Court of Justice in the *Nauru* case and that no rule in this sense is to be drawn by the dispositions in the Articles, either.

Moving on to the ARIO, some other useful insights on the matter are provided: in the second paragraph of the provision, it is asserted that: "subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation".[265] The concept of subsidiary responsibility draws from the civil law world and implies that the responsibility of each entity different from the primary responsible can be invoked only after the invocation of responsibility directed to the first actor has led to insufficient reparation.[266] Although this provision regarding subsidiary responsibility appears, in the text of the Articles, as if it could be setting a general rule, the commentary retracts this position and assesses that subsidiary responsibility can arise only in some cases, such as that of Article 62 ARIO, which regulates the acceptance of responsibility by a State member of an international organization for an internationally wrongful act of that organization. In this case, the ILC specifically assesses that responsibility

[261] ARSIWA with commentaries, Article 47, paragraph 5.

[262] ARSIWA, Article 55.

[263] Tony Weir. 'II. Multiple Debtors'. In *International Encyclopedia of Comparative Law Online*, edited by U. Drobnig, R. David, H. H. Egawa, R. Graveson, V. Knapp, A. T. Von Mehren, Y. Noda, et al., para. 105.

[264] ARSIWA with commentaries, Article 47, paragraph 10.

[265] ARIO, Article 48(2).

[266] ARIO with commentaries, Article 48, paragraph 3.

of the State may only be conceived as subsidiary responsibility, or as a joint and several responsibility.[267] The wording of Article 47 ARSIWA, which asserts that invocation of responsibility shall be conducted against "each responsible" and the necessity to adopt a coherent interpretation between the ARIO and the ARSIWA, suggest that the rule by which responsibility has to be invoked separately against each actor is valid under the present ARIO as well. In sum, even if more explicit mention to some rules regarding allocation of responsibility, even in the ARIO there is very little guidance as to how responsibility should be apportioned between the various actors, exception made for the case of Article 62. In a sense, an almost paradoxical situation takes place. There are various indications in the two articles concerned that would indicate the applicability of the "joint and several" principle, citing elements whose existence is only justified in presence of such principle, like the right to recourse and the subsidiarity, but at the same time it explicitly denies the applicability of it.

Indications supporting the existence of such principle in international law of responsibility, however, do exist in practice. An important mention, for example, has to be made to a passage contained in Judge Shahabuddeen's separate opinion on the previously mentioned *Nauru* judgment. In response to a statement by the Australian counsel, who commented on the reticence by the ILC towards the principle of joint and several responsibility, the Judge commented: "but reticence is not resistance".[268] The inference contained in this laconic comment is that the attitude of uncertainty and neutrality adopted by the Commission towards the principle should not necessarily indicate an *a priori* rejection. On the contrary, it is likely that the silence by the ILC should be interpreted as a handover to the judicial power, to decide on a case-by-case basis, paying regard to the primary rules breached and to the factual circumstances surrounding the case. Furthermore, it has already been cited, at the beginning of this thesis, the notable passage of Judge Simma's separate opinion to the *Oil Platforms* case, in which he attempted to demonstrate that the principle of "joint and several" responsibility could emerge as a general principle of international law.[269]

In general, the consistence of the principle is debated and there yet has to be a judgment in which the apportionment of responsibility among numerous actors is decided following the joint and several liability principle. This, however, should not be regarded necessarily as an insurmountable element to its possible application in the future. The ILC has consciously decided to avoid expressing itself in regard to the matter

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[267] ARIO with commentaries, Article 62, paragraph 13.

[268] International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Separate Opinion of Judge Shahabuddeen, I.C.J. Reports, 26 June 1992, p. 284.

[269] "On the basis of the (admittedly modest) study of comparative tort law thus provided, 1 venture to conclude that the principle of joint-and-several responsibility common to the jurisdictions that 1 have considered can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1 (c), of the Court's Statute", International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America),* Separate Opinion of Judge Simma, ICJ Reports, 6 November 2003, para. 74.

and to remit any determination to *leges speciales,* or to the tribunals' discretion. On a general note, it can be said that the existence of such a principle has been advocated by some important exponents in scholarship[270] and little doubt exists as to the fact that said principle is well-established in national legal systems. For these reasons, its applicability to situations of shared responsibility shall not be excluded.

#### 1.3.2.2. Several responsibility

As explained before, a rule that contemplates several responsibility requires each contribution to be distinguishable, in order for each actor to be allocated only the share of responsibility that derives from its contribution. In order for this to occur, however, there are some *caveats* that have to apply. First of all, one concerns the divisibility of the injury. If the "larger" injury is, in turn, also objectively divisible into various smaller injuries that can be linked causally to each contribution, each entity will not only respond merely for its own conduct, but also for the separate damage caused. It goes without saying that, in these cases, to talk about "shared responsibility" would not even be adequate,[271] as each contribution is independent both in terms of conduct (*ex ante facto* responsibility), both in terms of damage caused (*ex post facto* responsibility). Therefore, the true discussion concerns the hypothesis in which the injury is not divisible, where some questions shall be asked with regards to how to evaluate each conduct, for the purpose of allocating responsibility.

Indeed, an interesting differentiation has been attempted by Stern, on the basis of whether each contribution would have been sufficient, taken alone, to cause the injury that has been the result of a number of different acts.[272] In that case, where the single contributions appear sufficient to cause the harm also when taken singularly, a "joint and several" responsibility regime seems appropriate, but where each contribution would not be sufficient to cause the damage, then reasonings related to "several" responsibility should enter the conversation. Obviously, in these cases, the subsequent question relates to which are the parameters under which the contribution of each party can be quantified. Considering here only the question of reparation intended as economic compensation and leaving aside considerations on cessation or guarantees, which are external to the logics of apportionment, the certain data is that the aim is to compensate entirely

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[270] Noyes and Smith, note 24; Ian Brownlie, *Principles of Public International Law,* Oxford University Press, 9th Edition, 2019, p. 440.

[271] Nollkaemper excludes that these situations may be considered as cases of shared responsibility *strictu sensu.* Where individual contributions can be individuated in terms of causation, there is only exists individual responsibility. See André Nollkaemper's "Guiding Principles on Shared Responsibility in International Law", note 25, p. 367-8.

[272] Brigitte Bollecker-Stern, *Le Prejudice dans la theorie de la responsabilite internationale*, Editions Pedone Paris, 1973, p. 267.

the damage suffered by the injured party, as is clearly specified in Article 31 ARSIWA and Article 31 ARIO.[273] Therefore, the comprehensive damage has to be subdivided amongst the responsible parties.

To this purpose, it is obvious that each share of responsibility will have to be proportional to the share of damage caused, which is calculated, amongst other factors, on the basis of the causal linkage between the contribution and the final damage.[274] Causation, in itself, is a very abstract process,[275] whose exhaustive explanation largely verges the boundaries of the present thesis. Any episode is always the result of a combination of factors and there are various degrees of judgment that can be applied when deciding whether a factor should be considered relevant in having caused a determinate episode.[276] In this sense, evaluations of a causal link between two episodes can differ in terms of intensity: for instance, one may choose to attribute relevance to a factor only if the harmful event would never have taken place in the absence of such event, or can choose to attribute relevance to all factors which have enhanced the probability of the occurrence of the harmful event.[277] In turn, this choice can depend from a breadth of subjective and objective factors, amongst which are the element of fault,[278] of foreseeability of the harmful outcome, the absence of coercion or mere pressure by other actors. Scholarship and domestic traditions apart, there exists very little guidance as to how to implement these criteria, or as to the importance that should be attributed to these.[279] The commentary to Article 31 ARSIWA mentions a number of possible factors, such as the ones that we have exemplified here above, but again these factors are deliberately left to the discretional assessment of courts,[280] other than being rules formulated with reference to situations that would involve a single responsible party.

In conclusion, the above constitutes a roadmap of the rules that would guide apportionment of responsibility in situations of shared responsibility. Where individual contributions are clearly distinguished, it may happen that apportionment is guided by rules concerning proportionality between conduct and damage caused, but, realistically, these considerations, being highly hypothetical and subject to a discrete

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[273] ARSIWA, Article 31; ARIO, Article 31: “obligation to make *full* reparation of the injury caused” (emphasis added).

[274] Kornhauser, note 254, p. 224

[275] Herbert Lionel Adolphus Hart, *Causation in the Law,* Oxford University Press, 1985, p. 62.

[276] *ibid.,* p. 69.

[277] León Castellanos-Jankiewicz, “Causation and International State Responsibility”, Amsterdam Law School Research Paper No. 56, 2012, p. 10.

[278] The relevance of fault for the attribution of responsibility in the Articles has been observed by Special Rapporteur Arangio-Ruiz in: “Chapter V: The Forms and Degrees of Reparation and The Impact of Fault”, in *Second report on State responsibility*, A/CN.4/425/Add.1, 1989.

[279] Gattini, note 63, p. 29.

[280] ARSIWA with commentaries, Article 31, paragraphs 10-12.

share of abstractness, appear unlikely to take place in front of international tribunals. More likely, in terms of fairness, would appear the application of the “joint and several” liability principle. In this case, however, the reticence manifested by the ILC in the ARSIWA may have hampered the likeliness for its application by the judicial powers. In any case, what appears hardly debatable is that the silence over the subject can well have a deterrent effect over any future determination of shared responsibility.

## CHAPTER TWO: RELEVANT JURISPRUDENCE

### Introduction

The scarcity of practice in international tribunals is the principal obstacle to overcome for the establishment of the doctrine of shared responsibility in international law. The fact that very often cases involving the responsibility of multiple entities have been often rejected, deemed inadmissible, or settled before reaching the merits phase has contributed to some of the question marks that persist with regard to the theoretical aspect of shared responsibility, too.[281] Similarly, it has also been argued that the lack of consistency in judicial determinations, or the lack of practice in shared responsibility matters in general, may be caused precisely by the absence of a solid theoretical framework on the doctrine of shared responsibility that would guide the tribunals' activity.[282] Nonetheless, the attempts to bring cases that could, hypothetically, result in findings of shared responsibility in front of international tribunals have been numerous.

In the following Chapter an attempt is made to take a panoramic view on some of the most important judicial determinations that can serve useful, directly or indirectly, for the doctrine of shared responsibility. None of these cases are entirely centered onto the matter of shared responsibility, but each case adds some layers of additional information to some particular aspects of the doctrine. For this reason, the present overview can prove useful to envisage the projected avenues that may exist in the future of shared responsibility. Indeed, what future awaits the doctrine of shared responsibility will largely depend on the existence of future findings where multiple actors are found responsible for the commission of a single wrongful act. The importance of judicial precedents is not only suggested by their express mention in the ICJ Statute among the admitted sources that can guide the decision of a tribunal,[283] but, particularly with reference to the ICJ,[284] history proves that precedents often constitute a decisive factor in the substantive reasoning by the judges.[285] The analysis that follows will, thus, attempt to individuate some of the elements

[281] Alexander Orakhelashvili, "Division of Reparation between Responsible Entities" in *The Law of International Responsibility,* edited by Alain Pellet, James Crawford and Simon Olleson, Oxford University Press (2010): p. 647-664; p. 649.

[282] André Nollkaemper and Michael Faure, "Issues of Shared Responsibility before the International Court of Justice", Amsterdam Law School Legal Studies Research Paper No. 2011-01; p. 2-3.

[283] ICJ Statute, Article 38(1)(d).

[284] see, in general: Mohamed Shahabuddeen, *Precedent in the World Court,* Cambridge University Press, 1996.

[285] *ibid,,* p. 11-12: "In the presence of a clear precedent set by itself or its predecessor, the Court will not normally undertake fresh research".

of interest that may influence present and future juries in their understandings on the doctrine of shared responsibility.

In the first part of the Chapter, the emphasis will be placed solely on the matter of attribution of conduct between States and international organizations. Given that the element of attribution is crucial to the law on responsibility, multiple attribution of conduct plays an equally crucial role for the doctrine of shared responsibility. Possible cases of multiple attribution of conduct have been frequently occurring in contexts where 'joint public enterprises' ("JPEs") act.[286] The term refers to public ventures that are created by a number of States or international organizations, that are devoid of a legal international personality and usually temporary.[287] Whenever the UN, the North Atlantic Treaty Organization ("NATO", or "the Alliance"), or other intergovernmental organizations engage in a military operation, a JPE is usually created. These enterprises, whilst being formally associated to the international organization that has ordered their formation, are substantially comprised of troops that have been sent by the States members of the organization. The problem that arises, whenever a JPE commits a wrongful act is, therefore, establishing which entity can be attributed its conduct: the troop-contributing State, the international organization that mandated the operation, or both. The first five judgments that will be observed in the present Chapter, indeed, all concern the matter of attribution of conduct in the context of UN peacekeeping operations, or NATO-led operations. Furthermore, the choice of dedicating a large part to cases involving JPEs is also guided by the fact that the ambit of peacekeeping operations and military missions in general has been one on which the scholarly discussion on shared responsibility has been most fervent.[288] In this first part, the three initial judgments observed have all been delivered with reference to the wrongful conduct performed during UN peacekeeping missions, while the fourth judgment analyzed addresses the issue of multiple attribution of conduct with reference to NATO-led operations.

In the latter part of the Chapter, then, the focus will be laid on the question of distributing the responsibility among multiple actors, with reference to the allocation of the damage between the tortfeasors. The two judgments analyzed are extraneous from the scope of military operations and from the scope of international organizations, but are interesting for their own specific reasons. tThe first is the *Nauru* judgment delivered by the International Court of Justice, which has been touched upon in Chapter One as well, and which was mentioned by the ILC in Chapter IV of the ARSIWA addressing the "responsibility of a

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[286] Dannenbaum, note 135.

[287] *ibid.*

[288] *supra* Johnson, note 45; Nicholas Tsagourias, "The Responsibility of International Organisations for Military Missions", in *International Military Missions and International Law,* ed. by Odello and Piotrowicz, Brill, 2011; Paolo Palchetti, "International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution", Seqüência (Florianópolis), n. 70, p. 19-56, 2015.

state in connection with the act of another state".[289] In the judgment, various aspects inherent to the matter of shared responsibility are addressed, including the attribution of conduct performed by a joint entity, but the most interesting part of discussion, for the present thesis, concerns the correct criteria for the allocation of responsibility to multiple actors and the indications delivered by the judges on the "joint and several" liability principle. The last judgment analyzed will be the *Eurotunnel* arbitration, decided by the Permanent Court of Arbitration (PCA). This case can be considered, as of now, the first significant judgment that has established the shared responsibility of multiple states for a single wrongful conduct.

### 2.1. UN peacekeeping operations

The centrality this ambit for the doctrine of shared responsibility is not a coincidence, since UN peacekeeping operations present the characteristic of involving *per se* a number of actors: the States offering their national contingents for the purpose of the mission, the UN, the host states.[290] The plurality of subjects involved in the operations already renders, in itself, peacekeeping missions a fertile subject for speculations regarding shared responsibility, but such plurality of actors is even more interesting if we consider the rules that govern the relationships of authority between them. For instance, despite the troops being formally considered to be placed under the control of the UN, sending States also retain some elements of control over the soldiers.[291] This ambiguity of relationships of command puts the UN peacekeepers in a peculiar situation, as they factually receive orders by their national military commanders, while, on the other hand, the UN has always advocated in favor of the fact that these troops remain under the exclusive authority of the organization, while acting on UN mandate.[292] This results in the fact that that a judicial determination on which entity has control over the mission will necessarily involve an analysis of the peculiarities in the specific case at hand and may not be determined *a priori.* The ARIO had located the question of attribution in peacekeeping operations under the scope of application of Article 7,[293] which concerns the conduct of organs "placed at the disposal of" an international organization. Article 7 ARIO, indeed, clearly states that

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[289] ARSIWA, Chapter IV.

[290] Ray Murphy and Siobhán Wills, "United Nations Peacekeeping Operations", Chapter in *The Practice of Shared Responsibility in International Law,* edited by André Nollkaemper and Ilios Plakokefalos, Cambridge University Press (2017): 585-612. p. 588.

[291] Fry*,* note 186, p. 196.

[292] Umesh Palwankar, "Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces", *International Review of the Red Cross,* No. 294 (1993): 227-240.

[293] ARIO with commentaries, Article 7, paragraph 1.

the criterion to employ to decide the matter of attribution is that of "effective control" over the conduct,[294] a factual criterion that allows, at least in abstract, for the finding of multiple entities holding effective control onto a single conduct.[295] Despite the indications contained in the ARIO, however, it will be seen that said criterion is not the only one employed by the judges of the ECtHR, which renders even the question of the applicable rules for the attribution of a conduct a thorny one.

The subject of peacekeeping operations, then, neither receives autonomous regulation in the UN Charter, nor is it attributed an official definition.[296] Peacekeeping operations, indeed, are regulated by provisions from both Chapters VI and VII of the Charter and the absence of a specific definition implies that the factual boundaries that guide the recognition of a certain venture as a peacekeeping operation are blurred.[297] Much of its regulation has been devolved to rules generated by practice, rather than by hard-law codification.[298] Perhaps, also these considerations may be among the reasons for which decisions on the attribution of responsibility have not been always coherent in terms of the criteria to adopt, to the point of almost explicitly contradicting each other. The choice of the judgments that will be analyzed below is, indeed, guided by the attempt to provide concrete examples of the uncertainty that surrounds the matter of multiple attribution in judicial courts.

#### 2.1.1. *Behrami* and *Saramati* in front of the European Court of Human Rights

A highly controversial decision issued by the ECtHR in recent years has concerned the joined applications of *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* in front of the ECtHR,[299] in the context of the NATO and UN operations in Kosovo, respectively deployed 10 June 1999

[294] ARIO, Article 7.

[295] Ömer Faruk Direk, "Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the 'Effective Control' Standard", *Netherlands International Law Review,* Vol. 61 (May 2014): 1-22; pp. 10-14.

[296] Murphy and Wills, note 118, pp. 585-6.

[297] Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter,* Martinus Nijhoff Publishing, Leiden, 2009; pp. 29-30.

[298] Simon Chesterman, Thomas M. Franck, David M. Malone, *Law and Practice of the United Nations,* Oxford University Press, 2008, p. 269.

[299] *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, Grand Chamber, Decision, 2 May 2007 (hereinafter "*Behrami*").

and 12 June 1999, in accordance with UNSC Resolution 1244.[300] The Court deemed the two applications inadmissible *ratione personae*.

#### 2.1.1.1. The facts of the case

The two situations, as mentioned, concerned episodes occurred in Kosovo, during the period in which the territory was under the joint administration of the UN, via the United Nations Interim Administration Mission in Kosovo (UNMIK), which vested the role of the "civil" presence and of the Kosovo Force (KFOR), deployed by NATO in occasion of the conflicts with the Federal Republic of Yugoslavia (FRY).[301]

*a) Behrami and Behrami v. France*

The first of the two episodes concerned the explosion of undetonated cluster bombs, which killed Gadaf Behrami and gravely injured brother Bekim Behrami, causing him disfiguration and blindness. On the case, an UNMIK investigation was initiated, leading to the conclusion that the site was under the control of the KFOR troops, who, while aware of the possible danger inherent in the presence of the mines, had deprioritized the duty to adequately signal and disarm them. The cluster bombs that caused the tragedy had been released by the NATO forces in 1999. The UNMIK investigation concluded that the incident amounted to "unintentional killing caused by imprudence".[302] The father of the two, Agim Behrami, and the survived son, Bekim Behrami, after having exhausted internal measures, lodged a complaint to the Court accusing the French KFOR troops of having violated Article 2 of the Convention, which protects the right to life, in having failed to remove or adequately signal the undetonated bombs.

*b) Saramati v. France, Germany and Norway*

The second application concerned a number of restrictive measures suffered by Mr Saramati at the hands of the UNMIK police and of the KFOR police. Mr Saramati was first detained on 24 April 2001 by

[300] Security Council, Resolution 1244 (1999), S/RES/1244, 10 June 1999.

[301] *Ibid.*

[302] *Behrami,* para. 6.

UNMIK forces on suspicion of attempted murder and illegal possession of a weapon, but was released on appeal briefly after. In early July 2001 he was arrested again by the UNMIK forces, under the command of the KFOR commander. He was protracted detention from that moment. Interestingly, in all the trials initiated by Mr Saramati, the KFOR was indicated as the sole responsibility bearing party for his detention. He was convicted for attempted murder and ultimately released in October 2002, with a sentence released by the Supreme Court of Kosovo. Mr Saramati submitted a claim to the Court lamenting the violation, at the hands of KFOR, of Articles 5 (right to liberty and security), 6(1) (right to a fair trial) and 13 ECHR (right to an effective remedy).

#### 2.1.1.2. The judgment

The case touched on a number of controversial issues, among which stood the extraterritoriality of the ECtHR's jurisdiction and the attribution of conduct in cases in which said conduct is brought upon in a joint operation between the United Nations and other entities. The question whether the ECtHR could exercise its jurisdiction had been central in an equally controversial previous judgment, *Bankovic v. Belgium*, which had concerned the bombings in Kosovo by NATO.  Said case, which was dismissed by the Strasbourg judges on the basis of the absence of a jurisdictional link between the ECtHR and the territory (Kosovo) or the applicant (citizen of Kosovo),[303] had propounded a large debate on the extraterritoriality of the application of the Convention and had sparked numerous accusations in scholarship regarding the unsuitability of the judicial delivery to effectively protect human rights.[304] Hence, the *Behrami and Saramati* ruling was a much awaited one, seeing as the *Behrami* application presented a similar context, in terms of the territory concerned and of the nationality of the victims, to understand whether the Strasbourg judges intended to at least partially review its positions.[305] In this sense, it is significant to read that many of the observations by the representatives of the applicants and of the responding and observing States in *Behrami* centered around the interpretation of the question of territoriality, as to the fact that there existed no linkage

[303] *Bankovic and others v. Belgium and others,* (Appl. No. 52207/99), Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001 (hereinafter "*Bankovic*").

[304] generally: Erik Roxstrom, Mark Gibney, Terje Einarsen, "The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection," *Boston University International Law Journal* 23, no. 1 (2005): 55-136.

[305] Marko Milanović and Tatjana Papić, "As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law", *International and Comparative Law Quarterly*, Vol. 58, No. 2 (2008): pp. 267-296; p. 271.

between the applicants and the jurisdiction of the ECtHR.[306] This further confirms the general belief that the question of territoriality would have formed an important question for the decision of the case.

One of the main points of interest of the decision, indeed, is precisely that the court decided to tackle the case from the perspective of attribution, instead of that of territoriality of the jurisdiction.[307] The structure of the judgment was construed around three essential elements: the first regarding which of the two parties, KFOR or UNMIK, had a mandate for the detainment and for the disarm of the mined area. Secondly, whether the conducts by UNMIK and KFOR could be attributed to the UN, regardless of the mandates to detain and to disarm. Thirdly, whether the ECtHR had jurisdiction over the case.

With regard to the first question, it was found that the issuing of detention orders fell into the competences of the KFOR, while the entity competent for de-mining the area was UNMIK, despite the presence of KFOR in terms of operative personnel and despite KFOR initially retained such duty as theirs. Considering that one of the main claims forwarded by the applicants was the absence of a legal personality for KFOR and the fact that the acts performed by such entity could have been attributed to the TCNs that were in control of the KFOR troops at the time, it is no mystery that, already at this point, the only claim that had some probability of being received was Mr Saramati's. In the moment in which the UNMIK were considered formally responsible for the de-mining of the area, it was clear that the ECtHR would have considered the claim outside of its scope of jurisdiction.[308]

At this point, the court proceeded to assess whether the conduct of the troops could have been attributed to the Troop-Contributing Nations (TCNs), or to the UN. The decision was almost an implicit for UNMIK, an organ considered "institutionally, directly and fully answerable to the UNSC"[309] and, as such, extraneous to the jurisdiction *ratione personae* of the ECtHR. Much more complex, instead, was the question of detention, under the mandate of KFOR. The judges elaborated that the security presences established by the TCNs in Kosovo were placed under the delegation of the UN Security Council, in application of Resolution 1244. Subsequently, great importance was attributed to the fact that the terminology used in Resolution 1244 was that of "delegation" by the UN of NATO forces, as opposed to "authorization".[310] Under this infrastructure, under Chapter VII of the UN Charter, the court asserted that the delegation:

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[306] *Bankovic,* note 177, paras. 64 and 65; paras. 112-116

[307] *Behrami,* paras. 71-72

[308] As expressed with even more emphasis by Milanović and Papić: "*Behrami* was doomed the instant that the Court decided to examine the attributability to the UN of the conduct of UNMIK", note 282, p. 278.

[309] *Behrami,* para. 142.

[310] *Behrami*, para. 43.

"must be sufficiently limited so as to remain compatible with the degree of centralization of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN".[311]

From what emerges by these words, it would appear that whenever powers are delegated to a troop and the scope of such delegation is not too broad, the conduct performed by this entity should be attributable to the UN. Adopting similar language, then, the court also emphasized the importance of the criterion of "ultimate authority and control", as a parameter to establish the entity to whom the conduct has to be attributed.[312] The analysis was then conducted to verify whether said criterion was fulfilled. The judges considered particularly relevant that the delegation of powers was an express one and that it presented "sufficiently defined limits on the delegation by fixing the mandate with adequate precision",[313] along with the existence, pending on NATO commanders, of a duty to report to the UN.[314] In brief, the court envisioned the existence of a "chain of command",[315] at whose nucleus stood the UN, which retained "ultimate authority and control" over the entire operation. The notion of "chain of command", ultimately decisive for the judges' decision on attribution, was used to contrast the applicants' argument whereby the TCNs factually retaining very significant power over the KFOR operations would prove that there existed, in concrete, no unified chain of command between the UN Security Council ("UNSC") and KFOR.[316]

Finally, it was concluded that there existed, indeed, a chain of command that linked KFOR's conduct to the UNSC and this finding proved, at the eyes of the Strasbourg judges, that the KFOR troops had been merely exercising delegated powers of the UN. In conclusion, regardless of the fact that the conduct had been materially performed by KFOR, the conduct was attributed to the UN, in virtue of the linkages that chain of command hereby explained. for the court considered that the involvement of TCNs in the control of KFOR troops did not undermine the effectiveness of the NATO command.[317]

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[311] *Behrami,* para. 132.

[312] *Behrami,* para. 134.

[313] *ibid.*

[314] *ibid.*

[315] *Behrami*, para. 133-136.

[316] *Behrami,* para. 77.

[317] *Behrami,* para. 137-139.

#### 2.1.1.3. Commentary

The ECtHR's line of reasoning leaves room for debate about the criterion adopted to decide whom to attribute the conduct and about the choice of avoiding the issue of "extraterritorial jurisdiction". Both of these questions attain closely to the question of shared responsibility. The detachment from the criterion of "effective control", which was expressly disciplined by the ARIO, has been assimilated to a choice not to address the question of multiple attribution of conduct, and, ultimately, of shared responsibility, in the eyes of several scholars.[318] The possibility that a single conduct can be attributed to numerous entities has been expressly admitted in the Second Report on the Responsibility of International Organizations,[319] with specific reference to joint organs and to NATO operations.[320] In the Report, the attention is directed on the aspect that, factually, where a single operation can be causally linked to more actors, all of these actors should be, in principle, attributed such conduct.[321] More specifically, in paragraph 48, the aspect of the "effectiveness" of control is individuated as crucial to the possibility of establishing shared responsibility.[322]

For this reason, in detaching itself from the indications provided by the ILC both in the Articles and in the annexed documents, such as the Report cited above, the ECtHR has surely complicated, with the *Behrami* deliberation, the path for the establishment of dual attribution of conduct as an applicable rule in the law of international responsibility. More generally, in applying a criterion which detaches itself from any factual analysis and which seems construed as to individuate a single attributable actor, as is the "ultimate authority and control" criterion, the impression is that the ECtHR voluntarily strayed away from any

[318] Aurel Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* case", *Human Rights Law Review*, Vol. 8, pp. 151-170, 2008, Available at SSRN: https://ssrn.com/abstract=1317690, p. 160; Alexander Breitegger, "Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of Behrami & Saramati and Al Jedda," *International Community Law Review* 11, no. 2 (2009): 155-184;

[319] Special Rapporteur Giorgio Gaja, *Second Report on the Responsibility of International Organizations*, A/CN.4/541, 2 April 2004, Chapter I, paragraph 6 (hereinafter, "A/CN.4/541").

[320] *ibid.,* paragraph 7.

[321] *ibid.*, para. 8: "One envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out".

[322] *ibid.,* para. 48: "It should also be indicated that what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conducts".

suggestion concerning shared responsibility.[323] In doing so, the general question of which is the applicable criteria for the attribution of conduct in UN peacekeeping operations was also further complicated.[324]

It is important, however, to understand precisely why the present judgment constitutes one of the most relevant, albeit discouraging, cases for the doctrine of shared responsibility, to follow the structure of the entire judgment. The most controversial aspects of the deliberation will be, indeed, singularly observed in the following paragraphs.

*a) the importance attributed to "delegation"*

First of all, the question of "delegation" is attributed a role that has been described as hard to justify, from a legal point of view.[325] Essentially, in owe to the fact that the delegation contained in Resolution 1244 had generated a chain of command under which the UNSC retained some powers over the conduct of UNMIK and KFOR, the judges assumed that such a centralization of powers implied the possibility to exclusively attribute the troops' conduct to the UN. Therefore, the analysis by the court focused centrally on the lawfulness of the delegation of Chapter VII powers, which, if certified, would have been sufficient to imply the exclusive attribution of the operations to the UN. The general formulation of this reasoning appears flawed. Regardless of the question related to whether or not Resolution 1244 can be considered as a proper 'delegation of powers', it is unclear why this would automatically imply that responsibility should fall onto the delegated power. Firstly, there exists no international practice to support the idea that a finding over the lawfulness of a source governing a delegation of powers under Chapter VII can serve, by itself, as a proof for the exclusive attribution of the conduct performed to the delegating entity. The passage in which the Court links the question of the lawfulness of the delegation with the question of attribution of the delegated conduct[326] has been described by scholars as a "*non sequitur*", as these two ambits have no logical connection.[327] Secondly, and closely related to the first point, the scope of analysis in which the judges have entered is one that, in principle, does not have to do with the question of attribution of conduct. The rules on

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[323] André Nollkaemper, "Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica", ACIL Research Paper No 2011-11 (SHARES Series) (2011): 1-19; p. 14.

[324] Faruk Direk, note 295, p. 4.

[325] Breitegger, note 320, p. 167.

[326] *Behrami,* para. 132: "While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN."

[327] Milanović and Papić, note 305, p. 15.

State responsibility, thus including also the rules on attribution of conduct, are *secondary* rules. On the contrary, to determine the lawfulness of an authorization, recourse will have to be made onto rules of *primary* law that, as such, should not fall under the radar of the ECtHR in a decision over the attribution of a conduct, or at least should not play the role of the driving factor for such decision.[328] In a similar fashion, examining the possibility to attribute of a conduct to certain actors on the basis of Resolution 1244 and the rules contained in Chapter VII of the UN Charter implicitly means that the Court treats such sources of law as *lex specialis*.[329] The general rules on the attribution of responsibility expressed in ARSIWA and ARIO cease to operate only when in presence of such a special regime. The fact that the resolution in exam can embody such a role, however, is largely debatable. Resolution 1244, indeed, is an institutional source that regulates internal questions and can not be conceived as an instrument that decides which entities are attributable responsibility.[330]

Another perplexity that can be brought forward is whether a "delegation" could operate, considering the factual circumstances surrounding the context of the present case. There is accordance over the fact that the UN retains the competence, as a general principle of law,[331] to delegate its powers to other entities and, most specifically, it is an established procedure that the UNSC delegates its powers under Chapter VII, which regulates the UN reactions to "threats to peace, breaches of peace, or acts of aggression" to its member States for the implementation of the measures taken by the UNSC to restore peace and security.[332] One of the express limitations to said powers, however, concerns the fact that the UN must retain the powers that it delegates[333] and that these powers have to be legitimate.[334] The question, returning to the case at hand, is whether the UN possessed the power to detain, in conditions contrary to the norms of the European Convention of Human Rights, citizens of the territory they were called to administrate and whether such power could be delegated. The answer is obviously a negative one, but the rhetorical question conceals one of the fallacies that can be noted in the ECtHR's reasoning. Whenever, following a lawful delegation of powers, such powers are exercised in a way contrary to obligations of general international law, these

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[328] Breitegger, note 320, p. 167-8; Milanović and Papić, note 305, p. 19: "The issue of delegation is a matter for the institutional law of international organizations, not the law of responsibility".

[329] Milanović and Papić, note 305, p. 282-3.

[330] *ibid.*; Sari, note 318.

[331] Dan Sarooshi, "The General Legal Framework Governing the Process of a Delegation by the UN Security Council of its chapter VII Powers", *The United Nations and the Development of Collective Security : The Delegation by the UN Security Council of Its Chapter VII Powers,* Oxford University Press (2000): 3-49; pp. 16-17.

[332] *ibid.,* p. 4-5.

[333] *ibid.,* p. 20.

[334] Benedetto Conforti and Carlo Focarelli, *Le Nazioni Unite,* Wolters Kluwer, 2015, pp. 322-323.

powers should not be covered by the delegation. Given that the delegation of unlawful powers is naturally not a competence that can be exercised by the UN, the exercise of unlawful powers, albeit originating from a lawful delegation of powers, should be considered extraneous from the delegation. The delegated organs should be covered by the delegation only inasmuch as these are exercising powers that would be legitimate, were they exercised by the UN. It is seriously doubtful that such had happened with the present case.[335] Following this line of reasoning, the Strasbourg judges, having attested the lawfulness of the delegation from a formal point of view, should have analyzed whether the conduct concretely performed could have been placed under the scope of the delegation. In line with this reasoning, the judges, once the conduct was found breaching obligations of general international law, should have considered the conduct extraneous to the delegation and, at this point, should have applied the "effective control" test to verify whom the conduct could have been attributed to, operating a factual analysis.

*b) the criterion of "ultimate authority and control"*

The most discussed passage in the *Behrami* judgment was the application of the "ultimate authority and control" criterion to identify the entity that should have been attributed the wrongful conduct. This criterion, in fact, neither receives any mention at all in the directives suggested by the ILC in the 2011 ARIO, nor finds any support in the previous practice of the ECtHR. It has already been discussed how, in Article 7 ARIO, the ILC leave very little doubts as to the fact that the criterion of choice for solving questions of attribution in peacekeeping missions is that of "effective control". Aside from the fact that this judgment can serve as a proof of the limited authoritativeness of the instrument elaborated by the Commission,[336] the fact that the Court strayed from the dominant interpretation of the criterion is problematic in many senses.

The biggest problem lies first and foremost in the substance of the criterion elaborated by the court. The question forwarded to the judges was whether the conducts that formed the objects of the applicants' claims could be attributed to the TCNs. Following the rules contained in the ARIO, to answer to such question, the judges would have had to analyze whether the TCNs retained "effective control" over the conduct. The parameter, then, is that of the "effectiveness" of the control, which is described as: "the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving

[335] A similar position is held by Guglielmo Verdirame, *The UN and Human Rights*, Cambridge University Press, 2011, pp. 110-111.

[336] Arnold N. Pronto, "Reflections on the Scope of Application of the Articles" in *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie,* edited by Maurizio Ragazzi, Leiden: Martinus Nijhoff (2013): 147-158.

organization's disposal",[337] in reference to which "account needs to be taken of the "full factual circumstances and particular context".[338] Said evaluation, however, was never attempted, being preferred the application of a different criterion, that of "ultimate authority and command". There is a certain difficulty in explaining what is exactly conveyed by such expression, given the absence of any precedents. However, according to the reasoning of the court, the UN had fulfilled said criterion by reason of the existence of a lawful delegation of powers, whose limits were sufficiently expressed, and of the fact that such delegation imposed a duty on the delegated entities of reporting to the UNSC, "so as to allow the UNSC to exercise its overall power and control".[339] Several authors[340] have indicated that the reasoning of the ECtHR seems to have been inspired by Professor Dan Sarooshi's monograph over the delegation of Chapter VII powers.[341] It must be mentioned, however, that not even Sarooshi's work ever mentions the existence of the "ultimate authority and control criteria", but merely limits itself to argue that the UNSC must "at all times retain overall authority and control over the exercise of its delegated powers".[342] The criterion of "overall control", in itself, was used by the International Criminal Tribunal for the former Yugoslavia in the *Tadić* judgment, where the judges indicated that the criterion would be fulfilled where the entity in power acted "not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity".[343]

Even accepting the fact that the criterion of "overall control" enjoys some significant support both in case-law with the judgment just mentioned, both in scholarship,[344] it should be noted that it still poses itself in clear conflict with the "effective control" suggested by the ILC, with precise reference to the scenario of the present case, that of peacekeeping operations. Furthermore, even accepting the application of the "overall control" test, the court never proceeds to demonstrate that such criterion is actually fulfilled. The guidelines offered in *Tadić* appear to indicate that the threshold requested is something more than the mere existence of a delegation and the fact of being the recipient of a duty to report. The ECtHR, instead, found that the UN

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[337] ARIO with commentaries, Article 7, paragraph 4.

[338] *ibid.*

[339] *Behrami,* para. 134.

[340] Milanović and Papić, note 305, p. 20; Faruk Direk, note 295, p. 4;

[341] Dan Sarooshi, *The United Nations and the Development of Collective Security : The Delegation by the UN Security Council of Its Chapter VII Powers,* Oxford University Press, 2000.

[342] Sarooshi, note 331, p. 35.

[343] *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para. 134.

[344] Antonio Cassese, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *The European Journal of International Law*, Vol. 18 no. 4 (2007).

retained “overall control” as a direct consequence of the finding that the UN also retained “ultimate authority and control” - a notion newly introduced by the court itself. It is inevitable that many perplexities arise from this line of reasoning.

Furthermore, as noted by several scholars, the application of the “ultimate authority and control” has produced an outcome that did not respond to the claims made by the applicants.[345] The applicants’ claim was that the TCNs could have been deemed responsible, while the judges examined whether the UN could be attributed the conduct performed by UNMIK and NATO, without explicitly excluding that the TCNs could also be attributed the conduct. In brief, the court answered to the wrong question (whether the conduct could be attributed to the UN)[346] and addressed it by adopting a criterion that lacked any support in its previous jurisprudence,[347] expressly ignoring the authoritative indications contained in the ARIO on the matter of peacekeeping operations.

Another question is, then, what the relationship between the “effective control” criterion and the "ultimate authority and control” notion is.[348] The two notions, in abstract terms, would not appear to be reciprocally excluding each other, as the former implies a factual analysis, focusing on whom concretely gave instructions and approvals to each single specific action and conduct, while the latter seems to imply a structural, formal analysis, related to the legitimacy of the delegations, to the content of the formal source that contains the delegation. Always remaining in abstract, it is not impossible to think that an international organization may retain “ultimate authority and control” over an operation, without, however, necessarily exercising “effective control” over a specific conduct. In the case at hand, for instance, the “ultimate authority and control” criterion was fulfilled, but there is little doubt as to the fact that the TCNs were exercising an authority over the acts of KFOR that would have implied the attribution of the conduct to the TCNs, under the “effective control” criterion.[349] Nonetheless, for the purposes of the present judgment, despite attaining to different scopes of analysis, the two criteria have been considered incompatible in terms of the final result, which was the exclusive attribution of the conduct to the UN. Accordingly, Special

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[345] Milanović and Papić, note 305, p. 276-7.

[346] Verdirame, note 335, p. 112

[347] Breitegger, note 318, p. 168.

[348] Kjetil Muzinović Larsen, “Attribution of Conduct in Peace Operations: The ‘ Ultimate Authority and Control ’ Test”, *The European Journal of International Law* Vol. 19 no. 3 (2008): 509-531; p. 522.

[349] Tom Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers”, *Harvard International Law Journal*, Vol. 51 (2010): 114-192; p. 153; Milanović and Papić, note 282, p. 22: “KFOR troops were directly answerable to their national commanders and fell exclusively within the jurisdiction of their home state which decided on waiver of immunities; moreover, home states retained jurisdiction in disciplinary, civil and criminal matters and KFOR personnel was immune from arrest and detention other then by their state”.

Rapporteur Gaja righteously indicates, in his Seventh Report on Responsibility of International Organizations, that had the ECtHR applied the "effective control" test in the way in which it was explained in the Articles, instead of the "ultimate authority and control" criterion, the decision on attribution would have been different.[350]

*c) the problem of "dual attribution"*

Article 7 ARIO was actually mentioned in the delivered of the judges, although the provision was largely deprived of any practical effectiveness. Such provision, in fact, appears to have been misinterpreted, or only partially applied. It has already been noted how the judges failed to address the question actually put forward by the applicants, namely that of the responsibility of the TCNs, but it shall be explained that such failure occurred because the "ultimate authority and control" criterion, other than problematic in itself, was interpreted as excluding the possibility for control to be attributed to numerous entities. The fact that the terminology contained in Article 7 ARIO was used in addressing the issue of attribution suggests that the judges were at least aware of the suggestions made by the ILC, regarding the choices of the parameters that should have guided the test on attribution. Among these, however, the parts of the commentary to Article 7 ARIO in which the possibility of dual attribution was touched upon and, in general, the various indications, enumerated in Chapter One of the present thesis, regarding joint responsibility that are present in both the ARIO and the ARSIWA were widely ignored.

Hence, one of the clear problems with *Behrami* was that the possibility of multiple attribution was completely avoided by the ECtHR. As noted by Bell, the judges ought to have at least considered the possibility that the TCNs could have been responsible, after having declared the conduct of KFOR attributable to the UN.[351] The most sensible way to examine the question of attribution would have been to separately consider whether the UN had breached its obligations and whether the TCNs had breached theirs,[352] proceeding only subsequently to determinations concerning the "chain of command" and the attribution of responsibility. Regardless of the results of the application of such different test, it would have in any event brought to a more transparent decision in terms of the elements taken in consideration and one

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[350] Special Rapporteur Giorgio Gaja, *Seventh Report on Responsibility of International Organizations*, A/CN.4/610, 4 May 2009, para. 26.

[351] Caitlin A. Bell, "Reassessing Multiple Attribution: The International Law Commission and The *Behrami* and *Saramati* Decision", *International Law and Politics,* Vol. 42 (2010): 501-548; p. 519.

[352] *ibid.*

certainly more adherent to the indications stemming from the Articles, as both scholarly and the ILC's opinion confirm.[353]

As also upheld by Larsen, the choice not to consider the possibility for multiple attribution, but only to imply exclusive attribution, would have only been legitimate had there been absolute certainty as to the fact that attribution of conduct were a process that could only lead to the finding of a single attributable party.[354] The mere existence of contrary indications present in the Articles does not allow for such certainty to exist. In this regard, even leaving considerations of content aside and accepting the application of the "ultimate authority and control" as a fair choice, resulting in the exclusive attribution of responsibility to the UN, the fact that the Court ignored any reference to the possibility of multiple attribution remains a discouraging fact for the future of shared responsibility.

#### 2.1.1.4. The legacy

With *Behrami*, the ECtHR was gifted with an explicit opportunity of applying the rules and principles contained in ARIO and ARSIWA to a situation of peacekeeping. Article 7 ARIO, which is explicitly said to find application in UN peacekeeping operations, when "the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization",[355] received no attention, or was at the very least misapplied. Consequently, the implicit potentialities that a correct application of said disposition would have unlocked, namely an explicit decision concerning dual attribution of conduct, are confined into the future. The *Behrami* judgment can be thus understood as a lost opportunity. UN peacekeeping operations are more and more frequent and are evolving in order to tackle newly emerged political and social needs.[356] The rising number of peacekeeping operations increases the likelihood to incur into judgments concerning the responsibility of States and international organizations. Accordingly, it is vital that the rules and criteria adopted by the international courts concerning the attribution and the apportionment of responsibility are as uniformed as possible. The many different applicable rules had finally found some order in the codification by the ILC, but each judicial pronounce that detaches from said codification weakens the authoritativeness of the source and adds to the uncertainty on the subject. For these reasons, the direction chosen by the European judges, which implicitly disregards

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[353] Bell, note 351; Milanović and Papić, note 305; Larsen, note 348; Breitegger, note 318; A/CN.4/541, note 125.

[354] Larsen, note 348, p. 524-5.

[355] ARIO with commentaries, Article 7, paragraph 1.

[356] Verdirame, note 335, pp. 196-8.

some of the indications contained in the Articles, can be detrimental to the development of a solid body of law on international responsibility in peacekeeping operations.

Furthermore, the decision in *Behrami* is particularly damaging for the notion of shared responsibility, one that could have been glorified by this judgment and that is left crippled instead. It has been demonstrated that the application of the "ultimate authority and control" test has translated into a denial of the dual attribution principle, at least in this particular instance. The apparent strength and unambiguity of content that characterizes the application of the "effective control" principle was sacrificed in a judgment behind which underlying political exigencies clearly roar.[357] It is essential to note that a misguided interpretation of the Articles poses the concrete risk of leaving accountability black holes in relation to the operations in which the UN and member States are jointly involved.[358] Extensive case-law has already shown a paucity of rulings adjudging the responsibility of the member States, as a consequence of the application of rules attracting the attribution of peacekeeping forces' conduct onto the UN,[359] which enjoys large immunity.[360] This is a tendency that has historically been justified with reasonings concerning the necessity to enhance effectiveness of the military operations, under the aegis of the primacy of the objective to "maintain international peace and security".[361] However, such tendency, where read in accordance to the large immunities[362] conceded to the UN and to other international organizations,[363] inevitably gives rise to concerns regarding accountability gaps,[364] as also were manifested by Sir Ian Brownlie in the Commission's preparatory works to the drafting of the ARIO, where he highlights the risks of meaninglessness of the text if the Articles had not adequately faced "the crucial question of the occasional attempts by States to evade their

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[357] Cedric Ryngaert, "The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations", *The International and Comparative Law Quarterly*, Vol. 60 (2011): pp. 997-1016; p. 1008-9.

[358] See, generally, with reference to the attribution of responsibility for UN operations: Toni Erskine, ""Blood on the UN's Hands"? Assigning Duties and Apportioning Blame to an Intergovernmental Organisation", *Global Society*, Vol. 18, No. 1 (2004): 21-42.

[359] Carla Ferstman, "Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations", *International Organizations Law Review,* Vol. 16 (2019): 42-67; pp. 57-58.

[360] Ved P. Nanda, "Accountability of International Organizations: Some Observations", *Denver Journal of International Law & Policy,* Vol. 33 (2005): 379-390; p. 380.

[361] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 1(1); (hereinafter, "UN Charter").

[362] UN Charter, Art. 105(1).

[363] August Reinisch, "The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals", *Chinese Journal of International Law*, Vol. 7, No. 2 (2008): 285–306.

[364] August Reinisch, "To What Extent Can and Should National Courts 'Fill the Accountability Gap'?", *International Organizations Law Review,* Vol. 10 (2013): 572-587; pp. 574-578.

responsibility by hiding behind an international organization".[365] These concerns can be exemplified with the *Behrami and Saramati* judgment, where the submissions of the respondent (and third) State parties and of the UN pleaded towards a centralization of responsibilities onto the international organization.[366] In this sense, the *Behrami* judgment increases the threat that the conduct of the peacekeeping forces, being attributed only to the UN, may end up in an accountability *vacuum,* where the international organization is attributed responsibility, but no tribunal is enabled to exercise jurisdiction upon it.[367]

On a final note, however, some elements partially justify the Court's reasonings, also mitigating the potential negative effects of this judgment in the future. The first is that Article 47 ARSIWA, which regulates invocation against multiple actors, had not entered in force yet, when the *Behrami* judgment was delivered.[368] Said disposition, as we have explained in Chapter One, plays a very important role in a claim for multiple attribution of conduct. The Court would have had to rely on the suggestions present in the commentaries to Articles 4 to 6 of the ARSIWA and on the insights deriving from the discussions on the content of the ARIO, which formally entered into force only in 2011, four years later. Hence, Article 7 ARIO itself had yet to fully establish its field of application.[369]

The second reason for which the *Behrami* judgment may be less problematic than it seems, is that the ILC response to the judgment was, whilst respectful, also unmistakably directed at addressing the fallacies present in the ECtHR's reasoning. In the commentary to Article 7 ARIO, the Commission underlines the detachment in the *Behrami* decision from the standards contained in the ARIO and subtly expresses its concerns as to the interpretation adopted by the Court.[370] The ILC's attitude towards the *Behrami* decision, hinting that it should be remembered as an exception, rather than as a new rule, is fundamental for the possibility of the doctrine of multiple attribution of conduct to have a future.[371]

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[365] International Law Commission, *Summary record of the 2841st meeting*, 19 May 2005, A/CN.4/2841, para. 10.

[366] *Behrami*, paras. 85-90; paras. 94-95; paras. 110-111; para. 116; paras. 118-119.

[367] Dannenbaum, note 349, p. 125.

[368] Bell, note 351, p. 527.

[369] Blanca Montejo, "The Notion of 'Effective Control' under the Articles on the Responsibility of International Organizations", in *Responsibility of International Organizations, Essays in Honor of Sir Ian Brownlie* (2013): 389-404; pp. 394-398.

[370] ARIO with commentaries, Article 7, paragraph 10: "One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question".

[371] Bell, note 351, p. 531.

### 2.1.2. The *Al Jedda* case

As will be elaborated, the *Al-Jedda* decision represents almost a natural follow-up to the *Behrami* case for the present thesis, given the coincidence of ambit and the brief temporal margin elapsed between the two episodes.The judicial pronouncements on this case, both domestic, with the judgment by the British Supreme Court (formerly "House of Lords") and international, with the judgment by the ECtHR, constitute an important step in the evolution of the rules that guide the attribution of conduct in military operations.[372] The influence of the indications given by the Strasbourg judges in *Behrami* was evident in both the judgments that will be observed. In particular, it will be seen that both courts make a peculiar attempt to contextually restore the indications contained in Article 7 ARIO, namely with the application of the "effective control" criterion and those contained the *Behrami* precedent, in the attempt to support the validity of the "ultimate authority and control" criterion. The dual attribution principle lies, here, in a judicial limbo, as it is not expressly considered by the court, but is indirectly revived by a partial return to the "effective control" criterion.

#### 2.1.2.1. The facts of the case

Mr Hilal Abdul-Razzaq Ali Al- Jedda was an Iraqi born citizen, who was granted British citizenship in June 2000, after he had stayed in the United Kingdom since 1992. The case in question refers to Mr Al-Jedda's detention, at the hands of United Kingdom officials, which occurred in Iraq, from 10 October 2004, until 30 December 2007 and his deprival of the British citizenship, in reference to the same circumstances that were cited as a reason for his detention. The political context in which the above events occurred deserved some explanation. The Iraqi territory was, during the period in which Mr Al-Jedda was deprived of his liberty, under the control of the Multinational Force in Iraq (MNF), a coalition established by, among others, the United Kingdom and the United States of America, which had the primary objective of removing Saddam Hussein from power. The coalition, however, remained in control of the area even after Hussein's deposition and was empowered to do so by UN Resolution 1511, which configured the recognition of the UN of the exercise of interim powers by the coalition and affirmed the necessity of its activities.[373] Mr Al-Jedda travelled to Iraq in September 2004 and was arrested by British officials belonging to the MNF, on 10

[372] Aurel Sari, "Al-Jedda v United Kingdom, App. No. 27021/08, European Court of Human Rights, 7 July 2011", in *Judicial Decisions in the Law of International Organizations*, edited by Cedric Ryngaert et al., Oxford Scholarly Authorities on International Law (2016): 351-361; p. 351.

[373] UN Security Council, *The Situation Between Iraq and Kuwait,* 16 October 2003, S/RES/1511 (2003): para. 1.

October 2004, after information received by the British intelligence services. His internment was justified by reasons of maintaining security in Iraq, for a series of alleged activities in which Mr Al-Jedda was accused of taking part into. Mr Al-Jedda's detention was periodically checked by the officers in the detention facilities and he was eventually held until December 2007. The Secretary of State also decided for his deprivation of British citizenship, on the claim that it were contrary to the public good. Mr Al-Jedda appealed this decision and his appeal was dismissed by the Special Immigration Appeals Commission, on the grounds that the reasons for which the measure had been adopted were sufficiently grounded.

He had also previously appealed against his detainment on the grounds of a violation of the Human Rights Act 1998, for the breach of Article 5(1) of the European Convention of Human Rights, which protects the right to liberty and security. While the Secretary of State accepted that the applicant could enjoy the protection of the Convention, it was stated that the detention was lawful, for it was authorized by the Security Council Resolutions 1511 and 1546, a view which was upheld by the Court of Appeal too.[374] However, the Court of Appeal quashed the order by the Secretary of State concerning the deprivation of citizenship and the case was eventually brought in front of the House of Lords.

#### 2.1.2.2. The judgment by the House of Lords

At the judgment in front of the House of Lords, the Secretary of State of the United Kingdom presented the argument that the conduct in object had to be exclusively attributed to the UN, excluding that the United Kingdom could incur in responsibility for the acts performed by the MNF, expressly citing the decision of the ECtHR in *Behrami* as a valid precedent for the exclusive attribution of the impugned conduct to the international organization.[375] The question presented to the House of Lords was not only that of whom to attribute the conduct in question, but also, equally important, of whether a conduct which is performed in application of a Security Council Resolution can serve to justify an infringement of rights protected by the Convention.[376] A punctual analysis of such aspect is, however, extraneous to the scope of this thesis, where the focus will solely lay on the matters related to the attribution of conduct.

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[374] British Court of Appeal, [2006] EWCA Civ 327, Times 25-Apr-2006; para. 108. (The Court of Appeal's judgment for Al-Jedda v. The Secretary of State).

[375] British House of Lords, [2008] 2 WLR 31;[2008] 1 AC 332; Times 13-Dec-2008; para. 3 (The House of Lords' judgment for Al-Jedda v. The Secretary of State).

[376] A matter which was analyzed largely by the scholarship and one that was dealt with by the ECtHR in the famous *Bosphorus* judgment. See, for context: Kathrin Kuhnert, "Bosphorus – Double standards in European human rights protection?", *Utrecht Law Review,* Vol. 2, No. 2 (2006): 177-190; Philip Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", *Harvard Jean Monnet Working Paper 1/99* (2000).

On the matter of attribution, the judges of the House of Lords acknowledged the full accordance between applicants, defendants and judges regarding the fact that the relevant provision to address the issue of attribution was Article 7 ARIO (which, at the time of the judgment, was Article 5 ARIO).[377] The main point of conflict, instead, was whether the case at hand could be distinguished, or not, from the situation that occurred in Kosovo with KFOR and UNMIK. Lord Bingham, overall agreeing with the majority's line of reasoning, considered that the case at hand was, indeed, distinguishable from *Behrami*. Adopting a position fully adherent to the indications contained in the ARIO, he considered the notions of "exercise of effective control" and "effective command of control" as the decisive criteria that have to be fulfilled in order to consider a conduct attributable to the UN.[378] Such position is displayed by the fact that the question: "Did the UN exercise effective control over the conduct of UK forces?", is expressly asked and treated as a decisive interrogative for the question of attribution.[379] Lord Bingham proceeded then to illustrate the differences between the MNF and the Kosovo missions, concentrating his analysis exclusively on the factual circumstances that surrounded UNMIK's mandate and those concerning the mission of the MNF. It was noted that UNMIK was specifically constituted by the UN prior to the departure of the mission, while the troops under MNF were a result of the independent will of sovereign states, neither mandated by the UN, nor recipients of delegation of powers by the UN.[380] This last remark, in particular, denotes a recognition of the approach that the Court had adopted in *Behrami* and could trigger the inference that, had a delegation of powers to MNF occurred, the conduct by MNF would have been attributed to the UN.

Conversely, Lord Rodger adopts a position closer to the ECtHR judgment in *Behrami*,. Expressly citing the facts in Kosovo, for instance, the importance of the "ultimate authority and control" retained by the UN is emphasized. Lord Rodger indicates that the only differences that stand between the legal status of the forces in Kosovo and the legal status of the forces in Iraq are factual circumstances which prove irrelevant for the decision. In this reasoning, the UNSC Resolutions 1511 and 1546 are attributed the same role that was attributed, in *Behrami*, to Resolution 1244.[381] It is subsequently specified that the fact that Resolution 1244 had been adopted previous to the dispatch of the KFOR troops to Kosovo, counterposed to Resolution 1546, whose adoption was subsequent to the presence of the armed forces of the coalition in Iraq,

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[377] note 375, para. 6.

[378] note 375, para. 22.

[379] *ibid.*

[380] note 375, para. 24.

[381] note 375, para. 61.

is irrelevant, for the only relevant factor is that in both cases the UN official recognition of the operations had occurred prior to the commission of the wrongful conduct.[382]

Finally, Lord Brown focused on the fact that one of the decisive factors in *Behrami* was that the mandate by the UN contained in Resolution 1244 was “neither presumed nor implicit but rather prior and explicit in the Resolution itself”.[383] It is then argued that the same is not true for the indications given by the UN to the coalition forces in Resolutions 1511 and 1546.[384] Indeed:

> “Nothing either in the Resolution [1546] itself or in the letters annexed suggested for a moment that the [Multinational Force] had been under or was now being transferred to United Nations authority and control.”[385]

As a consequence, the House of Lords ended up considering the conduct attributable to the UK, after having applied the “effective control” test and after having distinguished the formal structure of delegations that constituted the chain of command in *Behrami* from that of the MNF, which was ultimately understood as not presenting a sufficiently strong link with the UN, for the international organization to be attributed the conduct. As it can also be seen by some of the passages cited above, however, the reminiscences of the *Behrami* judgment remain numerous and there is no doubt as to the fact that said pronounce played a relevant a role in terms of how the judges structured their reasoning. The divergence between the dispositions in the ARIO and the way in which the dispositions of the Articles have been interpreted by the ECtHR is the main reason behind some of the incoherences that emerged in the judgment in the House of Lords, where, occasionally, the positions held by the judges seemed to be standing on fragile, or incomplete legal bases.

**2.1.2.3. The judgment by the European Court of Human Rights**

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[382] note 375, paras. 87-88.

[383] *Behrami,* para. 134.

[384] note 375, para. 145.

[385] note 375, para. 148.

The case was eventually brought in front of the ECtHR, which was also requested to deliver a judgment on the same questions on which the House of Lords had adjudicated. Once again, our focus will lay exclusively on the issue of the attribution of conduct.

The judgment explored whether the Resolutions issued by the UN Security Council could have been interpreted as implying the exercise of control over the coalition forces. The analysis focused on UNSC Resolution 1483, UNSC Resolution 1511 and UNSC Resolution 1546. It was explored whether the tasks carried out by the Special Representative for Iraq, appointed by the Secretary General, could have justified the attribution to the UN of the conduct performed by the MNF armed forces. After having decided that Resolution 1483 did not contain any relevant provision in relation to such purposes,[386] decisive consideration was attributed to the presence of the coalition forces in Iraq before the issuing of Resolution 1511. This particular question, which had been expressly considered irrelevant for the purposes of the decision over attribution by Lord Rodger (see paragraph 4.2.2. above), is addressed by the ECtHR from the point of view of the relationships of command inherent to the structure of the MNF. Indeed, the decisive factor was the fact that none of the three resolutions impaired, or even only modified the "unified command structure" of the coalition.[387] Basically, the judges reasoned in the following sense: in absence of a UNSC resolution, the conduct would have been attributed undoubtedly to the TCNs controlling the MNF. Subsequently, it was decided that the UNSC resolutions that were issued, authorizing the conduct by the MNF, had not substantially modified the command structure of the troops. For this reason, the rules on attribution would have to operate as if no UNSC resolution had been issued at all. This conclusion remained valid also after the analysis of Resolution 1546, which was also treated as providing no indications of the fact that the UN had increased its role in terms of command over the operations.[388]

An interesting factual element which was considered by the court was that the UN Secretary-General had been complaining specifically about the internment and detention activities that the MNF had been performing,[389] which indicated that, even if a resolution authorizing the operation had been issued, it can not be said that the UN endorsed the conduct of the MNF troops, nor that such conduct was effectively controlled by the UN. The judges then returned on the elements that diversified the legal structure that stood behind UNMIK and KFOR, from that of MNF, drawing the focus, this time, on the fact that both KFOR and UNMIK had been established by a UNSC resolution and justified their very existence in the mandate of the

[386] *Al-Jedda v. United Kingdom* , Application no. 27021/08, Council of Europe: European Court of Human Rights, 7 July 2011, para. 78. (hereinafter, "Al-Jedda").

[387] *Al-Jedda*, para. 80.

[388] *Al-Jedda,* para. 81.

[389] *Al-Jedda,* para. 82.

UN, while this had definitely not been the case for the coalition forces in Iraq,[390] whose existence had been independent from any UN impulse, before the issuing of the resolutions observed. The court acknowledged, therefore, also basing itself on the findings delivered by the House of Lords, that the applicable rules to determine which entity should have been attributed the conduct were those contained in Article 7 ARIO and applied the "effective control" test, concluding that:

> "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations."[391]

#### 2.1.2.4. Commentary

*a) the House of Lords judgment*

The *Al-Jedda* judgment at the House of Lords is one of the most peculiar judgments on attribution that has been delivered in recent years and is one that serves as a perfect exemplification of the perils that were mentioned with regard to the *Behrami* judgment in Section 4.1.4. The situation in which the judges found themselves was described as one in which the judges: "either they had to distinguish the *Behrami* case on the very shaky foundations on which the majority eventually did, or they had to apply it despite their discomfort with its results."[392] The five judges composing the panel , indeed, all brought forward different lines of reasoning, drawing indications from the *Behrami* precedents in some passages, but reaching conclusions that would have resulted in different outcomes where applied to the situation in Kosovo in other passages.[393] For example, Lord Bingham has explained a series of differences that would separate the legal structure of MNF from that of UNMIK, which, to his view, justify a different treatment between the attribution to these two entities. When one looks at the elements that diversify these two entities, however, they could equally be applied to trace a difference between the UNMIK and KFOR troops in the *Behrami*

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[390] *Al-Jedda,* para. 83.

[391] *Al-Jedda,* para. 84.

[392] Francesco Messineo, "The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights", *Netherlands International Law Review, LVI,* (2009): 35-62; p. 47.

[393] *ibid.,* p. 46.

judgment and would ultimately justify a conclusion for which the conduct performed by KFOR would have had to be attributed to the TCNs, instead of the UN. To exemplify, in one passage Lord Bingham affirms that: "it is one thing to receive reports, another to exercise effective command and control".[394] In *Behrami,* however, the fact that the UN received the reports by KFOR had been understood as one of the five reasons on the basis of which the conduct could have been attributable to the UN:

> "…the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control."[395]

In the same exact way, the observation found decisive by Lord Bingham, that the MNF is not a subsidiary organ of the UN,[396] acquires different magnitude when considering that KFOR was neither. The fact that the differences elaborated by Lord Bingham were all construed taking UNMIK as a parameter is significant, since it is no mystery that the real controversial passage in *Behrami* was the attribution of KFOR's conduct to the UN and not UNMIK's. Basically, what appears from these reasonings, is precisely that the judges could not logically accept the possibility to attribute the conduct to the UN, but could not find any clear and relevant standing for the diversification between the KFOR and the MNF either.[397]

It is clear that the fact that the activity of the troops is reported to the UN does not represent a sufficient threshold to consider the troops under their "effective control". It is equally evident that there are some factual elements that differentiate the situation in Kosovo from the situation in Iraq, the most notable of which is the fact that in Kosovo the operations were originated by UN resolutions. However, the fact that the judges in the House of Lords themselves could not find a common ground to convincingly differentiate the status of MNF from that of KFOR, constitutes an implicit admittance of the fact that the *Behrami* judgment had construed some categories, such as that of "ultimate authority and control", which are hard to apply. This is made absolutely clear by Lord Brown, who admits that one of the only elements of differentiation between the two situations can be envisioned in the absence of "ultimate authority and control", a term that he founds "somewhat elusive".[398] This final passage in particular is almost paradoxical,

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[394] Note 375, para. 24.

[395] *Behrami,* para. 134.

[396] Note 375, para. 24.

[397] Marko Milanović, "*Al-Skeini* and *Al-Jedda* in Strasbourg", *The European Journal of International Law*, Vol. 23, no. 1 (2012): 121-139; p. 135.

[398] Note 375, para. 148.

as Lord Brown admits struggling to grasp the content of a criterion which appears to him that, if applied, would differentiate the situations of Kosovo and Iraq.[399]

Regardless of whether there was, or not, the intention to send a message to the ECtHR, it can safely be said that the judgment by the House of Lords had done so, indicating, at the very least, that to apply uniformly the indications suggested in *Behrami* is an indisputably harsh task.[400] An analysis of the Court's judgment will allow to envision whether these indications had found some response by the European judges.

*b) the ECtHR judgment*

The *Al-Jedda* decision by the ECtHR was welcomed by a part of scholarship almost as a revolutionary judgment, an overturn of the route error that the Court had committed in the *Behrami* decision.[401] However, from many points of view, the judgment by the ECtHR, despite the fact that it attributed the conduct to the TCNs and soothed the fears that the UN could become a centripetal entity attracting any form of responsibility, at the cost of victims, may not be as revolutionary as one could think.

Firstly, it had been explained that one of the most problematic points in the *Behrami* judgment was the fact that the Court seemed to have excluded *a priori* the possibility for multiple attribution of conduct, limiting itself to explore whether the UN could have been attributed the conduct and being content with limiting itself to such finding. It has been envisioned, in the scholarly analyses over the case, that the Court has retracted this approach in the present judgment, and has moved a step towards the potential establishment of an interpretation that would allow for multiple attribution to exist.[402] Such inferences, to a large extent, derive from the fact that the ECtHR employed the following terminology:[403]

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[399] *ibid.*

[400] Larsen, note 348, pp. 527-8.

[401] Daphna Shraga, "ILC Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule" in *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie,* edited by Maurizio Ragazzi, Martinus Nijhoff Publishers (2013): 201-212; p. 204; Palchetti, note 156; p. 24.

[402] Milanović, note 397, p. 136.

[403] *ibid.*; also, arguing the same thesis: Stian Øby Johansen, "Dual Attribution of Conduct to both an International Organisation and a Member State", Oslo Law Review, Vol. 6 (December 2019): 178-197; p. 189.

> "does not consider that […] the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations."[404]

The supporters of the thesis that this passage opens some doors for multiple attribution of conduct place emphasis on the fact that the ECtHR uses the word "or", in such a way that could suggest that it would be possible that the acts performed by the MNF could be attributable to the UN, whilst not ceasing to be attributable to the TCNs. At the same time, however, the Court does not manifestly express the possibility that the UN are attributed conduct in such a way that also the TCNs may be attributed the same conduct. If anything, the passage above could, instead, also be interpreted as understanding two possible directions in which the responsibility is attributed to the UN: either the UN are linked to the conduct by means of one of the criteria ("effective control", or "ultimate authority and control") that have been used by the Court in the past, or the UN is attributed the conduct for the presence of an element that hinders a linkage to the TCNs.

In any case, the alleged opening towards multiple attribution of conduct can be only implied reading between the lines. As such, the probability that *Al-Jedda* can serve as a precedent for the purposes of serving as the basis for international courts' future to support multiple attribution is very low. What it does, in concrete, is suggesting that the choices made by the Court in *Behrami* were ill-guided. It does so, however, only partially and implicitly. Implicitly, because the only true difference lies in the fact that the conduct was attributed to the TCNs, instead of the UN and because despite the attempt to differentiate factually the two situations, the Court falls short of convincingly prove that KFOR and MNF presented a different command structure situation and therefore deserved different outcomes.[405] Partially, because the UN does not explicitly depart from the suggestions made in *Behrami*, but instead applies them in a way which appears confusing.

This brings to the second element that deserves some elaboration: the criterion of "ultimate authority and control". The ECtHR's conclusion was that the UN "neither [had] effective control, nor ultimate authority and control", which led to a full attribution of responsibility to the UK. The problem, here, is that, as explained, the two cases had been distinguished merely by means of a factual analysis. If, indeed, the situation was already complex in *Behrami*, where the "ultimate authority and control" could be logically linked to an elaboration related to the "chain of command" and the powers related to the "delegation" under Chapter VII, the ECtHR never explains, in *Al-Jedda,* why the facts at hand exclude that the UN retained

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[404] *Al-Jedda,* para. 80.

[405] Milanović, note 397, p. 137.

such “ultimate authority and control”.[406] This judgment, then, does not represent a proper departure from its predecessor,[407] but rather it adds to the uncertainty over the actual content of the "ultimate authority and control” criterion, whose basis for application were already largely obscure.[408] Furthermore, the way in which the two criteria are presented by the ECtHR in the passage above seems to translate the idea that either of them would be sufficient for the conduct to be attributed to the UN, whilst in *Behrami*, the “effective control” test had clearly been emptied of any significance when the “ultimate authority and control” test demonstrated that the conduct had to be attributed to the UN.

In conclusion, many doubts surface from the reading of the present judgment. The majority of the problems, however, seems to be caused by the uncomfortable precedent of *Behrami.* The punctual application of the suggestions contained in said judgment are not only difficult to grasp, but they also threaten to lead to situations in which the outcome of the judgments is not fully supported, from a logical point of view, by the reasoning, as the *Al-Jedda* decision demonstrates. The ECtHR does not seem ready to depart from the structure of *Behrami* and this leads to problematic results, where the indications in the subsequent judgments become more blurred and the outcomes do not follow a clear path of legal reasoning. Certainly, had the Strasbourg judges overruled previous judgements on the point, it would have been a significant achievement for the future of the shared responsibility doctrine. However, it is equally understandable that the Strasbourg tribunal chose to take into consideration its former decisions, for reasons of uniformity with the judicial history. Like the House of Lords did, the ECtHR chose the easy, halfway solution:[409] to provide the most reasonable result, without abandoning the indications contained in the most recent judgments.

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[406] *ibid.*

[407] Tom Dannenbaum, “Dual Attribution in the Context of Military Operations”, *International Organizations Law Review,* Vol. 12 (2015): 401-426; p. 418.

[408] Russell Buchan, "UN Peacekeeping Operations: When Can Unlawful Acts Committed by Peacekeeping Forces Be Attributed to the UN," Legal Studies Vol. 32, no. 2 (June 2012): 282-301; p. 297.

[409] Milanović, note 351, p. 136.

### 2.1.3. *Hasan Nuhanović v. the Netherlands*[410] and *Mehida Mustafić-Mujić, Damir Mustafić, and Alma Mustafić v. the Netherlands*[411]

In the same years in which *Al-Jedda* was delivered, a couple of domestic rulings on the matter of attribution attracted the attention of the scholarship, namely the *Mukeshimana*[412] and the *Nuhanović* and *Mustafić* decisions. In *Mukeshimana*, the question lied on who, between UN and Belgian troops, had responsibility for the failure to prevent the massacre in Rwanda in 1994. In the First Instance judgment, the Court attributed responsibility for their acts to the Belgian troops, on the basis of some factual findings that suggested that the crucial decision had not involved a significant contribution by the UN commanders. Even though there had been no explicit choice operated by the Court between the adoptable criteria, it was made clear that in situations in which the role of direction is conducted by a number of different actors, emphasis should be put on the *actual* control.[413] The first instance decision was almost completely overruled in the following appeal judgment, where great emphasis was placed on the notion of "ultimate control", significantly narrowing the notion of "effective control" in a way that draws it close to the notion of "ultimate authority" seen in *Behrami.*[414] In 2011, instead, the *Mustafić* and *Nuhanović* cases were brought in front of the District Court of the Hague and successively to the Dutch Appeal Court and the Dutch Supreme Court. These two latter rulings can be considered, until this moment, two of the most interesting and innovative outputs by any domestic court on the matter of attribution of conduct in peacekeeping operations.

#### 2.1.3.1. The facts of the case

In 2011, the Dutch Appeal Court was requested a ruling on the cases that involved the deaths of Rizo Mustafić, Ibro Nuhanović and Muhamed Nuhanović, in occasion of their removal from a UN compound

[410] *Hasan Nuhanović v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN: BR5388; 200.020.174/01; ILDC 1742 (NL 2011), English translation available at http://zoeken.rechtspraak.nl/ (hereinafter, "*Nuhanovic*").

[411] *Mehida Mustafić-Mujić, Damir Mustafić, and Alma Mustafić v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN: BR5386; 200.020.173/01, English translation available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386 (hereinafter, "*Mustafic*").

[412] *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, RG No 04/4807/A, 07/15547/A, First Instance Judgment; *Mukeshimana-Ngulinzira and Others V. Belgium and Others,* 2011/AR/292, 2011/AR/294, Appellate Judgment.

[413] *Mustafić,* p. 176-7.

[414] Tom Ruys, "Mukeshimana-Ngulinzira and Others v. Belgium and Others. 2011/AR/292, 2011/AR/294. Appellate Judgment", *The American Journal of International Law,* vol. 114, no. 2, 2020, pp. 267-275, p. 272.

where they had found refuge. The subject of the claims was Dutchbat, a Dutch troop of combatants who partecipated in the UN efforts to protect the area of Srebrenica from the ongoing siege by the Bosnian Serb army. The Dutch battalion served as part of UNPROFOR (United Nations Protection Force). Following the outbreak of violence subsequent to the declaration of independence by the Republic of Bosnia and Herzegovina, the UN mandated UNPROFOR to operate in Bosnia under Resolution 758 to guarantee protection for civilians. Among the safe areas instituted by the UN, there was the city of Srebrenica, an enclave mostly inhabited by Bosnian Muslims. Beginning 3 March 1994, Dutchbat settled itself in protection of the city, quartering mainly in a compound in Potoçari, a few miles from Srebrenica. Between 5 and 11 July 1995, the Bosnian Serb army broke into Srebrenica, forcing the Dutchbat battalions that were in the city back into the compound and forcing the displacement of the citizens of the enclave from the city, mostly in the nearby forests. More or less 5000 of these were admitted in the UN compound in Potoçari. After having understood that the enclave was lost, however, a decision was taken to evacuate the compound, with the Commander of Dutchbat, Karremans, making agreements with Mladić, Commander of the Bosnian Serb army as to how to arrange the evacuation of refugees, after explicit assurances by the latter about the safety of the civil population. The evacuation began on 12 July 1995 and already from the following day there were various reports, comprehending testimonies of dead bodies found in the proximities of the compound, indicating the possibility that there had occurred situations of violence and abuse against the able-bodied men that had been entrusted to the Bosnian Serbs. Despite these reports, the evacuation proceeded the following day, in which Rizo Mustafić, Ibro Nuhanović, and Muhamed Nuhanović were kept from staying in the compound, subsequently losing their lives at the hand of the Bosnian Serb army.

#### 2.1.3.2. The judgment

*a) the judgment by the Court of Appeal*

The Dutch Court of Appeal ruled on the question of attribution by applying rules of international law, differently from how it had decided to deal with the question of tort, where domestic legislation was employed.[415] The judges privileged the indications contained in the ILC's ARIO, reverting the position adopted by the District Court, which, admittedly inspired by the *Behrami* ruling, had stated that participation

[415] Bérénice Boutin, "Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanovic´* and *Mustafic´* : The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping", *Leiden Journal of International Law,* vol.25 (2015): pp. 523–527.

to a peacekeeping mission under Chapter VII automatically implied a transfer of 'command and control'.[416] The judges of the appeal, instead, applied the criterion of "effective control" to adjudicate on the attribution of the conduct by Dutchbat.[417] Said criterion, however, was interpreted in a very peculiar way, with the introduction of the element of prevention in the evaluation of whom to attribute responsibility. After having stated that the evaluation has to be made under consideration of the concrete circumstances of the case, attaching importance to the existence of a specific order behind the wrongful conduct in question, the court also suggested that in the absence of such an indication, attention could have been drawn to whether the parties were in a position to prevent the conduct.[418] Immediately after, quite abruptly, the judges stated that "the possibility that more than one party has "effective control" is generally accepted",[419] thereby not only candidly admitting the possibility of dual attribution, which had already been previously implied,[420] but at the same time suggesting that the criteria of "effective control" should not be understood as an exclusive one, endorsing the largely majoritarian interpretation in scholarship. The Court of Appeal also specifically mentioned the *Behrami* ruling, indicating that the present situation distinguishes itself clearly from the situation that usually surrounds peacekeeping operations.[421] In particular, the UN peacekeeping mission had already failed in the moment in which the wrongful conduct in object was performed. A very analytical observation was carried out, concerning the causal linkages that each element of the directive personnel of the UN and of the Netherlands had with the decision to leave Rizo Mustafić, Ibro Nuhanović, and Muhamed Nuhanović outside of the compound. It was assessed, on the outcome of said observation, that the eviction of the victims had occurred following a joint decision by the Netherlands and the UN[422] and it was eventually decided that the Netherlands were responsible for their conduct.

An element that turned out to be decisive, as well as extremely innovative, was the fact that the Appeal Court attributed great importance to the fact that the Netherlands were in a position to prevent the wrongful conduct, thus adding a novel facet to the notion of "effective control". Despite the fact that the factual analysis conducted by the judges had already led to the fact that the contributions by both entities

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[416] *Mustafic and Others v. The Netherlands,* District Court in The Hague, Civil Law Section, Case number 265618 / HA ZA 06-1672, 10 September 2018, paragraph 4.10.

[417] "Nuhanovic is right in asserting that the decisive criterion for attribution is not who exercised 'command and control', but who actually was in possession of 'effective control'", *Nuhanovic,* para. 5.7.

[418] *Nuhanovic,* para. 5.9.

[419] *ibid.*

[420] "the actions of these troops that are placed at the disposal of the UN should be attributed to the State, the UN *or possibly to both*", *Nuhanović,* para. 5.3 (cursive mine).

[421] *Nuhanović,* para. 5.11.

[422] *Nuhanović,* para. 5.20

involved had to be understood as relevant for the attribution of the conduct and that the control over the Dutchbat battalion was "not only theoretical, [but] also exercised in practice",[423] the judges considered central for the question of attribution that the Dutch government had "the power to prevent".[424]

*b) the judgment by the Dutch Supreme Court*

After having effectively summarized the findings by the Court of Appeal, the Supreme Court proceeded to an analysis of the relevant dispositions in both ARIO and ARSIWA. The judges quoted some passages from the general commentary to the ARIO to imply that there was no rule in international law that guided towards a situation of exclusive attribution, but that, at best, a case could be made for multiple attribution to be the rule.[425] Claims requesting the application of Article 6 ARIO, instead of Article 7 ARIO, were dismissed behind the account that the retention of disciplinary powers and criminal jurisdiction onto the host State can not allow for a consideration of the troops as fully seconded to the international organization, but merely implies the preservation of a significant margin of power by the state.[426] Subsequently, a selection of the appropriate test for attribution was undertaken. As a natural consequence of the careful application of Article 7 ARIO, the choice fell onto the criterion of "effective control", with regards to which the judges asserted that:

> "For the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently. It is apparent from the Commentary on article 7 DARIO as referred to above at 3.9.5 that the attribution of conduct to the seconding State or the international organization is based *on the factual control over the specific conduct*, in which all factual circumstances and the special context of the case must be taken into account."[427]

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[423] *Nuhanović,* para. 5.18.

[424] *ibid.*

[425] Supreme Court of The Netherlands (Hoge Raad), The State of the Netherlands v. Hasan Nuhanović, 6 September 2013, Judgment, 12/03324; para. 3.9.3. (hereinafter, "12/03324").

[426] 12/03324, para. 3.10.2.

[427] 12/03324, para. 3.11.3. (emphasis added)

Having made this statement, on the basis of the factual analysis by the Court of Appeal, which is endorsed in full by the Supreme Court, the Court concluded that there were no foundations to overrule the judgment delivered by the Court of Appeal and that, therefore, the conduct were to be attributed to the Netherlands, notwithstanding the possibility that it could have been attributed *also* to the UN.

#### 2.1.3.3. Commentary

As mentioned above, the present decision is undoubtedly one of the most pioneering decisions in relation to shared responsibility.[428] Most of the elements that received criticism in the cases examined above are successfully surpassed by both Dutch courts' reasoning. In fact, the Dutch courts are credited for having done the easiest, but at the same time the more complex activity: that of reading attentively the indications present in the ARIO, with particular reference to Article 7, and that of consequently analyzing with great precision the factual developments that had taken place in the context of the decision by UNPROFOR of denying protection to the victims. By doing so, the *Nuhanović* judgment tacitly leaves behind the causal strainings that had characterized *Behrami* and *Al-Jedda* and pays justice to the "effective control" criterion, categorically ignoring the "ultimate authority and control" criterion.[429]

However, particularly in the Court of Appeal judgment, there appeared to be a moment in which the Dutch judges appeared to care to avoid a conflict with *Behrami.* The court, indeed, found that the factual circumstances surrounding the two situations were different from one another, and affirmed that such differences justified the application of distinct rules.[430] In truth, it is much easier to envision a difference between the factual circumstances in the Kosovo situation and the present, than between the Kosovo situation and the Iraqi one in *Al-Jedda*, which is paradoxical, if we consider that the difference in the outcome in *Al-Jedda, vis-à-vis Behrami,* was based predominantly on the factual differences between the two cases. In the present judgment, instead, where the factual differences could have in fact justified the application of different standards, the Court opted for not excessively paying attention to them. It is notable that neither the Court of Appeal, nor the Supreme Court focused on the reasons for their detachment from *Behrami* in the conclusions of their judgments, aside from the considerations just mentioned, which were

[428] Amir Čengić, "Introductory Note to the Netherlands v. Nuhanović and the Netherlands v. Mustafić-Mujić et al. (Sup. Ct. Neth.)", *International Legal Materials*, Vol. 53 (2014): 513-537.

[429] Tom Dannenbaum, "Killings at Srebrenica, Effective Control and The Power to Prevent Unlawful Conduct", *International and Comparative Law Quarterly,* Vol. 61 (2012): 713-728; p. 721.

[430] *Nuhanović,* para. 5.13: "the Court attaches importance to the fact that the context in which the alleged conduct of Dutchbat took place differs in a significant degree from the situation in which troops placed under the command of the UN normally operate".

ultimately irrelevant for the logical structure of the legal reasoning. Instead, the choice was to positively explaining, via the interpretation of the relevant sources, why the legal path chosen is the more legally sound one.

By far, the most interesting addition provided by the present decision is that of the attention given to the "preventive power". Strongly advocated by Dannenbaum,[431] the element of being in the position to prevent the wrongful conduct has been object of scholarly debate for a long time, receiving a large amount of endorsement.[432] Essentially, it is argued that to evaluate the degree of "effective control" exercised solely by making reference to the entities that gave the orders over the specific conduct can not be sufficient, as there may be instances in which the wrongful conduct is neither ordered by the UN, nor by the TCN, or in which the generic order to act by one of the parties can be endorsed by the other party and so on.[433] For this reasons, the proposal is to add another layer to the test of the effective control, evaluating which of the parties were concretely in a position to prevent the occurrence of the wrongful conduct.[434] This approach proves useful to the cause of shared responsibility, as it denotes a multiplication of the frameworks of investigation into the position of the different entities involved in the conduct. Where both entities could have contributed to the possibility of preventing the wrongful conduct, both shall be considered liable to be attributed the conduct. The introduction in the judgment by the Supreme Court of the preventive element was, it appears, one that took into consideration both the normative aspect of the power to prevent, both the factual aspect of such power.[435] Indeed, the judges observed both whether the entities observed had the legal power to prevent the impugned conduct, both whether the factual circumstances allowed them to exercise their authority to prevent the occurrence of the wrongful conduct.[436] This duality of scope of analysis may enrich the possibilities for judicial findings that can result in dual, or multiple attribution.

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[431] Tom Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers", *Harvard International Law Journal,* Vol. 51 (2010): 114-192; Tom Dannenbaum, "Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Ventures", in *Distribution of Responsibilities in International Law*, edited by André Nollkaemper and Dov Jacobs, Cambridge University Press (2015): 192-225; Tom Dannenbaum, "Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct", *International and Comparative Law Quarterly*, vol. 16 (2012): 713-728.

[432] Carla Ferstman, "Reparations for Mass Torts Involving the United Nations", *International Organizations Law Review,* Vol. 16 (2019): pp. 42-67; pp. 47-48; Christiane Ahlborn, "To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States", *Die Friedens-Warte*, Vol. 88, No. 3/4, Accountability of Peacekeepers (2013): pp. 45-75; p. 53.

[433] Dannenbaum, note 349, p. 156.

[434] *ibid.*

[435] André Nollkaemper, "Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica", ACIL Research Paper No 2011-11 (SHARES Series) (2011): 1-19; pp. 8-12.

[436] *ibid.*

The presence of this innovative element, anyway, further confirms that the matter of dual attribution and, consequently, the matter of shared responsibility are still in an almost embryonic stage of development. The fields of potential application are multiple and some of these will be observed in the following chapter. What can be drawn from the considerations made so far is that there exists, both from a theoretical, both from a judicial point of view, a timid support for the idea of shared responsibility in peacekeeping operations, or, at least, for multiple attribution of conduct. The procedural obstacles, however, appear significant in hindering applications of the principle in the most notable international *fora*. A grain of optimism can be drawn from the decisions analyzed above, delivered mostly by domestic tribunals, which have gradually opened to the idea of attribution as a non-exclusive process. At least for what concerns this latter point, especially in the context of peacekeeping operations, there is a large consensus among scholars, supported by the International Law Commission favoring the possibility of dual attribution of conduct. Only the future will tell whether or not this is going to be sufficient to succeed over the "notably political"[437] reasons guiding the choices of centralizing the responsibility onto the UN.

### 2.2. NATO-led operations

The reasons why NATO-led operations offer an important possibility to reason over possible judgments concerning shared responsibility are very similar to those concerning our choice of discussing peacekeeping operations. Here as well, indeed, a number of different actors are inevitably involved, with the addition, where compared to the UN, that the NATO member States that do not actively participate in the operations.[438] There have been many discussions related to the possibility of attributing a wrongful conduct to NATO and there is some concordance on the fact that NATO possesses an international legal personality, as a necessary consequence of the fact that it fulfills all the requirements enunciated for such purpose by the ICJ in the *Reparations for Injuries*[439] judgment.[440] Instead, some problems have arisen as to whether NATO

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[437] General Assembly, *Responsibility of international organizations: Comments and observations received from international organizations*, 14 February 2011, A/CN.4/637, paragraph 6.

[438] Marten Zwanenburg, "North Atlantic Treaty Organization-Led Operations", Chapter in *The Practice of Shared Responsibility in International Law,* edited by André Nollkaemper and Ilios Plakokefalos, Cambridge University Press (2017): 639-668; p. 639.

[439] *Reparation for injuries in the service of the United Nations,* Advisory Opinion: I.C.J. Reports, 1949, p. 174.

[440] Advocating for NATO's independent juridical personality, an authoritative opinion is that of Alain Pellet: "NATO is an international organization and, as such, possesses international legal personality. While it is true that it is a somewhat special organization, whose institutionalization has been empirical and gradual, it nevertheless has permanent organs, has been assigned a mission of its own, and has legal capacity and privileges and immunities" in Alain Pellet, "L'imputabilité d'éventuels actes illicites - Responsabilité de l'OTAN ou des Etats membres", *Kosovo and the International Community*, edited by Christian Tomuschat, Martinus Nijhoff Publishers (2002), p. 198.

"contractors" (i.e. personnel that, whilst maintaining their qualifications at national level, has been seconded to NATO headquarters) should be understood as agents of their member States, or as agents of NATO, for the purposes of attribution of conduct under ILC's ARIO. Not surprisingly, the same question can be posed with reference to the wrongful performed by the agents of TCNs that are seconded to NATO in the scope of operations led by the Alliance.[441] The reasonings made in Chapter One, related to multiple attribution of conduct under Article 7 ARIO, thus, could find perfect theoretical application also in the context of NATO. The subject acquires more resonance in consideration of the increase[442] that there has been in the recourse to operations conducted under the patronage of the Alliance over the recent years.[443]

#### 2.2.1. *Legality of Use of Force (Serbia and Montenegro v. Belgium; Canada; France; Germany; Italy; the Netherlands; Portugal; Spain; United Kingdom; United States of America)*

Although the following case was met with a judgment of inadmissibility by the ICJ, for reasons beyond the scope of the present thesis, the claims brought forward by the applicant and the submissions made by some of the respondent States still offered some important insights for the study of the pattern of applicability of rules related to shared responsibility and multiple attribution. The essential claim made by the Federal Republic of Yugoslavia (FRY), was that the member States that had contributed to the conduct impugned as wrongful were to be all considered responsible for their contributions to the damage. Essentially, the claimants invoked the shared responsibility of all member States and NATO.

##### 2.2.1.1. The facts of the case

The present judgment concerned the claim made by the FRY against ten respondent States, which were accused of having violated the prohibition on the use of force against other States. The claim was mostly based on the aerial bombing campaign conducted by NATO, on the territory of the FRY, between 24 March 1999 and 10 June 1999, which caused approximately 1,000 civilian casualties, 4,500 left with severe

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[441] David Nauta, *The International Responsibility of NATO and Its Personnel during Military Operations,* Brill | Nijhoff (2018); pp. 151-167.

[442] Zwanenberg, note 438, p. 640.

[443] An expected increase, as described in: Ugo Draetta and Marinella Fumagalli Meraviglia, *Il Diritto delle Organizzazioni Internazionali,* Giuffré Editore (2001); p. 372-375.

injuries and destroyed extensive parts of the territory of Yugoslavia, causing an unquantifiable damage to the survived civilians in terms of joblessness and economical unsustainability for the years to follow.[444]

#### 2.2.1.2. The submissions by the Federal Republic of Yugoslavia

The FRY claimed, *inter alia* and besides the already cited violation of the prohibition on the use of force, the existence of breaches of the obligations to spare the civilian population from acts of violence, not to commit any act of hostility directed against historical monuments, works of art, places of worship, and not to use prohibited weapons.[445] The requests were to cease immediately the acts of use of force, to refrain from any future act of such kind and to receive compensation for the damage done.[446] Yugoslavia had based its claims on the Geneva Convention of 1949 and of the Additional Protocol No. 1 of 1977 on the Protection of Civilians and Civilian Objects in Time of War, the 1948 Convention on Free Navigation on the Danube, the International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the Convention on the Prevention and Punishment of the Crime of Genocide.[447]

Most interestingly, the submission made by the FRY was singularly directed against each individual State party. The argument put forward by the FRY was that, in principle, a certain conduct performed by troops seconded to NATO, should have been attributed to all the States that have contributed to such conduct,[448] also involving the responsibility of NATO itself.[449] Yugoslavia, indeed, "had to go great lengths in arguing that the bombing was the responsibility of each single NATO member".[450] The choice made by the FRY, however, was almost a forced one. In fact, NATO does not have *locus standi* before any

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[444] *Legality of the Use of Force*, *Request for the Indication of Provisional Measures*, 29 April 1999, I.C.J. Reports 1999.

[445] *Legality of the Use of Force*, *Application instituting proceedings,* 29 April 1999, I.C.J. Reports 1999.

[446] *ibid.*

[447] "International Court of Justice: Cases concerning Legality of Use of Force: No Provisional Measures against NATO Member States," International Law FORUM Du Droit International 1, no. 3 (September 1999): 117-120; p. 117.

[448] Christian Dominicé, note 180; p. 282.

[449] *ibid.*

[450] Kirsten Schmalenbach, "Dispute Settlement" in *Research Handbook on the Law of International Organizations* edited by Jan Klabbers and Åsa Wallendahl, Edward Elgar Publishing Limited (2011): 251-273; p. 257.

international court,[451] rendering the "fusillade of complaints"[452] the only option available to States that seek reparations for the conduct attributable to NATO.

It is interesting to observe how Sir Ian Brownlie, who represented the FRY in the proceedings, exposed his thesis regarding the shared responsibility of the member States. First of all, Brownlie argued that "the respondent States are jointly and severally responsible for breaches of the Genocide Convention, and other breaches of international law committed through the instrumentality of the NATO military command structure".[453] The focus of his arguments drew on the fact that the operation in Yugoslavia always was acknowledged as a joint operation and that, as such, "it would be a legal anomaly" to consider its member States not accountable for the wrongful conducts formally performed by NATO.

#### 2.2.1.3. The submissions by the defendant parties

Equally deserving of attention have been some of the responses by the defendant parties to the claims made by the representatives of the applicant. Most of them have claimed the absence of basis to hold the member States responsible, even where a wrongful conduct could have been attributed to NATO. Some of the respondents, however, did not. Such silence may bear different meanings: it could be interpreted either as an acceptance of the fact that these parties could have been held responsible, under international law, for the acts committed by their troops while being seconded to NATO,[454] or a claim whereby NATO could not be held responsible because it is not a legal person.[455] Three of the most interesting passages, among the State parties' oral submissions, are shortly reported below.

*a) Portugal's submissions*

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[451] Nauta, note 441, p. 99.

[452] As wonderfully phrased by Schmalenbach, note 450.

[453] International Court of Justice, *Legality of the Use of Force, Oral Proceedings (sitting held on 12 May 1999),* I.C.J. Reports 1999, p. 13

[454] Zwanenburg, note 438, p. 655.

[455] Nollkaemper and Faure, note 282; p. 43.

Portugal was among the respondents expressly rebutting the claims made by the representatives of the FRY on the possibility to attribute NATO's actions to the member States.[456] Affirming that there existed no doubt as to NATO's international personality, the representatives concluded that: "Portugal considers that, under current international law, there is nothing that would make it responsible for NATO's acts, even if they were unlawful."[457] Seemingly ignoring the suggestions made by the ILC in the reports on the responsibility of international organizations, Portugal did not construe an elaborate theoretical explanation on why responsibility should be exclusively held by NATO, but simply claimed the absence of any legal basis that upheld the existence of a rule of multiple attribution. It is also significant that Portugal concludes by affirming that, in any case, the matter would belong to the merits phase, seemingly wanting to avoid the discussion on exclusive, or multiple attribution.[458]

Much more interestingly, Portugal's next argument draws the attention to the *Monetary Gold* principle, highlighting that the ICJ, in order to proceed to the merits of the case brought against the member States, would have to previously decide on the wrongfulness of NATO's conduct. Portugal claims that the lawfulness of NATO's conduct forms "a prerequisite" for the decision over the case at hand.[459] Following this reasoning, Portugal invokes the fact that the court would not be able to affirm the unlawfulness of the member States' conduct without implicitly also affirming the unlawfulness of NATO's conduct. Thus, due to the fact that NATO did not form a part of the proceedings, the case would have to be declared inadmissible. Obviously, Portugal is well aware of the fact that NATO possesses no *locus standi* to appear in front of the ICJ and, therefore, that if the argument were accepted by the judges, it would be a judgment-defining one.

Unfortunately, the suggestion was not dealt with by the judges, but Portugal's submission portrays neatly the obstacles that the *Monetary Gold* principle may pose in cases concerning multiple responsible parties. It has been observed earlier (paragraph 1.3.1.2. (*b)*) how such principle may cause admissibility boundaries under the principle of independent responsibility, and the same argument can be even more perilous when applied to situations in which international organizations are involved. Indeed, to this moment, the *Monetary Gold* principle has only found application in the context of contentions between States. If such principle was found to indiscriminately also apply to cases involving international organizations, its application would create an impasse even harder to overcome and definitely unjustifiable under reasons of efficiency. If, indeed, the obstacle posed by the *Monetary Gold* principle can be overcome

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[456] International Court of Justice, *Legality of the Use of Force, Oral Proceedings (Federal Republic of Yugoslavia v. Portugal) (sitting held on 19 April 2004),* I.C.J. Reports 2004, para. 4.7.

[457] *ibid.,* para. 4.8.

[458] *ibid.,* para. 4.8.

[459] *ibid.,* para. 4.9.

whenever the ICJ has jurisdiction over the second State involved, such outcome would not be viable when international organizations are involved, since these are not subject to the contentious jurisdiction of the court.[460]

*b) Canada's submissions*

Less interesting in terms of creativity, Canada's submissions presented similar arguments to those raised by Portugal. Essentially, the central focus lied on the fact that there existed, at the time, no rule, nor any interpretation of existing provisions under international law, allowing to envision the responsibility of member States, for a conduct attributable to the international organization. More specifically, Canada highlighted the fact that the burden of proof that member States could be attributed responsibility resided on the FRY and argued that the applicant side had never provided any probatory or circumstantial elements in this respect.[461]

It is also noteworthy that Canada's respondents, instead of explicitly mentioning rules of attribution, decided to focus on the notion of "joint and several" liability, which had been brought forward by the FRY in its statements.[462] Indeed, they argued that the "joint and several" regime of apportionment did not constitute a general rule, but could only exists inasmuch it is stipulated by a specific agreement.[463] Once again, it is unfortunate that the Court did not have the possibility to adjudicate on the merits of this case, as the question of the existence of a general rule of "joint and several" responsibility, which operates also in absence of a *lex specialis* rule that expressly provides for it is one on which the scholarly debate has been particularly fervent.[464]

*c) France's submissions*

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[460] Hugh Thirlway, "Jurisdiction in Contentious Cases (I)", *The International Court of Justice,* edited by Robert Kolb, Oxford University Press (2013): 35-43; p. 40.

[461] International Court of Justice, *Legality of the Use of Force, Oral Proceedings (Federal Republic of Yugoslavia v. Canada) (sitting held on 12 May 1999)*, I.C.J. Reports 1999, p. 10.

[462] *supra,* note 444.

[463] *supra,* note 461.

[464] See Chapter One, paragraph 1.3.2.1.; Also, the question of a "joint and several" liability principle was supported by Dannenbaum with specific reference to peacekeeping operations, see: Tom Dannenbaum, note 326; pp. 165-175.

France addressed differently the contested passages in the FRY's submission, in terms of attribution of conduct. In particular, the French representatives, instead of focusing on the legal framework that regulates the attribution of conduct, drew the attention on the formal and factual exercise of functions specific to different members involved in the NATO mission.[465] France submitted, indeed, that:

> "All the acts in which it took part for those purposes were carried out under the guidance and control of international organizations - and principally NATO. It was NATO which planned, decided upon and implemented the military operation on Yugoslav territory in the spring of 1999. It was also NATO which created KFOR and exercises unified command and control of it."[466]

Interestingly, France, instead of arguing the ill-foundedness of member States' liability for NATO's conduct, claimed a lack of *factual* basis to justify such claim, since the contribution offered by the country was causally irrelevant with respect to the realization of the wrongful conduct.

The difference between France's line of reasoning , compared to Canada's and Portugal's read above, however, is much less surprising when one notes that the hearing that is being quoted has taken place on 20 April 2004, while, for example, the extracts from Canada's oral proceedings are dated 1999. The difference in time is relevant, if one considers that it was precisely in 2003 that the First Report on the Responsibility of International Organization was made public by the ILC[467] and on 2 April 2004 also the Second Report[468] was made public. In particular, one passage from the Second Report openly challenges the views forwarded by the respondent states:

> "[…] several members of NATO were sued before ICJ in the cases on *Legality of Use of Force* and before the European Court of Human Rights in the *Banković* case. In both venues some of the respondent States argued that conduct was to be attributed to NATO and not to themselves, as the claimants contended. […] one may argue that attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution

[465] International Court of Justice, *Legality of the Use of Force, Oral Proceedings (Federal Republic of Yugoslavia v. France) (sitting held on 20 April 2004)*, I.C.J. Reports 2004, para. 50.

[466] *ibid.*

[467] International Law Commission, Special Rapporteur Giorgio Gaja, *First report on responsibility of international organizations*, 26 March 2003, A/CN.4/532.

[468] International Law Commission, Special Rapporteur Giorgio Gaja, *Second report on responsibility of international organizations*, 2 April 2004, A/CN.4/541.

to a State rule out attribution to an inter- national organization. Thus, one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out."[469]

In this report Special Rapporteur, the claims raised by the respondents during the oral proceedings related to the Provisional Measures phase are explicitly rejected. Reasonably, then, France decided to change its argumentative structure, illustrating how the general sentiment over the attribution of conduct was shifting from a theoretical to a factual approach. Shift that in fact, a few years later, would have conducted to the emergence of Article 7 ARIO and its commentary.

### 2.2.2. Concluding remarks over shared responsibility involving NATO

The hypothesis that NATO may share responsibility with its member States, for conduct performed during NATO-led military operations seems unlikely, since NATO is extraneous to the jurisdiction of international courts. The paradox emerges where NATO could theoretically incur in responsibility for the conduct committed by its agents and organs, but no tribunal can adjudicate on such responsibility. There is little doubt as to the fact that NATO is subject to obligations deriving from human rights law and international humanitarian law,[470] yet, without a tribunal empowered to hear these claims, holding NATO accountable would require a decision by member States to attribute jurisdiction to an existing tribunal over the organization, or to institute a novel one.[471] Municipal tribunals have also been suggested as a possible option, but NATO has a history of adequately ensuring its functional immunity by means of agreements with the countries involved. Also, member States have manifested an undeniable willingness to avoid NATO incurring in international responsibility,[472] further increasing the hurdles for the road to the accountability of the Alliance in national courts.

Having regard to multiple attribution of conduct, it is much easier to envision when responsibility is attributed to the various TCNs that have participated to the wrongful act. Following the suggestions already

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[469] *ibid.,* p. 4-5*,* para. 7.

[470] Nauta, note 441, p. 174-178.

[471] Daniël M. Grütters, "NATO, International Organizations and Functional Immunity", *International Organizations Law Review,* Vol. 13 (2016): 211-254; p. 253-4.

[472] *ibid.,* p. 252-3.; Bernd Martenczuk, "The Security Council, the International Court and Judicial Re- view: What Lessons from Lockerbie", *European Journal of International Law,* Vol. 10 (1999): pp. 517–547.

observed in the Articles, multiple States may be held responsible for the single conduct performed by a NATO organ. Also, the passage quoted from Gaja's Second Report on the Responsibility of International Organizations expressly indicates shared responsibility of both NATO and its member States is a viable pathway, but its abstract feasibility does not always correspond feasibility in concrete, due to the absence of *fora* empowered to adjudicate both on NATO, and on member States.

### 2.3. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*[473]

The *Nauru* judgment, delivered by the ICJ in 1992, is one of the most important decisions for the doctrine of shared responsibility among multiple States. Despite never proceeding to the merits and, therefore, not resulting in a proper finding concerning multiple State responsibility, both the judgment over the preliminary objections and some of the separate opinions by the judges contain relevant indications as to multiple attribution of responsibility. For the present case, the focus is being drawn away from the ambit of military operations and is posed on the scenario of multiple States acting in an administrating authority. A common trait between this judgment and the previously examined cases is that, also here, the focus lies on a situation in which the various States have acted through a joint organ. What differs, instead, is that the administrative authority in Nauru did not possess a separate legal personality, meaning that the question of shared responsibility concerned solely whether the three states involved (Australia, the United Kingdom and New Zealand) could be held responsible for their acts while acting as the administrative authority. If, therefore, in the previous cases the question was whether responsibility could be shared by States and international organizations, here the question is limitedly whether States can share responsibility.

#### 2.3.1. The facts of the case

The background of the Nauru case is inherently linked to the history of colonization of the Nauru island and, more generally, to the role of administrative authorities controlling the territory,. Nauru was first incorporated in 1888 in the Imperial German Protectorate of the Marshall Islands,[474] when the discovery of plentiful phosphate deposits in the small island gave rapid rise to a contention over the territory, especially

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[473] International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia),* Judgment, I.C.J. Reports 1992, 26 June 1992.

[474] Ramon E. Jr. Reyes, "Nauru v. Australia: The International Fiduciary Duty and The Settlement of Nauru's Claims for Rehabilitation of Its Phosphate Lands", *New York Law School Journal of International and Comparative Law*: Vol. 16 : No. 1 (1996): pp. 1-55; p. 10.

among Australia, New Zealand and Germany.[475] Following World War I, control over phosphate deposits was taken over by the British, Australian, and New Zealand Governments under an agreement of July 2, 1919,[476] namely the Nauru Island Agreement (N.I.A.). To avoid that further colonialist powers exercised their control over the island, Nauru was placed under the protectorate of the League of Nations.[477] A compromise was found in an agreement which attributed the territory to the United Kingdom, whilst subject to the supervision of the League of Nations and with the specific provision that no sovereignty could be exercised onto the island.[478] Australia was appointed as the Administrator of the agreement for the first five years and it was established that the duty to appoint the succeeding Administrators would have been shared by the governments when the period would have elapsed.[479]

Following a period of occupation by Japan during World War II, the Nauru island was brought under the United Nations Trusteeship Agreement,[480] with Australia, New Zealand and the United Kingdom being again attributed the administration over the island. Under such agreement, the three countries were expected to administer the land attributed to them with an aim of ensuring the "well-being and development" of the population.[481] Over time, a willingness to obtain autonomous administrative power grew among the Nauru citizens, concretizing in the grant of independence over their territory on 31 January 1968.

On 19 May 1989, Nauru submitted an application to the International Court of Justice against Australia, claiming that the latter had, in the exercise of its administrative authority, "breached the express obligations accepted by it under Article 76 of the United Nations Charter and under Articles 3 and 5 of the Trusteeship Agreement",[482] failed to comply with the international law principles relevant to the rules of self-determination,[483] denied the Nauruan citizens justice *lato sensu*,[484] abused of the lands of Nauru and

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[475] *ibid.*

[476] *League of Nations Convention*, Article 22, p. 98.

[477] Reyes, note 474*,* p. 11.

[478] *Ibid.*

[479] *Agreement between Australia, Great Britain and New Zealand Relative to the Administration of Nauru Island*, July 2, 1919, Doc. no. C1919A00008, Article 1.

[480] United Nations General Assembly, *(II), Proposed Trusteeship Agreement for Nauru*, A/RES/140(II).

[481] *supra,* note 476.

[482] International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Application Instituting Proceedings,* I.C.J. Reports 1989, 19 May 1989; para. 43.

[483] *ibid.,* para. 45.

[484] *ibid.,* para. 46.

engaged in acts of maladministration, failing to consider the right of inhabitability of the Nauruan people.[485] From a factual point of view, Nauru was accusing Australia of having exploited the island and its phosphate lands, as well as having allowed its exploitation by other countries and having taken economic advantage of such exploitation , in this way contravening to the mandate of administration which, in essence, requested the administrating countries to act in the sole interest of Nauru.[486]

### 2.3.2. The judgment

The case was deemed inadmissible due to one of Australia's preliminary objections, whereby one of Nauru's claims was not timely raised.[487] The court's response to one of the other grounds in the preliminary objections made by Australia, however, was particularly relevant for the purposes of the present work on shared responsibility. Australia argued that the claim by Nauru should have been deemed inadmissible for the fact that Nauru's submissions were directed against the administering authority in its entirety and that, therefore, the judgment would have involved the necessary presence of New Zealand and of the United Kingdom. Basically, the application of the *Monetary Gold* principle was invoked. The judges, however, were not receptive of Australia's arguments and provided an elastic reading of the *Monetary Gold* decision that, at least partially, tempered the rigidity of some of the previous takes on the subject, such as *East Timor* and *Nicaragua*.[488] In particular, the Court affirmed that the analysis of Australia's conduct would have not directly impacted the interests of New Zealand and the United Kingdom, thereby concluding that the *Monetary Gold* principle could not apply, as the interests of the United Kingdom and New Zealand did not form the subject-matter of the case.[489] Similarly, the present scenario was distinguished from the original *Monetary Gold* case for the fact that, in said judgment, the findings by the ICJ over the responsibility of the third parties would have constituted a logical prerequisite for the resolution of the case, while, in the present case, there was no logical necessity to rule over the responsibility of New Zealand and the United Kingdom, in order to decide the claim against Australia, despite the judges recognized that: "existence or the content of

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485 *ibid.,* para. 47-9.

486 Reyes, note 474, p. 21-22.

487 *Nauru,* paras. 64-67.

488 Hugh Thirlway, "What Role for the International Court of Justice?", in *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie,* edited by Maurizio Ragazzi, Martinus Nijhoff Publishers (2013): 351-360; p. 355.

489 *Nauru,* para. 54-55.

the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned".[490]

Finally, the *Nauru* case was also relevant since, in stating that the administering authority was devoid of an international legal personality,[491] the court implied that Australia was acting on joint behalf of the other States.[492] In this respect, Nauru turned out to be the ideal case study for the shared responsibility doctrine, with three States acting concurrently and generating a single harmful outcome. However, when Australia attempted to object that the countries involved were bound by a regime of "joint and several" responsibility, the court did not rule over such issue, deeming it relevant only in the context of a never reached merits phase. Despite the lack of a decision pointedly ascertaining shared responsibility, it is notable that in the Nauru case the question of apportionment was not passively dismissed, but rather it expressly specified that, had there been a merits phase, it would have been addressed in that instance.[493]

#### 2.3.3. Judge Shahabuddeen's Separate Opinion[494]

Furthermore, some of the most interesting insights of the case are offered by the separate opinion delivered by Judge Shahabuddeen, specifically on the matter of the applicable regime in the reparations phase. In particular, Judge Shahabuddeen focused on whether the responsibility regime deriving from the Trusteeship Agreement was "joint", as argued by Australia, or "joint and several", i.e. one where the invocation of responsibility may as well be against a single actor, as argued by Nauru. Secondly, Judge Shahabuddeen, in response to the claim raised by Australia's representatives concerning the alleged historical reticence of the ICJ in applying the notion of "joint and several" responsibility, laconically affirmed that "reticence is not resistance", portraying an open path towards a shared responsibility regime.[495]

The judge proceeds to quote a passage from the 1978 Yearbook of the ILC:

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[490] *Nauru,* para. 55.

[491] *Nauru,* para. 47.

[492] ARSIWA with commentaries, Chapter IV, paragraph 3.

[493] *Nauru,* para. 48.

[494] International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Separate Opinion of Judge Shahabuddeen,* I.C.J. Reports 1992, 26 June 1992.

[495] *ibid.,* p. 284.

"the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts."[496]

Such passage is noteworthy, for its description of the wrongful acts as "separate", where the conduct in analysis is one that has been performed by a joint entity. Acknowledging the wrongful conduct of the joint entity as separate wrongful acts of the various members of such joint entity equals, in a way, to denying one of the central elements of the doctrine of shared responsibility, namely the joint responsibility for the *same* wrongful conduct. This may lead to the understanding that, in the opinion of Judge Shahabuddeen, an instance of shared responsibility only exists with reference to the reparations phase, where the members of the joint entity would be jointly (and severally) liable to compensate the damage occurred.[497]

Then, the judge went on stating that the passage above, in the part where the wrongful conducts are described as separate, could be interpreted as an argument in favor of Nauru's claim, and focusing in particular on the "joint and several" nature of responsibility in the present case and on Nauru's subsequent entitlement to invoke Australia's responsibility, despite the claim was not also directed against New Zealand and the United Kingdom.[498] Ultimately, Professor Shahabuddeen also affirmed that, according to the results of his analysis of municipal principles concerning the apportionment of the obligation to repair a damage among multiple tortfeasors, there was sufficient evidence to consider that the regime of responsibility governing the relationships between the three countries participating in the wrongful conduct was one of "joint and several" responsibility.[499]

### 2.3.4. Commentary

The *Nauru* case presents some differences from those observed so far. First of all, the question of attribution of conduct is not as central as it was in the other judgments. The court did not proceed to elaborate whether the conduct could have been attributed to the three countries jointly, or whether Australia

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[496] *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 99.

[497] paragraph 1.1., pp. 4-5.

[498] note 494, p. 284.

[499] *ibid.,* p. 285-286.

could have been attributed the conduct alone, but limited itself to affirm that Australia could have been sued alone, suggesting that, at least from a procedure point of view, the *Monetary Gold* principle may not always represent an obstacle for the findings of responsibility of members of joint entities. Judge Shahabuddeen, in his separate opinion, instead, treats the element of attribution of conduct as one requiring specific analysis, having particular regard, in the present case, to the application of the Trusteeship Agreement.[500] Accordingly, the responsibility of the member States of a joint organ devoid of legal personality is not shared *a priori*, but rather it can be such following a factual analysis. This finding contradicts some of the indications that had arisen in both the ILC and the most authoritative scholarship, which seem to agree on the fact that, when multiple actors act by means of a joint entity, these should all be held responsible for the same conduct, provided that there exists no specific rule providing differently.[501] However, it is also to note that the situation in the *Nauru* case was still peculiar considering that – compared with the other members of the administering authority – Australia played a highly more significant role in the wrongful conduct, rendering almost irrelevant the role played by the United Kingdom and New Zealand. This could justify greater attention paid by the judges to the specific factual circumstances of the case, where compared with previous decisions.

Another important finding that can be drawn from this case, lies in the indications given by Judge Shahabuddeen as to the applicability of a principle of "joint and several" responsibility between the parties involved. The principle was used by the judge merely to determine whether Australia could be sued alone, but is one that can become very relevant to trace the contours of a very important element of the shared responsibility doctrine: that of the invocation by the damaged party and the rules concerning the apportionment of the reparations. Indeed, such separate opinion represents an authoritative indication towards the possibility that the "joint and several" regime of responsibility could establish itself as the rule of choice in future cases of shared responsibility.

### 2.4. The *Eurotunnel* arbitration award[502]

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[500] *ibid.,* p. 274-276.

[501] James Crawford, *State Responsibility,* Cambridge University Press, 2013, pp. 339-341; Giorgio Gaja wrote: "two States may establish a joint organ, whose conduct will generally have to be attributed to both States", which would suggest that the general rule determines multiple attribution, while the exception can occur when a *lex specialis* implies so. Gaja's quote can be found in: A/CN.4/541, note 74, para. 6.

[502] *The Channel Tunnel Group Limited and France-Manche S.A. v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de l'Equipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française,* Partial Award, Permanent Court of Arbitration (PCA) (30 January 2007), 132 ILR 1 (hereinafter, "*Eurotunnel*").

Lastly, a decision that, also on the merits, established the responsibility of multiple international persons[503] is the *Eurotunnel* partial arbitration award, delivered by the Permanent Court of Arbitration (PCA) on 30 January 2007. In this case, the PCA found responsible both the United Kingdom and France, which - similarly to the *Nauru* case - were participating in a joint entity, whose conduct was deemed wrongful. The decision by the PCA obviously is especially interesting with regard to the "joint and several" criteria for the apportionment of responsibility.

### 2.4.1. The facts of the case

The facts of the case date back to 1985, when the United Kingdom and France entered into an agreement to develop and construct a remarkable engineering project denominated "Fixed Link", that would have consisted in a tunnel across the Channel between the two countries. The project included the drafting, the development and the construction of the infrastructure, along with the terminals and the facilities devoted to the storage and transportation of goods.[504] The project was entirely financed with private funds and France-Manche S.A. and The Channel Tunnel Group Ltd were appointed as concessionaires of the Fixed Link.[505] An agreement, i.e. the Treaty of Canterbury (hereinafter, "the Agreement), was stipulated between the interested governments to regulate the matters concerning the progress of the project.[506] The Fixed Link was inaugurated in 1994.

On 17 December 2003, the two Concessionaires brought two claims before the Permanent Court of Arbitration, against the United Kingdom and France. The first concerned the frequent incursions of clandestine migrants at the French border, that had allegedly interfered with the prosecution of the works for the Link[507] and that it had "cost a great deal in additional protective measures".[508] The Concessionaires

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[503] John Dugard and Annemarieke Vermeer-Künzli, "The Case of the Quartet on the Middle East", *Responsibility of International Organizations, Essays in Honor of Sir Ian Brownlie,* edited by Maurizio Ragazzi, Martinus Nijhoff Publishers (2013): 261-273; p. 271.

[504] *Eurotunnel,* paras. 55-57.

[505] *Eurotunnel,* paras. 48-9.

[506] *Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link,* Canterbury, 12 February 1986.

[507] *Eurotunnel,* para. 58-64.

[508] *Eurotunnel,* para. 60.

blamed the two governments for having inadequately protected the area,[509] in that the security of the area, there considering also the protection from the disruptions of the migrants staying in the Sangatte Hostel, close to the French terminal, was devolved to the Intergovernmental Commission ("IGC"), formed by both States. The second claim, dismissed on jurisdiction grounds, was that the financial support given by the governments in favor of a particular infrastructure, the SeaFrench sea link, was inappropriate.[510]

### 2.4.2. The arbitration award

The arbitration award specifically addresses the claims made by the applicants concerning the joint and several responsibility of the two governments. France and the United Kingdom rebutted differently to such claims with reference to the possibility of "joint and several" responsibility, as the former did not contest the existence of such a principle arising from the agreement, while the second affirmed that the claimants' position was "equivocal",[511] and that the applicable regime of responsibility ought to be understood subsequent to an analysis of the relevant sources of law, refuting the existence of the general principle of "joint and several" liability.[512]

The tribunal began by looking at Article 47 ARSIWA, which regulates the invocation of responsibility against multiple actors, in the part in which it allowed joint and several responsibility for the performance of a wrongful conduct. In particular, the Tribunal, recalling the ILC, emphasized that the application of a regime of joint and several liability would depend upon "the circumstances and on the international obligations of each of the States concerned".[513] The question, then, was whether the relevant agreements between the parties suggested the applicability of the regime of joint and several liability. To this purpose, the PCA looked at Clause 20 of the Concession Agreement, which explicitly established a regime of joint and several liability in reference to the obligations held by the concessionaires in favor of the governments.[514] The PCA, however, in noting that there was no corresponding clause operating in the

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[509] Freya Baetens, "Invoking, establishing and remedying State responsibility in mixed multi-party disputes" in *Sovereignty, Statehood and State Responsibility, Essays in Honor of James Crawford*, edited by Christine Chinkin and Freya Baetens, Cambridge University Press (2015): 421-441; p. 425.

[510] *ibid.,* para. 143.

[511] *Eurotunnel,* para. 171.

[512] *ibid.*

[513] ARIO with commentaries, Article 47, paragraph 6.

[514] *Eurotunnel,* para. 176.

opposite direction (*i.e.* in favor of the concessionaires), concluded that neither could it be implied, in international law, that a rule providing for joint and several liability existed in general, nor could such a rule be found the specific sources that regulated the responsibility of the governments in the present agreements.[515]

Proceeding to the analysis of the first claim made by the Concessionaires, concerning the disruptions by the clandestine migrants, the PCA found that there was, indeed, a failure in adequately protecting the area from these incursions. The representatives of the United Kingdom claimed that the responsibility over such control, in the French border, resided in the exclusive responsibility of France and that, as a consequence of the Court's findings that there existed no general joint and several liability rule for the responsibility of the two government, the United Kingdom bore no individual responsibility for the events that occurred in the area of the Sangatte Hostel.[516]

In response to the claims by the representatives of the United Kingdom, the judges affirmed that:

> "The Tribunal has already held that the issue is not one of joint and several responsibility, which concerns the character of a responsibility already established against both States. It is whether the conditions for international responsibility are met in the first place."[517]

In this sense, indeed, the arbitrators noted that the United Kingdom and France shared the responsibility for the fact that the IGC took adequate steps to ensure the respect of the Agreement, in that:

> "What the IGC as a *joint organ* failed to do, the Principals in whose name and on whose behalf the IGC acted *equally failed* to do."[518]

For this reason, the court eventually assessed that the IGC failed to take the necessary steps to avoid the disruptions claimed by the applicant parties, thereby failing to fulfill its obligations and, therefore, assessed that the applicants were entitled to recover the damage that followed from these events in its entirety *vis-à-vis* both France and the United Kingdom.

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[515] *Eurotunnel,* para. 187.

[516] *Eurotunnel,* para. 316.

[517] *Eurotunnel,* para. 317.

[518] *ibid.* (emphasis added)

### 2.4.3. Commentary

Although the Eurotunnel award actually placed responsibility onto multiple States for the commission of a single wrongful conduct, the PCA’s attitude towards the matter was cautious.[519] Indeed, when addressed with the question of a rule for joint and several liability, the judges decided to avoid any far-reaching interpretation and to dismiss the inferences made by the claimants, as to the existence of a subtle principle of “joint and several” liability operating in the agreement. In a way, Professor James Crawford, who was president of the arbitration panel, had already expressed this approach in his Second Report of State Responsibility, where he had alerted that “terms such as “joint”, “joint and several”, “solidary”, derived from national legal systems, must be used with care”.[520] In this respect, the unwillingness by the ILC to take a stand on the applicability of a joint and several liability principle in cases of shared responsibility,[521] can be considered at the basis of the PCA decision, which relied upon the analysis of the relevant legal materials, avoiding to reach any result by interpreting the sources of general international law. The ILC, in discussing the rule of “joint and several” liability, mentioned the Convention on International Liability for Damage Caused by Space Objects, where the existence of such a regime of apportionment was explicitly disposed for by the treaty. This seems to imply that the ILC's position is that the “joint and several" regime may apply only where and inasmuch as it it is provided for in the *lex specialis*. Accordingly, the PCA researched whether such a provision was contained in the Trusteeship Agreement and found that there was none.[522]

If, on the one hand, then, this judgment conflicts with the suggestions, explained in paragraph 1.3.2.1., that supported for the existence of a general principle of "joint and several” liability where numerous actors perform with a joint entity, on the other hand the PCA did not envision the necessity to research for a particular provision in the Agreement that provided for the shared responsibility in case of wrongful conduct by the IGC, but presumed such shared responsibility from the fact that the IGC was a joint organ. Therefore, the award portrays two perfectly specular outcomes: the first, that a rule of “joint and several” liability does not exist unless specifically disposed for in a *lex specialis*, while the second, that the responsibility of a joint entity translates into the shared responsibility of its participants, unless differently

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519 Baetens, note 509, p. 429-430.

520 International Law Commission, Special Rapporteur James Crawford, *Second Report of State Responsibility*, A/CN. 4/498, 17 March 1999; para. 161(a), p. 45-46.

521 See paragraph 1.3.2.

522 Baetens, note 509, p. 430.

projected by a specific *lex specialis.* The factual circumstances surrounding the case do not seem to assume particular relevance with reference to the regime of apportionment of responsibility, as the arbitrators' scrutiny was limited to the legal grounds, once the attribution of conduct to the IGC had been decided.

In conclusion, the *Eurotunnel* arbitration award plays an important role in the scope of the shared responsibility doctrine, for it attributes some concreteness to the theoretical recognition of the participants of a joint entity as responsible for the conduct of such entity, as suggested by Articles 6 and 47 ARSIWA. At the same time, such award has to be interpreted as a very timid precedent for the establishment of a "joint and several" principle in cases of shared responsibility, since this is rigidly dependent upon the existence of a specific rule providing for it.

### 2.5. Conclusion

In the course of Chapter One in the present thesis, the importance of practice for the establishment of a novel principle in international law was frequently emphasized, leaving a heavy burden on the shoulders of the present Chapter, in terms of decisiveness for an understanding of what future may await shared responsibility. The answer, it is evident, is rather disappointing. Summing up briefly, before focusing in depth on the substantive problems, the positive results for the future of the shared responsibility doctrine, arising from the cases analyzed above are: a domestic judgment (joint applications of *Nuhanović* and *Mustafić)* expressly acknowledging the possibility that a single conduct may be attributed to numerous international actors, an ICJ judgment (*Nauru*) implying that the wrongful conduct of a joint entity can incur in the responsibility of its members and an arbitral award (*Eurotunnel*) that declared the shared responsibility of two States for their contributions to the breach of an obligation performed by a joint entity. Singularly observed, these results do not appear particularly exciting.

Beginning with the procedural threats that have been exposed in Chapter One, the status of most international tribunals' jurisdictions as consensual poses a primary problem to the judicial affirmation of shared responsibility: where multiple States committed a wrongful act, they would have to all be subject to the compulsory jurisdiction of a specific tribunal, or would have to accept its jurisdiction, for them to be held jointly responsible. This primary obstacle has found no solution in the cases observed above and there have been historical precedents, instead, where the absence of jurisdiction *ratione personae*, for the fact that defendant States had not consented to the court's jurisdiction, barred the admissibility of a claim directed against multiple countries.[523] There are, however, some international tribunals which may appear exempt

[523] See, for example: International Law Commission, *Case of the treatment in Hungary of aircraft of United States of America,* Order, I.C.J. Reports 1954; p. 99.

from these problems, as the ECtHR, for example, whose compulsory jurisdiction applies for all EU member States,[524] but even here, cases can be found where possible instances of shared responsibility were barred from being adjudicated because one of the States involved was extraneous to the court's jurisdiction.[525]

Among the procedural obstacles, then, the often cited *Monetary Gold* principle can appear a complex one to surmount, but practice in this sense, especially in the *Nauru* case, has contributed to downplay the problem.[526] Despite some animosity on the matter, it appears that the threshold necessary for a case to be prevented by such principle would consist in the tribunal explicitly finding the responsibility of a third State which is not a party to the proceedings.[527] Furthermore, a large portion of the scholarship, despite the claims made by numerous defendant states in the *Use of Force* proceedings mentioned above, concurs on the fact that the *Monetary Gold* principle does not find application in the context of international organizations, inevitable consequence of the fact that such organizations are generally not subject to the jurisdiction of the same tribunals.[528]

To speak generally of the difficulties that shared responsibility encounters in general may prove confusing, as different ambits, different tribunals and different treaties possess their own procedural and substantial traits that may render the applicability of the doctrine more or less favorable. Furthermore, each ambit encompasses interests of different nature, that implicate the entrance into play of numerous actors, such as the armed opposition groups mentioned in Chapter One, or fisheries, public energy actors and so on.

In this chapter, the issue of military operations where States and international organizations are involved has been observed extensively, where the frailty of the legal basis that supports multiple attribution of conduct has been highlighted. However, it has also been highlighted that judicial consistency may represent an even larger problem. The timid delivery by the ECtHR in *Behrami*, where the judges ignored a portion of the legal framework on attribution, refraining from holding States accountable for the conduct performed by their national troops acting under the UN, has proven highly problematic also for the successive decisions on the matter. The paucity of rulings of the matter of shared responsibility renders a decision to depart from a precedent position a highly burdensome one. As already mentioned, the matter lies in an *impasse.* The indications on multiple attribution are present in the ILC, but do not form a proper independent section of the Articles and the fact that judicial practice has also been non-univocal translates

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[524] Maarten den Heijer, "Issues of Shared Responsibility before the European Court of Human Rights", SHARES Research Paper 06 (2012), ACIL 2012-04, available at www.sharesproject.nl; p. 48.

[525] See, for example: *Hirsi Jamaa and Others v Italy* [GC], Application No. 27765/09, 23 February 2012.

[526] Nollkaemper and Plakokefalos, note 1, p. 1109.

[527] Faure & Nollkaemper, note 282, p. 21-23.

[528] *ibid.,* p. 25.

into the assumption that it will probably take a few consistent rulings by international courts, before it can be said that multiple attribution of conducts and shared responsibility are a reality for the law of international responsibility.

It is clear, therefore, that the problems with the judicial practice largely originate in the absence of a structured framework for shared responsibility. The problems related to the multiplicity of ambits is connected to the absence of an uniform indication of the substantial and procedural necessities that surround the doctrine of shared responsibility. For the moment, indeed, the only actual judicial delivery of shared responsibility was embedded in an arbitration award. In the opinion of some scholars and following the reasoning applied until this point, it is not a coincidence: the elasticity and the *ad hoc* character of arbitration processes are the reasons why this dispute resolution method has been argued to be, at the state of facts, the one most likely to drive the evolution of the shared responsibility doctrine.[529]

[529] Baetens, note 509, p. 436.

## Chapter Three: Shared Responsibility And Climate Change Law

### Introduction

There exists little contention as to the fact that the issues of global warming and climate change represent one of the all-time great challenges that mankind has been obligated to face - a challenge defined by Ban-Ki Moon as the "defining issue of our age".[530] At the current stage, climate change has been representing a focal element in the agenda of the international community for more than 30 years,[531] since the UN General Assembly, with Resolution 47/212, first recognized climate change as "a common concern for mankind"[532] and officially acknowledged the global level of the issue. Amongst the factors such matter a focal issue, there are its global dimension and its transversality of effects. The direct and indirect consequences of climate change, indeed, have been studied in relation to multiple fields, besides its immediate effects on the natural environment,[533] including finance,[534] the protection of human health[535] as well as sociological phenomena,[536] such as employment.[537]

The large-scale dimension of the problem and the multiplicity of actors involved in the matter represent the main reasons for the law on climate change to be connected with the doctrine of shared responsibility. The transversality of ambits in the effects of global warming is just comparable to the transversality in its causing factors. Environmental damage, almost by definition, is an extraterritorial

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[530] UN Secretary General Ban Ki-moon, 'Opening Remarks at 2014 Climate Summit' (23 September 2014) <http://www.un.org.proxy.library.uu.nl/apps/news/infocus/sgspeeches/statments_full.asp?statID=2355#.Vv21uBKANBc>

[531] Cinnamon Carlarne, Kevin R. Gray, and Richard Tarasofsky, "International Climate Change Law: Mapping The Field", in *The Oxford Handbook of International Climate Change Law,* edited by Kevin R. Gray, Cinnamon Carlarne and Richard Tarasofsky, Oxford University Press (2016): 3-26; p. 4-5.

[532] United Nations General Assembly, *Protection of global climate for present and future generations of mankind*, A/RES/43/532, 6 December 1988.

[533] A precise overview of the effects on the environment was formulated in: Trevor M. Letcher, "Indicators of Climate Change" in *Climate Change: Observed Impacts on Planet Earth,* Elsevier (2015): 319-338.

[534] Nikola Fabris, "Financial Stability and Climate Change", *Journal of Central Banking Theory and Practice,* Vol. 9, No. 3 (2020): 27-43.

[535] Christian Zammit et al., "Neurological disorders vis-à-vis climate change", *Early human development,* Vol. 155 (2021).

[536] Riley E. Dunlap and Robert J. Brulle, "Bringing Sociology into Climate Change Research and Climate Change into Sociology", in *Climate Change and Society*, Oxford University Press (2015): 412-432.

[537] Caleb Goods, "Climate Change and Employment Relations", *Journal of Industrial Relations*, Vol. 59, Issue 6 (2017): 670-679.

phenomenon. This comes as a consequence of the fact that the atmosphere represents the Earth's largest natural resource[538] and of the fact that any damage caused to it can be interpreted as a damage to the global population as a whole. Article 1(a) of the Long-Range Transboundary Air Pollution Convention defines "air pollution" as: "introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment".[539] Every single country performs activities that are harmful for the environment, such as the emission of greenhouse gases,[540] and thus contribute, albeit in different measures, to the damages produced by climate change. This consideration has been suggested as a cause for the model of responsibility necessary to tackle climate change to be declined as one of a shared responsibility between the various emitting States, in order to work.[541] If it is ascertained that climate change is, excluding the contributions made by non-State actors, which are indeed significant, the result of the joint contribution of all States, then logic suggests that it should, as such, be treated as a problem of shared responsibility. Nonetheless, the allocation of such responsibility is a complex matter and some of the factual features of the climate change phenomenon render it difficult to place under the rigid lens of international responsibility.

First of all, the effects of human contributions are spatially and temporally dispersed:[542] current human behavior – for instance, emissions - will concretize into a harmful result only far in time from its occurrence, rendering linkages between the two events extremely difficult.[543] Climate change, producing its effects onto the whole planet, is then destined to possibly heavily impact individuals who might have contributed only to a very small part of the global emissions.[544] Furthermore, scientific measurements that accompany the predictions and that describe the causal links between human actions and effective contributions to damages caused by global warming are a matter of probability rather than one of

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[538] Peter H. Sand, "Transboundary Air Pollution" in *The Practice of Shared Responsibility in International Law,* edited by Nollkaemper and Plakokefalos, Cambridge University Press (2017): 962-986; p. 964.

[539] Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 1302 UNTS 217, Article 1(a).

[540] The data can be traced with a search for each State Parties' contribution at the UNFCCC website: https://di.unfccc.int/detailed_data_by_party.

[541] Daniel H. Cole, "The Problem of Shared Irresponsibility in International Climate Law", in *Distribution of Responsibilities in International Law,* Cambridge University Press (2015): 290-320; p. 293.

[542] Cristina Shaheen Moosa, "Individual Obligations, Climate Change, and Shared Responsibility", *Edukacja Etyczna,* Vol. 17 (2020): 42-67;, p. 56.

[543] Stephen Gardiner, "A Perfect Moral Storm: Climate Change, Intergenerational Ethics, and the Problem of Moral Corruption." in Environmental Values , August 2006, Vol. 15, No. 3, Perspectives on Environmental Values: The Princeton Workshop (August 2006): 397-413; p. 403-4.

[544] Shaheen Moosa, note 542; p. 56-57.

certainty.[545] It is hard to frame, in scientific terms, whether a State can be defined as a "damaged party", or whether such damage is attributable to climate change-related conducts. This, in addition to the spatial and temporal dispersion of the effects of climate change renders "cause and effect" linkages extremely difficult.[546]

Secondly, the fact that emissions of greenhouse gases constitute the main cause of climate change is another issue that poses some problems, in terms of wrongfulness and responsibility. Emissions themselves are generally produced in the context of activities that are, taken by themselves, absolutely lawful.[547] From a State-centric perspective, no sources of hard law dispose a general duty on States to abstain completely from emitting carbon dioxide, and even adopting a more individualistic perspective, most human actions that contribute to the global emissions count (for instance, using an old, polluting vehicle to travel even very little distances) are morally reprehensible,[548] but not in themselves unlawful either.[549] These are only some of the problems that arise when attempting to apply the law on State responsibility to the scope of climate change.

Thirdly, the existing framework regulating climate change is only to a little extent composed of legally binding provisions, given the aim to encourage large participation to the existing treaties. Many large emission-contributing States, in fact, have demonstrated reticence to accept hard obligations,[550] as is exemplified by the United States' absence among the ratifying parties of the Kyoto Protocol and by Canada's withdrawal[551] from it. Nonetheless, several authors have supported the applicability of the rules concerning the law on State responsibility and human rights law to the subject of climate change.

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[545] *Ibid*., p. 54-55.

[546] Stephen Gardiner, "A Perfect Moral Storm: Climate Change, Intergenerational Ethics, and the Problem of Moral Corruption." in Environmental Values , August 2006, Vol. 15, No. 3, Perspectives on Environmental Values: The Princeton Workshop (August 2006): 397-413; p. 403-4.

[547] Christian Tomuschat, "Global Warming and State Responsibility", in Law of the Sea in Dialogue, edited by Holger Hestermeyer et al., SpringerLink (20122): 3-29; p. 4.

[548] Even though the moral sense of guilt of the individual has been argued by some scholars to be crucial to the development of a rule of international responsibility for the behavior of States in climate change law. See: Christopher L. Kutz, "Shared Responsibility for Climate Change: From Guilt to Taxes", *Distribution of Responsibilities in International Law,* Cambridge University Press (2015): 341-365; p. 349-351.

[549] Tomuschat, note 547, p. 15.

[550] Cinnamon Carlarne, "Delinking International Environmental Law & Climate Change", *Michigan Journal of Environmental and Administrative Law,* Vol. 4, Issue 1 (2014): 2-58; p. 41-42.

[551] Kyoto Protocol to the UN Framework Convention on Climate Change, *C.N.796.2011.TREATIES-1 (Depositary Notification), Canada: Withdrawal*, 15 December 2011, to become effective on 15 December 2012.

On the positive side, the climate challenge presents the advantage of representing the subject-matter that is currently receiving the largest share of global attention and research,[552] thereby also including the attention of international law, where great effort is being invested in researching ways to efficiently frame the phenomenon. One of the most salient points in law-related progresses towards the matter of climate change has been the recognition by the UN Human Rights Committee of the impact of such phenomenon on the enjoyment of human rights at all levels.[553] The acknowledgment of climate change as a threat to some of the most fundamental human rights has propelled the research on whether it is possible to identify some subjects that bear a responsibility for the damages that can be linked to global warming. It is uncontested that climate change will cause very significant future costs for States[554] and it is very likely that some of the nations that will have to bear the highest costs in terms of environmental damage will be the poorer countries,[555] with prevalence of island nations threatened with the dissolution of their entire land.[556] Precisely with reference to the aspect of responsibility, climate change can be understood simultaneously as very problematic in terms of the applicability of international law and potentially very interesting for the progression of the doctrine of shared responsibility, where small States may seek redress from international actors that have disregarded their obligations. The following chapters will help to understand if such pathways are viable.

First, an analysis of the passages that have been suggested in Chapter One will be undertaken, with a compatibility test between the rules contained in the Articles *vis-à-vis* climate change law on one side and the factual features of climate change on the other (paragraph 3.1.1). After having addressed this question, the focus will shift to shared responsibility. The first part of the Chapter will consider the notion of "wrongful conduct" and the breach of an obligation (paragraph 3.1.2). An analysis of the relevant sources of positive law existent in environmental law and of the customary rules that may be applied to the matter of climate change will follow (paragraph 3.1.3). Subsequently, the focus will be drawn to the question of

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[552] Rosemary Reyfuse and Shirley V. Scott, "Mapping the impact of climate change on international law", in *International law in the era of climate change,* Edward Elgar Publishing (2012): 3-25. p. 4.

[553] For example, in Resolution 10/4, it is stated that: "…climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence", UN Human Rights Council, *Resolution 10/4. Human Rights and Climate Change,* 25 March 2009.

[554] Kutz, note 548; p. 341.

[555] *ibid.,* p. 344.

[556] Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States', United Nations High Commissioner for Refugees, Division of International Protection, Legal and Protection Policy Research Series, May 2011, PPLA/2011/04, 1.

attribution. This part of the Chapter (paragraph 3.1.4) will focus on a series of parameters that could be used to identify actors that can be qualified as main contributors to the problem, and on the rules observed in the ARSIWA and ARIO, with specific reference to Articles 8 and 11 ARSIWA. Moreover, some scholarly opinions on the fact that some States may fulfill the requirements to be reckoned as particularly affected States, and the consequences thereof, will be examined as well (paragraph 3.1.5). Mention will also be made to the participation of non-State actors and to the possibility of holding States accountable for their conduct, too. Proceeding, the focus will be drawn to the elements of allocation and distribution of responsibility (paragraph 3.1.6). Some scholars have supported the applicability of the "joint and several" liability principle to the damages arising from climate change.

## 3.1. Theoretical framework of the complementarity between the law on climate change and the doctrine of shared responsibility

Despite the major obstacles inherent in the climate change phenomenon that have been hinted at, an application of the Articles to the area of climate change law, in the wake of the theoretical frame traced above in Chapter One, would seem abstractly viable, as long as a hard legal framework actually exists. In the following chapter, the attempt will be, indeed, to examine whether the rules contained in the Articles are applicable to the existing climate change law and, if so, how.

### 3.1.1. Application of the general rules of responsibility to the issue of climate change

The primary step, to begin the analysis, will be to verify whether the ILC's Articles can make up for the applicable framework of secondary rules, i.e. those specifying the consequences of a breach of an obligation stemming from primary rules of international law, with reference to instances pertaining to climate change. The ARSIWA and the ARIO represent secondary rules of law[557] and there is no contention over the fact that the ILC never contemplated the possibility for these legal texts to be the source of primary obligations.[558] Their function, as more exhaustively elaborated in Chapter One, is essentially to define responsibility and to establish the conditions for which a particular State or international organization can be

[557] David, note 182.

[558] International Law Commission, *Report on the work of its Thirty-second Session*, U.N. Doc. A/35/10, Supp. no. 10, 1980;, p. 27, para. 23.

considered as responsible for a wrongful act.[559] The Chapter, therefore, will proceed in the attempt to apply the secondary rules contained in the Articles to the primary rules stemming from the existing legal sources. An exhaustive study of the most relevant sources in international climate change law would exceed the scope of the present thesis, hence an analysis of the specific treaties will be pursued only when and to the extent it is necessary. In particular, this Chapter will only consider some dispositions contained in three of the most important multilateral sources in climate change law: the United Nations Framework Convention on Climate Change (UNFCCC),[560] the Kyoto Protocol[561] and the Paris Agreement.[562] To establish whether these norms can find application in climate change law, one preliminary question is whether the climate change legal system can be understood as a 'self-contained regime' - i.e. a legal system that completely excludes the application of the general rules of international law[563] - or even whether it establishes some norms concerning secondary responsibility that can embody the role of *lex specialis*,[564] preventing the application of the general norms. If the answer to one of these questions was to be affirmative, the rules on responsibility displayed by the Articles would be ineffective.

While it can be affirmed with some degree of certainty that the climate change legal framework can not be identified as a 'self-contained regime',[565] more contention surrounds the existence of *lex specialis* arising from some of the most relevant legal sources in this area. The Kyoto Protocol, indeed, established a specific non-compliance regime for member States who fail to comply with their obligations. Such mechanism may be interpreted as a *lex specialis*, with the possible effect of derogating to the correspondent provisions contained in the Articles. The mechanism stems from Decision 27/CMP.1, adopted by the Parties to the Kyoto Protocol,[566] which provided the establishment of two bodies - the "Facilitative Branch"[567] and

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[559] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries,* Cambridge University Press (2002); p. 31.

[560] UN General Assembly, United Nations Framework Convention on Climate Change: Resolution adopted by the General Assembly, 20 January 1994, A/RES/48/189.

[561] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 2303 UNTS 148.

[562] Paris Agreement, Paris, 12 December 2015, in force 4 November 2016, Doc. No. *I-54113.*

[563] Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", *The European Journal of International Law,* Vol. 17, no.3 (2006): 483-529; p. 490-491.

[564] Jacqueline Peel, "Climate Change" in *The Practice of Shared Responsibility in International Law,* edited by Nollkaemper and Plakokefalos, Cambridge University Press (2017): p. 1009-1051; p. 1037.

[565] Margaretha Wewerike-Singh, *State Responsibility, Climate Change and Human Rights under International Law,* Hart Publishing (2019); p. 69.

[566] Decision 27/CMP.1, *Procedures and mechanisms relating to compliance under the Kyoto Protocol,* FCCC/KP/CMP/2005/8/Add.3 (hereinafter, "Decision 27/CMP.1").

[567] Decision 27/CMP.1, paragraph (V.).

the "Enforcement Branch"[568] - instructed with tasks of compliance promotion and supervision of the behavior of the State Parties. The Enforcement Branch, however, is also endowed with the possibility to apply consequences to the non-compliance by the State Parties, which can result in a declaration of "non-compliance",[569] or in detrimental measures with reference to the commitments that the States would adopt in the future.[570] A similar mechanism is also contained in the Paris Agreement,[571] except that it poses the attention almost exclusively on the advisory and facilitative role, leaving any punitive aspect extraneous to its functions[572] and rendering it less interesting for the present discussion.

It could be thus argued that the mechanism developed by the Kyoto Protocol, implementing a different system for the supervision on potential breaches by the State Parties of their obligations, can be considered as a *lex specialis*, at least from the point of view of the rules on the consequences arising from responsibility. The question whether these norms may assume the role of provisions that justify a derogation from the general rules is, however, doubtful. It is hard to substitute the application of the penalties mentioned with the possibility to invoke reparations by States that have been damaged by an eventual breach of the obligations.[573] The consequences entailed by the enforcement mechanism of the Kyoto Protocol, indeed, do not have the same purposes of the reparations established in the ARSIWA, which aim at guaranteeing proper restoration for the damage suffered, but are finalized solely at increasing the future compliance by the State Party that has been in breach of an obligation.[574] In addition, there is no indication as to the fact that the relevant provisions can derogate the general rules on international responsibility.[575] There are, instead, numerous reservations to the UNFCCC, mostly presented by island states, requiring that the ratification of the Kyoto Protocol does not preclude the possibility of invoking responsibility and obtaining reparation for damage under the general laws of responsibility.[576] For all of these reasons, it can be concluded that the examined provision shall not be considered as *lex specialis*, *vis-à-vis* international law as a whole.

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[568] Decision 27/CMP.1, paragraph (VI.).

[569] Decision 27/CMP.1, paragraph (XV.), subpara. 1(a).

[570] Decision 27/CMP.1, paragraph (XV.), subpara. 5.

[571] UNFCCC 2015 Adoption of the Paris Agreement—FCCC/CP/ 2015/L.9/Rev.1, Article 15(1).

[572] Christina Voigt, "The Compliance and Implementation Mechanism of the Paris Agreement", *Review of European, Comparative and International Environmental Law,* Vol. 25, No. 2 (2016): 161-173; p. 165.

[573] Peel, note 564, p. 1039.

[574] *ibid.*

[575] Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility,* BRILL (2005), p. 138.

[576] Wewerike-Singh, note 565, p. 68.

Absent any other norms in the main sources of climate change law that could conflict with the general rules on responsibility, it can be affirmed that, in general, the ARSIWA and the ARIO may find application in the context of international responsibility for wrongful conduct maintained under climate change law.

### 3.1.2. The notion of "wrongful conduct" in international climate change law

Having asserted the applicability of the general rules on State responsibility, it is pivotal to note that the central notion of "wrongful conduct"[577] acquires great importance when discussing international responsibility in relation to climate change, given the difficulties that may arise in terms of attribution of conduct, as has been also anticipated in the introduction. It remains central that for international responsibility to arise, it is sufficient that a State has breached an international obligation,[578] and this implies that the first question to be answered is whether there international climate change law imposes any obligations that can give rise to international responsibility when breached.

#### 3.1.2.1. Problematic aspects in international climate change law

Focusing solely on the notion of the breach of an international obligation, international climate change law poses some challenges for the applicability of the rules on international responsibility. First of all, in terms of which conducts may give rise to a question of responsibility and, secondly, in terms of the bindingness of the most important sources of international climate change law. These two questions will be separately addressed below.

*a) conducts susceptible of being considered "in breach of an obligation"*

One of the paradoxes that characterize international climate change law is the fact that the conducts which pose serious risks of harm to the environment are not, in the most part, unlawful as such.[579] It is not surprising, therefore, to note that the large majority of hard law obligations related to the environmental

[577] ARSIWA, Article 1.

[578] Wewerike-Singh, note 565, p. 74.

[579] Verheyen, note 575, p. 233.

damage in general does not arise from multilateral treaties, but from bilateral ones,[580] which are of little use for this work on shared responsibility. If, however, only a small number of direct obligations towards States can be found with reference to climate change, the attempts of holding States responsible indirectly, adjusting provisions that stem from different treaties to the matter of climate change have had much larger success in scholarship,[581] as for example by claiming the violation of human rights law caused by conducts that do not comply with climate change law obligations. Aside from these indirect obligations arising from treaties that do not specifically pertain to climate change, however, scholars have identified some provisions which could give rise to sufficiently specific obligations whose breach may determine international responsibility. In addition, some obligations have been suggested to also arise from customary law. These possibilities will be analyzed in the following paragraph.

Among the further difficulties, it has been argued that, despite the necessary *caveat* that responsibility prescinds from the existence of damage, the law of international responsibility for climate change concerns conducts that, in concrete, are largely tied to the existence of a damage.[582] If this is true, a cascade of problems arises, regarding the determination of parameters to identify the magnitude of the damage caused, as well as the attribution of shares of responsibility for damages that are a result of contributions of several State to one or more specific international actor(s). The traditional conception of environmental damage, furthermore, is expressed by international courts as one still very dependent on the indirect damage suffered by humans as a consequence of a certain conduct,[583] instead of the damage suffered by the environment as such.[584] This complicates even further the possibility to link a certain conduct to a specific damage. If there is some agreement on the impact suffered by the environment as a consequence of climate change, determining its impact on human lives requires the evaluation of numerous alternative causes, rendering the burden of proof for claimants harder to sustain and satisfy. It will be demonstrated, however, that these arguments do not impede the possibility that States are held responsible for the breach of obligations of international law, insofar as the element of damage can not acquire a relevance sufficient to disallow a general finding of responsibility for States that have breached their obligations.

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[580] Peter H. Sand, note x; p. 967.

[581] Peel, note 538, p. 1019-1020.

[582] Céline Nègre, "Responsibility and International Environmental Law", *The Law of International Responsibility,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 803-815; p. 803-4.

[583] *ibid.,* p. 809; Marie Soveroski, "Environment Rights versus Environmental Wrongs: Forum over Substance?", *Review of European, Comparative and International Environmental Law*, Vol. 16, No. 3 (2007): 261-274.

[584] It must be mentioned, however, that some forward steps have been taken worldwide, with the inclusion in the African Charter of Human and People's Rights of the right to "a general satisfactory environment favourable to [people's] development" in: Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 24.

*b) the binding force of international law on climate change*

One of the classic notions related to international law is that of a "primitive" system of law,[585] for the absence of an organ that can guarantee the enforcement of its obligations. From this point of view, environmental law is particularly problematic. It is not specifically for the absence of an organ charged with the duty to ensure enforcement, but for the frequent vagueness of its primary law provisions, whose language itself does not convey the idea of proper bindingness.[586] There is no doubt that the wording of international environmental law rules is justified by reasons of policy,[587] to facilitate the largest possible adhesion to the agreements.[588] Nevertheless, the detriments of such an approach reside exactly in the uncertainty that surrounds some of the relevant provisions and their limits when it comes to deciding on their binding force.

In the past, serious concerns have surrounded the possibility that international environmental law would be successfully applied by national governments, or be enforced by domestic courts,[589] also considering that the absence of specificity in international rules often translates in even more vagueness when transposed in domestic law.[590] With reference to the restorative aspect of responsibility, indeed, significant awards of compensation arising from domestic courts have been almost inexistent.[591] An inherent contradiction that exists between environmental law and State responsibility is that, while one of the most important purposes served by the latter is the achievement of redress for the damaged party, the former has the primary objective of deterring States from increasing the rate at which they contribute to the already consistent environmental damage.[592] Although these reasonings are well-founded and although it is

[585] Kelsen, note 103, p. 150.

[586] Christina Voigt, "State Responsibility for Climate Change Damages", *Nordic Journal of International Law*, Vol. 77 (2008): 1–22; p. 2.

[587] Daniel Bodansky, Jutta Brunneé and Lavanya Rajamani, *International Climate Change Law,* Oxford University Press, 2017, p. 18.

[588] This approach to law-making has been commented and largely congratulated with reference to the Paris Agreement in: Lavanya Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations", *Journal of Environmental Law*, Vol. 28 (2016): 337–358.

[589] Carl Bruch, "Is International Environmental Law Really Law?: An Analysis of Application in Domestic Courts", *Pace Environmental Law Review,* Vol. 32, No. 2 (2006): 423-466; p. 452-454.

[590] *ibid.*

[591] Michel Faure and André Nollkaemper, "International Liability as an Instrument to Prevent and Compensate for Climate Change", *Stanford Journal of International Law* (2007): 124-182; p. 140-141.

[592] Nègré, note 582, p. 809.

undeniable that environmental law, thereby including the law on climate change, presents a very timid binding character, at the moment the tendency in the attitude of domestic courts may be partially shifting. More specifically, in the *Urgenda foundation v. the Netherlands* case,[593] which will be analyzed at large below, the Dutch tribunal delivered a ground-breaking decision recognizing the violation of the ECHR by the Netherlands for its failure to take adequate measures to tackle climate change.

#### 3.1.3. Climate change law obligations susceptible to trigger international responsibility

Despite the problematic characteristics just mentioned, some provisions, either stemming from treaty law, or arising from custom, are clearly acknowledged as binding and, thus, capable of triggering the responsibility of the States that do not fulfill them. The analysis below is aiming at clarifying whether these provisions exist and whether they can find application, focusing first on the three most important treaties in relation to climate change law, and subsequently on customary law.

##### 3.1.3.1. Treaty law

The general framework of the laws on climate change is largely construed upon 'quasi-agreements', which establish reciprocal obligations between its members[594] that can be differently distributed among them, under regimes of equality, in which all parties share the same obligation, or under the model of "common, but differentiated responsibilities", a legal notion first introduced in the context of the 1992 United Nations Conference on Environment and Development, the outcome of which was transposed into a document known as the Rio Declaration.[595] The first treaty to be observed will be the UNFCCC, where Articles 2 and 4 may prove useful for the purposes of the present thesis.

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[593] *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.).

[594] Cole, note 541, p. 302-303.

[595] The "common, but differentiated responsibilities" were introduced with the following words: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." in: *United Nations Conference on Environment and Development: Framework Convention on Climate Change*, May 9, 1992, 31 I.L.M., 877.

#### 3.1.3.1.1. UNFCCC

The UNFCCC has been identified by several commentators as a source of binding obligations, among which more than one has been pointed at as a potential ground for responsibility. First of all, Article 2 of the UNFCCC sets the general objective of the stabilization of greenhouse gases in the atmosphere, which should be read as correlated to the two degrees (2°C) temperature rise limit, compared to pre-industrial levels, discussed during the Copenhagen Climate Change Conference. Interpreting the general duty to stabilize greenhouse gases in the atmosphere and the 2°C temperature target as connected, some commentators have suggested that Article 2 embodies a specific duty to prevent, susceptible of triggering international responsibility, where the 2°C target attributes a margin of specificity to an otherwise non-binding provision.[596] Other authors, instead, have suggested that Article 2 may be considered as a binding obligation only when read contextually with Article 4(2) of the UNFCCC,[597] while other scholars again are more skeptical about the disposition, claiming that Article 2 merely reflects the general precautionary principle, without adding a specific obligation to what already is a general principle in international law.[598] Another argument in disfavor of the binding character of Article 2 UNFCCC is the language that it uses, which does not suggest a peremptory tone,[599] with the adoption of the modal verb "should", as opposed to "shall".[600]

Furthermore, Article 2 UNFCCC includes a temporal specification of the deadline by which the objectives set therein shall be fulfilled which confers further uncertainty over the exact commitment of the parties, as the parties are bound to act:

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[596] Verheyen, note 575, p. 56-58; p. 66-67.

[597] Voigt, note 586, p. 7-9.

[598]Jonathan Kuyper, Heike Schröder, Björn-Ola Linnér, "The Evolution of the UNFCCC", *Annual Review of Environment and Resources,* Vol. 45 (2018): 343-368; p. 356.

[599] Tomuschat, note 547, p. 18-19.

[600] To understand the enormous difference that exists between the usage of the verb "should" and the verb "shall", it is sufficient to cite the negotiations prior to the adoption of the Paris Agreement, where the verb "should" in Article 4(4) was, by mistake, changed into the verb "shall" in one of the drafts. The United States, had the text not been properly fixed, would have probably been out of the discussion for ratification, as found in: Wolfgang Obertassel et al., "Phoenix from the Ashes — An Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change", *Wuppertal Institute for Climate, Environment and Energy* (2016): 3-54; p. 10.

> "within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner".[601]

As is quite evident, this time-frame leaves a significant degree of appreciation. To hold States accountable under Article 2, one would have to demonstrate that the time-frame above has not been respected, which is a complex decision to make, where such subjective appreciations are required. It is probable, indeed, that Article 2, in itself, is not sufficient to form the basis for a successful claim of responsibility, for the general terms in which such disposition is expressed and for the fact that a decision finding a breach of Article 2 would necessarily require evaluations of a political nature, which are typically avoided by tribunals.

The discussion over the possible bindingness of UNFCCC provisions has been more vibrant with reference to Article 4 UNFCCC, which, *inter alia*, provides that the State parties:

> "shall take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs."[602]

Such provision certainly presents a more peremptory character,[603] where compared to Article 2 UNFCCC, for the use of the modal verb "shall" and for the increased concreteness of its content, which includes the imposition of specific duties onto the State Parties. Nonetheless, still, this obligation evidently lacks quantitative and temporal limits, revealing some deficiencies that had been noted by several State Parties to the Convention which requested more stringent commitments, at the time of the negotiations over the content of Article 4.[604] As was suggested above, some authors have attempted to fill some of the holes left by Article 4 with the general indications contained in the subsequent Conferences of Parties, with reference to the maximum objectives in terms of global temperature rise and domestic limitations of emissions.[605] Taken by itself, there is nothing in Article 4 UNFCCC that suggests its character as an

[601] UNFCCC, Article 2.

[602] UNFCCC, Article 4(2)(a).

[603] Verheyen, note 575, p. 79.

[604] Interim Secretariat of the United Nations Framework Convention on Climate Change, *Compilation of possible elements for a Framework Convention on Climate Change: note by the Secretariat*, 13 June 1991, A/AC.237/Misc.2; p. 27-37.

[605] Voigt, note 586, p. 7-9.

obligation of result,[606] but even Voigt's suggestion of considering the 2°C limitation and Article 4 UNFCCC as connected appears unstable[607] when considering that such quantitative limitation to the global temperature rise is a long-term, collective obligation that appears unsusceptible of forming the basis for the responsibility of one single State.[608] This particular aspect will prove interesting for the question of shared responsibility in climate change law, but more on this will be elaborated in the following paragraphs.

Some authors have, nevertheless, argued in favor of the bindingness of the obligation in object, simply reasoning that, whenever a provision requires a concrete conduct, the absence of such conduct determines a breach of the obligation.[609] Other authors have reasoned in a similar way, accepting the vagueness of the content of the obligation, but still supporting its validity as a commitment under international law that "arguably could be the basis of a liability claim".[610] However straightforward, such reasoning can not be fully accepted. Since the obligations contained in the UNFCCC are "obligation of means",[611] it is crucial to have some objective parameters that can guide the judicial activity for any evaluation on the lawfulness of a conduct. It is highly unlikely that developed States take absolutely no measures to tackle climate change, thus extreme cases will most likely and hopefully not exist. Therefore, in all cases in which governments have adopted some measures which may appear unsatisfying, yet still directed at tackling climate change - such as the United States of America, which are often criticized for their scarce contribution to the challenge of adversing climate change - the threshold sufficient to trigger responsibility may not be reached.[612]

Furthermore, in the UNFCCC agreement great prudence was displayed, in attempting to maximize the affluence of participants and the choice made, to avoid setting rigid benchmarks. Thus, not only is it hard to imagine that tribunals will take the path of interpreting general climate change law to *ex novo* establish quantitative thresholds under which State behavior can be considered in breach of an obligation arising from

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[606] Daniel Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary", *Yale Journal of International Law*, Vol. 18 (1993): 453-561; p. 521.

[607] Christine Voigt is also aware of the absence of consensus over the fact that an obligation may arise from the contextual reading of the two legal provisions. See, Voigt, note 563, p. 7.

[608] Maiko Meguro, "Litigating climate change through international law: Obligations strategy and rights strategy", *Leiden Journal of International Law,* Vol. 33 (2020): 933–951, p. 947.

[609] René Lefeber, "Climate change and state responsibility", in *International Law in the Era of Climate Change,* edited by Rosemary Rayfuse and Shirley V. Scott, Edward Elgar Publishing (2012): 321-350; p. 330-331.

[610] Nollkaemper and Faure, note 591, p. 143.

[611] The distinction was introduced by Roberto Ago in the discussions over State responsibility, while being Special Rapporteur at the ILC. Precisely, the distinction was first present in: International Law Commission, *Sixth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (continued),* Doc. No. A/CN.4/302 and Add.1, 2 & 3, 1977; paras. 3-13.

[612] Cole, note 541, p. 305.

the UNFCCC, but it may even result counterproductive for the general objective of protecting the environment. If member States were to be brought to court for the breach of an obligation whose bindingness they had accepted in light of its elastic character, this may cause the withdrawal of other State Parties from the Convention.[613] The UNFCCC is clearly to be regarded as a "point of departure",[614] which has the function to pave the way, in terms of delineating the substantive content, for subsequent treaties which may present a less generalist content.

In general, therefore, it can not be said that the UNFCCC presents a binding character, nor that such binding character would be desirable. The wording of its provisions is very generic and the negotiations that brought to the entry into force of the convention confirm that this aspect was a deliberate choice. Nonetheless, this does not conflict with the fact that the UNFCCC dispositions set clear, albeit general, long-term objectives and establish duties for member States to achieve these objectives. It remains for the other climate change treaties to implement the indications contained in the UNFCCC to develop rules of international climate change law that may create the basis for State responsibility and, consequently, for shared responsibility as well.

#### 3.1.3.1.2. The Kyoto Protocol

The possibilities to use the Kyoto Protocol as a basis to declare a State liable for climate change-related breaches appear more solidly founded, where compared to the UNFCCC. The Kyoto Protocol was developed moving from the establishment of quantitatively precise obligations and of specific consequences for the eventual failure to fulfill them. This choice had the specific aim to create a legal framework that allowed for the ratifying countries to be held responsible for their breaches, in their failure to fulfill the commitments adopted under the protocol.[615] The principle of "common, but differentiated responsibilities" was also applied, in that the Protocol divides the ratifying parties in reason of their historical contribution to the climate change problem.[616] The Kyoto Protocol, indeed, sets for each of its parties that are enumerated under Annex I a specific limitation for emissions and clear commitments to achieve in an established time-

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[613] *Ibid.*, p. 304.

[614] Tomuschat, note 547, p. 20

[615] Meinhart Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law,* Carswell (2005).

[616] Charlotte Epstein, "Common but differentiated responsibilities", *Encyclopedia Britannica* (2015).

frame. The problem with this treaty, whose success has been doubted by many,[617] is that the drastic choice of establishing binding obligations has had a detrimental effects in terms of participation to the treaty, with the aforementioned current absences of the United States and Canada among the ratifying parties.

For these reasons, the presence of individual targets and commitments for countries listed in Annex I of the Protocol and the presence of a list of indicative behaviors that might be adopted to reach these targets make a strong case for the susceptibility of the Kyoto Protocol to be used as a basis to declare a State responsible for climate change-related conducts.[618] The real crux of the issue is that, along with the United States and Canada, also China and India - both essential contributors to the global emissions count - are left untouched by the binding obligations arising from the protocol.[619] Finally, Canada's example displays that countries may avoid the responsibility arising from the breaches of the Kyoto Protocol by simply exiting it.[620]

Nevertheless, focusing solely on whether this legal document can constitute the basis for claims against State Parties, the answer should be an affirmative one. Assessing whether a country has reached its individual targets requires a relatively objective study. Some greater problems concern the assessment on the "adequacy" of the measures adopted. Despite the existence of a non-exhaustive list of possible measures that may be adopted to achieve the individual goals set by each country, contained in Article 2(1)(a) of the Protocol,[621] the "adequacy" parameter still leaves a margin of discretion that is too wide to think that tribunals will push themselves to such substantial analyses.[622] Having already solved the question of whether the compliance mechanisms disposed for in the Kyoto Protocol impede the recourse to the rules of international law on State responsibility,[623] it can be concluded that the quantitative emissions limitations and objectives of emissions reduction contained therein are binding and enforceable under the international law of responsibility.[624]

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[617] A particularly poignant analysis, which concentrates on the limited time frames and on the excessive staticity of the binding targets can be found in: Amanda M. Rosen, "The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change", *Politics and Policies*, Vol. 43 (2015): 30-58.

[618] Nollkaemper & Faure, note 591, p. 144; Lefeber, note 609, p. 330-333.

[619] Peel, note 538, p. 1026-1027.

[620] Cole, note 541, p. 306.

[621] Kyoto Protocol, Article 2(1)(a).

[622] The Canadian courts refrained from adjudicating on the measures adopted by the Canadian Government in: Federal Court, *Friends of the Earth* v *The Minister of the Environment,* 2008 FC 1183, Decision of 20 October 2008; as found in: Lefeber, note 609, p. 332.

[623] see paragraph 3.1.

[624] Verheyen, note 575, p. 119.

#### 3.1.3.1.3. The Paris Agreement

Lastly, the Paris Agreement concludes the framework of treaty law that could give rise to international responsibility in relation to climate change obligations. In this respect, firstly, the basic structure of the treaty distances itself from the approach contained in the Kyoto Protocol, preferring a "bottom-up" approach, instead of a "top-down" one.[625] It is, in fact, requested that each State Party to the agreement sets a "nationally determined contribution" ("NDC"), that has to be gradually updated, and that it "shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".[626] To understand the legal character of the agreement, it is important to consider the negotiations phase, in which the EU countries pushed for the elaboration of targets similar to the Kyoto Protocol, that would give birth to binding and enforceable obligations and other States pushed for a different instrument, that could even substitute the "top-down" approach expressed in the Kyoto Protocol.[627] The result has been an agreement that possesses "legal force",[628] but which is not necessarily legally binding, in the sense of the possibility of international responsibility arising from it.

More specifically, the only provisions in the Paris Agreement that suggest a peremptory character are strictly procedural obligations. The verb "shall", indeed, is used in more than one instance, but always with reference to the duties to communicate, to update and to enhance transparency of the progresses made in reference to the NDCs.[629] In other instances, the same verb is followed by a wording that emphasizes the vast space left to the choice of the State Parties, which neutralizes its peremptory reach, as can be seen in Article 7(9), where it is stated that countries "shall, *as appropriate*, engage in adaptation planning processes…".[630] As for its substantive content, the Paris Agreement also sets global goals for mitigation and adaptation to climate change and establishes itself the objective of holding the temperature increase under 2°C above pre-industrial levels. However, the wording referring to the conducts required from the member

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[625] Andrew J. Jordan et al., "Emergence of polycentric climate governance and its future prospects", *Nature Climate Change*, Vol. 5 (2015): 977–982.

[626] Paris Agreement, Article 4(2), 15.

[627] Daniel Bodansky, "The Legal Character of the Paris Agreement", *Review of European, Comparative and International Environmental Law,* Vol. 25, No. 2 (2016): 142-151.

[628] *ibid.*, p. 144.

[629] for example, Paris Agreement, Article 4(8): "…all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement".

[630] Paris Agreement, Article 7(9) (emphasis added).

States is always soft and vague, rendering scenarios of potential findings of international responsibility highly unlikely.[631]

From all the above, it can be concluded that the Paris Agreement does not impose binding obligations, or at least it does not do so in a way that may trigger State responsibility.

#### 3.1.3.2. Customary law

The discussion on the possible sources for international responsibility would be far from complete without an analysis of the relevant rules under customary international law. Customary law has been described as the most important source of law that could form the basis for State responsibility in the environmental context.[632] The most notable customary rule, in environmental law, is crystalized in the *Train Smelter* arbitration between Canada and the United States,[633] in which it was affirmed that each State has an obligation to avoid that the activities performed in its jurisdiction cause a harm to the environment beyond its territory.[634] The general no-harm principle has been interpreted as to have a role for the purposes of invoking responsibility, under the proposal that claimants could sue States for their contribution to global warming related damages. The rule essentially places upon governments a general due diligence obligation to refrain from causing environmental harm to other subjects[635] and to take appropriate measures to prevent that national private actors do so.[636] From this description, however, it is already evident that some of the obstacles mentioned with reference to the provisions contained in the UNFCCC and in the Paris Agreement are also present here: the generality of the obligation leaves large margins of appreciation to the tribunals to examine whether the measures of vigilance adopted by the states are "adequate". In the event it were the State itself to contribute to the general harm, it would be easier to frame whether the conduct could be deemed unlawful. However, with reference to climate change law, it is hard to identify with precision if and how much a specific conduct has contributed to a phenomenon which, as said before, is global.

Some authors have suggested that to undertake such analysis is unnecessary for the determination of the unlawfulness of a State's conduct under the no-harm principle, as the interpretation of the notion of "risk

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[631] Peel, note 538, p. 1028.

[632] Nègré, note 582, p. 804.

[633] *Train Smelter Arbitration (United States of America vs. Canada),* Award, 3 RIAA 1905 (1938).

[634] Ved P. Nanda and George Pring, *International Environmental Law: International Environmental Law and Policy for the 21st Century,* BRILL, 2012, pp. 23-25.

[635] Peel, note 538, p. 1030.

[636] Verheyen, note 575, p. 152.

of transboundary damage", offered by the ILC in their Report of the 53rd session,[637] and subsequently transposed in the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,[638] enshrines that responsibility arises whenever the States fail to adopt all the "appropriate measures" to avoid harm.[639] From this starting point, it has been argued that States should view the obligation as requiring them to do whatever it takes to prevent the damage, in order to avoid the application of the "no-harm" rule.[640] The unknown effects of climate change and the uncertainty as to the effective contributions of each State to the phenomenon, however, render these reasonings difficult to apply to the issue of climate change. Even if one were to accept that each State has to put in place all of its resources to avoid a certain damage, it will still be required that the damage is causally linked to the contribution with some degree of precision, and such passage, for the moment, does not appear realistic.

Again, the verification of whether States' conducts tangibly contributes to minimizing the risk of damage was suggested as another parameter to envision whether a conduct can be considered unlawful.[641] Even here, however, the absence of qualitative and quantitative parameters to evaluate the lawfulness of the behavior of the governments renders this path a complicated one, especially considering that the activities that enhance climate change-related problems are usually, as has been thoroughly repeated, completely lawful.[642] The tribunals' analysis, indeed, will not be directed at finding a conduct that is in breach of an obligation, but will rather be directed at finding whether a lawful conduct is being performed in such a way, or in such a quantity, that can cause a damage to other States.

Further, for the "no-harm principle" to find application, it has generally understood that the harm suffered by the claimant has to be an "injury of serious consequence",[643] or in any case a "significant" one.[644] This further requirement adds on to the difficulties that surround the applicability of the "no harm" rule, given that the damages produced by climate change-related events are global. It is complicated to evaluate the linkage between a climate change-related conduct and a harmful event as such, but it is clearly

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[637] International Law Commission, *Report of the International Law Commission on the work of its fifty-third session*, 23 April 2001, Doc. No. A/56/10; Chapter V.

[638] International Law Commission, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries,* adopted 11 May 2001, Doc. No. A/RES/56/82; Article 3.

[639] *Ibid.,* Article 11(3), p. 147.

[640] Verheyen, note 575, p. 159-160.

[641] *ibid*., p. 162.

[642] Peel, note 538, p. 1031.

[643] Cole, note 541, p. 306.

[644] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law,* Cambridge University Press (2012): p. 195.

more complex when there is a specific requirement regarding the entity of such damage. There are, indeed, numerous further variables that enter the equation, such as the alternative factors that may have contributed to the damage, or the parameters that should guide the measurement of the the "seriousness" of the damage. Some scholars downplay these problems, arguing that the standard of proof necessary to demonstrate the damage has to be determined on the basis of the global risk of harm, which has been for a long time a subject of study of environmental law scholars and where some scientific concordance has been reached.[645] Following this assumption, without the requirement that each claimant State proves the defendant's contribution to the individually suffered damage, the possibility that the "no harm" rule could constitute a viable ground for responsibility to arise greatly increases.

Although this suggestion is in line with the general purpose of climate change law, the interpretation of the "no-harm" principle that seems more respectful of the *Train Smelter* case is that the claimant has a *locus standi* in front of international tribunals only when it has suffered concrete harm deriving from the defendant State's conduct. Scientific evidence exists whereby some States will suffer the effects of climate change more than others, for instance in terms of loss of inhabitable land. This could imply that there could exist some grounds on which countries that can prove their endangered status may actually be entitled to claim responsibility against other international actors that contribute to such status.[646] It remains to be debated, however, whether the scientific evidence that would form the basis for these claims is enough, at the current stage, for claimants to successfully bring defendant States to be held responsible for their conduct. Practice in this sense has been both scarce and unsuccessful.[647]

### 3.1.4. Attribution of conduct to a State for climate change-related behavior

In Chapter One, the issue of attribution of conduct has been extensively analyzed with particular focus on the rules contained in Articles 4 to 11 of the ARSIWA. It remains to be examined whether such rules can find application in climate change law. From a factual point of view,, the answer is that there is nothing that suggests a departure from the rules that apply to State responsibility in general.[648] Therefore, a

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[645] Verheyen, note 575, p. 185.

[646] Leonard A. Nurse, "Small Island States", in *TAR Climate Change 2001: Impacts, Adaptations and Vulnerability,* for the Intergovernmental Panel on Climate Change (2001): 845-870.

[647] see, for example: *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, where the applicant claimed that the repatriation of him and his family to Kiribati was to be considered unlawful for the high risk that the progressive loss of terrain of the island would determine progressive inhabitability.

[648] Wewerinke-Singh, note 565, p. 85.

State would be responsible when individuals that are linked *de jure* or *de facto* to it are attributed a conduct that breaches an obligation under climate change law. For the purposes of this paragraph, the dispositions in the sources mentioned in the paragraphs above will be considered as if there were no contention over their legal bindingness and over their ability to trigger international responsibility.

A relevant differentiation, with reference to attribution of conduct, is whether only the conduct of State organs is to be considered susceptible of being attributed to the State, or whether also non-State entities can be linked to the international responsibility of the State. The question has great importance, considered that the majority of emissions are caused by activities that are not directly performed by public entities.[649] In scholarship, a distinction was drawn distinguishing the situations in which a State has not put in place the adequate measures to ensure compliance with the relevant climate change law obligations by its private citizens, from those in which the State has adopted sufficient measures.[650] In the first case, the State would be attributed the conduct even if the conduct has been performed by private actors.[651] The conclusion appears reasonable, given the "due diligence" character of most obligation arising from climate change law.[652] It is therefore imaginable that, whenever a State under the Kyoto Protocol has not implemented any legislation or different measures to reduce emissions (for example, a measure addressed at reducing the emissions by the industrial sector which emits the largest share of greenhouse gases), an eventual failure to reach self-determined reduction national goals may be attributed to the State. The reasoning is also consistent when reading the commentary to the ARSIWA, which considers the State bearer of responsibility for unlawful omission whenever the failure to act is in breach of an obligation, without mentioning whether the eventual damage has to be directly linked to the omission.[653]

Conversely, in the event the State has fulfilled its due diligence obligations, it will not incur in responsibility whenever the unlawful conduct can be linked to a non-State actor. Nonetheless, the rules related to the "effective control" of the State also apply in the context of climate change-related activities,[654] or those related to the organs acting under the instructions of a State.[655] If, for instance, a private enterprise

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[649] *ibid.,* p. 86.

[650] Verheyen, note 575, p. 239.

[651] *ibid.*

[652] Lefeber, note 609, p. 334-335; Lavanya Rajamani, "Due Diligence in International Climate Change Law" in *Due Diligence in the International Legal Order,* edited by Heike Krieger, Anne Peters, and Leonhard Kreuzer, Oxford University Press (2020): 163-181.

[653] ARSIWA with commentaries, General commentary to Chapter II, paragraph 2.

[654] ARSIWA, Article 5.

[655] ARSIWA, Article 8.

that is substantially controlled by a public organ breaches its obligations under climate change law, then such conduct shall be attributed to the State. The same applies in the scenario in which a private enterprise performs a wrongful conduct in compliance with specific indications received by the State.

### 3.1.5. Responsibility for a damage caused by a wrongful conduct in climate change law

Having assessed that a conduct in breach of an obligation under climate change law can, indeed, be attributed to a State, more complex is the question of whether such conduct can be connected to a specific damage. Proceeding with order, it has just been repeated that the notion of "damage" does not constitute a necessary element for the findings of responsibility of a State. This remains true, but it shall also be mentioned that, very often, the driving force that brings a claimant to initiate proceedings to invoke a State's responsibility is the objective of receiving compensation for a harmful event suffered. It will be important, to this purpose, to observe the possible criteria that connect the impugned conduct with the damage - an operation that is particularly complex with climate change, considering the global range of the effects of the phenomenon. Before that, however, it is also relevant to understand what is necessary for a claimant to have the *locus standi* to bring a case in front of an international tribunal.

#### 3.1.5.1. Invocation of responsibility

Article 42 of the ARSIWA stipulates that a State is entitled to invoke the responsibility of another State only when an obligation is specifically owed to the claimant by the respondent, or when the respondent owes the obligation to the international community as a whole.[656] In this second case, however, the claimant has to be specifically affected by the failure to comply, or the obligation has to be such that it would "radically […] change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation".[657] The initial possibility, of the obligation owed specifically to the State, reflects the wider share of the international agreements currently in force, which are largely bilateral ones.[658] These agreements, however, are of little use for the purposes of shared responsibility and will be left aside.

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[656] ARSIWA, Article 42.

[657] ARSIWA, Article 42(b)(i) and Article 42(b)(ii).

[658] Robert Stauvins and Zou Ji, "International Cooperation: Agreements & Instruments", in *Climate Change 2014: Mitigation of Climate Change*, for the UN Intergovernmental Panel on Climate Change (2014): 1005-1054; p. 1053.

Instead, the attention will be drawn to those cases in which the obligations are *erga omnes*, or owed to the entire community. Whenever one or more States can be considered as "specially affected" by a conduct, no real problem arises, as they will have the *locus standi* to claim the responsibility of the State that has performed it. The ability to demonstrate that one entity is particularly harmed by a conduct under climate change law has been considered as highly unrealistic by numerous authors, in reason of the already mentioned uncertainty as to how and how much a particular harmful event can be causally linked to global warming related problems. Nonetheless, the *Urgenda* case,[659] which was delivered in the context of a claim being brought against the Netherlands for the failure to comply with a climate change-related obligation under human rights law, could have opened a new pathway for the invocation of responsibility. Indeed, the "specially affected" position may not necessarily have to be understood as requiring claimants to prove a differentiated position from other possibly affected entities strictly under climate change law, but will merely require the demonstration of the violation of a human rights law obligation. Obviously, the standing requirements of the Dutch procedural system can not be symmetrically applied to international tribunals, but this still remains an interesting precedent. Furthermore, the interrelation between human rights law and environmental law had been supported in scholarship for a lengthy period, before the delivery of the mentioned judgment,[660] which then further strengthened such suggestion.

It must be equally understood, however, that the use of human rights law to introduce climate change litigations does not exempt claimants to demonstrate the existence of a causal linkage between the human rights violation suffered and the impugned act or omission of the defendant,[661] which remains a considerable hurdle. The ECtHR, in *Fadeyeva v. Russia*, referred to the requirements of: "an actual interference with the applicant's private sphere" and the threshold of a certain "level of severity",[662] in order for a violation of human rights consequent to environment-threatening conduct to be upheld by the tribunal.

In any event, the ILC had also elaborated Article 48 ARSIWA, which allows States different from the injured one to invoke responsibility whenever the obligation breached was owed to the community as a whole.[663] The main difference between Article 42 ARSIWA and such provision is that no reparations, in this latter case, can be awarded to the claimant, even in case of a successful finding of the responsibility of the

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[659] *supra,* note 593.

[660] Sara C. Aminzadeh, "A Moral Imperative: The Human Rights Implications of Climate Change," *Hastings International and Comparative Law Review*, Vol. 30, No. 2 (2007): 231-266; Marc Limon, "Human Rights and Climate Change: Constructing a Case for Political Action." *Harvard Law Review* (2009): 439-476.

[661] Ingrid Leijten, "Human rights v. Insufficient climate action: The Urgenda case", *Netherlands Quarterly of Human Rights,* Vol. 37 (2019): 112-118; p. 116.

[662] *Fadeyeva v Russia*, App. no. 55723/00, (ECtHR 30 November 2005).

[663] ARSIWA, Article 48

defendant State. However, the possibility contained in Article 48 ARSIWA serves a crucial purpose for *erga omnes* obligations, since it would be unreasonable that a violation of human rights law could go unaccounted for if the injured State chose not to invoke responsibility.[664] In any event, in order to establish international responsibility for climate change-related conduct, the focal point is whether the obligations to protect the environment from the effects of climate change can assume the status of *erga omnes* obligations. A positive answer was suggested by part of the scholarship,[665] with reference to the protection of the "common heritage of mankind",[666] which can be interpreted as including the environment.[667] The interpretation of the environment as a non-consumable, public good has been suggested in scholarship, claiming that any action that abuses the right for climate to be enjoyed by all humans would be to considered unlawful and, as such, a potential basis for international responsibility.[668]

International judicial practice was also decisive in this sense, with the *Whaling in the Antarctic* case in front of the ICJ,[669] where Australia brought a claim against Japan claiming that the pursuance of a large-scale whaling program was allegedly in breach of the International Convention for the Regulation of Whaling (ICRW).[670] When the judges requested to what extent exactly Australia was to be considered an injured party, the counsel for Australia responded that the country had the same interest to claim Japan's responsibilities as all other countries.[671] The ICJ did not specifically make a reference, in their judgment, to this passage in the applicants' arguments and thus on the *erga omnes* nature of environmental obligations, but still accepted Australia's contentions, declaring the case admissible.[672]

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[664] Giorgio Gaja, "States Having An Interest in Compliance with The Obligation Breached", in *The Law of International Responsibility,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 957-963; p. 961.

[665] Meguro, note 608, pp. 936-938.

[666] Thomas Cottier et al., "The Principle of Common Concern and Climate Change", Working Paper No 2014/18 | June 2014; p. 15.

[667] Special Rapporteur James Crawford, *Third report on State responsibility*, 2000, A/CN.4/507 and Add. 1-4, para. 92.

[668] Cottier, note 666.

[669] *Whaling in the Antarctic*, note 36.

[670] *International Convention for the Regulation of Whaling*, 2 December 1946, Reg. No. 2124.

[671] *Whaling in the Antarctic,* Presentation by Laurence Boisson de Chazournes, Verbatim Record, CR 2013/18, 9 July 2013, 23, para. 19.

[672] Yoshifumi Tanaka, "Reflections on Locus Standi in Response to a Breach of Obligations Erga Omnes Partes: A Comparative Analysis of the Whaling in the Antarctic and South China Sea Cases", *The Law & Practice of International Courts and Tribunals* Vol. 17, No. 3 (2018): 527-554; p. 536.

It can be thus concluded that the ARSIWA provide numerous possible *loci standi* (i.e. the claims made under human rights law; Article 48 ARSIWA) for a State to invoke the responsibility for climate change related conducts, even where an obligation is not owed specifically to it.

#### 3.1.5.2. The necessary criteria to link a wrongful conduct to a damage

Whenever responsibility is invoked with the objective of obtaining reparation for a damage suffered, States have to demonstrate the existence of an "injury" suffered as a consequence of the wrongful conduct.[673] Many of the issues with defining responsibility for climate change-related conduct are: the fact that largest part of worldwide emissions are produced by private actors; that these emissions are, for physical features, spatially diffuse and that their effects are diluted in time; that no criterion has established itself as a parameter of choice for tribunals to causally link a certain damage to a certain conduct, rendering the general matter of the attribution of an injury to a specific actor very complex.[674] Furthermore, the attribution of responsibility for violations of the mere "due diligence" obligations by a State can not be considered helpful here, since the claims concerning reparations, as opposed to those concerning responsibility, necessarily revolve around the binomen "injury-wrongful conduct". It will be therefore necessary that, for a reparations claim to be successfully advanced by applicants, even when a State fails to fulfill its positive "due diligence" obligations, a circumscribed damage is alleged to such failure. Indeed, historically, it has been argued that environmental damage can not be compensated by means of judicial proceedings, precisely for the difficulty in operating a causal link between the conduct and the damage.[675]

The commentary to Article 31 ARSIWA describes the relationship between wrongful conducts and damage as one of causation, but not only. It will not, indeed, be sufficient that the wrongful conduct is, in abstract, causally linked to the damage, but it will be necessary that the two events are not "remote", or distant one from another.[676] The ILC mentions some elements that could guide the decision on causation: directness, foreseeability, proximity and fault.[677] Some voices in scholarship have suggested that, for the factual features of climate change just mentioned and for the magnitude of the consequences of global

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[673] ARSIWA, Article 31(2).

[674] Peel, note 538, p. 1040.

[675] Oscar Schachter, *International Law in Theory and Practice,* BRILL, 1991; p. 380; Alan Boyle, "Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches", in *Harm to the Environment: The Right to Compensation and Assessment of Damages,* edited by Peter Wetterstein, Oxford University Press (1997): 83-100.

[676] ARSIWA with commentaries, Article 31, paragraph 10.

[677] *ibid.*

warming, requiring a State to demonstrate with precision a linkage between a conduct and an injury would be unreasonable.[678] However logically sound, this argument might be more fitting for a general invocation of responsibility, but may not be an optimistic one when dealing with reparations. It is true that the commentary to the ARSIWA clearly emphasizes that a State may be bound to offer compensation even when it has only contributed partially to the damage, but the international practice mentioned by the ILC on the matter (*Corfu Channel,*[679] *United States Diplomatic and Consular Staff in Tehran*[680]) concerns cases where the contribution by the States that were found responsible was more distinguishable and immediately linkable to the damage, whereas contributions to climate change are connected to the damages that derive from it with a lesser degree of immediacy.

Some scholars have proposed a division between "general causation" and "specific causation", which respectively refer to the general link between greenhouse gas emissions and the consequence of climate change, and to the fact that a specific conduct related to climate change causes a specific damage related to climate change.[681] While the scientific evidence for the first category is uncontested, the scope of this analysis centers on the second category. It has been also suggested that a possible criterion to be adopted is that of considering a conduct causally linked to a damage when it increases the risk for the damage to take place.[682] Although this criterion seems hardly compatible with the commentary mentioned above, it was upheld by The Hague District Court in the *Urgenda* case, where, after the Dutch government claimed that the Netherlands' contribution was almost meaningless, when compared to global emissions, the Court affirmed that such argument was irrelevant for the purposes of a finding of responsibility.[683] The Court rested its reasoning on the indisputability of the fact that greenhouse gases emissions are a leading cause of global warming and that any breach of an obligation by the State in obligations that concerns such issue are contributive to the phenomenon in general.[684] Despite the *Urgenda* case was not centered on a request for reparations, the reasoning by the Court regards specifically the matter of causation. Indeed, the Court did not

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[678] Jacob David Werksman, "Could a Small Island Successfully Sue a Big Emitter?", in *Threatened Island Nations*, edited by Michael B. Gerrard, Cambridge University Press (2013): 409-433; p. 413.

[679] *Corfu Channel Case (United Kingdom v. Albania)*; Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), 15 December 1949.

[680] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980.

[681] Voigt, note 586, p. 15, Verheyen, note 575, p. 257.

[682] Peel, note 538, p. 1044.

[683] *Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment),* First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court, para. 4.79

[684] *ibid.*

dismiss the arguments proposed by the Dutch counsel on the basis of the fact that contribution to the damage is irrelevant for a finding of responsibility, but implicitly asserted that, when dealing with the climate change phenomenon, for a contribution to be considered relevant it will be sufficient that such contribution increases the risk of the harmful event, without having to quantify the increase in the risk.[685] In a sense, the general causation category was used as a basis for the Court to imply a finding relevant to specific causation.

This process of reasoning, in terms of causation, has also been defined as the absence of a "break in the causation chain".[686] It is argued that a particular contribution may cause a damage even when other contributions concur, as long as there does not exist an interruption - i.e. a superseding cause - between the contribution in exam and the damage caused.[687] For example, whenever a contribution would be susceptible of producing a certain effect, but such effect is produced by a different contribution, there is a break in the causation chain. With reference to the relationship between greenhouse gases emissions and climate change related consequences, there does not appear to be such interruptive event and, therefore, were this the test applied, a specific State could successfully claim the responsibility of another State for damages deriving by the latter's conduct breaching climate change-related obligations, provided that the harm is not linked to an alternative event that, by itself, has caused it.

Having observed the notions of directness and proximity, among the indications contained in the commentary of Article 31 ARSIWA, the residual elements to be observed are the notions of fault and of foreseeability. The degree of fault that concerns the voluntariness of the conduct is of little relevance in the context of State responsibility for the emissions produced, when considering that the emitting States suffer themselves the consequences of their actions. Foreseeability, in turn, is itself a subjective element of proximate causation[688] and it is usually relevant for due diligence obligations. It involves the fact that the alleged actor ought to have known that the activity performed could have caused a damage. The criterion has developed in judicial practice as one that does not require the foreseeability of all the specific details of a damage, but merely requires that the possible consequences that could arise from the damage could have been "imaginable".[689] In this context, it is legitimate to think whether the principle of precaution could play a part in the discussion. The principle, in essence, affirms that the lack of scientific certainty may not excuse

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[685] This theory is also supported by Verhayen, note 575, p. 255.

[686] Voigt, note 586, p. 17.

[687] *ibid.*

[688] León Castellanos-Jankiewicz, "Causation and International State Responsibility", SHARES Research Paper 07 (2012), available at www.sharesproject.nl; pp. 56-58.

[689] Verheyen, note 575, p. 181.

the performance of a conduct which is susceptible to cause significant harm.[690] The precautionary principle has been supported as a means to avoid the necessity to demonstrate the existence of a causal link between injury and conduct, with specific reference to climate change law[691] and was defined as requiring "careful anticipation, avoidance and mitigation of potential harm" by governmental action.[692] The indication is interesting, but it seems more plausible that the argument could prove more successful in a claim invoking responsibility regardless of injury, than in an instance in which the claimant is attempting to receive compensation for a damage. In particular, there is little doubt as to the fact that the precautionary principle can find application in climate change law,[693] but the assumption that its application can fully demonstrate a linkage between an injury and its causing factor is far more questionable.

In conclusion, there is no concordance as to which rules, or parameters should be applied to evaluate the possibility of deciding for the compensation of an injured party in climate change law. Some of the practice suggests that the literal reading of the ARSIWA commentaries is not the sole solution, as seen in the comparison with the *Urgenda* judgment. On the other hand, however, the question here concerns strictly the possibility to obtain compensation, rather than the discussion over the determinations of responsibility for a wrongful act in general, and practice has been practically inexistent with reference to rulings that grant compensation for an injury under climate change law. Therefore, however appealing it would be, the position that reparations can prescind from a demonstration of a causal link between the contribution claimed as wrongful and the injury suffered, provided that such demonstration may not necessarily be highly specific, can not be supported with certainty.

### 3.1.6. Shared responsibility and international climate change law

Finally, the focus can be placed on shared responsibility and on how it can prove relevant for the challenges regarding responsibility for climate change-related conduct. As repeated extensively, one of the characterizing feature of climate change is that it results from the emissions produced by all countries in the world. Obviously, holding all States accountable for the damages that, in time, will be provoked by global

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[690] Gerhard Hafner, Isabelle Buffard, "Obligations of Prevention and the Precautionary Principle", in *The Law of International Responsibility,* edited by James Crawford, Alain Pellet and Simon Olleson, Oxford University Press (2010): 521-535; p. 529.

[691] Faure and Nollkaemper, note 591, p. 159.

[692] IUCN, 'Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management' (2007).

[693] UNFCCC, Article 3(3): "The parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects."

warming can not be a viable solution. It has been seen, however, that there exists some basis to invoke States' responsibility for a failure to comply with the obligations accepted under climate change law treaties. More than often, it will happen that numerous States are in breach of these obligations and that environmental harm will be caused. Leaving aside the problematics in linking injury and wrongful conduct, the breaching States will probably have to be held responsible for the damage, under a regime of shared responsibility.[694] Prescinding from the joint liability to provide reparation for a damage, shared responsibility can prove relevant also for the purposes of findings of responsibility in general that may come as a consequence of violations of multilateral environmental agreements, like the Kyoto Protocol.[695] For instance, the Kyoto Agreement has an internal mechanism of supervision and control over the compliance of each party's personal commitments. If, indeed, numerous parties were found in violation of their obligations under the internal mechanisms, which, as demonstrated above, do not prevent access to a judicial settlement under international law, responsibility could be invoked jointly against all parties.

In scholarship, the notion of shared responsibility has been associated to some specific scenarios, other than the examples mentioned here. The first scenario is one concerning "climate justice",[696] where the most vulnerable countries in terms of suffering climate change consequences sue the largest emitting countries for their failure to avoid the damage that is suffered by these smaller countries. The scenario envisioned is one that is strongly connected to the notion of equity and it draws a "David against Goliath" type of situation. Secondly, also commitments contained in multilateral environmental agreements that require a joint implementation by their parties could trigger shared responsibility when the failure to comply with the obligation can be attributed to all the parties involved.[697] Indeed, many could be the factual situations that could justify the application of the norms of shared responsibility. It will be important, now, to envision whether the theoretical framework elaborated in Chapter One can find application in the field of climate change.

#### 3.1.6.1. Attribution of wrongful conduct to multiple parties

[694] Nollkaemper and Jacobs, note 5, p. 361.

[695] *ibid.,* p. 403.

[696] Peel, note 538, p. 1014.

[697] Peel, note 538, p. 1015-1016.

In general terms, the rules on attribution do not apply to situations that involve climate change law much differently than how it happens with international law as a whole. Article 47 ARSIWA, thus, can provide a point of departure for findings of shared responsibility in international law.

The analysis of the rules on attribution for climate change-related conducts has produced the outcome that, whenever it can be demonstrated that a State has violated its obligations, which can imply a failure to comply with the commitments undertaken or also a failure to monitor the activities that took place under its jurisdiction, that State can be attributed the breach. These findings have to be merged with the findings that had been elaborated in Chapter One, concerning multiple attribution of conduct. The essential requirement, for numerous parties to be attributed a wrongful conduct, was found in the fact that the actors had to be in breach of obligations that protect the same "concrete interest". This means, essentially, that the multiple actors against whom the claim is directed will have to have breached the same obligation, or obligations stemming from different sources, which present a substantive overlapping content. With reference to climate change law, this requirement is virtually always fulfilled. Multilateral environmental agreements largely share the same objectives, which can be differently declined, but which all aim at the achievement of measures of mitigation and adaptation to climate change. For this reason, it can be argued that the fact that, from a formal point of view, the States involved may have violated different obligations, should not pose an obstacle towards their joint responsibility, since the latter derives from a failure to contributing to a common objective. Essentially, in fact, the focal obligation that all States are required to fulfill under international climate change law is that of reducing their emissions. Thus, different States can be responsible in different measures, but they will all be responsible, indirectly, for having violated the same obligation.

An attempt to address the issue of attribution of wrongful conduct in international climate change law has been that of categorizing its obligations in "separable" and "inseparable" obligations.[698] Separable obligation are those commitments that are separately undertaken by each State and that have to be individually achieved.[699] Examples of separable obligations are the nationally determined contributions ("NDCs") under the Paris Agreements, or the target for the reduction of the emissions imposed to each Annex I State under the Kyoto Protocol. These obligations result less interesting for the purpose of this paragraph, but they may still give rise to findings of shared responsibility. The NDCs are not binding and therefore they do not trigger the responsibility of the non-complying State, but the targets under the Kyoto Protocol, indeed, are. As we mentioned above, the violation of these targets can be ascertained by the internal mechanisms promoting compliance and nothing stands in the way of a claim under the ARSIWA

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[698] Meguro, note 608, p. 942.

[699] *ibid.*

against the breaching countries, both individually and jointly considered. Inseparable obligations, instead, are those obligations which are collectively owed, and whose breach would theoretically imply the responsibility of all States.[700] Among these, the most important is the obligation setting at two degrees (2°C) the maximum temperature increase above pre-industrial levels,[701] which was followed by the enunciation of a second, alternative and more ambitious target of one and a half degrees (1.5°C) in the context of the Paris Agreement.[702] The discussion regarding the bindingness of these global objectives has been significant, but it has resulted in wide agreement as to the fact that the answer should be negative. Nonetheless, it can be argued that such inseparable non-binding obligations can play an important role in guiding findings of responsibility of some of the States that are breaching their separable obligations. For instance, the two-degree objective could be used as a parameter to adjudicate on the diligence of the States that are members to the treaty. Calculating the emissions by each country is a relatively straightforward task,[703] and judging their adequacy in comparison to the general objective of the treaty is equally unproblematic. A similar line of reasoning was followed by the Dutch courts in the *Urgenda* case, where the inconsistency of the climate change measures adopted by the Dutch Government was evaluated precisely making reference to the ideal quantity of emissions that the country would have had to produce in order for it to be in line with the 2°C objective.[704] This argument has been criticized on the basis that the recognition of the 2°C objective as a binding one would have entailed the necessary responsibility of all States, rendering any determination of responsibility, therefore, meaningless.[705]

Emphasis is also drawn to the fact that the willingness of parties to join an agreement which did not lay on grounds of bindingness could create a threat for the numerosity of participants, if the general objectives that emerged from the treaty were intended as binding.[706] The argument is fair, indeed, but it does not pose an obstacle to the fact that these objectives may be used not as binding obligations by themselves, but that they may constitute parameters to evaluate State parties' compliance with their personal, binding commitments.

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[700] *ibid.,* p. 943.

[701] *ibid.*

[702] Paris Agreement, Article 2.

[703] Nollkaemper and Faure, note 591, p. 165.

[704] *Urgenda,* note 593, paragraphs from 7.4.1 to 7.4.6.

[705] Meguro, note 608, p. 947-8.

[706] *ibid.*

### 3.1.6.2. Joint and several liability

The principle of joint and several liability, with reference to State responsibility for climate change-related conduct is one that has been mentioned by several scholars, which have defended different positions.[707] Such principle would allow an injured State to claim full compensation to one of the numerous tortfeasors, whom would subsequently claim redress to the other debtors for their part of the damage. Accordingly, this principle is very favorable to the injured party, who will be discharged from the necessity to prove the responsibility to offer compensation against each tortfeasor. In the context of climate change-related damages, this advantage is even more evident, given the uncertainty that surrounds the general issue of causation of damage.[708] As has been observed both in Chapter One and Chapter Two, however, the principle of "joint and several" liability has not established itself sufficiently in the international law of responsibility to consider it likely to find application, despite some authoritative voices claiming the opposite.[709]

Nonetheless, it has been argued that the area of climate change is particularly favorable to the application of the principle. For instance, it has been noted that an important feature for the "joint and several" liability principle to find application, in domestic regimes, is the indivisibility of the damage, or the impossibility to associate a portion of the damage to each specific contribution.[710] For climate change-related damage, such requirement is certainly fulfilled. However, it is unrealistic that this remark can prove sufficient for the principle to be applied. Ultimately, as has been demonstrated in Chapter One, the application of a regime of "joint and several" responsibility depends on whether anything in the primary norms establishing the obligations breached suggests the application of such principle. In the silence of primary law, it is hard to interpret in favor of its operativity.

Other interesting contributions, with reference to the application of the principle to climate change law, are those regarding the substantial iniquity of the fact that the small, damaged country has to claim responsibility against the large contributors.[711] The argument, singularly observed, is legitimate, but it must be also noted that, under the "joint and several" principle, also the tortfeasor against whom responsibility is invoked will then have to prove that the other tortfeasors are responsible. Hence, the unjust burden would

[707] For example, in favor of the principle: Matthew F. Pawa, "Global Warming: The Ultimate Public Nuisance", *Environmental Law Report,* Vol. 39 (2009): 10230-10250; pp. 10241-10242.

[708] Verheyen, note 575, p. 269.

[709] *supra,* Judge Simma, note 33.

[710] Verheyen, note 575, p. 271.

[711] Rapporteur Dietrich Rauschning, *Report of the 64th conference of the International Law Association*, 1990.

merely shift from the injured party to the tortfeasor found responsible. Furthermore, amounts of compensation that follows damage related to climate change consequences will probably be very important and difficult to bear for a single State. There is little practice on the subject of which courts are entitled to enforce claims made by the single tortfeasor that has compensated the entire damage against the other tortfeasors. It would be unacceptable that, if the reparation of the damage consisted in a very significant sum, a single tortfeasor could to be burdened with the payment of the entire sum without having the certainty of receiving the contributions by the other tortfeasors. This means that, aside from the discourse regarding the equity of the apportionment method, the "joint and several" liability principle in the context of environmental law is one whose application is unrealistic, where the contested damage is a significant one.

#### 3.1.6.3. Other rules on apportionment

Having excluded the general applicability of the "joint and several" liability principle, it can be interesting to envision some of the possible criteria that could be adopted in the apportionment phase, where damage arising from a wrongful conduct under climate change law were successfully pursued by a claimant. If the claim was brought against many tortfeasors and the responsibility of these was found, what would be the most preferable criteria to apportion responsibility among them?

The following suggestions are experimental solutions that revolve around multiple facets of the element of fault. These proposals[712] attempt to elaborate the most "equitable" solution for damage to be correctly divided among responsible parties. It has been already explained that the notion of fault has been considered extraneous to the purposes of adjudicating responsibility by the ILC, being expressly excluded from the necessary elements of a wrongful conduct.[713] Nonetheless, it can be argued that the element of fault can serve a purpose when responsibility has already been established on the part of multiple actors, to quantify the degree of responsibility that each of them shall bear. The following criteria can be applied altogether, but it will be seen that the first two criteria mentioned may also produce convincing results also when individually taken.

*a) the State's effort to reduce its emissions*

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[712] All of the following proposals are taken from: Henry Shue, "Transboundary Damage in Climate Change", in *Distributions of Responsibilities in International Law*, edited by André Nollkaemper and Dov Jacobs, Cambridge University Press (2007): 321-340.

[713] ARSIWA with commentaries, Article 2, paragraph 10.

The first possibility is to evaluate each State's share of responsibility on the basis of its effort to reduce its emissions.[714] It would be unjust, in the apportionment of damage, to focus on the mere quantity of emissions produced by each State. There are numerous factors that can cause the larger quantity of emissions produced by one State from another, as for example the number of inhabitants, the type of industry prevalent in the country and so on. The criterion of each State's effort can prove valid in the perspective that the obligations under climate change law are obligations of due diligence[715] and that each State has a duty each to different extents, to implement some measures that decrease the weight of global emissions on the planet. It is fair, under this point of view, that the countries that have been more diligent than others, despite not being sufficiently diligent to avoid incurring in responsibility, should pay a lower price for the damages caused, where compared to countries that have put less effort in fulfilling their commitments. The principle of good-faith effort is therefore also valued, which the ILC had demonstrated to value as relevant for the severity of the judgment on the responsibility of States.[716]

*b) the costs that each State would have to face in order to lower its emissions*[717]

This particular criterion may be applied alone, or contextually to the previous one. The reasons that render it a possible choice for the apportionment of damages, indeed, are similar to those observed in explaining the first potential criterion: considering that what is required by each State is the "due diligence", it has to be considered that for some States it may be more complicated than for other States to implement measures that can lower emissions. Some of the possible scenarios that may guide this differentiation are, for example, the economies of the various countries, which could be more or less dependent on industrial sectors that contribute the most to the generation of emissions. Also, a prolonged situation of economic distraught following a natural disaster may be taken into consideration, especially if the commitment was undertaken before the occurrence of the detrimental episode. The ARSIWA elaborate a series of circumstances precluding wrongfulness,[718] but there may be some episodes that do not meet the threshold to be considered as such, but that should nonetheless be taken into consideration. The present criterion offers a way to do so.

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[714] Shue, note 712, p. 329.

[715] *ibid.*

[716] ARSIWA with commentaries, Article 24, paragraph 4.

[717] Shue, note 712, p. 329.

[718] ARSIWA, Chapter V, Articles from 20 to 27.

It may appear unreasonable to apply this criterion without considering the one observed above, regarding the efforts of each State. Indeed, when these two criteria are applied altogether, they produce a more detailed parameter that guides a more equitable distinction between responsible actors. However, the application of these two parameters together stands on the assumption that there exist different levels of due diligence.

Conversely, if one were to consider the matter of responsibility as a "black or white" question, regardless of how close or how far one actor is to complying with its obligations for the purposes of defining the *quantum* of his responsibility, the present criterion would acquire a completely different magnitude. Indeed, it would become highly favorable exclusively to countries with struggling economies, or whose costs of mitigation are high where compared to their finances, attributing higher importance to the strictly financial aspect and erasing the good-faith effort aspect.

*c) current emissions* per capita[719]

This criterion is one of the most popular when assessing the possible rules of apportionment, and it is also seen as representing an equitable way to frame the question.[720] This principle can clearly not be taken into account in absence of the first two, for the very reason that their absence would render this criterion inequitable. Nonetheless, the "*per capita* emissions" criterion is a valid representation of the share of emissions that each State is singularly contributing. Essentially, it represents each State's contribution more faithfully that looking at the mere quantity of emissions per State, by merely inserting the number of inhabitants for each State in the equation. It may be argued that it does not add much to the previous criteria, but it should be noted that in the hypothesis in which two countries - both responsible for a breach of an obligation - are found having invested the same efforts in mitigation measures and bearing the same costs to upgrade their efforts, a difference in the quantity of emissions *per capita* will guide one of the two to be attributed more responsibility than the other.

The legitimacy of such approach may righteously be doubted. If the costs and the effort are parameters that can be said to be updated to the present day, emissions *per capita* may also depend on historical factors, as for example that a country has been developed for a longer time, than another. It may happen that a poorer country, with a significant ecological historical debt, may be attributed a similar quantity of responsibility of a country that has low emissions *per capita*, but that is spending no efforts in

[719] Shue, note 712, p. 330.

[720] Werksman discusses this criterion in evaluating whether States can be said implementing "due diligence", in: Werksman, note 678, p. 422.

mitigation measures.[721] The legitimacy of considering this as an apportionment factor is extraneous to the scope of this thesis,[722] yet it may offer an interesting point for further reflection.

*d) the State's percentage of cumulative emissions*[723]

The most obvious of the four parameters is the percentage share of emissions that each country produces in respect to global emissions. The criterion moves from a conception of the global emissions as a maximum budget of expenses that is set for all countries. From the moment in which the UNFCCC had placed the target of the 2°C temperature maximum increase in a specific time frame, it has been possible to calculate the quantity of emissions remaining for the target not to be exceeded.[724] By calculating the emissions of each State so far, in comparison to the total quantity of emissions that can be produced, each State's percentage of cumulative emissions can be found.

Similarly to what said about the criterion above, this scale of measurement ignores the same crucial factors, and should not, thus, be used as an exclusive criterion. However, its cumulative applicability with the other parameters mentioned may prove a further enhancement of the possibilities that responsibility is equitably distributed.[725] For instance, an image that could be symbolically associated to the percentage of cumulative emissions is that of an individual that abuses his right to access to the limited amount of food available to his community. In order to understand the detriment inherent in the actions of such individuals, the measure of the percentage of food eaten by the individual, in comparison to the percentage which he had the right to enjoy, is an immediate one.

### 3.2. Relevant case law

[721] Although, it has been observed that "the *per capita* emissions of developing countries are and, for the time being, will continue to be much lower than those of developed countries", in: Lefeber, note 609, p. 325.

[722] A critical voice can be found in: Olivier Godard, "Ecological Debt and Historical Responsibility Revisited: The case of climate change", EUI RSCAS, Global Governance Programme-26, Global Economics (2012).

[723] Shue, note 712, p. 331.

[724] Myles Allen et al., "Warming caused by cumulative carbon emissions towards the trillionth tonne", *Nature*, 458 (2009): 1163–1166.

[725] Shue, note 712, p. 332.

Particularly in the context of climate change law, the role of courts is a crucial one.[726] It has been seen, up until this point that environmental law, and specifically the law on climate change, is in a phase of quick evolution.[727] In this process, the work arising from the judicial sphere will be decisive in guiding the direction towards which the legal protection of the environment is headed: courts are called to identify the applicable rules of law and to attribute a specific meaning to norms which leave relevant margins of appreciation.[728] As has been seen in the brief summary of the possible binding norms, there is great uncertainty as to how to interpret the obligations imposed by the principal multilateral agreements on climate change law. Along with governments, the role of clearing these doubts is remitted to tribunals. Differently from governments, tribunals represent an independent voice and they are, for this reason, endowed with the duty to ensure the adequacy of the various States' measures for the protection of the environment.[729] Courts have represented the projected place for a solution to governmental inaction, in claims brought by numerous public and private actors, with a special mention to non-governmental organizations in the quest for an increase in the attention to climate change-related measures.[730]

Furthermore, climate change litigation in international courts has experienced a change in trends in the recent past. In particular, there have been numerous cases which have demonstrated a viable intersection between climate change law and human rights law, providing tribunals with more numerous legal sources from which to draw indications for their judgments.[731] Human rights sources have been claimed to offer also more concreteness and precision to the judicial activity, where compared to the limited and often generalist rules in climate change law.[732] These trends will be exemplified with the *Urgenda* case, the most important judicial outcome that has employed human rights law to produce a finding of responsibility for climate change related conduct. After the analysis of the case, a brief overview of other pending or already decided cases concerning the intersection between human rights law and climate change law will be operated.

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[726] Christina Voigt and Zen Makuch, "Courts and the Environment: An Introduction" in *Courts and the Environment*, ed. Christina Voigt et al., Edward Elgar Publishing, 2018; p. 6.

[727] Bodansky, Brunneé and Hey, note 587, p. 68-69.

[728] Voigt and Makuch, note 726.

[729] Nonetheless, there are numerous other factors that can influence judicial decisions, such as legislation, mass media and political interferences. See, in this context: Justice Brian Preston, Paul Martin and Amanda Kennedy, "Bridging the gap between aspiration and outcomes: the role of the court in ensuring ecologically sustainable development", in *Courts and the Environment,* edited by Christina Voigt and Zen Makuch (2018): 35-58; p. 45 onwards.

[730] Jolene Lin, "The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)", *Climate Law* (2017): 65-81; p. 66-68.

[731] See generally: Jacqueline Peel and Hari M. Osofsky, "A Rights Turn in Climate Change Litigation?", *Transnational Environmental Law*, Vol. 7, No. 1 (2018): 37-67.

[732] Margaux J. Hall and David C. Weiss, "Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law", *The Yale Journal of International Law,* Vol. 37 (2012): 309-366; p. 348.

### 3.2.1. *Urgenda Foundation v. The Netherlands*

To trace the history of the previously mentioned *Urgenda* case, it shall be important to recall some of the most important legislative progresses that characterized international climate change law before 2013. The 2010 Cancun Agreements,[733] indeed, marked the appointment in which a specific objective for emissions reduction was formally recognized for Annex I countries - a category that essentially includes all the “developed” countries from the Kyoto Protocol classification. The target selected for the EU, and consequently for the Netherlands, was of reducing the total emissions of 25-40% below the 1990 level before 2020, as contained in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (“IPCC”) of 2017.[734] The Netherlands, in 2007, decided to set their emissions reduction goal to 30% under the 1990 level. Subsequently, however, due to the “lack of concrete action and the lack of ambition”,[735] the Netherlands recalibrated their objective and drew the limit to a 20% reduction by 2020.

*a) the judgment by The Hague District Court*

In November 2013, the Urgenda Foundation, a non-profit organization dedicated to climate change protection,[736] brought, along with 886 Dutch citizens, a claim against the Dutch Government alleging that the action taken to mitigate climate change was insufficient. More precisely, the foundation argued that the policies put in place by the Netherlands could amount to hazardous negligence and invoked that the government was failing in its duties to protect the community from the effects of climate change, seeking the court’s authority to order that the reduction target would be placed back between 25-40%. The basis for the claims were largely drawn from environmental law, while only one claim resorted to human rights law.[737]

The Court was brought on first instance before The Hague District Court, where the judges considered that the claims made by the Urgenda Foundation could be upheld. It is important to note that the

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[733] United Nations Framework Convention on Climate Change (UNFCCC), Outcome of the work of the ad hoc working group on long-term cooperative action under the convention, 7 December 2012, FCCC/AWGLCA/2012/L.4.

[734] United Nations Intergovernmental Panel on Climate Change, *Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change.*

[735] Marjan Minnesma, “The Urgenda case in the Netherlands: creating a revolution through the courts”, in *Standing Up for a Sustainable World,* edited by Claude Henry, Johan Rockström and Nicholas Stern, Edward Elgar Publishing (2020): 140-151.

[736] See Urgenda website available at: http://www.urgenda.nl/en.

[737] Peel & Osofsky, note 731, p. 49.

claim against the Netherlands was proposed under Dutch civil law and it was not based directly on any environmental norm.[738] In particular, what was indicated as unlawful was precisely the omission by the Dutch Government to take action and the risks inherent in such lack of action. It is equally important to note that the Court did not uphold Urgenda's claim on the basis of a violation of any binding obligation under neither international, nor domestic law. Rather, the Court considered that there existed a generic "duty of care" under the Dutch regime, over which governments possess some margin of appreciation. The norm containing such duty is one whose content is left to the completion by the implementation of established rules in international law. To reach their verdict, thus, the judges found that the indications contained in the climate change law treaties which the Netherlands had adhered to could be used to interpret the exact content of the "duty of care". In the court's reasoning, the solidity of the scientific data available was often resorted to, in order to justify the direction towards which the judgment was going.[739]

One of the defensive arguments attempted by the Dutch government was that of claiming that the Netherlands, as such, could not be attributed the emission of greenhouse gases. This argument touches upon the discussion that was made in paragraph 3.1.4., regarding the possibility to attribute the emissions originating in the activities of non-State actors to the State. The court addresses such question indicating that what is relevant is that the State has the power to strongly influence the total emissions of the activities that take place under its jurisdiction, and that accordingly it should do so.[740]

Another important passage concerns the defensive argument that the choice of the adequate policies is one that requires a political margin of appreciation and that, as such, it should not be touched upon by the activity of the judiciary. This claim is also crucial for the discussion about climate change law and State responsibility, as the substantiveness of some of the evaluations that are required by the wide margins of appreciation left by climate change law legislation are usually treated as a threat to the possibility that these norms could serve as a basis for responsibility. Instead, the judges, whilst admitting the existence of a political space which is immune to judicial evaluation, asserted that – when they are dealing with a question of risk for the citizens - they are also entitled to apply a "judicial review" of the government's decisions.[741] Moreover, the fact that specific quantitative objectives were posed by the most important agreements,

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[738] Minnesma, note 735, p. 144.

[739] See, *Urgenda,* note 570, para. 4.65: "it is also an established fact that without farreaching reduction measures, the global greenhouse gas emissions will have reached a level in several years, around 2030, that realising the 2° target will have become impossible, these mitigation measures should be taken expeditiously"; para. 4.71: "The court also considers that in climate science and the international climate policy there is consensus that the most serious consequences of climate change have to be prevented".

[740] *ibid.,* para. 4.66.

[741] *ibid.*, para. 4.94.-4.102.

specifically citing the Cancun Agreements,[742] allows them to legitimately evaluate the lawfulness of the measures adopted by the State, without exceeding their scope of competence. Equally, the court dismissed the argument that the Netherlands' efforts were not destined to achieve the problem if not followed by the other EU States, by submitting scientific proof that the State's argument was ill-founded.[743]

The court, thus, concluded:

> "that the State – apart from the defence to be discussed below – has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990"[744]

and:

> "orders the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf".[745]

*b) the judgment by the Dutch Court of Appeal*[746]

The Dutch government appealed the judgment delivered by the District Court on all grounds, bringing the case in front of the Dutch Appeal Court. The judges substantially upheld *in toto* the decision that had been delivered by the District Court, also accepting the motivations contained therein. There was, in particular, a ground that is absolutely worthy of further attention: namely, the violations by the Dutch government of the ECHR.

As was stated above, indeed, the District Court did not ground its decision on any rule of international law, remitting the claim entirely to domestic civil and tort law. Nonetheless, the Urgenda Foundation also brought one ground of counter-appeal to the judges of second instance: the claim that the foundation could be a direct victim of the violation of Articles 2 ECHR (the right to life) and Article 8 ECHR (the right to private

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[742] *ibid.,* para. 4.79.

[743] *ibid.*, para. 4.81.

[744] *ibid.,* para. 4.93.

[745] *ibid.*, para. 5.1.

[746] The Hague Court of Appeal, *The Netherlands v. Urgenda Foundation,* ECLI:NL:GHDHA:2018:2610, Case number : 200.178.245/01 (hereinafter, "*Urgenda II*").

life and family).[747] The District Court had dismissed the claims made under the ECHR alleging the fact that Urgenda, as a legal person, could not be directly victim of violations of rights granted by the Convention.[748]

The judges of appeal, whilst rejecting the 29 grounds of appeal presented by the government representatives, overturned the position adopted by the District Court with reference to the counter-appeal made by Urgenda. The appeal judgment, in truth, does not address the question mentioned by the District Court, concerning the reasons why Urgenda could not be considered a direct victim, but it merely proceeded to the merits of the claim, implying that there would be no obstacles for a foundation to bring a claim under the ECHR. Nevertheless, the analysis of whether Articles 2 and 8 ECHR were to be considered violated is highly interesting. The judges began by considering the two provisions as implying a duty to protect the rights contained therein and to prevent their infringement, also encompassing a duty to protect these rights from any future infringements, with the only *caveat* that a State may be exempted from such duties when the adoption of the necessary measures would "place an 'impossible or disproportionate burden' on the government".[749] The court proceeded to a detailed scientific analysis to verify whether the threat of violation of Articles 2 and 8 ECHR could be deemed as real and concluded that "a dangerous situation is imminent, which requires interventions being taken now".[750] Finally, the judges found that the governmental choice to stray from the projected targets that had been agreed under the UNFCCC had no scientific basis, and that the less stringent target that had subsequently been set by the Dutch government would have excessively increased the risk of violating the rights contained in Articles 2 and 8 ECHR, even considering a political "margin of appreciation".[751]

For these reasons, the Dutch Appeal Court found that the Netherlands were in violation of the ECHR, by their failure to take adequate measures to reach the mitigation objectives that were set by the most important treaties in climate change law.

The case was eventually appealed again and proceeded to the Dutch Supreme Court, where the previous judgment was upheld on all grounds, including the new finding related to the Netherlands' responsibility for violations of the ECHR. The third instance judgment will not be analyzed below, as no significant new elements were addressed by the Court.

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[747] Minnesma, note 735, p. 147.

[748] *Urgenda,* note 570, para. 4.45: "unlike with a natural person, a legal person's physical integrity cannot be violated nor can a legal person's privacy be interfered with […] the protection of national and international society from a violation of Article 2 and 8 ECHR, this does not give Urgenda the status of a potential victim within the sense of Article 34 ECHR."

[749] *Urgenda II,* note 746, para. 42.

[750] *ibid.,* para. 71.

[751] *ibid.,* para. 73.

*c) the relevance of the case*

From a legal point of view, the *Urgenda* judgment has to be acknowledged as a landmark decision, in the scope of climate change law. Indeed, for the first time in history, a State was held responsible in a judicial decision for the breach of its climate change-related obligations. More precisely, in the *Urgenda* case, for the first time in history a court addressed the issue of excessive greenhouse gases emissions by a State, examining "climate change on a legal basis that is not underpinned by a statutory mandate".[752] The points of interest of the present case are innumerable. Before turning to the strictly legal points, however, it is important to also mention the social impact of the decisions delivered by the Dutch courts. The case attracted large attention on national and international levels, both of the legal scholarship[753] and of the general public.[754] This is well exemplified by the fact that, when the claim was first brought, Urgenda made a call to arms[755] to enhance the greatest possible participation to the case, which was responded by other 886 plaintiffs that acted as claimants along with the foundation.

From the strictly legal point of view, then, the *Urgenda* judgment was revolutionary. Most of the critical points that were characterized in legal literature as obstacles difficult to surmount were overcome by the tribunal's reasonings. First of all, one notable passage concerns how the issue of causation was dealt with, where the court implied that factual causation and normative causation are to be treated on equal terms.[756] The Dutch judges, at all instances, considered that the scientific evidence that a failure to comply with the commitments undertaken under climate change law can be a contributing factor to the risk of suffering injury (in this case, the violation of the right to life and of the right to private and family life) is a sufficient threshold for the causation link to be fulfilled. Therefore, it seems that the "risk increase" test was applied to the present scenario, without the necessity to precisely delimit the threat of damage or the damage already suffered.

Also, the *Urgenda* decision cleared the path for the interrelation between human rights law and climate change law, arriving to a proper judicial decision of responsibility in this sense. However, deeming

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[752] Lin, note 730, p. 67.

[753] Jacqueline Peel and Hari M. Osofsky, "Climate Change Litigation", *Annual Review of Law and Social Science,* Vol. 16 (2020): 21-36; p. 29.

[754] Otto Spijkers, "The Urgenda case: a successful example of public interest litigation for the protection of the environment?", in *Courts and the Environment,* edited by Christina Voigt and Zen Makuch, Edward Elgar Publishing (2018): 305-345; p. 305-309.

[755] Minnesma, note 730, p. 142.

[756] Lin, note 730, p. 67.

that this decision will clear the path for future claims is probably too optimistic, as on most grounds the Dutch tribunals found the State responsible on the basis of Dutch civil and tort law only, which means that it can not be confidently stated that this approach can be replied in other domestic systems. Nonetheless, the finding of responsibility under Articles 2 and 8 ECHR offers an interesting basis for future cases. The Court used the general, non-binding UNFCCC objectives as scientific evidence of the State's failure to comply with domestic and European human rights law obligations, rather than considering these climate change law sources as obligations themselves. Similarly was argued in paragraph 3.1.3.1.1., with reference to Voigt's suggestions about reading the 2°C objective in Article 2 UNFCCC as an interpretative norm that can substantiate the general obligations stemming from other provisions, or from other climate change law treaties. In *Urgenda*, the court adopted a similar approach, using the most authoritative indications in climate change treaties to replenish the empty spaces left by the domestic rules on the "duty of care".

It will be interesting to see if the same process may take place within other courts, using the UNFCCC objectives to direct the conduct of States within the wide margin of appreciation left to them in the context of environmental law legislation. The doctrine of shared responsibility would undoubtedly benefit from the *Urgenda* decision, if the substantial legal positions taken by the Dutch courts were also adopted by international tribunals, although it has been explained that a domestic approach is not immediately replicable on an international level. Indeed, the Netherlands' conduct was deemed as wrongful for the fact that the measures taken by the Dutch government were inadequate to reach a target that did not concern the Netherlands, but one that was global. For instance, the Netherlands were singularly tried in front of a domestic tribunal, but on a theoretical level nothing stands in the way for such approach to be directed, when on an international plane, also towards numerous countries for their failure to play their part in the path to fulfilling the global targets set in the context of the UNFCCC. The possibility that shared responsibility could be construed in this sense would, furthermore, also be highly beneficial for the increase of possibilities of reaching of the global targets. If, indeed, the countries that do not appear to be implementing adequate measures to be in pace with the common targets are held jointly responsible, there is a much higher possibility that these countries will strengthen their mitigation plans, as happened with the Netherlands. Another interesting aspect of a shared responsibility for the failure to implement measures adequate to the global targets is that, in being held jointly responsible, the defendant States would not be entitled to employ the argument, also used by the Netherlands, that that the failure to comply of a single State can not be causally linked to the failure to reach the target, when also other States have failed to fulfill their own obligations, having also contributed to the damage. What can be said is that the *Urgenda* decisions have paved the way for an exciting path in climate change litigation and that it is legitimate to have great curiosity in understanding where this path will be directed to.

### 3.2.2. *Tuvalu v. United States of America and Australia*

At the current stage there exist no judgments that considered the responsibility of multiple States for climate change related violations.[757] Nonetheless, a very close attempt took place in 2002, when the small island State of Tuvalu threatened the United States of America ("USA") and Australia to bring a claim before the ICJ for their failure to stabilize greenhouse gases emissions under the UNFCCC rules.[758] Unfortunately, the case at hand can merely serve to imagine possible instances of shared responsibility, but it may be interesting to look at the substantive literature that had been published at the time and at whether things may have changed after the most recent trends in climate change litigation.

First of all, it must be specified that Tuvalu had very little chances of reaching the merits phase in the present case,[759] as the United States would have likely rejected the jurisdiction of the ICJ, under Article 36(1) of the Court's Statute.[760] At the same time, even if Australia is among the countries that accepted the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute, such provision only operates in situations of reciprocity[761] and Tuvalu had not accepted compulsory jurisdiction. Finally, only the Netherlands had filed a declaration to the UNFCCC expressly accepting as mandatory the means of litigation included in Article 14(2) UNFCCC,[762] thereby including the ICJ.[763]

Proceeding to the merits of the claim, they essentially concern the UNFCCC-related findings on the fact that a concrete threat to the environment is posed by climate change, and to the consequent necessity to adopt immediate measures to mitigate such phenomenon.[764] One of the central arguments that were provided to suggest that the claim by Tuvalu was destined to be dismissed, was that neither the UNFCCC was

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757 Peel, note 538, p. 1013.

758 Amsterdam International Law Clinic and Michael G. Faure & André Nollkaemper, *Climate Change Litigation Cases,* Milieu Defensie (2007), p. 41.

759 *ibid.,* p. 42-43.

760 ICJ Statute, Article 36(1).

761 ICJ Statute, Article 36(2).

762 UNFCCC, Article 14(2).

763 UNFCCC, Declarations of the Parties, *Declaration by the Netherlands*: " "The Kingdom of the Netherlands declares, in accordance with paragraph 2 of Article 14 of the United Nations Framework Convention on Climate Change, that it accepts both means of dispute settlement referred to in that paragraph as compulsory in relation to any Party accepting one or both means of dispute settlement.", 17 February 2010.

764 Rebecca Elizabeth Jacobs, "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice", *Washington International Law Journal* (2005): 103-130; p. 108-111.

binding, nor was the United States of America a ratifying country to the Kyoto Protocol.[765] These propositions are both true and not much can be counter-argued. It shall be noted, however, that the *Urgenda* case suggests that, albeit non-binding, the ratification by the USA and Australia of the UNFCCC could be the means for a country to claim a violation of different, binding norms, for conducts that contrast with the indications contained in their climate change commitments. For example, the 2009 Report of the Office of the UN High Commissioner for Human Rights ("OHCHR")[766] suggested the existence of a general duty on all ratifying parties to the International Convention on Economic, Social and Cultural Rights ("ICESCR")[767] of reducing emissions, as indicated in the relevant international law instruments.[768] Considering that Australia is a party to the ICESCR,[769] Tuvalu could have had a more solid basis for its claim.

The Tuvalu claim could have been interesting for the perspective of obtaining a judgment of shared responsibility, since small State islands, as mentioned above, are amongst the most vulnerable to the immediate consequences of climate change, with Tuvalu being the front-runner since the country is being rendered uninhabitable by the sea level rise.[770] The case had been linked, in literature, to the *Nauru* case in front of the ICJ, as to the possible findings on the responsible parties and with regards to the fact that the duty to bring a case against all tortfeasors singularly does not prevent for the responsibility of each responsible party to be adjudicated.[771]

### 3.3. Conclusion

International law on State responsibility has demonstrated that cases concerning shared responsibility can be adjudicated, under the rules contained in Article 48 ARSIWA. Similarly, the *Urgenda* case

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[765] *ibid.,* p. 111-115.

[766] Office of the U.N. High Commissioner for Human Rights [OHCHR], *Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

[767] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[768] Marc Limon, "Human rights and climate change: constructing a case for political action", *Harvard Environmental Law Review,* Vol.33, No. 2 (2007): 439-477; p. 455.

[769] The ratifications of each UN human rights treaty, organized per country, can be found at: https://indicators.ohchr.org/

[770] Nollkaemper & Faure, note 591, p. 124-125.

[771] Hannah Stallard, "Turning up the heat on Tuvalu: an assessment of potential compensation for climate change damage in accordance with state responsibility under international law", *Canterbury Law Review,* Vol. 15 (2009): 163-204; p. 192.

demonstrated that findings of responsibility for climate change-related conduct can arise in relation to States that are parties to the most important climate change treaties. International law is not, by any means, a science of additions, but these two axioms can guide to the assumption that numerous countries may be found responsible for their failures to comply with climate change law obligations. Small island States like Tuvalu are legitimately the countries for which the expectations of success are the greatest, as the scientific evidence concerning the threat for their very existence is vast, but the *Urgenda* case demonstrates that immediacy of risk is not as strong a requirement, as is - instead - certainty of the risk.

For this reason, the perspective of bringing a claim against numerous obligations-breaching States does not represent an utopian scenario anymore and, moreover, the trend seems favorable to judgments like *Urgenda* to be replicated in other countries.[772] Whether shared responsibility can play a part in this process, it remains to be seen, but it can not be denied that both the factual features of the phenomenon - envisioning a global duty, thereby resulting in numerous potential responsible parties - both the progressive overcoming, via judicial pronouncements, of obstacles that were thought impassable for climate change litigation, suggest that the answer could eventually – and hopefully – be a positive one.

[772] See, for example: *Juliana v United States of America,* 217 F.Supp.3d 1224 (D Or 2016).

## CONCLUDING OBSERVATIONS

The final Chapter of the present thesis confirms that to treat the subject of shared responsibility without making any distinction of ambit is a hard task to fulfill and one that only partially describes the complexity of the matter. As has been seen with reference to the relationship between shared responsibility and climate change law, in fact, some of the most decisive factors in the question whether the doctrine can find application are encompassed in the dispositions of the primary law that regulates the matter specifically and the same remark is valid for each subject of study. Shared responsibility is, indeed, a potentially revolutionary introduction in international law. To conceive of such revolution as one that can invest contemporaneously the totality of the ambits that are regulated in international law is, to a large extent, unlikely.[773] More realistically, instead, if shared responsibility will become a reality, its establishment will be gradual and will initially depend on the judicial and legal developments pertaining to few particular ambits. The above is demonstrated by the *Nauru* case, where the ICJ left no questions as to the fact that the applicability of the principle of joint and several responsibility was dependent on the existence of such principle in the primary rules relevant for the dispute at stake. Essentially, shared responsibility will not find indiscriminate application,[774] but nothing prevents that it may be applied in specific contexts. The difficulties - substantive and procedural - that withstand between the current legal system and the establishment of the doctrine of shared responsibility are different for most ambits and for most tribunals, which eventually means that the question whether shared responsibility can find space in the general international law framework is one which finds no answer, at this moment in time.

This thesis, however, has highlighted numerous elements hinting to the ILC's awareness, or even favor, towards the question of shared responsibility. Nonetheless, these hints have found substantiation only in few provisions, such as Article 47 ARSIWA - regulating the invocation of responsibility against multiple responsible parties - which can be referred to as the most tangible indication of the possibility of shared responsibility.[775] Despite the absence of a solid and distinguished regulatory mechanism for questions of shared responsibility, however, it can not be denied that the possibility for numerous international actors to be held responsible for a single wrongful conduct exists, from a theoretical point of view. This is a necessary

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[773] Nollkaemper and Plakokefalos, note 24.

[774] André Nollkaemper and Ilios Plakokefalos, "Conclusions: Beyond the ILC Legacy", in *Principles of Shared Responsibility in International Law,* edited by Nollkaemper and Plakokefalos, Cambridge University Press (2014): 341-363; p. 354.

[775] Dominicé, note 180, p. 284-5.

starting point for any reasoning related to shared responsibility. The margin of legal foundation that supports the shared responsibility doctrine is somewhat subjective: if one requires, in order for a certain rule to be considered established, that such rule is addressed specifically and comprehensively by the legal system in which it finds placement, the doctrine of shared responsibility does not answer these requirements. On the opposite, if one admits that a rule may also arise independently from a comprehensive and specific positive establishment, then, a case for the immediate relevance of shared responsibility in the law of international responsibility can successfully be made. The author of the present thesis stands with the second option. It can be argued, in fact, that the international law regime is one that, compared to many domestic legal regimes, ought to privilege the element of flexibility,[776] at the loss of certainty.[777] The absence of punctual regulation does not automatically imply that a certain principle will not evolve in international law. A process of evolution and progressive application can consolidate the relevance of a rule in ways different to general positive regulation, such as through practice, soft law provisions, or sector-specific regulation.

However, one of the problems that affect the doctrine in object is constituted by the plurality of voices that overlap in the context of the scholarship. The scholarly interest in the matter and the absence of proper regulation have led to large debate on some of the essential aspects of the doctrine. For example, there exists disagreement as to whether a wrongful conduct forming the object of shared responsibility should be considered as a single wrongful act that may be attributed to multiple States,[778] or as multiple wrongful conducts performed by multiple States.[779] These remarks contribute to the conclusion that the doctrine of shared responsibility is still located at a very premature stage of development. There is no debate as to the fact that it does not currently fit the requirements to be considered a principle of general customary law and, in truth, it can not be said with certainty whether the direction in which the principle is moving is that of a progressive increase in its application by international tribunals. Important past judicial decisions, especially with reference to military operations which have included international organizations and States, have largely ignored the question of shared responsibility, or even merely the question of dual attribution, and, despite some interesting insights arriving from domestic tribunals on the matter, it would be utopian to

[776] Jaye Ellis, “Shades of Grey: Soft Law and the Validity of Public International Law”, *Leiden Journal of International Law*, Vol. 25 (2012): 313–334; pp. 332-334.

[777] For a general description of the conflict between these elements: Kermit Roosevelt, “Certainty vs. Flexibility in the Conflict of Laws”, University of Penn Law School, Public Law Research Paper No. 18-40.

[778] Vaughan Lowe, “Responsibility for the Conduct of Other States”, *Japanese Annual of International Law,* Vol. 1 (2002): 2-24; p. 6.

[779] Ahlborn, note 42, p. 53.

look at the judicial history concerning the attribution of responsibility to multiple States and to affirm that the momentum is moving towards the establishment of the doctrine.[780]

There exists, however, a specific scenario that has drawn some concordance: the conduct performed by a joint organ, controlled by multiple States, that does not possess a separate legal personality.[781] With reference to this particular hypothesis, in fact, there has been diffuse consensus in scholarship that the interested States would jointly responsible for the conduct.[782] It is not a coincidence that some of the most important judgments on the matter of shared responsibility, including the *Eurotunnel* arbitration award - the only one which expressly found multiple State responsible for a single wrongful conduct[783] - were delivered in the context of a conduct performed by a joint entity. Much more complex, as was exhaustively discussed, is the question whether the same considerations can apply to international organizations endowed with a legal personality, such as the UN, or NATO. There have been notable personalities voicing the opinion that, in considering the responsibility of States members of organizations *vis-à-vis* damaged parties , "the existence or not of separate legal personality would appear to be inconclusive, or, on another view, irrelevant".[784] However, practice has been prevalent in the opposite sense, leaving wishes of full accountability unanswered in the context of wrongful conducts performed by international organizations. In this particular context, diplomatic considerations make their way in the equation: States do not accept to be held responsible for acts that have been committed by international organizations[785] and international organization do not want to risk losing State membership and are thus willing to centralize responsibility on themselves.[786]

It may be said, returning to the question of the paradoxes inherent to shared responsibility mentioned in Chapter One, that shared responsibility is the right idea in the wrong place. Personally, I am fascinated by the possibility that such doctrine could serve as a possible solution to reiterated accountability gaps and, to a

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[780] A dated contribution, although the consistency of the practice of tribunals has not increased significantly since then, headed in the same direction can be found in: Bernard Graefrath, "Complicity in the Law of State Responsibility", *Reveu Belge de Droit International,* Éditions Bruyland (1996): 371-381; see also, Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, Hart Publishing, 2016, p. 15.

[781] James Crawford, *State Responsibility,* Cambridge University Press, 2013, p. 340.

[782] Dominicé, note 180, p. 287; Dannenbaum, note 135.

[783] *Eurotunnel,* note 139.

[784] Ian Brownlie, "The Responsibility of States for the Acts by International Organizations", in *International Responsibility Today. Essays in Memory of Oscar Schachter,* edited by Maurizio Ragazzi, Martinus Nijhoff Publishers (2005): 355-362; p. 360.

[785] Kazuhiro Nakatani, "Responsibility of Member States Towards Third Parties", in *Responsibility of International Organizations,* edited by Maurizio Ragazzi, Martinus Nijhoff Publishers (2013): 293-301; p. 301.

[786] Cedric Rygnaert, "Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after *Behrami*", *Israel Law Review*, Vol. 45, No. 1 (2012): 151-178; pp. 163-164.

certain extent, as a viable approach to the global challenge of climate change. Furthermore, the comments made in the introduction, regarding the growing interconnectedness between States and the increase in cooperated actions in the global scope, are undeniably true.[787] From this perspective, it is likely that at a certain point in time the doctrine of shared responsibility will be revisited by international tribunals and establish itself as a proper rule. The main problem is, at the current stage, that such inference can only be made moving from considerations that attain to the world of international relations, while it would not be equally justified looking at the legal history revolving around the matter, considering that, as said, it is virtually unexplored by tribunals.

It can be concluded, thus, that the doctrine of shared responsibility is distant from being a consolidated rule of international law, despite the existence of a legal theoretical framework, albeit dispersive and opaque at times. The deficiencies can be reduced in two general questions: the absence of a solid and compact legal regulation and the absence of judicial practice. If the former, as has been argued above, can not be considered decisive in itself, it acquires relevance as a fueling factor in connection to the latter reason. The two areas are mutually linked by a causal relationship, which creates an *impasse*, where the positive law dispositions that would regulate the subject of shared responsibility are too generic to overcome the political, procedural and substantial obstacles that hinder their application[788] and judicial decisions that affirm the responsibility of multiple States for a single wrongful conduct are inexistent and can not contribute to a more punctual legislative effort. In sum, the absence of clear rules hinders the delivery of explicit judgments and, contextually, the absence of explicit judgments in favor of shared responsibility prevents the ILC from interpreting the rules on international responsibility contained in the Articles in a way favorable to the establishment of the doctrine.

In some particular ambits which may be considered particularly permeable to the doctrine of shared responsibility, such as the law regulating military operations and environmental law, courts have attempted to break this *impasse* with the delivery of powerful and creative judgments, such as *Urgenda* and *Mustafić and Nuhanović*. For how these deliveries deserve to be praised as remarkable attempts, it is far from automatic that these sentences have the capacity to produce imitative effects in other fields of law, or even that they will have the capacity to consolidate a strong precedent in their own particular ambit. Some fortune could assist the applicability of the doctrine of shared responsibility with reference to the ambit of international climate change law, to the ambit of international peacekeeping operations (with more prudence) and to episodes in which States cooperate in the formation of a joint organ which commits a wrongful

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[787] Helmut Philipp Aust, *Complicity and the Law of State Responsibility,* Cambridge University Press, 2011 , pp. 23-35.

[788] Nataša Nedeski and André Nollkaemper, "Responsibility of International Organizations 'in connection with acts of States'", *International Organizations Law Review*, Vol. 9 (2012): 33-52; pp. 49-50.

conduct. However, this randomness in the potential application of the principle does surely not increase its chances of affirming itself as a principle of customary law, a scenario that seems very distant, at the current stage.

In conclusion, the projected avenues for the doctrine of shared responsibility remain largely undisclosed and in the hands of international tribunals, which are the actors who have the largest power to influence its future. Political and social instances can constitute a driving force for the advancement of the discourse over this discipline and the dispositions present in the ARIO and ARSIWA a solid starting point, but, in general terms, it is still early to confide in the consolidation of the doctrine. Nonetheless, some hope can be placed for a tangible development in the areas that have been addressed more specifically during this thesis: climate change law and humanitarian law, specifically with reference to military operations involving national troops acting under the mandate of international organizations.

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