

GUIDING PRINCIPLES ON SHARED RESPONSIBILITY IN INTERNATIONAL LAW

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

PART I – DETERMINATION OF SHARED RESPONSIBILITY

Principle 1

Use of terms

For purposes of the present Guiding Principles:

- (a) ‘international person’ means states and international organizations;
- (b) ‘person’ means actors other than states and international organizations;
- (c) ‘injury’ means material and non-material damage, and does not include legal injury;
- (d) ‘contribution to injury’ means a causal relationship between conduct and injury.

Principle 2

Shared responsibility of international persons

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

Principle 3

Shared responsibility arising from a single internationally wrongful act

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

- (a) is attributable to multiple international persons; and
- (b) constitutes a breach of an international obligation for each of those international persons; and

- (c) contributes to the indivisible injury of another person.

Principle 4

Shared responsibility arising from multiple internationally wrongful acts

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

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

Principle 5

Circumstances precluding wrongfulness in situations of shared responsibility

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

PART II – SPECIFIC SITUATIONS OF SHARED RESPONSIBILITY ARISING FROM MULTIPLE INTERNATIONALLY WRONGFUL ACTS

Principle 6

Shared responsibility in situations of aid or assistance

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

Principle 7

Shared responsibility in situations of concerted action

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

Principle 8

Shared responsibility in situations of control

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

PART III – CONTENT OF SHARED RESPONSIBILITY

Principle 9

Cessation and non-repetition in situations of shared responsibility

1. Each international person sharing responsibility is under an obligation:
 - (a) to cease the act attributable to it, if this act is continuing;
 - (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. Each responsible international person is under an obligation to ensure that other responsible international persons fulfil their obligations pursuant to paragraph 1.

Principle 10

Reparation in situations of shared responsibility

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

Principle 11

Forms of reparation in situations of shared responsibility

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

Principle 12

Right of recourse

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

Principle 13

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

1. When multiple international persons commit one or more internationally wrongful act(s) that constitute a serious breach of an obligation arising under a peremptory norm of general international law and contribute to an indivisible injury, all other international persons are under an obligation

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

PART IV – IMPLEMENTATION OF SHARED RESPONSIBILITY

Principle 14

Invocation of shared responsibility

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

Principle 15

Countermeasures in situations of shared responsibility

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

2. Text of the Guiding Principles on Shared Responsibility in International Law and commentaries thereto:

Introduction

The Guiding Principles on Shared Responsibility in International Law (hereinafter ‘the Principles’) provide guidance to judges, practitioners and researchers when confronted with legal questions of shared responsibility of states and international organizations.

The Principles substantiate, supplement, and adjust the existing rules on the law of international responsibility, as those are reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts¹ (ARSIWA) and the Articles on the Responsibility of International Organizations² (ARIO). They build on the rules in the ARSIWA and ARIO that address situations of shared responsibility. The Principles expand on those rules based on the practice of states and international organizations, and by relying on subsidiary means for the determination of rules of law such as authoritative scholarly studies and decisions by international and domestic courts and tribunals.

The Principles have been elaborated by a group of international lawyers with recognized expertise in the field of international responsibility. They draw on the findings and output generated by a major research project on shared responsibility in international law (SHARES) funded by the European Research Council (2010–2015) and conducted at the University of Amsterdam. The drafting process took place between 2016 and 2019 and included wide-range consultations with practitioners and international judges. During that period, earlier drafts of the Principles were subject of extensive discussion in academic circles.³

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

The Principles and the commentaries thereto do not systematically distinguish between those Principles that codify existing rules of international law and those that constitute progressive development. This is in line with the working methods of the International Law Commission (ILC).⁴ The commentaries to the Principles indicate the extent to which any Principle is supported by existing rules, practice and authoritative scholarship. When a Principle departs from existing rules of the law of international responsibility, the commentaries indicate this explicitly and provide the policy considerations for such a departure, as well as reference to concurring practice and scholarship.

¹ Articles on the Responsibility of States for Internationally Wrongful Acts, 2(2) *ILC Yearbook* (2001), UN Doc. A/56/10, at 26–30 (‘ARSIWA’); Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries thereto, 2(2) *ILC Yearbook* (2001), UN Doc. A/56/10, at 31–143 (‘ARSIWA commentaries’).

² Articles on the Responsibility of International Organizations, 2(2) *ILC Yearbook* (2011), UN Doc. A/66/10, at 40–46 (‘ARIO’); Articles on the Responsibility of International Organizations with commentaries, 2(2) *ILC Yearbook* (2011), UN Doc. A/66/10, at 46–105 (‘ARIO commentaries’).

³ Academic events specifically dedicated to the Principles include those that took place at the Faculty of Law of Humboldt University on 2 March 2017, at All Souls College at the University of Oxford on 1 March 2018, at the Faculty of Law of the University of Amsterdam on 19 March 2018, at the Lauterpacht Research Centre in International Law at the University of Cambridge on 6 June 2018, and at the Asser Institute in The Hague on 23 November 2018 and 28 June 2019.

⁴ United Nations, *The Work of the International Law Commission*, Vol. I, 9th ed. (2017), at 47–49.

PART I – DETERMINATION OF SHARED RESPONSIBILITY

Principle 1

Use of terms

For purposes of the present Guiding Principles:

- (e) ‘international person’ means states and international organizations;
- (f) ‘person’ means actors other than states and international organizations;
- (g) ‘injury’ means material and non-material damage, and does not include legal injury;
- (h) ‘contribution to injury’ means a causal relationship between conduct and injury.

Commentary

1. Principle 1, subparagraph (a), states that the term ‘international person’ used in the Principles means states and international organizations. This definition aligns the Principles with the scope of the ARSIWA and the ARIIO, which apply to states and international organizations that are subject to international obligations and that may incur international responsibility. The Principles are without prejudice to the possibility that other actors, such as individuals or other non-state actors, bear international obligations and share responsibility in certain circumstances.

2. The Principles use the term ‘person’, as defined in subparagraph (b), to refer to situations in which individuals or other non-state actors bear rights under international law and may invoke shared responsibility and claim reparation for injury. In this respect, the Principles go beyond the scope of the ARSIWA and the ARIIO, which do not address the invocation of responsibility and claims of reparations by individuals and other persons.⁵ The wider scope of the present Principles, which take into account that individuals and other persons may invoke responsibility, corresponds to contemporary practice in the law of international responsibility, in particular in international human rights law and investment arbitration. This practice illustrates that responsibility may be shared in situations in which injured parties are not states or international organizations.

3. Principle 1, subparagraph (c), defines ‘injury’ as material and non-material damage. As generally accepted in the law of international responsibility, injury ‘includes any damage, whether material or moral, caused by the internationally wrongful act of⁶ an international person.

4. The definition of injury does not include legal injury, which is understood as the injury inherent in a breach of international law.⁷ The reason for excluding legal injury is that the Principles

⁵ See commentary to Article 33 ARSIWA, para. 4: ‘It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility’.

⁶ Articles 31(2) ARSIWA and ARIIO.

⁷ J. Crawford, *State Responsibility: The General Part* (2013), at 487; B. Stern, ‘The Obligation to Make Reparation’, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), at 569; B. Stern, ‘A Plea For “Reconstruction” of International Responsibility Based on the Notion of Legal Injury’, in M. Ragazzi (ed.) *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 93; J. Barboza, ‘Legal injury: The Tip of the Iceberg in the Law

limit the scope of shared responsibility to indivisible injury (Principle 2) and that one of the main legal consequences of shared responsibility is the obligation of each international person sharing responsibility to make full reparation for the indivisible injury (Principle 10). Such an obligation cannot arise as a result of legal injury alone, considering that legal injury does not give rise to an obligation of reparation.⁸ This definition of injury is without prejudice to the situation where the conduct of multiple international persons results solely in legal injury and engages their international responsibility.

5. Principle 1, subparagraph (d), clarifies that ‘contribution to injury’ means a causal relationship between conduct and injury.⁹ Different tests exist to establish such a causal relationship. No specific test of causation is prescribed by international law.¹⁰ The Principles do not seek to impose a general test of causation between conduct and injury that would for all situations of shared responsibility define when a particular conduct does or does not constitute a contribution to injury. Yet, they do provide guidance on the possible ways in which the causal relationship between conduct and injury can be established in situations of shared responsibility, in particular with a view to apprehending multiple contributions to the same injury.

Principle 2

Shared responsibility of international persons

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

Commentary

1. Principle 2(1) sets forth in which situations shared responsibility for the purpose of the Principles arises. Shared responsibility refers to situations in which two or more international persons share responsibility for their contribution to an indivisible injury of third persons. The defining feature of shared responsibility is that multiple international persons, by committing one or more internationally wrongful acts, contribute to an indivisible injury. Shared responsibility may arise from collective conduct, in situations in which international persons engage in cooperation, such as in multinational military operations, or from independent conduct, such as multiple states independently contributing to environmental harm.¹¹

2. All situations of shared responsibility involve the commission of one or more internationally wrongful acts. The Principles do not deviate from the definition of an internationally wrongful act in the law of international responsibility. An internationally wrongful act is constituted by a conduct attributable to an international person and in breach of an international legal obligation of that

of State Responsibility?’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 7.

⁸ This is consistent with the notion of injury in Article 31 ARSIWA which does not include legal injury.

⁹ The notion of contribution to injury as used in these Principles differs from the notion of contribution to injury by wilful or negligent action or omission of the injured international person, as found in Articles 39 ARSIWA and ARIO.

¹⁰ D. Pusztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 112; A. Gattini, ‘Breach of International Obligations’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 25, at 30–31.

¹¹ Commentary to Article 47 ARSIWA, para. 8.

international person. The existence of both elements, i.e. attribution of conduct and breach, is determined in accordance with the existing rules on the law of international responsibility, especially Articles 4 to 11 of the ARSIWA and Articles 6 to 9 of the ARIO. A contribution to an indivisible injury that does not involve a breach of an applicable international obligation does not give rise to shared responsibility.

3. Principle 2(1) stipulates that international persons only share responsibility when they contribute to an *indivisible injury* of another person. This Principle delimits the scope of the complex cases that the Principles address. One or more internationally wrongful acts that do not contribute to an indivisible injury do not fall within the scope of the present Principles. For purposes of the present Principles, responsibility is only shared when one or more wrongful acts contribute to an indivisible injury.

4. International persons thus do not share responsibility pursuant to these Principles when they contribute to an injury that is *divisible*. An injury is divisible when contributions to that injury can be distinguished from each other by using a factual test of causation. This will be the case when an internationally wrongful act qualifies as the single necessary and sufficient cause of a certain injury: that injury would not have occurred but for the wrongful act (hence it was necessary), and the wrongful act was sufficient on its own to bring about that injury. In such a situation, the international person committing that internationally wrongful act would not incur *shared* responsibility but *independent* international responsibility. Such independent responsibility would be established under the generally accepted principles of international responsibility.¹²

5. Principle 2(2) sets out that an indivisible injury resulting from the conduct of multiple international persons can arise in three types of situations: in the case of an *individual contribution* in which a single contribution caused the injury by itself, in the case of *concurrent contributions* in which each of the contributions could have caused the injury by itself, and in the case of *cumulative contributions* in which the conduct of multiple international persons together results in an injury that none could have caused on their own.¹³

6. *Individual contribution* to injury covers situations in which one contribution that is attributable to multiple international persons is sufficient to cause the injury of its own. An example can be found in the situation addressed in the *Nauru* case before the International Court of Justice (ICJ), where the conduct of the Administering Authority established by Australia, New Zealand and the United Kingdom (UK) that damaged phosphate lands in Nauru was attributable to each of the three states.¹⁴ Another example can be taken from the facts of the *Gabčíkovo-Nagymaros* case. The system of barrages originally planned jointly by Hungary and Czechoslovakia involved a project intended to be jointly implemented by two upstream riparian states. Had such a joint act resulted in harm to one or more of

¹² Commentary to Chapter IV of Part One, ARSIWA, para. 1 (“The principle that State responsibility is specific to the State concerned underlies the present articles as a whole”).

¹³ Similar distinctions have been formulated in scholarship. See e.g. H.L.A. Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985); B. Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973); D. Puztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 180–187. See also Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur, (2)1 *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4., para. 31.

¹⁴ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, paras. 45–47.

the downstream co-riparian states, including Serbia, Croatia, Bulgaria, Romania, Moldova, and Ukraine,¹⁵ this could have constituted an individual contribution to an indivisible injury.

7. *Concurrent* contributions to injury concern situations in which each of the respective acts or omissions of multiple international persons would have been sufficient to cause the injury. In order to identify such concurrent contributions that engage shared responsibility, a test of causal sufficiency can be applied. In contrast, the ‘but-for’ test of causation is not helpful for identifying concurrent contributions, since ‘but for’ one of the contributions, the injury would have still occurred.¹⁶ If, for instance, in the context of operations carried out by Iraq and the coalition against the Islamic State led by the United States (US), both the US and Iraq were to simultaneously bomb a civilian hospital in Syria, each of these actions would have been sufficient to cause the injury and would therefore qualify as a concurrent contribution to an indivisible injury.¹⁷ In another example, in 2011, a boat with seventy-two persons on their way to the Italian island of Lampedusa ran out of fuel and drifted along the Libyan shore before washing up sixteen days later with only eleven survivors.¹⁸ As several states, including Italy and Malta, had boats in the sea area at the time and received distress signals, it could be argued that both states were in the position to take action and can be held responsible for their omission to act. Their concurrent failures to attempt rescue each would have been sufficient to produce the indivisible injury.

8. *Cumulative* contributions to injury refer to the wide variety of situations in which multiple internationally wrongful acts accumulate and jointly produce an injury. In the *Corfu Channel* case,¹⁹ ‘the laying of the minefield [...] could not have been accomplished without the knowledge of the Albanian Government’,²⁰ thus the laying of the mines and Albania’s failure to warn British Royal Navy ships of the presence of these mines together resulted in the injury. Similarly, under the case file system within the framework of the Berne Convention on European Wildlife and Natural Habitats,²¹ the Convention Secretariat addressed the planned construction of a tourist resort in a Moroccan national park which threatened the habitat of a bird that was protected under the Convention. Not only did it find Morocco’s planned construction to be in breach of the Convention, it also expressly took the position that the funding provided by France for the tourist resort would engage the international responsibility of the latter state.²² If the actual construction of such a tourist resort had indeed destroyed the habitat of this endangered bird, the internationally wrongful acts of both states would have jointly produced the injury. In the case of climate change, the failure of a state to reduce CO₂ emissions in line with its international obligations may not be sufficient on its own to cause adverse global warming, but the combined failure to reduce CO₂ emissions of many states can result in such an indivisible injury.²³ The

¹⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7. See O. McIntyre, ‘Transboundary Water Resources’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 905.

¹⁶ D. Pusztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 190; I. Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, 26 *EJIL* (2015) 471–492, at 477.

¹⁷ This corresponds, in causation theory, to the classical example of the hunting cross-fire accident where multiple bullets concurrently hit and cause the death of a victim (see *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948)).

¹⁸ Forensic Oceanography, ‘Report on the “Left-To-Die Boat”’, 11 April 2012.

¹⁹ *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4.

²⁰ *Ibid.*, at 22.

²¹ Convention on the Conservation of European Wildlife and Natural Habitats, Berne, 19 September 1979, in force 1 June 1982, ETS No. 104.

²² A. Trouwborst, ‘Nature Conversation’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 987, at 1006.

²³ J. Peel, ‘Climate Change’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 1009, at 1010 and 1032.

same can be said about the failure of multiple states to take necessary conservation measures with regard to their nationals engaged in fisheries of fish stocks in the high seas, which results in stock depletion.²⁴

9. In situations of cumulative contributions, it will have to be determined which conduct constitutes a contribution that engages international responsibility. Various tests have been devised to determine cumulative causes²⁵ and could be used for this purpose. One such test considers a conduct to be a contribution that engages responsibility when it constitutes a material contribution to the injury.²⁶ An international person materially accordingly contributes to injury when its ‘wrongful conduct played a more than minimal role in a mechanism which was causally sufficient for the claimant’s damage’.²⁷ An alternative test to identify cumulative contributions giving rise to shared responsibility examines whether, together with the contributions of other international persons, a conduct is part of a jointly sufficient set of contributions.²⁸ An application of this test may be found in the reasoning of the Arbitral Tribunal in the *Naulilaa* case, which concerned a claim for reparation following a German offensive in a Portuguese colony. Portugal claimed compensation for damage to live stock, military equipment, and increased costs, due to the haste with which it had to launch a counter-offensive. However, Germany opposed that these damages would have occurred independently of its offensive.²⁹ The Arbitral Tribunal held that the German act of aggression caused Portugal to accelerate and redirect its forces, and therefore the damage resulted from the combined effect of the acceleration by Portugal and the aggression by Germany.³⁰ Another possible illustration is Albania’s contribution to the UK’s injury in the *Corfu Channel* case³¹, which can be analysed in terms of jointly sufficient contributions. The injury ‘was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence’, and ‘[b]oth are efficient causes of the injury, without which it would not have occurred.’³²

10. Situations of aid or assistance, concerted action and control as they are addressed in Part II of the present Principles often consist of an accumulation of acts or omissions that jointly produce the

²⁴ Y. Takei, ‘Fisheries’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 350, at 353–354; E.J. Molenaar, ‘Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach’, 19(3) *IJMCL* 223 (2004), at 227–228.

²⁵ See examples given in I. Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’, 26 *EJIL* (2015) 471.

²⁶ See D. Pusztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 253–254 (stating that the internationally wrongful act should have contributed to the occurrence of the injury and that such contribution was major, not marginal, and also noting that this rule is supported by the jurisprudence of human rights courts, the UNCC and the Eritrea-Ethiopia Claims Commission).

²⁷ S. Steel, ‘Causation in English Tort Law: Still Wrong After All These Years’, (2012) 31 *University of Queensland Law Journal* 243, at fn 3.

²⁸ This is similar to the so-called NESS test (requiring that a conduct is a necessary element in a jointly sufficient set of contributions); see e.g. R.W. Wright, ‘Causation in Tort Law’, 73(6) *California Law Review* (1985) 1735; D. Pusztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 110; I. Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, 26 *EJIL* (2015) 471, at 477. A comparable test (INUS test) enquires whether a contribution is an insufficient but necessary element of an unnecessary but sufficient set (J.L. Mackie, *The Cement of the Universe: A Study of Causation* (1980));

²⁹ *Responsabilité de l’Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne) (Naulilaa)*, Decision of 30 June 1930, reprinted in 2 UNRIAA (2006) 1035, at 1069.

³⁰ *Ibid.*, at 1071; I. Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, 26 *EJIL* (2015) 471, at 487.

³¹ *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4.

³² Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4., para. 31.

injury. For instance, in the *El-Masri* case before the European Court of Human Rights (ECtHR),³³ agents of Macedonia handed El-Masri over to agents of the US Central Intelligence Agency (CIA) who subsequently subjected him to torture and ill-treatment. Though the Court only expressed itself on the wrongful conduct of Macedonia, on the basis of the information available on the conduct of the US, it can be said that the conduct of Macedonia and the US together produced the indivisible injury.

11. Principle 2 also covers situations that involve a combination of cumulative and concurrent contributions. This occurs, for instance, when the contributions of fifteen states are jointly sufficient to cause marine pollution, resulting in the extinction of a particular species. Additional pollution by five other states can be seen as not necessary in light of the other contributions that were jointly sufficient to cause the species extinction. However, in the absence of some of the contributions of the fifteen original polluters, the contributions of the latter five states *could have been* necessary within the jointly sufficient set of contributions.³⁴ In the case of climate change, individual failures to reduce CO₂ emissions can also be analysed in these terms. The inclusion of such supplementary contributions in the scope of shared responsibility is premised on the idea that an international person having committed an international wrongful act contributing to an injury should not be able to escape shared responsibility simply because others have already contributed to the same injury.

Principle 3

Shared responsibility arising from a single internationally wrongful act

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

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

Commentary

1. Principle 3 addresses situations in which multiple international persons are responsible for a *single* wrongful act that results in an indivisible injury. As explained in the commentaries to the ARSIWA in relation to responsibility of states, a ‘single wrongful act’ arises when two or more international persons engage in ‘a single course of conduct [which] is at the same time attributable to several [international persons] and is internationally wrongful for each of them.’³⁵

2. Principle 3 stipulates the necessary elements of shared responsibility for a single internationally wrongful act. Shared responsibility pursuant to this principle arises from a single conduct that is attributed to multiple international persons, and that constitutes a breach of an international

³³ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment of 13 December 2012.

³⁴ D. Pusztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 186 (defining contributory causation as a situation in which ‘a factor is neither necessary, nor sufficient for the occurrence of the injury, but it nevertheless made a contribution to its occurrence and it could have theoretically caused the injury as a cumulative cause in a sufficient combination of causes’).

³⁵ Commentary to Article 47 ARSIWA, para. 3.

obligation of those international persons. Principle 3 further provides that the conduct should contribute to the indivisible injury of another person. This corresponds to the definition of shared responsibility contained in Principle 2. Accordingly, situations in which international persons share responsibility in relation to a single internationally wrongful act can be construed in terms of an individual contribution to an indivisible injury.³⁶ This individual contribution is attributed to multiple international persons, as defined in Principle 2(2).

3. The possibility of multiple attribution of conduct is based on the consideration that attribution of conduct to an international person does not preclude the possibility that the same conduct is attributed to another person. Therefore, by application of the rules on attribution of conduct of Articles 4 to 11 ARSIWA and Articles 6 to 9 ARIO, the same conduct may be simultaneously attributed to more than one international person.³⁷ Multiple attribution of conduct has been acknowledged in practice.³⁸ It is also recognized in Article 47 ARSIWA and Article 48 ARIO in relation to the invocation of responsibility, as well as in scholarship.³⁹

4. Principle 3 covers situations in which conduct is carried out by a person or entity acting on behalf of more than one international person at the same time, for instance when the organ of an international person is put at the non-exclusive disposal of another. In such a situation, the lent organ has a functional or factual link with both international persons.⁴⁰ This may happen in multinational military operations when states transfer operational control over their soldiers to the United Nations (UN), while retaining non-transferrable elements of full command (control over organic matters such as recruitment, training and discipline). Under the test of effective control enshrined in Article 7 ARIO, the conduct of a peacekeeper may be attributed to both the UN and the troop-contributing state if factual circumstances show that both parties exercised control over the contingent.⁴¹

5. Principle 3 also addresses situations in which a wrongful act is carried out by the common organ of multiple international persons. A common organ is an individual or entity that acts on behalf of multiple international persons and which does not have a separate international legal personality.⁴² A common organ qualifies as the organ of each of the international persons on behalf of which it acts.

³⁶ See the commentary to Principle 2, para. 6.

³⁷ Commentary to Article 1 ARSIWA, para. 6, and commentary to Article 47 ARSIWA, para. 3; Second Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur, 2(1) *ILC Yearbook* (2004), at 14, UN Doc A/CN.4/541, para. 48.

³⁸ ECtHR, *Al-Jedda v. the United Kingdom*, Application no. 27021/08, Judgment of 7 July 2011, para. 80 ('The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force *became attributable to the United Nations or – more importantly, for the purpose of this case – ceased to be attributable to the troop-contributing nations*'; emphasis added); *Hasan Nubanovic 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), para. 5.9; *Hasan Nubanovic v. the Netherlands*, Supreme Court, (6 September 2013) ECLI:NL:HR:2013:BZ9225, para. 3.9.4.

³⁹ E.g. S. Besson, 'La Pluralité d'Etats Responsables: Vers une Solidarité Internationale?' (2007) 17 *Revue Suisse de Droit International et de Droit Européen* 13, at 21; J. Crawford, *State Responsibility: The General Part* (2013), at 333; C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 281; F. Messineo, 'Attribution of Conduct', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 60; A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', 9(5) *JICJ* (2011) 1143.

⁴⁰ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur, 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4., para. 267, point 1; ARIO commentary to Article 7, para. 1.

⁴¹ B. Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control', 18(2) *Melbourne Journal of International Law* (2017) 154, at 171.

⁴² Commentary to Chapter IV of Part One, ARSIWA, para. 3; J. Crawford, *State Responsibility: The General Part* (2013), at 340.

Therefore, its conduct is simultaneously attributed to each of these international persons.⁴³ In this regard, the ILC has noted that ‘the conduct of the common organ cannot be considered otherwise than as an act of each of the [international persons] whose common organ it is’.⁴⁴ An example of a common organ that is relevant in relation to shared responsibility was the Administering Authority set up by Australia, New Zealand and the UK in Nauru.⁴⁵ As the ICJ noted in the Nauru case, ‘this Authority did not have an international legal personality distinct from those of the States thus designated’.⁴⁶ Rather than a separate legal person, the Administering Authority was a common organ of Australia, New Zealand and the UK.⁴⁷ Other examples include the Channel Tunnel Intergovernmental Commission,⁴⁸ the Coalition Provisional Authority set up by the UK and the US during the occupation of Iraq,⁴⁹ the Kommandatura established by the Allied Powers to administer Berlin,⁵⁰ and the Force Commander of the Allied Powers in Japan.⁵¹ A body set up by two riparian states in order to manage a boundary river and supervise harmful discharges could also qualify as a common organ.⁵²

6. In addition, Principle 3 covers situations in which two or more international persons ‘combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation’.⁵³ In such situations of joint conduct, when the entire operation is carried out jointly by two or more international persons, the operation is attributed to each international persons, which, acting through its own organs, co-authored the wrongful act.⁵⁴ In the *Legality of Use of Force* cases, for example, Serbia and Montenegro argued that the respondent states would be jointly and severally responsible for their actions within the North Atlantic Treaty Organization (NATO) military command structure, which it argued constituted an instrumentality of the respondent states.⁵⁵ In particular, the applicant submitted that the North Atlantic

⁴³ Commentary to Article 6 ARSIWA, para. 3; F. Messineo, ‘Attribution of Conduct’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 60, at 72; J. Crawford, *State Responsibility: The General Part* (2013), at 340; C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 281, at 283.

⁴⁴ Report of the International Law Commission on the work of its thirtieth session, 8 May - 28 July 1978, 2(2) *ILC Yearbook* (1978), at 99.

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

⁴⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, para. 47.

⁴⁷ M. Saul, ‘Internationally Administered Territories’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 15, at 19.

⁴⁸ Eurotunnel Arbitration (*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*), Partial Award, PCA Case no. 2003-06, 30 January 2007, para. 179.

⁴⁹ E. Milano, ‘Occupation’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility* (2017) 733, at 750; C. Chinkin, ‘The Continuing Occupation? Issues of Joint and Several Liability and Effective Control’, in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008) 161, at 174; S. Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’, in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008) 185, at 203.

⁵⁰ European Commission of Human Rights, *Hess v. United Kingdom*, Application no. 6231/73, Decision of 28 May 1975), at 73–74.

⁵¹ *Anglo-Chinese Shipping Company Ltd v. United States*, United States Court of Claims (11 January 1955), at 986.

⁵² Commentary to Article 47 ARSIWA, para. 2.

⁵³ *Ibid.*

⁵⁴ I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), at 190–191; B. Boutin, *The Role of Control in Allocating International Responsibility in Collaborative Military Operations* (2015) Doctoral dissertation, University of Amsterdam, at 106; F. Messineo, ‘Attribution of Conduct’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 60, at 80.

⁵⁵ *Legality of Use of Force (Serbia and Montenegro v. UK)* (Oral Proceedings) (Public Sitting 12 May 1999), Verbatim Record 1999/25. See T. Stein, ‘The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?’, in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment*

Council directed the war against Yugoslavia as a joint enterprise and that '[i]t would be a legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member States. This joint and several responsibility was justified both in legal principle and by the conduct of the member States.'⁵⁶ Another example of conduct that may constitute joint conduct of multiple international persons is the joint naval patrols carried out by Benin and Nigeria in the Gulf of Guinea as part of an anti-piracy operation.⁵⁷ The same could be said for a situation in which two soldiers – each belonging to a different coalition partner – jointly operate a tank that unlawfully kills a civilian.⁵⁸

7. Shared responsibility for a joint conduct only arises when the wrongful act consists of a single course of conduct attributable to multiple international persons. If multiple international persons closely coordinate their action but engage in separate conduct, the situation is not one of shared responsibility for a single wrongful act but rather one of shared responsibility for multiple internationally wrongful acts that could concurrently or cumulatively cause the injury. Shared responsibility under Principle 3 must thus be distinguished from shared responsibility arising under Principle 4 (shared responsibility arising from multiple wrongful acts), which finds particular application in Principle 6 (shared responsibility arising from aid or assistance), Principle 7 (shared responsibility for concerted action) and Principle 8 (shared responsibility in situations of control).

8. A single wrongful act can also consist of a composite act, which is 'a series of actions or omissions defined in aggregate as wrongful'.⁵⁹ For example, the act of genocide concerns some aggregate conduct and not individual acts as such.⁶⁰ Genocide is not committed 'until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent';⁶¹ which might be committed by a plurality of international persons. However, this does not mean that an act or omission of an international person that is *per se* lawful would be rendered unlawful on account of it having been added up with other acts and omissions attributable to other international persons.⁶²

9. A distinct case of shared responsibility arising from a single internationally wrongful act is the breach of an indivisible shared obligation.⁶³ Breaches of indivisible shared obligations always entail shared responsibility for a single internationally wrongful act. An indivisible shared obligation is a positive obligation of result that obliges all of its bearers to achieve a common result. Examples include the obligation of the European Union (EU) and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020;⁶⁴ the obligation of

(2002) 181; C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 281, at 282.

⁵⁶ *Legality of Use of Force (Serbia and Montenegro v. UK)* (Oral Proceedings) (Public Sitting 12 May 1999), Verbatim Record 1999/25, at 16.

⁵⁷ E. Papastavridis, 'Piracy', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 316, at 343.

⁵⁸ F. Messineo, 'Attribution of Conduct', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 60, at 79.

⁵⁹ Article 15 ARSIWA.

⁶⁰ Commentary to Article 15 ARSIWA, para. 2.

⁶¹ Commentary to Article 15 ARSIWA, para. 3.

⁶² A. Gattini, 'Breach of International Obligations', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 25, at 49 (noting that, 'it is inconceivable that, through the concept of a composite act, a state could be made responsible only for the fact that an act or omission which is attributable to it, and which is *per se* perfectly lawful, is in a way causally linked to other wrongful acts or omissions attributable to other states').

⁶³ N. Nedeski, *Shared Obligations in International Law* (2017), Doctoral dissertation, University of Amsterdam.

⁶⁴ *Ibid.*, at 193-195; Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, 'Report on Its Seventh Session' (2011) FCCC/KP/CMP/2011/10/Add.1.

Australia, New Zealand and the UK to rehabilitate Nauru's worked out phosphate lands,⁶⁵ the obligation of two riparian states to conclude a bilateral treaty regarding the protection of a transboundary lake⁶⁶ and the obligation of the European Economic Community (EEC) and its member states to provide 12.000 million ECU in financial assistance to the African, Caribbean and Pacific Group of States, arising from the Lomé Convention.⁶⁷ Due to its indivisible structure of performance, such an obligation can only be fulfilled or breached by all international persons that bear the obligation simultaneously, regardless of what individual international persons have done in their efforts to comply with the obligation. This means that the obligation is either fulfilled by all duty-bearers simultaneously when the common performance is achieved – which, in the latter example, would entail the payment of 12.000 million ECU – or it is breached by all duty-bearers simultaneously when the common performance is not achieved – which, in this example, would entail the failure to provide 12.000 million ECU in financial assistance. Considering that *multiple* international persons were bound to achieve that common result, the failure to achieve that result constitutes a joint failure that is attributable to all bearers of the obligation simultaneously,⁶⁸ giving rise to the responsibility of all of them for a single wrongful act.

Principle 4

Shared responsibility arising from multiple internationally wrongful acts

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

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

Commentary

1. Principle 4 addresses shared responsibility resulting from a situation in which international persons separately commit internationally wrongful acts and contribute to an indivisible injury. Shared

⁶⁵ N. Nedeski, *Shared Obligations in International Law* (2017), Doctoral dissertation, University of Amsterdam, at 183–185; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Memorial of the Republic of Nauru, 20 March 1990, Volume I, para. 290; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Separate Opinion of Judge Shahabuddeen, ICJ Reports (1992) 270, at 273.

⁶⁶ Article 9 Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992, 1936 UNTS 269. See also A. Tanzi, A. Kolliopoulos and N. Nikiforova, 'Normative Features of the UNECE Water Convention', in A. Tanzi et al. (eds.), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (2015), at 122, who note that '[t]he Water Convention is rather stringent with regard to the institutional aspect of cooperation [...] insofar as article 9 is mandatory about the *conclusion* of watercourse agreements.'

⁶⁷ N. Nedeski, *Shared Obligations in International Law* (2017), Doctoral dissertation, University of Amsterdam, at 189–191. See also P.T. Stoll, 'Lomé Conventions', *Max Planck Encyclopedia of Public International Law, Volume II* (1997).

⁶⁸ On the attribution of a failure to act, see P. d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) 1 *Questions of International Law* 17; M. Jackson, *Complicity in International Law* (2015), at 195.

responsibility pursuant to Principle 4 can arise when multiple internationally wrongful acts either constitute concurrent contributions to an injury, or cumulative contributions to an injury.

2. Principle 4 sets out the elements of shared responsibility for multiple internationally wrongful acts. Subparagraph (a) states that shared responsibility arising from multiple internationally wrongful acts is based on conduct that is attributable to each of the international persons separately. This means that separate wrongful acts are committed by each of those international persons.

3. Subparagraph (b) confirms that the qualification of such acts as internationally wrongful requires the breach of an international obligation. A conduct that as such is lawful cannot engage the responsibility of the author of the act on account of the fact that, in combination with the wrongful conduct of other international persons, it contributes to the injury of a third person. For instance, in order to establish shared responsibility for the indivisible injury of climate change, violations of applicable international obligations incumbent on each of the responsible international persons need to be established, for instance under international environmental law⁶⁹ or international human rights law.⁷⁰

4. Shared responsibility pursuant to Principle 4 arises irrespective of whether international persons breach different obligations or the same obligation. Multiple international persons breach the same obligation when they each breach an obligation with the same normative content. For example, the European Commission has made determinations of non-compliance by multiple flag states with the same prohibition of transshipment by non-registered vessels under the International Commission for the Conservation of Atlantic Tunas Recommendation 06-11.⁷¹ Multiple international persons breach different obligations when they each breach an obligation with a different normative content. In the *Rantsev* case the ECtHR found Cyprus and Russia responsible with respect to the death, in Cyprus, of a Russian national and probable victim of trafficking. While each state had violated different obligations under the European Convention of Human Rights (ECHR), the Court found that both of them had contributed to the indivisible injury to the victim.⁷²

5. In exceptional cases, a breach by two or more international persons of the same obligation will not result in shared responsibility for multiple wrongful acts but in shared responsibility for a single wrongful act, governed by Principle 3. That is the case when the obligation in question is a so-called indivisible obligation.⁷³ However, in most cases, international obligations are structured in such a way that they oblige each duty-bearer to do its own share, and are hence 'divisible'.⁷⁴ A breach of these obligations then will result in shared responsibility for multiple wrongful acts. This is the case for the example given above regarding the violations by multiple flag states of their obligations in relation to transshipment of unregistered vessels. The same will hold for the obligation of multiple riparian states to refrain from polluting a river, or the obligation of the US and the UK as joint occupying powers 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources' in

⁶⁹ See e.g. J. Peel, 'Climate Change', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 1009, at 1031; B. Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics' (2016) 19 *Asia-Pacific Journal of Environmental Law* 79.

⁷⁰ *Stichting Urgenda v. The Netherlands*, Court of Appeal in The Hague, Civil Law Section (9 October 2018), ECLI:NL:GHDHA:2018:2591.

⁷¹ ICCAT Recommendation 06-11; see Y. Takei, 'Fisheries', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 350, at 370. Such recommendations are binding pursuant to Article 8(2) of the International Convention for the Conservation of Atlantic Tunas 1966, 673 UNTS 63.

⁷² ECtHR, *Rantsev v. Cyprus and the Russian Federation*, Application no. 25965/04, Judgment of 7 January 2010). See A. T. Gallagher, 'Human Rights and Human Trafficking', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 556, at 560.

⁷³ See the commentary to Principle 3, para. 10.

⁷⁴ N. Nedeski, *Shared Obligations in International Law* (2017), Doctoral dissertation, University of Amsterdam.

Iraq.⁷⁵ Due to their structure, such obligations are performed or breached by each duty-bearer independently. A breach of a divisible obligation by one international person does not necessarily entail a breach by all other international persons that bear the obligation. But where two or more international persons do breach the same obligation and indivisible injury occurs, they will share responsibility for multiple wrongful acts.

6. Subparagraph (c) specifies, in line with Principle 2, that shared responsibility pursuant to Principle 4 only arises if several international person(s) contribute to the indivisible injury of another person. Comparable to the situation of single internationally wrongful acts,⁷⁶ it will need to be determined in each individual case whether a particular injury is divisible or indivisible. If a particular injury is divisible, two or more international persons may still incur international responsibility, but such responsibility would not be shared responsibility as defined in the present Principles.

7. The indivisibility of a particular injury may not always be obvious. An example that illustrates different approaches to the determination of whether multiple internationally wrongful acts caused indivisible injury is provided by several judgments of Dutch courts in the case brought by the ‘Mothers of Srebrenica’ against the state of the Netherlands for the conduct of the Dutch battalion of UN peacekeepers in Srebrenica. The District Court held the Netherlands fully responsible for the deaths of 350 men who were not allowed by the Dutch battalion to stay in the UN compound and were subsequently killed by the Bosnian Serb forces.⁷⁷ The holding of the District Court that the Netherlands was fully responsible can be understood as a determination that the injury, which in fact was caused by more than one actor, was indivisible. The Court of Appeals took a different approach and held that ‘the surviving relatives of the men who stayed in the compound on 13 July 1995 are entitled to a compensation of their loss in proportion to the probability that these men would have had to safely escape and survive had the Dutchbat not acted wrongfully, that is, for the Court, 30 % of the loss incurred.’⁷⁸ The Dutch Supreme Court upheld the finding of a responsibility of the Dutch state but reduced the chance that the male refugees would have escaped the Bosnian Serbs to 10%.⁷⁹

8. The reasoning was exclusively based on Dutch law, in particular applicable domestic law doctrines of apportioning responsibility on the basis of risk, that have no equivalent in international law. If the situation that gave rise to the *Mothers of Srebrenica* case were to be approached from an international law perspective it would be covered by Principle 4. The injury consisting of death of the Bosnian men could qualify as indivisible, and it resulted from acts or omissions from several (international) persons, including the Netherlands, the UN and the Bosnian Serb Republic. Although it should be noted that the Bosnian Serb Republic was a non-state actor whose contribution to the injury is formally not within the scope of the present Principles, Dutchbat’s cooperation in the evacuation of the male refugees that were present inside the compound in combination with the Bosnian Serbs’ acts of genocide, contributed to the deaths of 350 refugees. While the Court of Appeal and the Supreme Court apportioned responsibility between the Netherlands and the Bosnian Serbs, the UN was likely also responsible for failure to prevent the death of the Bosnian men. These cumulative contributions to the injury cannot be distinguished using a factual test of causation.⁸⁰

⁷⁵ E. Milano, ‘Occupation’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 733, at 741; S. Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’, in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008) 185, at 206.

⁷⁶ See the commentary to Principle 3, paras. 3-4.

⁷⁷ District Court of The Hague, C/09/295247 / HA ZA 07-2973, 16 July 2014, paras. 4.330 and 4.338.

⁷⁸ Court of Appeals of The Hague, 200.158.313/01 and 200.160.317/01, 27 June 2017, para. 69.1.

⁷⁹ Supreme Court of the Netherlands, ECLI:NL:HR:2019:1284, 19 July 2019, para. 5.1.

⁸⁰ See the commentary to Principle 2, para. 4.

9. Principles 6 to 8 in Chapter II below are particular applications of Principle 4 and therefore subject to its conditions. Principles 6 to 8 may be understood as presupposing a corresponding primary obligation under international law: the obligation not to aid or assist in the commission of a wrongful act (Principle 6), the obligation not to engage in concerted action in the commission of a wrongful act (Principle 7), and the obligation not to control another international person in the commission of a wrongful act (Principle 8). The breach of that specific obligation constitutes one of the multiple internationally wrongful acts that give rise to shared responsibility pursuant to Principle 4. As far as Principle 6 is concerned, the primary nature of the obligation not to aid or assist is commonly accepted.⁸¹ Principles 7 and 8, for their part, are premised on the view that international law respectively prohibits concerted action and control of other international persons in the commission of a wrongful act, which finds support in scholarship.⁸² This idea that responsibility for aid or assistance, concerted action, and control is shared by virtue of a breach of a primary obligation is the expression of one of the main paradigms underlying the rules of international responsibility, namely that responsibility results from one or more internationally wrongful acts.

Principle 5

Circumstances precluding wrongfulness in situations of shared responsibility

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

Commentary

1. The rules of international responsibility provide a basis for the preclusion of the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the international person(s) concerned. The circumstances precluding wrongfulness that can be

⁸¹ Commentary to Chapter IV of Part One, ARSIWA, para. 7; commentary to Article 16 ARSIWA, para. 9; J. Crawford, *State Responsibility: The General Part* (2013), at 399; B. Graefrath, 'Complicity in the Law of International Responsibility', 2 *Revue Belge de Droit International* (1996) 371, at 372; V. Lanovoy 'Complicity in an Internationally Wrongful Act', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 134, at 139; V. Lowe, 'Responsibility for the Conduct of Other States', 101 *Kokusaiho Gaiko Zasshi* (2002) 1, at 4.

⁸² C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 281, at 289; G. Gaja, 'The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations', *SHARES Research Paper* 25 (2013) at 7; N. Nedeski and A. Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"', 9 *International Organizations Law Review* (2012) 33, at 44; O. Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization', 8 *International Organizations Law Review* (2011) 291, at 301; P.-J. Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?', 7 *International Organizations Law Review* (2010) 9.

invoked in situations of shared responsibility include those codified in Articles 20 to 25 ARSIWA and Articles 20 to 25 ARIO. Principle 5 specifies how these circumstances precluding wrongfulness apply in the specific situations covered by the present Principles in which two or more international persons, by committing one or more internationally wrongful act(s), contribute to an indivisible injury incurred by another person.

2. Principle 5(1) stipulates that each international person that contributed to an indivisible injury may individually invoke a circumstance precluding wrongfulness under the rules of international responsibility. Each international person that invokes such a circumstance has to establish that the specific criteria for that circumstance precluding wrongfulness are fulfilled in relation to its conduct. Considering that the rules on circumstances precluding wrongfulness, as codified in the ARSIWA and ARIO, are geared towards bilateral situations (involving one responsible state or international organization and one injured state or international organization), it may be presumed that those existing rules work, in principle, to the benefit of international persons that can individually satisfy the relevant requirements of a circumstance precluding wrongfulness.⁸³

3. Principle 5(2) formulates the default principle that a circumstance precluding wrongfulness that is individually invoked by an international person does not automatically extend to the other international persons with whom responsibility is shared. This is without prejudice to the situation in which an international person with whom responsibility is shared and who is separately invoking the same or a distinct circumstance precluding wrongfulness meets the requirements thereof.

4. Notwithstanding the default Principle articulated in Principle 5(2), the preclusion of wrongfulness for the conduct of an international person may, in certain situations, extend to the wrongfulness of the conduct of other international persons that contributed to the indivisible injury. This may be due to the possible consequences of whether one construes a particular circumstance precluding wrongfulness as a justification or an excuse. In its commentaries to Articles 20-27 ARSIWA and Articles 20-27 ARIO, the ILC employed both the term ‘justification’ and the term ‘excuse’. This suggests that the ILC did not take a position on whether the circumstances precluding wrongfulness in these provisions operate as justifications or excuses,⁸⁴ and the present principles follow this approach. Justifications would render an act lawful and might more readily extend to other international legal persons that contributed to the injury.⁸⁵ Excuses would shield an international person from the legal consequences of an act that remains unlawful⁸⁶ and hence could be considered as more individualized to the particular international person.⁸⁷

5. The potential effects of this distinction may be illustrated by the example of an international person aiding or assisting, acting in concert with or controlling another international person in the commission of an internationally wrongful act, which are covered by Principles 6, 7 and 8. In all of these instances, conduct is rendered wrongful ‘because it constitutes a form of participation in the

⁸³ See also H. P. Aust, ‘Circumstances Precluding Wrongfulness’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 169, at 199.

⁸⁴ For an overview of the discussion within the ILC on this issue see F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 37–52. See also Second Report on State Responsibility, by Mr James Crawford, Special Rapporteur, 2(1) *ILC Yearbook* (1999), at 58-60, 86, UN Doc A/CN.4/498, paras. 223-231, 355.

⁸⁵ F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 31–32.

⁸⁶ H. P. Aust, ‘Circumstances Precluding Wrongfulness’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 169, at 176. See also V. Lowe, ‘Precluding Wrongfulness or Responsibility: A Plea for Excuses’, 10 *EJIL* (1999) 405, at 410; F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 37–51.

⁸⁷ F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 288.

wrongful act of another'.⁸⁸ If the wrongfulness of the act of the principal actor were to be precluded because the circumstance precluding wrongfulness invoked operates as a justification, this may bear upon the possibility of establishing responsibility of the international person(s) that participated in that act. An international person's aid or assistance to an act that is lawful cannot in principle result in its responsibility for aid or assistance.⁸⁹ Hence, when Libya claimed that the UK had acted wrongfully when it granted the US the use of air bases on the UK's territory for the launching of air strikes on targets in Tripoli and Benghazi in 1986, the UK argued that its conduct was lawful since it had assisted the US in its lawful exercise of self-defence.⁹⁰

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

⁸⁸ F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 68–69.

⁸⁹ *Ibid.*, 69.

⁹⁰ Statement of the UK representative to the Security Council, UN Doc. S/PV.2679, 26-28 (1986); F. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 69; H. P. Aust, *Complicity and the Law of State Responsibility* (2011), at 112.

PART II – SPECIFIC SITUATIONS OF SHARED RESPONSIBILITY ARISING FROM MULTIPLE INTERNATIONALLY WRONGFUL ACTS

Principle 6

Shared responsibility in situations of aid or assistance

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

Commentary

1. Principle 6 concerns the sharing of responsibility between an international person that commits an internationally wrongful act, and one or more international persons that provide aid or assistance in the commission of that wrongful act. The Principle is based on Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO, respectively.

2. Practice is replete with situations in which aid or assistance is provided in a way that jointly contributes to an indivisible injury. Examples include aid or the assistance in the form of providing military equipment,⁹¹ allowing the use of territory or air space or military bases,⁹² contributing to renditions schemes,⁹³ allowing reconnaissance missions, aerial refuelling, sharing information used for targeting,⁹⁴ or informing and facilitating interdiction at sea.⁹⁵ Over the last years, domestic courts have recognized that such aid or assistance can engage the responsibility of the aiding or assisting state – generally without expressing themselves on questions of shared responsibility since no claims have been brought against the principal wrongdoing international person.⁹⁶

3. Principle 6(1) indicates that aid or assistance gives rise to shared responsibility of several international persons when the respective conduct of all of those persons contributes to an indivisible injury. In situations of aid or assistance, contributions to injury will typically consist of cumulative

⁹¹ See Principle 2(2) and commentary.

⁹² B. Boutin ‘Responsibility in Connection with the Conduct of Military Partners’, 56 *Military Law and the Law of War Review* (2018) 57, at 59.

⁹³ M. J. Strauss, ‘Territorial Leases’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 65, at 77.

⁹⁴ H. Duffy, ‘Detention and Interrogation Abroad: The “Extraordinary Rendition” Programme’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 89, at 123.

⁹⁵ *Ibid.*, at 116.

⁹⁶ E. Papastavridis, ‘Piracy’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 316, at 342.

⁹⁷ See e.g. *General Prosecutor at the Court of Appeals of Milan v. Adler and ors*, Final appeal judgment, No 46340/2012; ILDC 1960 (IT 2012), 29 November 2012; *Belhaj and another (Appellants) v. Director of Public Prosecutions and another (Respondents)*, 4 July 2018, [2018] UKSC 33.

contributions, which often means that the aid or assistance provided is part of a set of acts or omissions that jointly caused the injury. The nature of contribution that is required before the responsibility of the aiding or assisting international person is engaged is a matter of some uncertainty. The commentary to Article 16 ARSIWA states that the aid or assistance must facilitate the commission of the wrongful act.⁹⁷ ‘There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act’.⁹⁸ However, the ILC also recognized that ‘assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered’.⁹⁹ The level of contribution required for aid or assistance ultimately depends on the circumstances of the particular case.¹⁰⁰

4. Principle 6(2) provides that the knowledge requirement in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act. It makes explicit that the object of the required knowledge is the fact that the aid or assistance would facilitate the commission of an internationally wrongful act.¹⁰¹ Principle 6(2) also states that knowledge of circumstances is to be understood as *constructive knowledge*. As a result, the Principle covers situations in which the aiding or assisting state should have known that its conduct would aid or assist another international person to commit a wrongful act.¹⁰²

5. The criterion of constructive knowledge provided by Principle 6(2) is premised on the view that, when information is available to them, aiding or assisting international persons cannot invoke ignorance of the circumstances.¹⁰³ Hence, if an international person shares intelligence on nationals from a third state with another state that has a record of carrying out unlawful targeted killing by drone strikes in the third state in relation, the aiding or assisting international person cannot claim absence of knowledge of the circumstances of the wrongful act.¹⁰⁴ Although the *Corfu Channel* case did not address aid or assistance, it provides a relevant precedent. The ICJ inferred that Albania ‘must have known’¹⁰⁵ of the minelaying in its territorial waters on the basis of available circumstantial evidence. This element of constructive knowledge is firmly supported by the case law of human rights courts on the provision of assistance to human rights violations (for instance in the context of extraordinary renditions),¹⁰⁶ and

⁹⁷ Commentary to Article 16 ARSIWA, paras. 3 and 5.

⁹⁸ *Ibid.*, para. 5.

⁹⁹ *Ibid.*, para. 10.

¹⁰⁰ *Ibid.*, para. 10; see also Principle 11(3).

¹⁰¹ Article 16(a) ARSIWA; commentary to Article 16 ARSIWA, paras 3-4.

¹⁰² V. Lowe, ‘Responsibility for the Conduct of Other States’, 101 *Kokusaiho Gaiko Zasshi* (2002) 1, at 10. During the drafting negotiations, the Netherlands suggested to introduce constructive knowledge in Article 16 ARSIWA (2(1) *ILC Yearbook* (2001), at 52).

¹⁰³ H. Moynihan, ‘Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission’s Articles on State Responsibility’, 67 *International and Comparative Law Quarterly* (2018) 455, at 461–462.

¹⁰⁴ See also V. Lanovoy, ‘Complicity in an Internationally Wrongful Act’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 134, at 153.

¹⁰⁵ *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4, at 19.

¹⁰⁶ See e.g. Committee Against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication no 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para. 13.2; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, App no. 39630/09, Judgment of 13 December 2012, para. 217; H. Duffy, ‘Detention and Interrogation Abroad: The “Extraordinary Rendition” Programme’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 89, at 114.

is also deemed relevant in relation to the obligation not to aid or assist in case of violations of international humanitarian law.¹⁰⁷

6. Pursuant to Principle 6(2), intent to facilitate the wrongful act of another international person is not required. In this regard, the Principles deviate from the ARSIWA, which stipulate that ‘the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’.¹⁰⁸ The ICJ in the *Bosnian Genocide* case referred to the knowledge of the intent of the assisted person in relation to complicity in genocide, but did not pronounce on the intent of the aiding or assisting state.¹⁰⁹ This deviation by the present Principles from the approach of the ILC is justified by the difficulties associated with demonstrating subjective intent.¹¹⁰ Indeed, a standard of intent comes with considerable drawbacks.¹¹¹ Establishing that an international person had actual intent may prove impossible in situations characterized by secrecy and lack of transparency, such as in the practice of extraordinary rendition,¹¹² and in many cases would make the notion of aid or assistance ‘unworkable’.¹¹³

7. Principle 6(3) restates the general condition of the ARSIWA and ARIO in relation to situations of aid or assistance that the international person providing aid or assistance only incurs international responsibility when it is bound by the obligation that is breached by the person benefiting from the aid or assistance. This condition, sometimes referred to as the ‘opposability’ requirement, is intended to ensure the application of the *pacta tertiis* rule. It has been said that the condition would be undesirable since international law should not allow states to incur no responsibility when they clearly assist another state in causing injury to a third state.¹¹⁴ However, the combination of the wider standard of knowledge applied in Principle 6 and a lack of an opposability requirement would overly broaden the possibility of sharing responsibility in situations of aid or assistance. The adoption of the ‘opposability’ requirement in Principle 6 is also informed by the common idea underlying responsibility for aid or assistance that an international person ‘cannot do by another what it cannot do by itself’.¹¹⁵

8. In certain circumstances, Principle 6 covers situations in which an international organization authorizes an international person to commit an act that is wrongful for both of them.¹¹⁶ When the requirements discussed above are met, the authorization of a wrongful conduct will result in shared responsibility of that international organization and the other international person(s).

¹⁰⁷ ICRC, *Commentary on the First Geneva Convention* (2016), para. 161; See also, M. Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ 84 *International Review of the Red Cross* (2002) 401, at 413.

¹⁰⁸ *Commentary to Article 16 ARSIWA*, para. 5.

¹⁰⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, paras. 421–422, at 218. See also C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 281, at 286.

¹¹⁰ B. Graefrath, ‘Complicity in the Law of International Responsibility’, 2 *Revue Belge de Droit International* (1996) 371, at 375; J. Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ 57 *BYIL* (1986) 77, at 111. See also J. d’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’, 9 *International Organizations Law Review* (2012) 15.

¹¹¹ See e.g., H. P. Aust, *Complicity and the Law of State Responsibility* (2011), at 236.

¹¹² H. Duffy, ‘Detention and Interrogation Abroad: The “Extraordinary Rendition” Programme’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 89, at 114.

¹¹³ J. Quigley, ‘Complicity in international law: a new direction in the law of state responsibility’ 57 *BYIL* (1986) 77, at 111.

¹¹⁴ V. Lowe, ‘Responsibility for the Conduct of Other States’, 101 *Kokusaiho Gaiko Zasshi* (2002) 1.

¹¹⁵ *Commentary to Article 16 ARSIWA*, para. 6.

¹¹⁶ See e.g. N. Voulgaris, ‘Rethinking Indirect Responsibility’, 11 *International Organizations Law Review* (2015) 5, who argues that in some cases Article 17(2) ARIO overlaps with Article 14 ARIO on aid or assistance.

Principle 7

Shared responsibility in situations of concerted action

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

Commentary

1. Principle 7 addresses the situation in which international persons act in concert in the commission of one or several internationally wrongful acts and contribute to an indivisible injury. Concerted action may become a ground of shared responsibility, as defined by the Principles, when two or more international persons participate in a course of conduct that involves one or more internationally wrongful act(s) with a view to achieving agreed goals. Principle 7 is based on the view that international law prohibits international persons from engaging in concerted wrongful action that causes an injury to third parties.¹¹⁷ The term ‘concerted action’ is understood as a term of art, which may include both actions and omissions.

2. The main rationale of shared responsibility for concerted action is that the injured party should not be put in a position of having to prove which parts of the injury are attributable to each of the responsible international persons. Another rationale for including a Principle providing for responsibility based on concerted action is that in some situations the wrongful act by an international person, and the injury resulting therefrom, only come about because other international persons acted in concert with one or more other international persons. By engaging in concerted wrongful action, the actors involved can produce results that they could not have brought about on their own. Principle 7 makes clear that in such situations, the international persons acting in concert would not be able to evade international responsibility. This Principle also creates incentives for such international persons to refrain from acting in concert when they are aware that this could result in injury to a third person.

3. Although the ARSIWA and ARIIO do not include a provision on responsibility for concerted action, and international judicial pronouncements on concerted action are rare, Principle 7 is not without precedent. The principle echoes the notion of ‘common adventures’ referred to by Special Rapporteur Crawford in his Third Report in which he observed: ‘Where two persons jointly engage in a

¹¹⁷ See the commentary to Principle 4, para. 9.

common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants.¹¹⁸

4. Principle 7 also covers situations that fall within the scope of Articles 17 and 61 ARIO on the circumvention of international obligations.¹¹⁹ Like in the situations of circumvention as understood in Articles 17 and 61 ARIO, Principle 7 allows for the allocation of responsibility to international persons that try to circumvent their international obligations by working with or through others. It extends the principle of circumvention, as stipulated in the ARIO, to a wider group of international persons, including states. The main novelty of Principle 7 thus is that it applies not only to states acting through international organizations and *vice versa*, but to all international persons attempting to evade their international obligations by working with or through other international persons.

5. There may be a certain overlap between shared responsibility based on aid or assistance in Principle 6, on the one hand, and shared responsibility for concerted action in Principle 7, on the other hand. In some situations, one course of conduct may fall within the scope of both Principles. Nonetheless, the scope of these two Principles is not identical. In particular, responsibility for aid or assistance requires that the contribution to the internationally wrongful act of another international person reach a particular threshold. Responsibility for concerted action, however, arises as soon as international persons participate in a course of conduct that involves one or more internationally wrongful act(s) with a view to achieving agreed goals. This difference between concerted action and aid or assistance with regard to their material threshold can be illustrated by invasion of Iraq in 2003 by a coalition of states. This military action may amount to concerted action under the definition of paragraph 2. However, not all the conduct of states acting in concert may qualify as aid or assistance. As situations of concerted action cannot always be captured by other Principles on shared responsibility, a separate principle on concerted action is warranted.

6. Principle 7(1) introduces the principle of shared responsibility based on concerted action. The Principle indicates that an international person shares responsibility for concerted action only when it acts in concert with another international person that commits an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person. Accordingly, Principle 7 addresses situations where a set of connected, yet separate wrongful acts are committed that contribute to the indivisible injury of another person. It is a particular application of Principle 4 and should therefore be distinguished from situations of shared responsibility for a single wrongful act (resulting from a single course of conduct attributable to multiple international persons), which is covered by Principle 3.¹²⁰

7. Principle 7(2) provides a definition of concerted action. The defining feature of concerted action is that two or more international persons actively participate in a course of conduct with a view

¹¹⁸ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4, para. 276(c): ‘Existence of special rules of responsibility for ‘common adventures’. Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants, on the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of them. International tribunals have reached similar results by reference to considerations of ‘equity’ or by requiring a State responsible for wrongful conduct to show what consequences flowing from the breach should not be attributed to it.’

¹¹⁹ The ILC uses the concept of circumvention address situations in which one international person uses the legal personality of another legal person to avoid compliance with its own obligations. See commentary to Article 17 ARIO, para. 1, and Article 61 ARIO, para. 1. See generally O. Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’, 8 *International Organizations Law Review* (2011) 291.

¹²⁰ See the commentary to Principle 3, para. 7.

to achieving agreed goals. Concerted action necessarily involves some form of coordination of conduct between participating actors. This may be in the form of an agreement between actors, but typically is of a more informal nature. Situations covered by Principle 7 include collaboration between international financial institutions; concerted military action involving the UN, NATO and the EU; cooperation between the Food and Agriculture Organization (FAO), regional fisheries institutions, individual states, and private parties to ensure sustainable use of natural resources, cooperation between the EU, its member states and non-EU states in the context of migration controls and joint cross-border police activities. In each of these situations, multiple actors coordinate their conduct with a view to achieving a common aim. For instance, the air strikes conducted in Libya in 2011 by the US, the UK, France and Canada acting through their own organs before NATO took command of the operations, can be considered as an example of concerted action.¹²¹ Another example is the bombing of Iraq carried out by coalition partners where, although only certain states carried out the actual bombings, multiple other states participated in the decision-making and execution processes.¹²²

8. The definition of concerted action under Principle 7(2) does not require that the goal that is pursued by two or more international persons as such would be in contravention of international law. What is required is that a wrongful act is committed in the course of that concerted action. In the ‘EU – Turkey Statement’, which was agreed on by the member states of the EU and Turkey,¹²³ it was declared that, ‘[i]n order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk’, the decision has been made to ‘end the irregular migration from Turkey to the EU’.¹²⁴ As such, this agreed goal is not in contravention of international law. In order to achieve this goal, all EU member states, together with Turkey, agreed to return new irregular migrants crossing from Turkey into Greece as of 20 March 2016 to Turkey. The Statement was negotiated and published at a time when it was well-known that detention conditions in Greece and deficiencies in its asylum procedure were in violation of the ECHR.¹²⁵ The implementation of the above action point in the EU-Turkey Statement put further pressure on the already overburdened Greek asylum system, and various reports indicated that the Greek asylum system remained deficient and refugees and migrant in camps were exposed to inhuman conditions.¹²⁶ Accordingly, this is an example of multiple international persons pursuing an agreed goal through concerted action that is itself lawful, but during which one or multiple wrongful acts may have been committed.

9. Principle 7(3) provides that, like Principle 6, responsibility for concerted action requires constructive knowledge about the circumstances of the internationally wrongful act. The considerations that justify applying a standard of constructive knowledge in relation to aid or assistance also apply with regard to concerted action.

¹²¹ UNSC Resolution 1973 (2011), S/RES/1973; S. Erlanger, ‘Confusion Over Who Leads Libya Strikes, and for How Long’ (21 March 2011) New York Times.

¹²² M. Tondini, ‘Coalitions of the Willing’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 701.

¹²³ On 28 February 2017 the General Court of the European Union ruled that the EU-Turkey Statement was not concluded by the EU, but by all of the individual EU member states together with Turkey (Order of the General Court, *NF v. European Council*, T-192/16, ECLI:EU:T:2017:128, para. 69).

¹²⁴ European Council, ‘EU-Turkey Statement’, Press Release, 18 March 2016 (144/16)

¹²⁵ In 2011, the ECtHR ruled that detention conditions in Greece and deficiencies in its asylum procedure were in violation of the ECHR (see ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011). As a result of this ruling, Greece was excluded from the EU’s Dublin system, and EU member states could no longer deport asylum seekers to Greece. In March 2016, Greece was still excluded from the Dublin system.

¹²⁶ See e.g. Council of Europe Parliamentary Assembly, Resolution 2109 (2016), ‘The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016’; Amnesty International, ‘A Blueprint for Despair: Human Rights Impacts of the EU-Turkey Deal’, February 2017.

10. Principle 7(4) provides that international persons involved in the concerted action only incur responsibility if the wrongful act that is committed as a part of the concerted action would also have been wrongful if committed by them. Therefore, those international persons must be bound by an obligation that in substance is the same as the obligation breached by the wrongdoing international person. An exception to this opposability requirement may apply when member states act in concert in the framework of an international organization. In such situations, this Principle applies irrespective of whether the act in question is internationally wrongful for the international organization. In this regard, the Principle follows Article 61 of the ARIO, which states that member status shall not use an international organization to circumvent their international obligations.¹²⁷ The provision finds support in the case law of the ECtHR on ‘equivalent protection’.¹²⁸ As the Court stated in the *Bosphorus* case, the ECHR does not prevent the Contracting Parties to transfer sovereign powers to an international organization, but ‘[t]he State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.’¹²⁹

Principle 8

Shared responsibility in situations of control

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

Commentary

1. Principle 8 provides for shared responsibility in situations in which an international person controls another international person in the commission of an internationally wrongful act. This Principle addresses, but is not limited to, situations of responsibility in connection with the internationally wrongful act of another international person that are covered by Articles 17 and 18 ARSIWA as well as Articles 15, 16, 17(1), 59, 60 ARIO. The notion of control in this Principle thus refers to situations as various as direction and control or coercion as these notions are understood in the ARSIWA and ARIO. Principle 8 is not limited to those rules as it recognizes the possibility of other

¹²⁷ Article 61(2) ARIO provides: ‘Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.’

¹²⁸ Commentary to Article 61 ARIO, paras. 4-5.

¹²⁹ ECtHR, *Bosphorus v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005, para. 154. See also *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999, para. 67; *Matthews v. United Kingdom*, Application no. 24833/94, Judgment of 18 February 1999, para. 31; and European Commission of Human Rights, *M. & Co. v. Germany*, Application no. 13258/87, Decision of 9 January 1990.

situations of control, such as normative control, which are not explicitly addressed in the ARSIWA and ARIO.¹³⁰

2. Principle 8(1) provides for the possibility that responsibility is shared in situations in which an international person controls another international person in committing a wrongful act. Situations covered by Principle 8 presuppose that the international person(s) that is subject to the control simultaneously incurs responsibility with the controlling international person. As the commentary to Article 17 ARSIWA states, '[a]s to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under Chapter V of Part One.'¹³¹ A possible exception in this regard may be a situation of coercion because the coerced international person may invoke coercion as a circumstance precluding wrongfulness.¹³²

3. By defining 'control' broadly as including 'direction and control, acts of international organizations, and coercion', paragraph 2 makes clear that Principle 8 covers situations that are not explicitly addressed by the law of international responsibility as codified by the ILC. In particular, the paragraph refers to 'acts' of international organizations to capture the wide variety of terms used in the decision-making processes of international organizations, such as resolutions and decisions, that allow those organizations to control their member states or organizations. In the *Bosphorus* case, the ECtHR acknowledged that member states may act under the normative control of the European Community (EC) when implementing EC law, but also noted that '[i]t remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations.'¹³³

4. The application of Principle 8 to such situations entails that an international organization shares international responsibility if it adopts an act that requires another international person to commit an act that would be internationally wrongful if committed by the organization. This Principle thus covers cases in which an international organization adopts a binding decision that requires an international person to commit an act that would be internationally wrongful if committed by the organization. This reflects the ground of responsibility in connection with the internationally wrongful act of another international person envisaged by Article 17(1) ARIO. Unlike Principle 8, however, the application of Article 17(1) ARIO would also require 'an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation'.¹³⁴

5. Principle 8(3) indicates that the situations of responsibility in connection with the internationally wrongful act of another international person covered by this Principle are conditioned by the requirement of knowledge of the circumstances of the wrongful act. Principle 8(3) provides for the possibility of knowledge being understood as constructive knowledge, in the same way as the constructive knowledge for aid or assistance covered by Principle 6 and Principle 7 on concerted action.

6. Principle 8(4) restates the opposability requirement, which is also contained in Article 17 of the ARSIWA and Articles 15 and 59 ARIO. The opposability requirement is applicable to all forms of control except for coercion because an act of coercion is so serious that responsibility could be engaged

¹³⁰ On normative control see A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011), at 40, and Frank Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' 21 *EJIL* (2010) 741. See also J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 4 *International Organizations Law Review* (2007) 91.

¹³¹ See the commentary to Article 17 ARSIWA, para. 9.

¹³² See the commentary to Article 18 ARSIWA, para. 4.

¹³³ ECtHR, *Bosphorus v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005, para. 157

¹³⁴ See the commentary to Article 17 ARIO, para. 4.

even if the act would not be internationally wrongful if committed by the coercing international person. Moreover, as the coerced international person could invoke coercion as a circumstance precluding wrongfulness, no international person would otherwise incur responsibility if the coercing state was not bound by the relevant obligation.¹³⁵ This position mirrors the distinct treatment of coercion in other doctrines of international law,¹³⁶ and is in conformity with the position of the ILC.¹³⁷

PART III – CONTENT OF SHARED RESPONSIBILITY

Principle 9

Cessation and non-repetition in situations of shared responsibility

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

Commentary

1. Principle 9 states that the obligation of cessation and the obligation to offer assurances and guarantees of non-repetition, as provided for in Articles 30 ARSIWA and ARIO, may arise for multiple international persons in situations of shared responsibility. The obligations of cessation and assurances and guarantees of non-repetition extend to each international person sharing international responsibility in accordance with the present Principles.

2. In line with the rules of the law of international responsibility, Principle 9(1) provides that an international person responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. As the obligation of cessation is attached to the wrongful conduct and not to the injury, each responsible international person that shares international responsibility as defined in the present Principles must cease the conduct that is attributed to it.¹³⁸

3. When multiple international persons are responsible for a single internationally wrongful act, as stated in Principle 3, conduct consisting of an act or omission is attributable to multiple international persons. If that single wrongful act is of a continuing character, it follows that all responsible

¹³⁵ Coercion of another international person might thus lead to independent responsibility of the coercing international person, depending on the degree of coercion.

¹³⁶ See e.g. Articles 51, 52 and 69 para. 3 of the Vienna Convention of the Law of Treaties 1969, 1155 UNTS 331.

¹³⁷ Article 18 ARSIWA; Articles 16 and 60 ARIO.

¹³⁸ P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 208, at 215; B. Boutin 'Responsibility in Connection with the Conduct of Military Partners', 56 *Military Law and the Law of War Review* (2018) 57, at 85.

international persons are under a shared obligation to cease that act.¹³⁹ When international persons share responsibility for multiple wrongful acts, whether or not all responsible states actually are under an obligation to cease the conduct depends on the circumstances of the case. In *M.S.S. v. Belgium and Greece*, Belgium had violated its obligations under the ECHR by transferring the applicant to Greece, whereas Greece had breached obligations by for subjecting the asylum seeker inhuman detention conditions. Both states shared responsibility, but given that Belgium already had transferred the applicant, the obligation to cease the wrongful act only applied to Greece.¹⁴⁰

4. Principle 9(2) provides that in situations of shared responsibility, as covered by the present Principles, the obligation of cessation entails an obligation of conduct to take appropriate measures to ensure that other responsible international persons cease their respective wrongful conduct. In situations in which shared responsibility arises out of collective rather than independent conduct,¹⁴¹ which includes the situations covered by Principles 6 to 8, responsible parties may be able to exert some influence over their partners, and induce them to cease their wrongful conduct. Therefore, the obligation to take measures to ensure cessation by other responsible international persons requires more efforts by international persons that have means at their disposal to exert influence over the conduct of others.

5. The obligation stated in Principle 9(2) finds support in practice in different fields of international law. In the context of multinational military operations, international persons have an obligation to ‘exert their influence, to the degree possible, to stop violations’.¹⁴² In a case brought before British courts by the Campaign Against Arms Trade, it was held that ‘[a]rms producing and exporting states can be considered particularly influential in “ensuring respect” for international humanitarian law’, and ‘should therefore exercise particular caution to ensure that their export is not used to commit serious violations’.¹⁴³ In the *Eurotunnel* arbitration, the Tribunal ruled that both the UK and France were responsible for a breach of the obligation to maintain conditions of normal security and public order in and around the Coquelles terminal, which was incumbent on both states.¹⁴⁴ Even though the UK did not have the competence to authorize actions in any form in and around the Coquelles terminal, which was situated on French territory, the Tribunal noted that it could have ‘undertaken certain actions to try to induce France to comply with the obligations resting on both respondents’.¹⁴⁵ An obligation of cessation in this situation would entail that the UK takes appropriate measures to induce France to cease its wrongful conduct and to maintain public order around the Coquelles terminal on French territory. Other examples may be found in the practice of wrongful extradition by a state to another state where an individual will be subjected to treatment contrary to

¹³⁹ N. Nedeski, *Shared obligations in international law*, Doctoral dissertation, University of Amsterdam, at 205.

¹⁴⁰ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011. See M. den Heijer, ‘Refolement’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 481, at 504.

¹⁴¹ See the commentary to Principle 2, para. 1.

¹⁴² M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Vol. 1, 2005), at 509 (Rule 144). See also B. Boutin ‘Responsibility in Connection with the Conduct of Military Partners’, 56 *Military Law and the Law of War Review* (2018) 57.

¹⁴³ R (*Campaign Against Arms Trade*) v. *The Secretary of State for International Trade* [2017] EWHC 1726 (Admin), [2019] EWCA Civ 1020, para. 21.

¹⁴⁴ Eurotunnel Arbitration (*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*), Partial Award, PCA Case No. 2003-06, 30 January 2007.

¹⁴⁵ F. Baetens, ‘Invoking, Establishing and Remediating State Responsibility in Mixed Multi-Party Disputes: Lessons From Eurotunnel’, in C. Chinkin and F. Baetens (eds.) *Sovereignty, Statehood and State Responsibility – Essays in Honour of James Crawford*, (2015), at 437-438. The Tribunal noted that the UK had failed to show that it had done ‘everything within its power to bring a clearly unsatisfactory situation promptly to an end.’ (para. 318).

international human rights law.¹⁴⁶ In *Israil v. Kazakhstan*, the Human Rights Committee requested Kazakhstan ‘to put in place effective measures for the monitoring of the situation of the author of the communication, in cooperation with the receiving State [China],¹⁴⁷ and in *Kalinichenko v. Morocco* the Committee Against Torture urged Morocco to establish ‘an effective follow-up mechanism to ensure that the complainant is not subjected to torture or ill-treatment’¹⁴⁸ in Russia. Finally, in *Ng v. Canada* the Human Rights Committee requested Canada to ‘make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the [US] to ensure that a similar situation does not arise in the future.’¹⁴⁹

Principle 10

Reparation in situations of shared responsibility

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

Commentary

1. Principle 10 provides that each international person sharing responsibility has an obligation to provide full reparation for the indivisible injury caused by all of them. An obligation to provide full reparation entails an obligation to ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’¹⁵⁰ Principle 10 extends this obligation, as codified in Articles 31 of the ARSIWA and ARIO, to an injury caused by multiple responsible international persons.

2. Under Principle 10, the shared obligation to provide full reparation is borne equally by each of the responsible international persons. This indicates that the injured party can claim full reparation from any of these international persons. The obligation of each responsible international person to provide full reparation is complemented by Principle 12, according to which any international person that has made full reparation for an indivisible injury has a right of recourse against all other international persons that share responsibility for that injury.

3. The ILC has not clearly recognized the possibility of claiming full reparation from each responsible international person in situations of shared responsibility. In its commentaries to Article 47 ARSIWA, the ILC emphasizes that ‘terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal systems and analogies must be applied with care’.¹⁵¹ The possibility of claiming full reparation from each responsible international person in situations of shared responsibility provided by Principle 10 does not contradict the established rule that international

¹⁴⁶ See A. Constantinides, ‘Extradition’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 128, at 150–151.

¹⁴⁷ Committee Against Torture, *Israil v. Kazakhstan*, Communication no. 2024/2011, UN Doc. CCPR/C/103/D/2024/2011 (2011), para. 11.

¹⁴⁸ Committee Against Torture, *Kalinichenko v. Morocco* (Decision), Communication no. 428/2010, UN Doc. CAT/C/47/D/428/2010 (2011), para. 17.

¹⁴⁹ Human Rights Committee *Ng v. Canada*, Communication no. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994), para. 18.

¹⁵⁰ Case Concerning the Factory at Chorzów (*Germany v. Poland*), Judgement, PCIJ Series A, No. 9 (1928), at 47. See also, commentary to Article 31 ARSIWA, para. 3.

¹⁵¹ Commentary to Article 47 ARSIWA, para. 3.

persons must provide full reparation for the injury caused by their internationally wrongful act. Moreover, in its commentaries, the ILC does suggest that ‘international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault’.¹⁵² In the words of the ILC, ‘unless some part of the injury can be shown to be severable in causal terms’,¹⁵³ reparation should be provided for the whole injury caused.

4. While the present Principles do not transpose common domestic law doctrines of ‘joint’, ‘joint and several’ or ‘solidary’ liability for indivisible damage¹⁵⁴ to international law, the rationale for such a principle in domestic legal systems, in particular to offer the victim of the harm the maximum possible chance of having his harm properly and fully compensated,¹⁵⁵ is comparable to the rationale behind Principle 10. The primary justification for the obligation to make full reparation for all responsible international persons in situations of shared responsibility is the protection of injured persons that, given the limited access to international courts, would otherwise have no remedy. In situations of shared responsibility, it should not be for the injured person to ‘prove how much damage each did, when it is certain that between them they did all’.¹⁵⁶ The injured person also ‘should not be required to prove which particular elements of damage were attributable to each’.¹⁵⁷ The obligation of each responsible international person sharing responsibility to make full reparation contributes to securing of the remedial function of international responsibility. Although the protection of the rights of injured persons is not the only purpose of the law of international responsibility,¹⁵⁸ it is one of its primary functions.

5. The protection of the position of injured persons is particularly important in light of the practical hurdles often present in situations of shared responsibility, such as the possibility that a claim may not be brought against all responsible international persons. Moreover, an obligation of full reparation for all responsible international persons that share responsibility can contribute to the protection of the interests of injured parties by inducing international persons to agree on the apportionment of responsibility *ex ante*.¹⁵⁹ The practice of the EU provides an illustration in this

¹⁵² Commentary to Article 31 ARSIWA, para. 12

¹⁵³ Commentary to Article 31 ARSIWA, para. 13.

¹⁵⁴ See European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (SpringerWienNewYork 2005) article 9:101; C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009), article 4:103(2); The Commission on European Contract Law, *Principles of European Contract Law: Part III* (2003) article 10:102(2); R. Alford, ‘Apportioning Responsibility Among Joint Tortfeasors for International Law Violations’ 38 *Pepperdine Law Review* (2011) 233, at 245; J. Noyes and B. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ 13 *Yale Journal of International Law* (1988) 225, at 151–154; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, Separate Opinion of Judge Simma.

¹⁵⁵ J. Noyes and B. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ 13 *Yale Journal of International Law* (1988) 225, at 254. See also The Commission on European Contract Law, *Principles of European Contract Law: Part III* (2003), at 64; C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009), at 978: ‘in order to protect the victim of damage caused by several people [...] the obligation of reparation arising out of damage is solidary.’

¹⁵⁶ *Summers v. Tice*, 33 Cal. 2d 80 (1948), at 85–86. See also: *Earnshaw & Others Case (Zafiro Case) (U.K. v. U.S.)*, 30 November 1925, 6 UNRIAA (2006) 160, at 164: ‘we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the Zafiro’.

¹⁵⁷ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4, para. 276(c).

¹⁵⁸ See the discussion on the private and public law dimensions of international responsibility in A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MJIL* 359, at 400–403.

¹⁵⁹ See e.g. Article 6 Annex IX UN Law of the Sea Convention (LOSC) 1982 (1833 UNTS 3), which is the result of firm opposition by EU member states at the Law of the Sea Conference to a proposed general rule of joint and several liability, see Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001) at 150.

regard. In particular, the possibility of joint and several responsibility may have been one of the reasons why the EU has developed a practice of attaching special ‘declarations of competence’ to international agreements to which both the EU and/or its member states are parties.¹⁶⁰

6. The obligation stated in Principle 10 finds support in practice and doctrine. In situations of multiple attribution of conduct, the application of the established rules on reparation results in an obligation of each responsible person to provide full reparation. The obligation of reparation in Article 31 ARSIWA and Article 31 ARIO requires a responsible international person to ‘make full reparation for the injury caused by its internationally wrongful act’. Since a single wrongful act for which multiple actors are responsible caused the whole (indivisible) injury, all responsible actors are under an obligation to make full reparation for the whole injury.¹⁶¹ In situations in which each contribution would be by itself sufficient to cause the whole damage (concurrent contributions), an obligation of full reparation of each responsible person can be inferred from the above-mentioned established rules on reparation because each conduct could have caused the whole injury. For instance, the UN Compensation Commission considered that Iraq had to fully compensate damages caused concurrently by Iraq’s invasion and occupation of Kuwait and the trade embargo and related measures.¹⁶²

7. In the *Corfu Channel* case, the ICJ did not reduce the reparation owed by Albania to the UK even though it was evident that Albania’s conduct was only one of the factors that led to the explosions (the other one being the laying of the mines by a third state).¹⁶³ In his dissenting opinion to the *Oil Platforms* case, Judge Simma found ‘no objection to holding Iran responsible for the entire damage even though it did not directly cause it all.’¹⁶⁴ Moreover, based on a ‘modest study of comparative tort law’, he concluded that the principle of joint and several liability (which would allow for Iran to be held responsible for the full damage) ‘can properly be regarded as a ‘general principle of law’ within the meaning of Article 38, paragraph 1 (c) of the Court’s Statute.’¹⁶⁵

8. Similarly, in the *Certain Phosphate Lands in Nauru* case, Nauru instituted proceedings against Australia for the way Nauru had been administered, which had resulted in the mining out of Nauru’s phosphate lands. Since the territory of Nauru had been administered through a common organ of Australia, New Zealand and the UK, Australia had ‘raised the question whether the liability of the three

¹⁶⁰ C. Ahlborn, ‘To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States’, 88 *Die Friedenswarte – Journal of International Peace and Organization* (2013) 45, at 64. See also P.-J. Kuijper and E. Paasivirta, ‘Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations’ 1 *International Organizations Law Review* (2004) 111, at 120, who assert that the threat of joint and several liability in Article 6 Annex IX LOSC ‘is a good incentive for the Community and its Member States to provide prompt and truthful information on demand’ about where responsibility lies.

¹⁶¹ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4, para. 277; S. Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’, in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008) 185, at 211; P. d’Argent, ‘Reparation, Cessation, Assurances and Guarantees of Non-Repetition’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 208, at 238.

¹⁶² UN Compensation Commission, Governing Council Decision, Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, 4 January 1993, S/AC.26/1992/15_*/, para. 9, at 4: ‘the full extent of a loss, damage, or injury may be attributed both to Iraq’s unlawful invasion and occupation of Kuwait and to the trade embargo and related measures; they are parallel causes.’ See D. Pusztai, *Causation in the Law of State Responsibility* (2017), Doctoral dissertation, University of Cambridge, at 211.

¹⁶³ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4, para. 34.

¹⁶⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, Separate Opinion of Judge Simma, para. 73.

¹⁶⁵ *Ibid.*, para. 74.

states would be “joint and several” (solidaire), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority.¹⁶⁶ In his separate opinion, Judge Shahabudeen supported Nauru’s contention that the three states were bound to joint and several obligations and could be held jointly and severally responsible for the way Nauru had been administered.¹⁶⁷

9. In a number of cases before international courts and tribunals, one of the parties to proceedings has based its argument on the notion of joint and several liability.¹⁶⁸ In *Aerial Incident of 27 July 1955*, the US referred to Article 38(1)(c) and (d) ICJ Statute when it asserted in its pleadings: ‘in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage.’¹⁶⁹ In *Treatment in Hungary of Aircraft and Crew of United States of America*, the US asked the ICJ to decide that Hungary and the USSR were jointly and severally responsible to the US for the damage caused,¹⁷⁰ and in the *Legality of Use of Force* cases brought by Serbia and Montenegro against ten different states, Serbia and Montenegro argued that the respondent states were jointly and severally responsible for the actions of the NATO military command structure.¹⁷¹

10. In the *Eurotunnel* arbitration, claimants argued that joint and several liability of France and the UK ‘followed from the fact that the [relevant] Instruments contemplate the Governments cooperating and coordinating their actions in making appropriate provisions in those fields.’¹⁷² The Tribunal rejected the argument that joint and several liability resulted *per se* from the cooperative character of the obligations in the field of security and frontier controls, though it did eventually rule that both France and the UK were responsible for their failure to maintain conditions of normal security and public order in and around the Coquelles terminal. Claimants were therefore entitled to recover the losses resulting directly from this breach, to be assessed in a separate phase.¹⁷³ In another example, the ITLOS’ Seabed Disputes Chamber affirmed that multiple sponsoring states can incur joint

¹⁶⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, para. 48.

¹⁶⁷ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, Separate Opinion of Judge Shahabuddeen, paras. 283–286.

¹⁶⁸ A. Nollkaemper, ‘Issues of Shared Responsibility Before the International Court of Justice’, in E. Rieter and H. de Waele (eds.) *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2012) 199.

¹⁶⁹ *Aerial Incident of 27 July 1955 (USA v. Bulgaria)*, Merits - Memorial submitted by the United States Government, 2 December 1958, Part I, 229.

¹⁷⁰ *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People’s Republic; United States of America v. Union of Soviet Socialist Republic)*, Application instituting proceedings, 16 February 1954, ICJ Reports (1954), at 10.

¹⁷¹ *Legality of Use of Force (Serbia and Montenegro v. UK)* (Oral Proceedings) (Public Sitting 10 May 1999), Verbatim Record 1999/14, p. 40.

¹⁷² *Eurotunnel Arbitration (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)*, Partial Award, PCA Case no. 2003-06, 30 January 2007, para. 165.

¹⁷³ *Eurotunnel Arbitration (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)*, Partial Award, PCA Case no. 2003-06, 30 January 2007, para. 319. This next phase concerned with the determination and allocation of damages was terminated when parties reached a settlement, the precise terms of which are not publicly available, Freya Baetens, ‘Invoking, Establishing and Remediating State Responsibility in Mixed Multi-Party Disputes’, in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 435.

and several liability when they contribute to a common damage.¹⁷⁴ However, this conclusion was based on an interpretation of Article 139(2) LOSC, which explicitly provides for joint and several liability.

11. Principle 10 also finds considerable support in scholarship. Many scholars have argued in favour of an obligation to provide full reparation incumbent on each responsible international person in certain circumstances or have argued that international law provides bases for such an obligation.¹⁷⁵

Principle 11

Forms of reparation in situations of shared responsibility

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

Commentary

1. Principle 11 concerns the different forms of reparation in situations of shared responsibility. It is based on Articles 34 ARSIWA and ARIO, as well as how these provisions are further specified in Articles 35 to 37 of the ARSIWA and ARIO, and extends those provisions to situations in which multiple international persons cause an indivisible injury.

2. Principle 11(1) spells out the forms of reparation as they are established in the law of international responsibility. They consist of restitution, compensation and satisfaction, and can be used

¹⁷⁴ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, para 201. See I. Plakokefalos, 'Environmental Protection of the Deep Seabed', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 380, at 393.

¹⁷⁵ J. Noyes and B. Smith, 'State Responsibility and the Principle of Joint and Several Liability' 13 *Yale Journal of International Law* (1988) 225; B. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (1988) at 59–62. B. Graefrath, 'Complicity in the Law of International Responsibility', 2 *Revue Belge de Droit International* (1996) 371, at 380; S. Yee, 'The Responsibility of States Members of an International Organization for Its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005); E. Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO', 17 *EJIL* (2006) 837; C. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008) 161, at 181; C. Voigt, 'State Responsibility for Climate Change Damages' 77 *Nordic Journal of International Law* (2008) 1, at 19–20; A. Orakhelashvili, 'Division of Reparation between Responsible Entities', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010); P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 208; W. Vandenhoele, 'Shared Responsibility of Non-State Actors: A Human Rights Perspective', in N. Gal-Or, C. Ryngaert and M. Noortmann (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (2015) 75.

either singly or in combination with one another in order to achieve full reparation.¹⁷⁶ Principle 11(1) is premised on the view that international persons sharing responsibility may be under an obligation to provide distinct forms of reparation.

3. In situations of shared responsibility, only some of the responsible international persons may be in a position to make restitution in kind. For instance, an individual can only be released by the international person that has custody of him or her. As restitution must be provided when materially possible,¹⁷⁷ an international person in a position to provide restitution has an obligation to do so. Pursuant to Principle 11(2), other international persons sharing responsibility that are not in the position to provide restitution have an obligation to ensure that restitution is made by those international persons that are in position to do so. As with the obligation to seek cessation stated in Principle 9(2), the conduct required by such an obligation may vary based to degree of the influence that the international persons can exert over the conduct of each other.¹⁷⁸

4. The obligation formulated in Principle 11(2) has been recognized in various cases. One example is the case of *Sayadi and Vinck v. Belgium* before the Human Rights Committee. Belgium had communicated personal information concerning two Belgian nationals to the relevant UN Sanctions Committee, on the basis of which they were unjustly placed on the corresponding UN sanctions list. The Human Rights Committee concluded that Belgium's conduct had resulted in a violation of the right to private life of Sayadi and Vinck,¹⁷⁹ with the consequence that Belgium should provide them with an effective remedy. The Human Rights Committee considered that even though Belgium itself was unable to remove their names from the Sanctions Committee's list, it was under the obligation 'to do all it can to have their names removed from the list as soon as possible, [...] to make public the requests for removal [...] [and] to ensure that similar violations do not occur in the future.'¹⁸⁰ Similarly, in the case of *Serrano Sáenz v. Ecuador*, the Inter-American Commission on Human Rights concluded that Ecuador had illegally detained Serrano Sáenz, had held him incommunicado and in inhumane conditions, and later illegally and summarily deported him to the US, where the victim had been sentenced to death. The Commission recommended Ecuador to 'take the necessary and timely measures, legal and diplomatic, with a view to the return of said person to his country of birth, from where he was arbitrarily deported.'¹⁸¹ Another example of an obligation to make efforts to ensure that another international person provides restitution can be found in the case of *Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs* in which UK forces in Iraq had captured Rahmatullah and transferred him to the custody of US forces. The British Court of Appeal held that the UK had 'an international legal obligation to demand the return of the applicant'.¹⁸²

5. Principle 11(3) provides for an obligation of compensation in situations in which restitution in kind is materially impossible, or not sufficient to wipe out all of the consequences of the wrongful act(s).¹⁸³ Each of the responsible international persons is then under an obligation to compensate for the indivisible injury caused. In situations in which an international person can provide restitution but is

¹⁷⁶ Commentary to Article 34 ARSIWA, para. 2.

¹⁷⁷ Articles 35 ARSIWA and ARIO.

¹⁷⁸ ICRC, Commentary on the First Geneva Convention (2016), para. 164.

¹⁷⁹ Human Rights Committee, *Sayadi and Vinck v. Belgium*, Communication no. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (2008), para. 10.13.

¹⁸⁰ Human Rights Committee, *Sayadi and Vinck v. Belgium*, Communication no. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (2008), para. 12.

¹⁸¹ Inter-American Commission on Human Rights, *Serrano Sáenz v. Ecuador*, Case 12.525, Report no. 84/09 of 6 August 2009, para. 80(1).

¹⁸² *Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs & Another* [2011] EWCA Civ 1540 (14 December 2011), para. 35.

¹⁸³ Articles 36 ARSIWA and ARIO.

unwilling to do so, other international persons will be under an obligation to provide compensation for the indivisible injury pursuant to Principle 11(3). In the case of *Al-Jedda v. the United Kingdom*, the ECtHR ordered the UK to provide monetary compensation for the wrongful detention of Al-Jedda in Iraq,¹⁸⁴ although the US as a joint occupying power also contributed to the injury.¹⁸⁵ In the *Mothers of Srebrenica* case, the Court of Appeal ordered the Dutch state for the damage caused by not giving the male refugees inside the UN compound the option of staying in the compound and thus denying them the 30% chance of not being exposed to the inhumane treatment and executions by the Bosnian Serbs.¹⁸⁶ While the UN was likely also responsible for not preventing the death of the male refugees, the Netherlands alone was held to compensate.¹⁸⁷

6. As the *Al-Jedda* and *Mothers of Srebrenica* cases illustrate, the performance of the obligation to provide full compensation can be claimed from each international person that shares responsibility. This is of particular relevance if international proceedings are instituted against only one of the responsible international persons, for example as a result of jurisdictional hurdles that make it impossible to bring all of the responsible international persons before a particular international court or tribunal. In the case that multiple international persons are brought before an international court or tribunal, full reparation can be claimed from all of them together. In such a situation, the court itself may choose to apportion compensation between the responsible international persons, so that they jointly provide full reparation to the injured person. Such an approach can be observed in the case-law of the ECtHR when cases are brought against multiple states parties to the ECHR.¹⁸⁸ For example, in *M.S.S. v. Belgium and Greece*, both Belgium and Greece were found responsible in relation to the injury of the asylum seeker that Belgium had transferred to Greece, where he was subjected to inhuman detention conditions. The ECtHR apportioned compensation of non-pecuniary damage on an uneven basis to Greece and Belgium, the latter being obliged to pay a considerably larger sum.¹⁸⁹ Also in the *Rantsev* case, involving shared responsibility of Cyprus and Russia, the ECtHR apportioned the obligation to pay compensation unevenly.¹⁹⁰

7. Principle 11(3) stipulates an exception to the obligation of each responsible international person to compensate for the indivisible injury caused in situations in which its contribution to that injury is negligible. Whether a contribution to indivisible injury is negligible depends on the circumstances of the case as well as the relative importance of the contribution in relation to other international persons contributing to the injury. For instance, if an international person provided only minor logistical support to a major military operation conducted by other international persons, its contribution may be negligible for purposes of establishing an obligation of compensation. This is in line with the ILC commentary to Article 16 ARSIWA, which recognizes that where ‘the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed

¹⁸⁴ ECtHR, *Al-Jedda v. the United Kingdom*, Application no. 27021/08, Judgment of 7 July 2011, para. 114.

¹⁸⁵ *Ibid.*, para. 67.

¹⁸⁶ Court of Appeals of The Hague, 200.158.313/01 and 200.160.317/01, 27 June 2017, Ruling.

¹⁸⁷ See also the commentary to Principle 4, para. 8. Applicants had initially brought claims against the UN before Dutch Courts, but the Dutch Supreme Court, as the final instance, upheld the immunity of the UN (Supreme Court of the Netherlands, Case No. 10/04437, 13 April 2012, at paras. 4.3.6-4.3.14)

¹⁸⁸ M. den Heijer, ‘Procedural Aspects of Shared Responsibility in the European Court of Human Rights’, 4 *Journal of International Dispute Settlement* (2013), at 378-381

¹⁸⁹ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011, paras. 402–23; M. den Heijer, ‘Refoulement’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 481, at 504.

¹⁹⁰ ECtHR, *Rantsev v. Cyprus and the Russian Federation*, Appl. no. 25965/04, Judgment of 7 January 2010, paras. 341-343. See A. T. Gallagher, ‘Human Rights and Human Trafficking’, in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 556, at 560.

only to a minor degree, if at all, to the injury suffered [an international person] should not necessarily be held to indemnify the victim for all the consequences of the act'.¹⁹¹

8. Principle 11(4) indicates that, when full reparation entails an obligation to provide satisfaction, this obligation is owed by each of the responsible international persons and is born equally by each of the responsible international persons. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, or a formal apology.¹⁹² After the destruction of the Chinese Embassy in Belgrade by bombings by NATO states in 1999, the British Prime Minister apologised to the Chinese Government even though the missiles had not been fired by a British plane.¹⁹³ In the case of *Nada v. Switzerland*, the ECtHR found that 'there has been a violation of Article 13 of the Convention taken in conjunction with Article 8',¹⁹⁴ after a prior finding that the relevant Security Council resolution 1390 (2002) imposed an obligation on UN member states to take measures capable of breaching human rights.¹⁹⁵ This finding of a violation of the ECHR could be considered satisfaction as a form of reparation to be borne by both Switzerland and the UN.¹⁹⁶

Principle 12

Right of recourse

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

Commentary

1. Principle 12 states that an international person that has provided full reparation to an injured person has a right to seek contribution from other responsible international persons. The other international persons that share responsibility are under a corresponding obligation to compensate the international person that has made full reparation.

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

¹⁹¹ Commentary to Article 16 ARSIWA, para. 10.

¹⁹² On the different modalities by which satisfaction may be expressed see commentary to Articles 37 ARSIWA and ARIO).

¹⁹³ *Legality of Use of Force* case (*Serbia and Montenegro v. UK*) (Oral Proceedings) (Public Sitting 12 May 1999), Verbatim Record 1999/25, at 16; A. Nollkaemper, 'Issues of Shared Responsibility Before the International Court of Justice', in E. Rieter and H. de Waele (eds.) *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2012) 199.

¹⁹⁴ ECtHR, *Nada v. Switzerland*, Application no. 10593/08, Judgment of 12 September 2012, para. 214.

¹⁹⁵ *Ibid.*, at para. 172.

¹⁹⁶ The applicants in the *Nada* case had not submitted any claim in respect of pecuniary or non-pecuniary damage, which is why the court did not award any further reparation (*ibid.*, at paras. 239-240). On declaratory judgments as a form of satisfaction see the commentary to Article 37 ARSIWA, para. 6 (referring to the *Corfu Channel* case).

basis.¹⁹⁷ An express provision has been adopted in the Convention on Liability for Damage Caused by Space Objects, which stipulates that

‘[i]n all cases of joint and several liability [...] the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.’¹⁹⁸

A specific example are the payments made by the UK and New Zealand to Australia in respect of its settlement of the *Phosphate Lands* case, even though Australia never formally accepted legal responsibility when it agreed to pay Nauru.¹⁹⁹

3. Where the obligation of full reparation for each responsible international person that shares responsibility safeguards the interests of injured persons, a right of recourse protects a responsible international person from having to bear the entire burden of reparation for a damage caused by a plurality of actors. In that sense, ‘the possibility to subsequently sue the other wrongdoers for their individual contributions [...] reduce[s] the costs of shared responsibility for the co-responsible actors’.²⁰⁰ In domestic legal systems, a right of recourse is sometimes recognized ‘on the basis of mandate, negotiorum gestio or unjustified enrichment’.²⁰¹

4. Pursuant to Principle 12, it is for the international person seeking recourse to justify that it is entitled to partial compensation by one or more of the other international persons sharing responsibility and to determine the extent thereof. The extent of such compensation depends on the circumstances of the case, including the nature of the obligation and the extent of the contribution to the injury, and other relevant factors in the determination of responsibility such as remoteness of damage, foreseeability, fault and reasonableness.²⁰² In case of concurrent contributions, where the equivalent conduct of each responsible person could have alone caused the injury, an international person that has provided full reparation may not be able to justify a claim of contribution against others because its conduct would have been sufficient to bring about the whole injury. However, the fact that indivisible damage has been caused by concurrent contributions could also be an argument for proportionate allocation among the responsible international persons, considering that each is equally at fault in such a situation.

¹⁹⁷ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4, para. 276(d). In the *International Tin Council* case, Lord Templeman noted that ‘[a]n international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice’. UK, House of Lords, *Maclaine Watson & Co Ltd v. International Tin Council* (26 October 1989), [1990] 2 A.C. 418, at 480.

¹⁹⁸ Article IV(2) Convention on Liability for Damage Caused by Space Objects 1972, 961 UNTS 187.

¹⁹⁹ Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur (2000), 2(1) *ILC Yearbook* (2000), at 3, UN Doc. A/CN.4/507 and Add.1–4, para. 276(d), with references to the Settlement Agreement of 10 August 1993, 32 ILM (1993) 1471.

²⁰⁰ C. Ahlborn, ‘To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States’, 88 *Die Friedenswarte – Journal of International Peace and Organization* (2013) 45, at 69.

²⁰¹ The Commission on European Contract Law, *Principles of European Contract Law: Part III* (2003), 69.

²⁰² ARSIWA commentary to Article 31, para. 10.

5. Principle 12(2) provides that when an international organization shares responsibility with other international persons, this Principle is without prejudice to the rules of the organization.²⁰³ Those rules may contain a right of recourse and the modalities for determining the extent of the compensation due by the other international persons that share responsibility.

Principle 13

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

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

Commentary

1. Principle 13 restates the specific consequences that arise when multiple international persons commit a serious violation of a peremptory norm of general international law. It reflects Articles 40 and 41 ARSIWA and Article 41 and 42 ARIO as applied in situations of shared responsibility. Principle 13 extends the scope of those provisions by including obligations for international organizations in relation to serious breaches of peremptory norms by states.²⁰⁴ Accordingly, international organizations are under an obligation to seek to bring to an end serious violations of peremptory norms committed by states and not to recognize as lawful a situation created by the breach, nor render aid or assistance in maintaining that situation.

2. Principle 13(1) makes explicit that the obligations of all other international persons are due in relation to each of the international persons that have committed a serious violation of a peremptory norm and share responsibility. This is the case when a single internationally wrongful act engages the responsibility of multiple international persons under Principle 3. For instance, a joint military operation that constitutes an unlawful act of aggression engages the shared responsibility of each state to which the wrongful conduct is attributed. When multiple internationally wrongful acts are involved,

²⁰³ On the legal nature of the rules of the organization see C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', 8 *International Organizations Law Review* (2011) 397. See also S. Yee, 'The Responsibility of States Members of an International Organization for Its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 442-443, discussing the internal allocation of responsibility between international organizations and their member states.

²⁰⁴ Article 41 ARSIWA provides for obligations of states in relation to serious breaches by states, and Article 42 ARIO provides for obligations of states and international organizations in relation to serious breaches by international organizations.

as stated in Principle 4, Principle 13 applies when each contribution to injury individually reaches the threshold of a serious violation as is understood by the existing rules on international responsibility.

3. Article 40(2) ARSIWA and Article 41(2) ARIIO define a breach as serious ‘if it involves a gross or systematic failure by the responsible State to fulfil the obligation.’ In practice, breaches of peremptory norms can consist of an accumulation of wrongful acts (such as discrimination and abuse) that, taken individually, do not qualify as gross or systematic but which, cumulatively, can reach the required threshold of gravity to qualify as a serious breach.²⁰⁵ This is why Principle 13(2) provides that in situations of shared responsibility a serious breach of a peremptory norm may also consist of the wrongful conduct of multiple international persons that cumulatively constitutes a serious breach of a peremptory norm of international law, but which would not reach the threshold of a serious breach when considered independently. Principle 13(2) thus extends the existing rules of international responsibility, which could be considered ‘too narrow in scope to cover serious breaches reached by multiple actors cumulatively.’²⁰⁶

4. The failure to comply with the obligation to cooperate to bring a serious breach to an end, or the obligation not to recognize, nor render aid or assistance in maintaining a situation created by a serious breach, may lead to shared responsibility for international persons that fail to comply with those obligations.

PART IV – IMPLEMENTATION OF SHARED RESPONSIBILITY

Principle 14

Invocation of shared responsibility

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

Commentary

1. Principle 14 concerns the invocation of shared responsibility. Subject to a few exceptions provided for below, the principles relating to invocation of shared responsibility are largely patterned after those relating to invocation of responsibility in general. The entitlement to invoke the

²⁰⁵ E. Wyler and L. Castellanos-Jankiewicz, ‘Serious Breaches of Peremptory Norms’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 284, at 291.

²⁰⁶ *Ibid.*

responsibility of each responsible international person reflects the principles laid down in Article 47 ARSIWA and Article 48 ARIO.

2. The right to invoke the responsibility of each of the responsible persons is without prejudice to the question whether a single claim is brought against a plurality of responsible states as such,²⁰⁷ or whether multiple claims are brought against each of a multiple responsible international persons.²⁰⁸ Whether a single or multiple claims are brought depends on the injured persons and may be influenced by the applicable procedural law of the relevant court or tribunal.

3. Principle 14(1) indicates that an injured international person, as defined in Article 42 ARSIWA and Article 43 ARIO, is entitled to invoke the responsibility of each international person that shares responsibility. In accordance with Principles 9 and 10, this entails that an injured international person may be entitled to claim cessation and assurances and guarantees of non-repetition from each responsible international person, as well as full reparation for the indivisible injury it has suffered.

4. Principle 14(2) provides that an international person other than an injured international person, as defined in Article 48 ARSIWA and Article 49 ARIO, is entitled to invoke responsibility of each of the international persons that share responsibility. Under the law of international responsibility, such international persons are entitled to claim cessation and assurances and guarantees of non-repetition, and full reparation on behalf of the injured person.²⁰⁹ While the ARSIWA and ARIO do not explicitly make clear that invocation under Article 48 ARSIWA and Article 49 ARIO is possible against a plurality of responsible persons, they do not exclude such invocation.²¹⁰ Principle 14(2) makes this possibility explicit for situations of shared responsibility.

5. Principle 14(3) addresses the invocation by injured individuals and other persons, which is not dealt with in the ARSIWA and ARIO.²¹¹ The scope of the present Principles is limited to states and international organizations as actors that may incur shared responsibility, but the entitlement to invoke responsibility under the Principles extends to all persons that have rights under international law. In many cases involving shared responsibility, obligations are not only owed to states or international organizations, but also to individuals or other entities such as corporations. This is in particularly relevant for persons that have rights under human rights law and international investment law.

6. Principle 14(3) restricts the possibility of invocation by individuals and other persons to situations in which a state or an international organization owes obligations to such persons and acts in breach of such obligations. Article 42(b) ARSIWA and Article 43 ARIO, which address the invocation of responsibility in relation to obligations owed to a group of states or international organizations, is deemed to have no legal relevance in relation to individuals. Moreover, the situations addressed in Article 48 ARSIWA and Article 49 ARIO do not apply to invocation of shared responsibility by persons other than states or international organizations. There is no practice that would support an extension of those provisions to non-injured persons that are not states or international organizations.

²⁰⁷ See e.g. *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, ICJ Reports (1954), 19.

²⁰⁸ E.g. the *Legality of Use of Force* cases, where the Federal Republic of Yugoslavia brought claims against ten NATO member states separately.

²⁰⁹ Article 48(2) ARSIWA and Article 49(4) ARIO.

²¹⁰ A. Vermeer-Künzli, 'Invocation of Responsibility', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 251, at 252.

²¹¹ Article 33(2) ARSIWA and Article 33(2) ARIO.

Furthermore, the policy rationale underlying Article 48 ARSIWA and Article 49 ARIO, namely the protection of a collective interest, does not necessarily apply to persons other than states or international organizations.

7. While under Principle 14 an injured (international) person may bring claims against multiple responsible persons, it cannot recover, by way of compensation, more than the injury it has suffered.²¹² If an injured person has recovered full reparation in the form of compensation from one responsible international person, it can no longer claim compensation from other international persons that share responsibility. The prohibition of double recovery is justified by the fact that the obligation to make reparation and the right to obtain full reparation 'is limited by the damage suffered'.²¹³

8. The invocation of responsibility according to Principle 14 must be compliant with the conditions and procedures provided by Articles 43 to 46 ARSIWA, Articles 44 to 47 ARIO as well as those conditions and procedures applicable in special regimes. In the specific context of shared responsibility, however, such conditions and procedures can constitute an impediment to the implementation of shared responsibility. For instance, in cases of diplomatic protection, the local remedies rule may require that the state that invokes responsibility of multiple other states, can only do so after local remedies in all responsible states are exhausted. The requirement of the exhaustion of local remedies in several jurisdictions may apply in cases brought under human rights instruments.²¹⁴ In situations of shared responsibility, it should be considered whether this requirement is 'contrary to the notion of reasonableness on which the rule arguably relies and which limits exhaustion to remedies that are reasonably available to the injured individual'.²¹⁵

9. Moreover, the rules of jurisdiction and admissibility of international courts and tribunals may frustrate the invocation of responsibility in situations of shared responsibility. In particular, the 'necessary third party' principle as articulated by the ICJ, can void the ability of an injured person to claim full reparation from any of the responsible international persons in accordance with Principle 10, and can therefore be an insurmountable obstacle for the implementation of these Principles.²¹⁶ This can be illustrated in the *East Timor case*, where the ICJ found it could not exercise jurisdiction in relation to the claim brought by Portugal against Australia, in view of the absence of Indonesia from the proceedings. While the Portuguese claim was not formulated in terms of shared responsibility, the alleged Australian wrong consisted in the conclusion of a treaty with Indonesia, which potentially could have resulted in a situation of shared responsibility. The Court's finding that it could not exercise jurisdiction in view of the absence of Indonesia,²¹⁷ effectively precluded a finding of shared responsibility.

²¹² Article 47 ARSIWA and Article 48 ARIO.

²¹³ ARSIWA commentary to Article 47, para. 9; *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgement, 26 July 1927, PCIJ Series A, No. 9.

²¹⁴ But see the Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)008rev2, Strasbourg, 10 June 2013, para. 40 (noting that the newly introduced Article 36, paragraph 4, of the Convention 'ensures that an application will not be declared inadmissible as a result of the participation of the co-respondent, notably with regard to the exhaustion of domestic remedies within the meaning of Article 35, paragraph 1, of the Convention.') The Court of Justice of the EU rejected the Draft Agreement in Opinion 2/13, ECLI:EU:C:2014:2454 (18 December 2014).

²¹⁵ A. Vermeer-Künzli, 'Invocation of Responsibility', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 251, at 267.

²¹⁶ E.g. *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, ICJ Reports (1954), 19.

²¹⁷ *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports (1995) 90, para. 34.

10. The effective implementation of the Principles calls for a restrictive interpretation of the ‘necessary third party’ principle in situations of shared responsibility. The mere fact that the Court could make a determination of responsibility in relation to one state, in a situation where that state may share responsibility with another state that is not party to of the proceedings, in principle should not be a reason to abstain from the exercise of jurisdiction.²¹⁸ This is supported by the fact that in the *Nauru* case the Court did not find that the necessary parties rule presented a bar to the exercise of jurisdiction against Australia, since ‘the interests of New Zealand and the UK do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s application.’²¹⁹ The ‘necessary third party’ principle should only be applied when the responsibility of a state that is absent from the proceedings would form the very subject-matter of a judgment, as was the case in *Monetary Gold*.²²⁰ Also, in the context of shared responsibility, the ‘necessary third party’ principle should not apply in relation to international persons that are formally outside the jurisdiction of the dispute settlement mechanism concerned, for the latter cannot be deemed to be able to pronounce on the responsibility of the third party excluded from its jurisdiction.²²¹ This implies, for instance, that the necessary parties rule does not apply to situations where a an injured party institutes proceedings only against a responsible state that shares responsibility with an international organization, given that the Court by definition could not exercise jurisdiction in relation to the international organization.²²²

Principle 15

Countermeasures in situations of shared responsibility

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

Commentary

1. Principle 15 provides that an international person entitled to take countermeasures may do so against all international persons that share responsibility pursuant to Principle 2. As the commentary to Article 22 ARSIWA provides, ‘[a]s a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State.’²²³ In situations of multiple responsible international persons, it may be warranted to take countermeasures against each of them. The

²¹⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 392, para. 88.

²¹⁹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, para. 55.

²²⁰ *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, ICJ Reports (1954), 19.

²²¹ A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MJIL* 359.

²²² A. Nollkaemper, ‘Issues of Shared Responsibility Before the International Court of Justice’, in E. Rieter and H. de Waele (eds.) *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2012) 199, at 217–218. See also P. Palchetti, ‘Litigating Member State Responsibility: The Monetary Gold Principle and the Protection of Absent Organization’ 12 *International Organizations Law Review* (2015) 468. See *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Reports (2011) 644, paras. 42–44 (in which the Court decided not to apply the indispensable third parties rule to NATO).

²²³ Commentary to Article 22 ARSIWA, para. 4. See also, commentary to Article 49 ARSIWA, para. 4, and commentary to Article 22 ARIO, para. 2, indicating that this applies by analogy to international organizations.

objectives of restoring legality through the cessation of the wrongful act as well as the implementation of obligation to provide full reparation similarly apply to countermeasures against the international persons that share responsibility pursuant to these Principles.

2. It is possible for countermeasures to be taken against all responsible international persons in situations of shared responsibility arises either out of a single wrongful act under Principle 3 or under multiple wrongful acts under Principle 4.²²⁴ In the *Airbus* case, the WTO Appellate Body authorized the US to take countermeasures against the EU and Airbus-producing countries Britain, France, Germany and Spain in response to illegal EU subsidies to Airbus.²²⁵ The authorization to take such countermeasures could be construed as relating to a single internationally wrongful act attributable to multiple international persons, i.e. the payment of European subsidies that had adverse effects under Article 7.8 of the Agreement on Subsidies and Countervailing Measures.²²⁶

3. An example of countermeasures in reaction to an indivisible injury caused by separate internationally wrongful acts may be found in the EU system to prevent, deter and eliminate illegal, unreported and unregulated fishing. On the basis of Regulation 1005/2008²²⁷ the EU can decide to subject multiple flag states, coastal states, port states and market states to sanctions for failing to comply with their international obligations in relation to fisheries conservation. In November 2013, the European Commission considered Korea and Curacao to be in breach of their obligations as flag states in relation to fishing by their vessel in the territorial waters of Ghana, whereas Ghana itself was considered to have breached its obligations as a coastal state in relation to such fishing.²²⁸ The European Commission issued a formal warning to the states concerned, which could have resulted in trade sanctions against all of them if the situation had not improved.²²⁹

4. In principle, countermeasures against multiple states that share responsibility are subject to the criteria that apply under the ARIO and the ARSIWA to the taking of countermeasures.²³⁰ In the context of shared responsibility additional comments are in order on three points. First, the condition that an injured international person may only take countermeasures against a responsible international person in order to induce that international person to comply with its obligations as provided for in Principles 9 and 10 may lead to a differentiation of countermeasures against international persons sharing responsibility. The ability of multiple responsible international persons to cease the wrongful conduct or to provide reparation may differ, and this may have consequences for the legality of

²²⁴ C. J. Tams, 'Countermeasures against Multiple Responsible Actors', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 312, at 323 ('It is perfectly possible to treat the two breaches as self-standing, each triggering its own consequences, and each triggering a right of the injured actor to implement responsibility, including by means of countermeasures').

²²⁵ *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/ARB, 2 October 2019.

²²⁶ See also J. Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 849, at 870 (noting that in the factual situation that led to the decision of the Appellate Body in *Turkey-Textiles*, Turkey and the EU both were responsible, and that India could have taken countermeasures against both Turkey and the EU).

²²⁷ Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter, and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93 (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 (2008) OJ L 286/1.

²²⁸ Y. Takei, 'Fisheries', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017) 350, at 367–370

²²⁹ European Commission, 'European Commission intensifies the fight against illegal fishing', Press Release 26 November 2013 (IP-13-1162).

²³⁰ Article 49-54 ARSIWA and Article 51-57 ARIO

countermeasures in situation of shared responsibility. For instance, when the Security Council lists an individual on a counter-terrorism sanctions list, the implementing member state is individually not able to delist the individual, but may be in a position to provide compensation.²³¹ The legality of countermeasures in situations of shared responsibility thus will depend on an assessment of the extent to which each responsible international person is capable of complying with obligations under Principle 9 and 10.

5. Second, the principle of proportionality might have relevance for countermeasures in relation to situations of shared responsibility. Under Article 51 ARSIWA and 54 ARIO, countermeasures ‘must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.’ While shared responsibility for indivisible injury will generally not allow an injured party to differentiate between different degrees of responsibility, it is conceivable that an injured party might be able to distinguish between the gravity of an internationally wrongful act. This is particularly the case when shared responsibility is engaged by multiple wrongful acts under Principle 4. In that case, the principle of proportionality may require a differentiation in the type of countermeasures taken in relation to responsible international persons.²³²

6. Finally, when countermeasures are taken pursuant to Principle 15, it may be that such countermeasures are successful in inducing one or more responsible international persons, but not all such persons, to comply with their obligations of cessation and reparation. In that situation, the principle contained in Article 49 paragraph 2 ARSIWA²³³ and Article 53 ARSIWA,²³⁴ as well as Article 51(2) and Article 54 ARIO requires that the countermeasures are discontinued against those international persons that have complied with their obligations but may be continued against the other international persons.

²³¹ See A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011), at 146-147. See also the discussion of the *Nada* case in the commentary to Principle 11, para. 8.

²³² See generally on the application of proportionality in situations of shared responsibility C. J. Tams, ‘Countermeasures against Multiple Responsible Actors’, in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 312, at 329.

²³³ Article 49 paragraph 2 ARSIWA provides: ‘Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.’

²³⁴ Article 53 ARSIWA provides: ‘Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.’