Is it ever about the money?
Remedies, Compensation and Shared International Responsibility before the ICJ and beyond

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Abstract

The present thesis examines how the obligation to make reparation is allocated among multiple responsible actors before the International Court of Justice (ICJ) and beyond. It starts from an analysis of the applicable rules and principles on the obligation to make reparation and the law of remedies in international law and before various judicial institutions. It then turns to the various typologies of cases involving multiple responsible actors as well as to an examination of the principle of joint and several responsibility. Finally, it inquires how the ICJ (primarily) and other international courts and tribunals have dealt with such cases in their broader jurisdictional context and taking into consideration their approach to remedies generally.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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I. Introduction

The work of the International Law Commission (ILC) on international responsibility was the most long-lasting and one of the most complex codification projects that the Commission had grappled with since its creation in 1947.[1] James Crawford, the last Special Rapporteur of the ILC on the topic, has summarized its work as follows:[2]

> The topic of State responsibility is one of the most important topics undertaken by the ILC. It has also taken longest to finish. The Articles on Responsibility of States for Internationally Wrongful Acts seek to respond fairly and fully to the comments made by governments and others, and to the issues engaged. Adopted without a vote and with consensus on virtually all points, it accurately reflects the balance of opinion within the ILC following prolonged discussion and debate over several decades, and intensively since 1992.

When the project finally came to fruition in 2001 with the adoption of the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'),[3] and later in 2011 with the adoption of the Draft Articles on the Responsibility of International Organizations, there were many successes to be counted. Having retained in the final product of its work the distinction between primary and secondary rules of international law as conceptualised by the Second Special Rapporteur Roberto Ago, the ILC avoided the difficult discussion regarding the content of primary international obligations; it clarified and codified to a large extent the customary rules on attribution of conduct to States and international organizations; it successfully articulated a rule on the

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[1] GA Res 174 (II) of 21 November 1947. The ILC was established by the UN General Assembly as a means to realize the Article 13 (1)(a) UN Charter: '1. The General Assembly shall initiate studies and make recommendations for the purpose of: (a) … encouraging the progressive development of international law and its codification"; see also Article 1(1) of the ILC Statute, adopted by GA Res 174 (II). For the ILC generally and its contribution to the progressive development and codification of international law see R Higgins et al, *Oppenheim's International Law: United Nations* (Oxford, OUP 2017) 929– 46 and 974–77 with further references; M Shaw, *International Law* (8th edn, CUP 2017) 89–90 and n 223 therein.

[2] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 60.

[3] GA Res 56/83 of 12 December 2001, Annex; and Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, YBILC (2001), vol. II (Part 2), 31 ('ARSIWA commentary').

responsibility of States in case of aid and assistance;[4] it clarified circumstances under which wrongfulness is precluded;[5] and it laid down situations of aggravated responsibility and their consequences, among others.[6] The articles on the content of international responsibility, in particular on the obligation to make reparation as a consequence of an internationally wrongful act, also codified, in their greatest part, pre-existing customary international law and are articulated in –at least seemingly[7]– quite clear terms.[8] According to the PCIJ's *Chorzów Factory* judgment,[9] the *locus classicus* on remedies in international law, as codified in Article 31 ARSIWA, every internationally wrongful act triggers the secondary obligation to make full reparation to the injured State for the injury caused. Reparation can take different forms[10] depending on the damage caused and the type of internationally wrongful act committed, as long as it achieves 'full reparation'.

These successes notwithstanding, and as usual in such ambitious codification efforts, the need for compromise and for commonly accepted outcomes left 'unanswered several important questions'.[11] One of these questions, is the manner that the obligation to make reparation is allocated among multiple responsible actors: States, international organizations, multinational corporations, private individuals. In that respect, according to

[4] See generally B Graefrath, 'Complicity in the Law of International Responsibility' (1996) RBDI 371; V Lowe, 'Responsibility for Conduct of Other States' (2002) 101 Journal of International Law and Diplomacy 1; H Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 192–268.

[5] For a discussion on the conceptual issues raised by the nature of circumstances precluding wrongfulness as 'justifications' or 'excuses' and their incorporation in the ARSIWA, see V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 1 EJIL 405; generally F Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018), and especially 129ff.

[6] R Rosenstock/M Kaplan, 'The Fifty-Third Session of the International Law Commission' (2002) 96 AJIL 412.

[7] D Shelton, 'Righting Wrongs: Reparations in the Articles of State Responsibility' (2002) 96 *American Journal of International Law* 833.

[8] Cf however the first Report of the Special Rapporteur Garcia-Amador on International Responsibility, 'State Responsibility', UN Doc A/CN.4/96, (1956) II YBILC 172, 209: "[A]s one inquires into the content of that duty [to make reparation], or the nature and extent of reparation, problems and difficulties of an exceptional complexity are disclosed. In no other aspect of the law of international responsibility is there a greater number of uncertain points'.

[9] *Factory at Chorzów (Claim for Indemnity)*, Jurisdiction, PCJI Series A, No 9, 1927, 4, at 21.

[10] See Article 34 ARSIWA.

[11] Shelton, 'Righting Wrongs' (n 7) 833.

d'Argent, the work of the ILC could even be considered as 'deliberately inconclusive'.[12] The question the present dissertation will explore is exactly how the intricacies of the obligation to make reparation and of remedies in international law have shaped the approach of the International Court of Justice (ICJ) and to a certain extent other international courts and tribunals towards the apportionment of damages among multiple responsible actors.

Situations where damage may be caused by a plurality of responsible (or even not responsible) actors are not at all new in international law.[13] For example, in the 1950s the question arose who bore international responsibility for the damage suffered by Swiss nationals in the international zone of Tangier.[14] The Swiss Federal Political Council came to the conclusion that effective control over the zone of Tangier was jointly exercised by a Commission of Control composed by representatives of the States participating in the international administration of the territory, ie France, Spain, Great Britain, USA, the Soviet Union, the Netherlands, Portugal and Italy.[15] As the Commission constituted their common organ, the States participating in it had responsibility for its actions.[16] However, and given that the common body was composed by representatives of the various States, each State was considered to be responsible not for the entirety of the damage caused, but rather only for a part of it.[17]

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[12] D'Argent, 'Cessation, Reparation, Assurances and Guarantees of Non-Repetition' in A Nollkaemper/I Plakokefalos (eds), *Principles of Shared Responsibility: An Appraisal of the State of the Art* (CUP 2014) 208 –50.

[13] M Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4 JIDS 295, 299. According to J Crawford, *State Responsibility: The General Part* (CUP 2013) 325, 'States rarely operate in isolation. There are many situation where they choose to act together to achieve a mutually beneficial outcome, and as many forms which such joint and collective action may take … Given how common interstate co-operation is, it is perhaps surprising that the law of responsibility in this area remains relatively undeveloped'.

[14] For a brief description of the status of the international zone of Tangier and its administration see C G Fenwick, 'The International Status of Tangier' (1929) 23 AJIL 140; P Guggenheim, 'Droit International Public: Responsabilité internationale pour des dommages causés dans la zone de Tanger' (1953) 10 Annuaire suisse de droit international 238, 241–43.

[15] 'Responsabilité internationale pour des dommages causés dans la zone de Tanger' (n 14) 242–47.

[16] Ibid.

[17] Ibid 247–48.

As explained in Chapter III, situations where a plurality of actors may cause and contribute to a single injury can be encountered in many different formulations. As will be shown, these can be broken down into two primary types.[18] Although the ILC recognized the existence of such situations and the possibility of sharing responsibility in the ARSIWA (and the DARIO), it only briefly discussed the matters in the commentary. It left largely unanswered the question of how the obligation to make reparation shall be divided among a plurality of responsible actors and from whom the injured State may request reparation for the damage suffered. Scholarly authorities have argued that the principles governing such situations remain 'indistinct'[19] and have advocated for the existence (or the need) of a grand principle to address such situations, in the guise of 'joint and several responsibility' as found in domestic legal systems. As will be explained this principle is not completely unknown to international law. However, and although one may recognize the merits of such a general rule to regulate the allocation of the obligation to make reparation among multiple responsible actors, especially for victims' justice, international jurisprudence hardly supports its existence and the rule does not presently constitute *lex lata*.

Accuracy in the determination of liability and the assessment of harm is necessary both for the deterrence of unlawful behaviour and for potential responsible actors to take appropriate precautions when making their decisions.[20] Additionally, and in light of the consent-based, bilateralised, and fragmented international dispute settlement system, understanding the principles governing such situations will clarify and highlight how rules on jurisdiction and admissibility apply in such situations as well as their necessary ramifications.[21]

[18] Crawford, *State Responsibility* (n 13) 333 discussing the different typologies of 'joint and collective state conduct' highlights that 'in practice the differences may not be clear-cut, and various forms of collaborative conduct can co-exist in the same case'.

[19] Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 554.

[20] L Kaplow/S Shavell, 'Accuracy in the Determination of Liability' (1994) 37 Journal of Law and Economics 1; L Kaplow/S Shavell, 'Accuracy in the Assessment of Damages' (1996) 39 Journal of Law and Economics 191.

[21] See for the procedural difficulties arising in the context of cases of shared responsibility the collection of essays in the Journal of International Dispute Settlement 4 (2013) with contributions by Nollkaemper, Plakokefalos, Palchetti, Paparinskis, and van Heijer.

Chapters IV and V will then explore how the ICJ has navigated the unclear waters of remedies and situations of shared responsibility. In a recent case on compensation, the *Certain Activities carried out by Nicaragua in the Border Area*,[22] it was recognized that

> [t]he damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in the light of the facts of the case at hand and the evidence presented to the Court.[23]

Hence, the Court seems mindful of the possibility that more than one causes, indeed more than one responsible actors, may contribute to the injury suffered by a State, as has been the case with other disputes brought before it in the past. As the analysis will demonstrate, dealing with such situations the Court has resisted articulating some grand principle on how apportionment of damages against multiple responsible States is to be performed. It has rather treated each case within the framework and limitations of the jurisdictional title at hand and in light of first principles of international responsibility. These include the principle of independent responsibility, 'full reparation' and the existence of the necessary causal link between the internationally wrongful act(s) and the damage suffered. The Court's attitude in these cases is consistent with its more general practice of displaying flexibility in the determination of remedies and is affirmed by the practice of other international courts and tribunals.

The final part of this dissertation, Chapter VI, will then conclude summarizing the main conclusions of this study, offering explanations and suggestions on the possible takeaways. It has to be stated at the outset that the present thesis is not intended to oppose the argument that it is normatively desirable for international law to have an overarching rule on how the obligation to make reparation is allocated among multiple responsible actors.

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[22] For a commentary see D Desierto, 'Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Great Caribbean', EJIL:Talk!, 14 February 2018, available at https://www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/.

[23] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v* Nicaragua) Compensation, Judgment of 2 February 2018, para 34.

Nor is it supposed to reject the principle of joint and several responsibility pursuant to what Hersch Lauterpacht described as

> a custom with publicists writing on certain disputed questions of international law to base their argument on the assertion that the opinion with which they happen to disagree is nothing else than a misleading analogy to a conception of private law.[24]

The main argument advanced herein is that remedies is a field in which international courts and tribunals tend to maintain flexibility and take a case-specific approach. This tactic is fundamentally not conducive to the articulation of any grand principle on the allocation of the obligation to make reparation among multiple responsible actors. Additionally, the principle of consent and the particularities of each specific jurisdictional setting will essentially limit the power to engage in discussions that may implicate third parties extraneous to the proceedings at hand. As will be shown, the ICJ and to a certain extent other international courts and tribunals have rather found different ways to deal with such situations when presented to them. These include primarily a resort to first principles of international responsibility and a thorough look into the primary obligations at stake.

Before beginning the analysis, it is necessary to set out the methodology employed in the present dissertation and recognize its limitations. The subject-matter is analysed through the lens of an internal, doctrinal approach in which the applicable rules of international law and first principles play a central role. Additionally, a comparative study of a selection of cases from international court and tribunals that have dealt with the issue of reparation when multiple actors are involved has been conducted. It has to be conceded at the outset that due to time and space constraints the cases examined here are only a selection from the case-law. The thesis has made the ICJ the primary focus of inquiry and refers to decisions of other international courts and tribunals to the extent that they affirm or contradict the approach taken by the Court. The selection of cases examined has been based on the author's view that they are representative of the *problématique* underlying the present dissertation and help illustrate its overarching argument. Finally, an important clarification in delimiting the subject matter of this study has to be made. Situations involving multiple responsible actors causing a single injury are multifaceted and may involve actors of a very different nature. The present dissertation grapples with the topic from the perspective of responsible States rather than States and international organizations or non-state, private actors. The issues arising from situations involving such other actors

[24] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927) vii.

have informed the research of course and feature at the background of this study and are referred to whenever necessary.

II. State responsibility and the obligation to make reparation

1. The genesis of the obligation to make reparation and its remedial function

a. The obligation to make reparation as a consequence of an internationally wrongful act

Under general international law,[25] when a State commits an internationally wrongful act—an act or omission that is attributable to her and simultaneously constitutes a violation of her international obligations[26]—her international responsibility is engaged.[27] This may be considered a general principle of international law, even an 'axiomatic' one.[28]

In his seminal study on *State Responsibility*, Brownlie asserts:[29]

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[25] The rules on international responsibility surveyed in this dissertation are those under general international law that operate as the default option when a State (or another international actor) violates her international obligations. Nothing prevents States from agreeing to special rules to apply in the relations between them under a particular treaty regime, or even through the emergence of regional custom (at least in principle, although see for the difficulties concerning the emergence of a regional custom *Right of Passage over Indian Territory* (Portugal *v* India) Merits [1960] ICJ Rep 6). See also ARSIWA Article 55, and generally Simma/Pulkowski, 'Of Planets and the University: Self-contained Regimes in International Law' (2006) 17 EJIL 483.

[26] ARSIWA Article 2; see also DARIO Article 4 for an international wrongful act by an international organization.

[27] See *Phosphates in Morocco*, Preliminary Objections, PCIJ Series A/B No 74, 1938, 10, 28:

> It is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly, involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately between the two States.

See also ARSIWA Article 1; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953, 2006) 170. The same holds true for international organizations and the violation of their international obligations, see: DARIO Article 3.

[28] J Crawford, 'State Responsibility' in *MPEPIL*, MN 17.

[29] I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Clarendon Press 1983) 1–2. On the origins of international responsibility generally and state responsibility in particular see ibid 2–9; also, Y Matsui, 'The Transformation of the Law of State Responsibility' in R Provost (ed), *State Responsibility in International Law* (Routledge 2002) 3–63.

> the concept of responsibility is both very simple and yet sophisticated. It is both a fundamental moral idea common to laymen and lawyers, and a concept which in legal experience calls for considerable study and refinement, involving nice problems of measure of damages, liability for moral damage and so forth.

The content of a State's international responsibility consists of the genesis of 'a new legal relationship'[30] between the responsible State and the injured State. This new legal relationship gives rise to another set of obligations, also often referred to as 'secondary obligations',[31] which aim to restore legality and remedy the injury suffered. This new set of obligations consists, first, of an obligation of cessation of the internationally wrongful act (if it is a continuing one) and the provision of assurances and guarantees of non-repetition,[32] and, second, of an obligation to make reparation for the injury caused.[33] Reparation can then take different forms, namely restitution, compensation, or satisfaction, either singly or in combination.[34]

According to the often-quoted dictum of the PCIJ in the Chorzow *Factory* case:[35]

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[30] Cf L Reitzer, *La Réparation comme Conséquence de l'Acte illicite en Droit international* (Sirey 1938) 25, who speaks of 'une obligation nouvelle: celle de réparer le tort' and his n 2. Also, J Combacau/D Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 NYIL 81, 85; B Stern, 'The Obligation to Make Reparation' in J Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) 563–70, 563.

[31] See ARSIWA Article 28 with commentaries; DARIO Article 28 with commentaries; Reitzer (n 30) 26; d'Argent, *Reparation* (n 12) 208. The term 'secondary obligations' is not meant to diminish the importance of the consequences of international responsibility, to the contrary these are indeed fundamental (cf *Ahmadou Sadio Diallo* (Republic of Guinea *v* DRC) Compensation, Judgment, Dis Op Cancado Trinidade [2012] ICJ Rep 347, paras 32–40), as the PCIJ had already recognised in the *Factory at Chorzów (Claim for Indemnity)*, PCJI Series A/09, 1927, Jurisdiction, 4, 21.

[32] ARSIWA Article 30.

[33] ARSIWA Article 31. Cf *Dispute regarding Navigational and Related Rights* (Costa Rica *v* Nicaragua) Judgment [2009] ICJ Rep 213, 267, para 149, where the Court characterized cessation as 'a form of reparation for the injured State'.

[34] See ARSIWA Articles 34–37 (and DARIO Articles 34–37). For an analysis of the various forms see Stern, 'The Obligation to Make Reparation' in Crawford et al (n 30); C Gray, 'The Choice Between Restitution and Compensation' (1999) EJIL 413.

[35] *Factory at Chorzów (Claim for Indemnity)*, Jurisdiction, PCJI Series A, No 9, 1927, 4, 21

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.

So central is the duty to make reparation that in much of the early scholarship on the subject the content of international responsibility seems to have been virtually equated with the obligation to make reparation.[36] Eagleton in his early study of international responsibility characteristically starts the first chapter as follows:[37]

> The study of the responsibility of states in international law involves an examination of the theory upon which reparation may be demanded by one state of another, and of the processes by which it may be obtained… The failure to meet [international] obligations imposes upon the guilty state the further obligation to make reparation for the injury caused; and, in practice, states are every day called upon for such reparation.

For his part, Reitzer in 1938 in his study of reparation as a consequence of an internationally wrongful act argued:

> La doctrine and la pratique du droit des gens affirment à peu près unanimement que tout acte illicite entraîne à la charge de son auteur un devoir de réparation.[38]

The obligation to make reparation being the necessary corollary of the violation of an international obligation is automatically triggered by the commission of an internationally wrongful act; it occurs 'as a matter of law' and it does not require the injured party to present a claim against or invoke the responsibility of the responsible State.[39] Complementing this 'substantive corollary' are the obligations of cessation and non-repetition of the internationally wrongful act.[40] Literature has paid less attention to these

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[36] See ILC, 'State Responsibility', Report of the Special Rapporteur Garcia Amador, UN Doc A/CN.4/96, 209; also B Stern, 'The Elements of An Internationally Wrongful Act' in Crawford et al (n 30), 193–218, 194.

[37] C Eagleton, *The Responsibility of States in International Law* (NYU Press 1928) 3.

[38] Reitzer (n 30) 25.

[39] ARSIWA commentary, 91, para 4; Crawford, *State Responsibility* (n 13) 95.

[40] Cf Gray, 'Remedies' in Romano et al (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 871–98, 879. According to the Court in *Dispute regarding Navigational and Related*

consequences of international responsibility than to the obligation to make reparation, but in everyday international practice they will often be of bigger importance to States.[41] Crawford refers by way of example to the multilateral trade system established under the World Trade Organization (WTO) and its dispute settlement mechanism.[42] In that context, a State that has violated its obligations under the WTO Agreements is primarily obligated to cease the violation, and more specifically to bring the measure found in breach of WTO law in conformity with the covered agreements. Under the Dispute Settlement Understanding (DSU)[43] compensation and suspension of concessions have a limited role to play compared to cessation of the breach and full implementation of the covered agreements which are the preferred remedies.[44]

b. Reparation as a remedy

The duty to provide reparation is not only a consequence of an internationally wrongful act but also essentially a remedy afforded to the injured party for the damage suffered as a result of an international law violation.[45] According to the Umpire in the *Lusitania Cases* 'it is a general rule … that for every such injury the law gives a remedy … commensurate with the injury received. It is variously expressed as "compensation", "reparation", "indemnity" … and is measured by pecuniary standards, because, says Grotius, "money is

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Rights (Costa Rica *v* Nicaragua) Judgment [2009] ICJ Rep 213, 267, para 148 'the obligation incumbent on the State concerned to cease such conduct [of a wrongful nature] derives by operation from the very fact that the Court establishes the existence of a violation of a continuing character'; For the terminology 'substantive corollary' and 'procedural corollary' of an internationally wrongful act, see Crawford, *State Responsibility* (n 13) 95. The 'procedural corollaries' of international responsibility are the invocation of responsibility and the presentation of a claim on behalf of the injured party, as well as the taking of countermeasures, see Crawford, ibid.

[41] See Graefrath, 'Responsibility and Damages Caused: Relationship Between Responsibility and Damages' (1985) 185 *Recueil des Cours* 9–149, 73; Crawford, 'State Responsibility' (n 28) MN 23; cf Gray, 'Remedies' (n 40) 880. Cf the treatment of cessation and guarantees and assurances of non-repetition by the ICJ in *LaGrand* (Germany *v* USA) Judgment [2001] ICJ Rep 466, 512–14, paras 123–25.

[42] Crawford, 'State Responsibility' (n 28) MN 23.

[43] Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 3, Annex 2, 1867 UNTS 154.

[44] Articles 3.7, 19, 21 and 22 DSU. See also C Brown, *A Common Law of International Adjudication* (OUP 2007) 218–20.

[45] Brown (n 44) 186.

the common measure of valuable things"'.[46] In contemporary international law it is generally accepted that 'remedy' is a term somewhat broader than 'reparation'[47] as it may encompass other means of remedying the breach, such as assurances and guarantees of non-repetition. In turn, 'reparation' is an umbrella term and as mentioned above may take three different forms: restitution, compensation, and satisfaction. 'Compensation' is often used interchangeably with 'damages' to denote the monetary awards granted to make good the damage suffered.

Notwithstanding that the obligation to make reparation accrues in an automatic way, it will practically require for its realization the invocation of the responsibility of the author of the internationally wrongful act and the presentation of a claim.[48] In the decentralized system of international law these actions will usually take place through diplomatic channels and negotiations.[49] But they might also often involve a third party, especially if the situation has culminated into a dispute between the parties involved.[50] This third party may assist the disputing parties either in a non-binding manner, ie by facilitating their negotiations, by

[46] *Lusitania Case*s, 1 November 1923, RIAA, vol VII, 32–44, 35.

[47] L Marotti/P Palchetti, 'Of Restoring Compliance, *Lex Specialis* and Intersecting Wrongs: The Question of "Remedies" in *Gabčíkovo-Nagymaros*' in S Forlati/M Mbengue (eds), *The Gabčíkovo-Nagymaros Judgment and its Contribution to the Development of International Law* (Brill/Nijhoff, forthcoming), 1 (provisional page).

[48] A Vermeer-Kunzli, 'Invocation of Responsibility' in A Nollkaemper/I Plakokefalos (n 12) 251–83, 252.

[49] For a discussion of negotiations as a means of dispute settlement in the context of remedies, see D Anderson, 'Negotiation and Dispute Settlement' in M Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1994) 111–21.

[50] The most often quoted definition of an international dispute is the following passage from the *The Mavrommatis Palestine Concessions*, PCIJ, Series A, No 2, 6, at 11: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.' Of course, if the injured State invokes the responsibility of the author of the internationally wrongful act and claims reparation for the damage suffered, and the latter accepts such responsibility and offers reparation then there would be no dispute between the parties to be resolved by a third party. Cf Graefrath, 'Responsibility and damages caused' (n 41) 91.

mediating or offering their good offices and so forth,[51] or may involve binding dispute resolution, through arbitration or judicial settlement. As Shaw observes:[52]

> A finding that a rule of international law has been breached by a particular party constitutes the indispensable first stage in a remedial action; to put it another way, a remedy is contingent upon the determination and definition of responsibility, which in turn relies upon an earlier decision as to the existence of a breach of international law.

Arbitral and judicial institutions are indeed quite instrumental to the realization of the obligation to make reparation. This is evident, among other things, from the practice to establish tribunals or commissions to deal with the aftermath of crises of an international character or when a large number of claims for damages need to be dealt with. Examples of this practice are the Mixed Claims Commissions established at the start of the 20th century, the Iran-US Claims Tribunal, as well as the Eritrea-Ethiopia Claims Commission. Apart from that, arbitral and judicial institutions have also had big influence in the crystallization of many of the fundamental principles that operate in the realm of international responsibility, reparation and damages.[53] According to Graefrath the *Chorzów Factory* dictum has been repeated 'in every single piece of legal scholarship on the topic'.[54]

However, despite the cardinal role ascribed to the *Chorzów Factory* principle in legal scholarship, and its almost 'ritual incantation'[55] in the relevant decisions of international courts and tribunals, the field of remedies in general international law has been to a certain extent overlooked.[56] In recent years, there have been few more detailed studies on remedies within specialized systems of international law, such as human rights or

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[51] For a comment on these 'softer' means of dispute settlement see C Chinkin, 'Alternative Dispute Resolution under International Law' in Evans (n 49) 122–40.

[52] M Shaw, 'The International Court, Remedies and Responsibility' in M Fitzmaurice/D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 19–33, 19.

[53] Brown (n 44) 185.

[54] Graefrath, 'Responsibility and damages caused' (n 41) 69.

[55] This phrase in international legal scholarship was used first by C Gray in *International Law and the Use of Force* (4th edn, OUP 2018) 125.

[56] C Gray, *Judicial Remedies in International Law* (Clarendon Press 1987) 1; Shaw, 'The International Court, Remedies and Responsibility' (n 52) 20; Gray, 'Remedies' (n 40) 872.

international investment law.[57] But not on the rules and principles applicable to remedies under general international law.[58]

Concluding a recent assessment of the topic of remedies before various international courts and tribunals, Gray has asserted that '[t]he diversity of tribunals is clearly reflected in the diversity of their practice on remedies.'[59] Thus, according to her analysis even though the *Chorzów Factory* principle is considered generally applicable and as reflecting a general principle of international law, it is usually adjusted in the circumstances of each particular judicial setting and in the subject-matter of the particular case in question.[60]

The foregoing analysis illustrates the following points. First, the issue of remedies is generally underexplored in international law and international courts and tribunals seem to have quite diverse approaches when it comes to it. This will necessarily affect any effort to articulate a general rule concerning the allocation of the obligation to make reparation among multiple actors that have all contributed to the same damage, at least one that would be of use in different judicial settings. Therefore, when searching for a grand principle fit to deal with situations of shared responsibility one needs to conduct her research having this general context in mind. Additionally, the jurisprudence of international courts and tribunals on remedies and in general has been instrumental in the development of the law of international responsibility, as well as in crystallizing the consequences of an internationally wrongful act. Hence, it is necessary to conduct any discussion on the principles applicable to the allocation of the obligation to make reparation among multiple responsible actors with international judicial institutions in mind. As the analysis in Chapters IV and V will illustrate the ICJ and to a certain extent other international court

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[57] See, for example, D Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015); D Desierto, 'The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in Chorzow' (2017) 55 Columbia Journal of Transnational Law 395.

[58] But see for short studies Gray, 'Remedies' (n 40); Brown (n 44) 185–224; Shelton, 'Righting Wrongs' (n 7). See also I Brownlie, 'Remedies in the International Court of Justice' in V Lowe/M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 557; as well as M Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1998); and a very recent thesis conducted in the University of Geneva, V S Stoica, *Remedies Before the International Court of Justice: A Systemic Analysis*, Université de Genève (2018), available at https://archive-ouverte.unige.ch/unige:104150.

[59] Gray, 'Remedies' (n 40) 896.

[60] Ibid.

and tribunals have already dealt with such situations one way or another. Their practice in doing so constitutes then a useful guiding principle on how we should be thinking about the subject. Moreover, given the proliferation of international adjudicatory bodies as well as the increasing regularity with which cases involving multiple responsible actors appear before them, any general rule on the allocation of the obligation to make reparation would need to be workable in the context of international dispute settlement.

The next section will turn to the issue of damage and the conceptual and practical difficulties surrounding it, to explore how this might affect an inquiry on how the obligation to make reparation should be allocated among multiple responsible actors.

2. The question of damage

The place of damage in the law of international responsibility had been extensively discussed in the early scholarship on the topic and the early years of the work of the ILC on the matter. Naturally, as at the time State responsibility was mostly viewed in relation to the injuries sustained by aliens in a foreign State's territory, damage played a central role in such a conception of responsibility. A conscious choice of the ILC during the long-lasting preparation of the ARSIWA, however, was to disentangle the engagement of international responsibility from the occurrence of damage. Ago initiated this shift towards a concept of international responsibility that would occur irrespective of whether the violation of the international obligation in question had caused damage to the affected state, when he succeeded Garcia-Amador as Special Rapporteur.[61] This marked a change in perception with regard to the function of international responsibility itself.[62] It signified a move from a private, civil law approach to responsibility—with the sole purpose of providing indemnification for the damage suffered—to a more international public law idea of responsibility as a means of reinstating the stability and integrity of the international legal order disturbed by the breach.[63]

[61] Graefrath, 'Responsibility and damages caused' (n 41) 34 and n 41, and 36, 63.

[62] Graefrath, 'Responsibility and damages caused' (n 41) 24–25, 32–33, 36.

[63] See generally ibid 19–33, 36, for a detailed account of this progress from a civil law concept of responsibility entirely focused on the provision of reparation to the victim of the violation to a more 'international' public law concept of responsibility: Stern, 'The Elements of an Internationally Wrongful Act' (n 36) 194–95; see also ARSIWA with commentaries, 87, para 1, stating 'the rules and institutions of State responsibility are significant for the maintenance of

Ultimately, damage was considered to be an issue falling within the realm of the primary rules of international law, as was the case with fault.[64] As such, it may be that the primary obligation incumbent upon the responsible State requires that no harm to another State is caused.[65] In this case, the State will have violated its international obligation only if damage in one form or another has been actually suffered by the affected State. But it may also be that what the State's international obligations require is for it to adopt a certain conduct[66] or legislation in its domestic legal order to give effect to its international obligations.[67] In this latter case, the State would violate its international obligations through mere non-performance with no need for actual damage to be sustained by another party; its international responsibility would arise independently from it. Implicit in this

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respect for international law and for the achievement of the goals which States advance through law-making at the international level'.

[64] See ARSIWA with commentaries, 36, paras 9-10, and 92, para 6; Crawford, *State Responsibility* (n 13) 58–61; For the concept of fault see R Provost (ed), *State Responsibility in International Law* (Routledge 2002) 3–4; I Brownlie, 'State Responsibility and the International Court of Justice' in Fitzmaurice/ Sarooshi (n 52) 11–18, 12; also, for an early account see Lauterpacht, *Private Sources* (n 24) 134–43.

[65] Article 31 ARSIWA with commentaries, 92, para 6; Crawford, *State Responsibility* (n 13) 57.

[66] For the distinction between obligations of conduct and obligations of result, see Jean Combacau, 'Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse' in *Mélanges offerts à Paul Reuter—Le droit international: Unité et diversité* (Pedone 1981) 181–204. See, also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v* Serbia and Montenegro) Merits, Judgment [2007] ICJ Rep 43, 221, para 430; *Pulp Mills on the River Uruguay* (Argentina *v* Uruguay) Judgment [2010] ICJ Rep 14, 77, para 187; Cf *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion [2011] ITLOS Rep 10, 41, para 110:

> The sponsoring State's obligation 'to ensure' is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligations may be characterized as an obligation 'of conduct' and not 'of result', and as an obligation of 'due diligence'.

[67] See Article 2 ARSIWA with commentaries, 36, para 9 and n 73 therein; Article 31 ARSIWA with commentaries, 92, para 6; Crawford, *State Responsibility* (n 13) 57. This has been increasingly the case with the so-called 'inward-looking' norms of international law, see ILA, 'Mapping the Engagement of Domestic Courts with International Law', Final Report of the Study Group on the Principles of the Engagement of Domestic Courts with International Law (Johannesburg 2016), para 12.

conceptualisation is the theoretical distinction between the concept of injury which is the result of 'any violation of a right' and that of 'consequential harm' that may be caused by such violation which is captured by the concept of damage.[68]

For the obligation to make reparation to arise however the internationally wrongful act has to have caused an injury,[69] which is defined in Article 31(2) ARSIWA in a 'broad and inclusive way, leaving it to the primary obligations to specify what is required in each case'.[70] Under Article 31(2) '[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State'. The commentary then defines 'damage' as 'material or moral loss or detriment suffered by a State in general, as an impairment of property or goods or the dignity or honour of the State, which can be either direct or indirect, suffered though the State's nationals'.[71] Material damage is any damage inflicted upon another State that is financially assessable,[72] whereas moral damage is any other 'individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life'.[73]

International practice and jurisprudence does in fact affirm such a broad reading of the concept of injury. In particular, 'moral' or 'non-material' damage has regularly been the object of the obligation of a State to make reparation. Very early on, the Umpire in the *Lusitania Cases* proclaimed that it could not be doubted '[t]hat one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social

[68] Graefrath, 'Responsibility and damages caused' (n 41) 35; ARSIWA commentary, 92, para 7. See also generally Stern, 'The Elements of an Internationally Wrongful Act' (n 36) 193.

[69] Article 31(1) ARSIWA; D'Argent (n 12) 209, 220.

[70] Article 31 ARSIWA with commentaries, 92, para 8; Crawford, 'State Responsibility' (n 28) MN 27; See also Crawford, *State Responsibility* (n 30) 65, discussing the usefulness of the distinction between primary and secondary rules adopted in ARSIWA and asserting that '[i]t is only necessary for the ARSIWA to be drafted in such a way as to allow for the various possibilities [with respect to the element of damage]' as provided for in the respective primary rules.

[71] ARSIWA with commentaries Article 31(2) and 91-92, para 5; See also DARIO with commentaries Article 31(2) and 56, para 2; See also Graefrath, 'Responsibility and damages caused' (n 41) 20.

[72] See also Article 34(2), which defines damage for which compensation may be due as any 'financially assessable damage including loss of profit insofar as it is established'.

[73] ARSIWA with commentaries, 92, para 5.

position or injury to his credit or to his reputation'.[74] This was later confirmed by the ICJ in the *Diallo* case, where the Court recognized that '"[m]ental and moral damage" … or "non-pecuniary inury" … covers harm other than material injury which is suffered by an injured entity or individual. Non-material injury to a person which is cognizable under international law may take various forms'.[75] To support its conclusion and because its case-law is rather scarce when it comes to awarding damages, the Court turned to the jurisprudence of the Inter-American Court of Human Rights. The latter,[76] as well as the European Court of Human Rights[77] and the European Court of Justice,[78] very regularly award compensation to victims of human rights violations for moral or non-material damage.[79]

'Moral' or 'non-material damage' is also relevant in cases other than those involving rights of individuals. In fact, the commentary to ARSIWA Article 31 refers in that respect to the *Rainbow Warrior* arbitration.[80] In *Rainbow Warrior* (New Zealand *v* France), the arbitral tribunal concluded that France's actions

> provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage… of a moral, political, and legal nature resulting

[74] *Lusitania cases* (USA *v* Germany), 1 November 1923, VII RIAA 32, 40.

[75] *Ahmadou Sadio Diallo* (Guinea *v* DRC) Compensation, Judgment [2012] ICJ Rep 324, para 18. See, also, generally S Wittich, 'Non-Material Damage and Monetary Reparation in International Law' (2004) 15 FinnYIL 321.

[76] See, for example, IACtHR, *Guttieréz-Soler v Colombia*, Series C, No 132, 2005; IACtHR, Case of *"Street Children" (Villagrán-Morales et al) v Guatemala*, Series C, No 77, 2001.

[77] See, for example, *König v Germany* (Article 50), App no 6232/73, Just Satisfaction, Judgment of 10 March 1980, Series A No 36, para 19; *Artico v Italy*, App no 6494/74, Just Satisfaction, Judgment of 13 May 1980, Series A No 37, para 47; *Young, James and Webster v UK (Article 50)*, App nos 7601/76 and 7806/77, Just Satisfaction, Judgment of 18 October 1982, Series A No 44, paras 12–13; *Loizidou v Turkey* (Article 50), App no 40/1993/435/514, Just Satisfaction, Judgment of 28 July 1998, Series A No 310, para 39.

[78] Joined cases C-7/56 and 3-7/57, *Algera et al v Common Assembly of the European Coal and Steel Community*, ECLI:EU:C:1957:7, Judgment of 12 July 1957, 66–67; Joined cases C-169/83 and 36/84, *Leussink et al v Commission of the European Communities*, ECLI:EU:C:1986:371, Judgment of 8 October 1986, [1986] ECR 2801, 2827–28.

[79] Shelton, *Remedies in International Human Rights Law* (n 57) 278–79, 346–54.

[80] Article 31 ARSIWA with commentaries, 92, para 7.

> from the affront to the dignity, and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well.[81]

The aforementioned notwithstanding, such matters as whether damage has actually occurred and whether it has been material or moral will essentially affect the quantum and mode of reparation. These are complicated matters that have not been studied thoroughly in international law.[82] During the work of the ILC on the topic, Special Rapporteur Crawford asserted that 'the wide variety of factual situations, the influence of particular primary obligations, evaluations of the respective behaviour of the parties (both in terms of gravity of the breach and their subsequent conduct)' made it difficult to articulate further rules regulating the assessment of compensation.[83] The same would be equally true for any general rule aiming to regulate the allocation of the obligation to make reparation among multiple responsible actors. In view of the fact that damage is left to be determined in each specific case, depending on the requirements of the primary obligation that has been violated, a rule on the allocation of the obligation to make reparation for such damage *in abstracto* would be hardly helpful, at least in practice. Different actors are bound by different obligations, which in turn may well have different requirements concerning the occurrence of damage or otherwise, in order for them to be breached. In this complex, factual and rule-specific setting, such a grand principle does not seem to make much sense and would most probably fail to capture (and consequently accommodate) all possible situations.

A final crucial point to be addressed here is the problem of *causation* or the necessary *causal link*. Causation is interconnected with damage, as in order for any damage to become the object of reparation 'it has to be proven that such damage was the result of the

[81] *Rainbow Warrior* (New Zealand *v* France), 30 April 1990, XX RIAA 215, 266–67, paras 107–110.

[82] From the very few scholarly works on these matters see: I Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, OUP 2017); Desierto (n 57).

[83] ILC, Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, UN Doc A/CN.4/507 and Add 1–4 (2000), at 51, para 159 (references omitted) ('Third Report Crawford'). See also Graefrath, 'Responsibility and damages caused' (n 41) 94 and n 233 therein for further references.

violation'.[84] The ILC has been 'particularly silent' on the issue of causation.[85] The latter is however implicit in the wording of Article 31 ARSIWA (and Article 31 DARIO), where it is stated that the responsible State has to make reparation for the damage 'caused' by its internationally wrongful act; the damage thus needs to be causally connected to the internationally wrongful act of the State and not be due to another cause.

Despite its apparent central place in the law of international responsibility, in particular with regard to the obligation to make reparation, causation as a concept is rather underexplored in international law; international courts and tribunals have generally 'dodged' such questions, approaching the issue when it arises in cases before them in an unclear and at times ad hoc manner, whereas international legal scholarship has never paid too much attention to it either.[86]

Causation is the process of connecting an act or omission to an outcome as a cause and effect.[87] In the words of the ILC, reparation is due for 'injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act'.[88] Explaining what causation in law means, the ILC maintained that '[t]he allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process' and that in certain cases injuries that are 'too remote' or 'consequential' are excluded from the obligation to provide reparation.[89] In a more clear-cut manner, Plakokefalos argues that causation should be constructed as a two-step process; that of factual causation and that of scope of responsibility.[90]

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[84] Graefrath, 'Responsibility and damages caused' (n 41) 35; D'Argent (n 12) 220, according to whom 'causality triggers the obligation to make reparation regarding certain harms, i.e. those that can be said to be the result of the breach'.

[85] Stern, 'The Obligation to Make Reparation' (n 34) 569.

[86] For a recent exploration of causation in international law see I Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471.

[87] Ibid 472.

[88] ARSIWA commentary, 92, para 9.

[89] Ibid para 10.

[90] See generally Plakokefalos (n 86). D Hamer, '"Factual causation" and "scope of liability": What's the Difference?' (2014) 77 MLR 155, argues that '[f]actual causation is determined through a purely factual enquire whereas scope of liability is non-causal and involves a normative assessment.' Hamer argues (ibid generally) that although the distinction between the two concepts

In the realm of reparation, causation is significant not only because it allows us to find which injury is reparable, but also because it indicates who is the subject liable to make reparation.[91] Its importance is further revealed, when in the event of a plurality of responsible actors one attempts to allocate the obligation to make reparation amongst them.[92] According to d'Argent, causality is crucial for the obligation to make reparation also because it determines 'the allocation of its performance, since it is on the basis of causality that, notably, apportionment is decided'.[93] This might seem quite straightforward but it immediately triggers two concerns. First, if it is true that international courts and tribunals approach causality in an unprincipled and ad hoc, case-specific manner, then it would be next to impossible to develop any general rule on the allocation of the obligation to make reparation that would apply in all situation that a plurality of responsible actors exists. Second, when it is not possible to causally divide the injury and perform apportionment of the damage on a causal basis, who amongst the multiple responsible actors and to what extent bears the obligation to make reparation to the injured party?

Interim Conclusions

The obligation to make reparation is a central feature of the law of international responsibility. It is both a consequence of the internationally wrongful act and a remedy to its victim for the injury suffered. As straightforward as it may be however that 'the breach of an international engagement entails an obligation to make reparation' there are a lot of unclear points in that respect. For one, the obligation to make reparation depends very much upon the occurrence of damage. Issues such as the form of the damage and its extent have great influence on the appropriate form of reparation. Second, causality seems to play

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has had value in promoting clarity and conceptual understanding of the intricacies of causation its sharpness has been overstated.

[91] Cf J D Fry, 'Attribution of Responsibility' in Nollkaemper/Plakokefalos (eds), *Principles of Shared Responsibility* (n 12) 98–133, 101, where he briefly refers to the debate of whether attribution of an act to the state has to be performed by law rather than causality (or the opposite) is the proper test. As Fry correctly concludes attribution means 'a probe into the question of "who did it"'. Thus, attribution merely aims at identifying the state or international organization to which the internationally wrongful act is 'attached' for responsibility purposes but it 'says nothing about whether responsibility should actually attach [sic] or not' (ibid 101).

[92] For the articulation of this same concern see A Nollkaemper/I Plakokefalos, 'Conclusions: Beyond the ILC Legacy' in A Nollkaemper/I Plakokefalos, *Principles of Shared Responsibility* (n 12), 341–63, 350.

[93] D'Argent (n 12) 220.

a central role in connecting the injury that becomes the object of reparation and the internationally wrongful act but is evidently underexplored in international law and international courts and tribunals tend to approach the matter in an ad hoc manner depending on the primary obligations at stake and the circumstances of each case. Perhaps even more importantly for the purposes of the present inquiry the approach of the ICJ and to a certain extent of other international judicial institutions to remedies is characterized by diversity and flexibility. These two features, helpful as they may be in accommodating a wide variety of situations, they make it quite hard to establish clear patterns concerning how the obligation to make reparation is to be treated by international adjudicatory bodies.

All these characteristics and intricacies of the obligation to make reparation and the law of remedies in international adjudication essentially complicate the question how the allocation of the obligation to make reparation among multiple responsible actors is to be performed. They also make tremendously difficult at least at first sight the articulation of a general rule capable of capturing and accommodating all possible situations since so many things seem to depend on the particular primary rule in question, on the occurrence of damage and its form and on the approach that each judicial institution takes in respect of remedies and so forth.

For all these reasons, the analysis will now turn to the general framework of the law of international responsibility as well as to the different typologies of 'responsibility sharing'. It will also explore the position adopted by the ILC on the matter during its codification work as well as the efforts of scholars to articulate a grand principle for the allocation of the obligation to make reparation among multiple responsible actors. This will assist us in better understanding the broader context as well as the different situations in which such questions may arise before inquiring how the ICJ has in fact dealt with such situations. It will also reveal a stark contradiction between the scholarly work on the matter and practice in international dispute settlement.

III. Plurality of Responsible Actors, the ILC, and the Principle of Joint and Several Liability

1. Basic principles of the regime of international responsibility

Having sketched out the contours of the obligation to make reparation as a consequence of an internationally wrongful act, as well as the marshlands of remedies and damage, it is time to inquire about the broader context. This is necessary to investigate whether the *cadre juridique* of international responsibility takes a particular stance towards situations involving multiple responsible actors or whether structurally and from a normative perspective it remains neutral. From a bird's eye view it seems that there is one basic principle underpinning the entire regime of international responsibility and another two underlying the obligation to make reparation, as the latter has been described in the previous sections.

A fundamental, crosscutting principle of the regime of international responsibility is that of 'independent responsibility', namely the concept that each State is only responsible for its own conduct and its own internationally wrongful acts.[94] This is apparent both from the wording of Article 1 ARSIWA and the commentary, which recognize that every internationally wrongful act of the State entails its international responsibility. The general rule is that of independent responsibility,[95] and this is also stressed in the commentary of Article 47 ARSIWA, which addresses the issue of invocation of responsibility in case of a plurality of responsible States.[96] With respect to situations of 'derivative' responsibility as envisaged in the ARSIWA,[97] it is argued that even in the cases of 'participation' of an actor to the internationally wrongful act of another, the former is again held responsible because of its own conduct that has in a certain way facilitated or formed part of the

[94] Cheng, *General Principles* (n 27) 213. Cheng recognized certain 'exceptions' to this general principle of law, ie cases of 'assumed' or 'legal responsibility', but did not consider any of these as affecting the principle of individual responsibility proper (ibid 213–17).

[95] Ibid.

[96] ARSIWA Article 47 with commentaries, 124, para 1, 125, paras 6-7.

[97] ARSIWA Articles 16, 17 and 18; See also DARIO Part II, Chapter IV and Part V. See for an analysis, Fry (n 91); V Lanovoy, 'Complicity in Internationally Wrongful Act' in Nollkaemper/Plakokefalos, *Principles of Shared Responsibility* (n 12) 134–68.

internationally wrongful act of the principal actor.[98] Thus, the principle of independent responsibility is reaffirmed.

Turning to the two basic tenets of the obligation to make reparation, first, as expressly stated in Article 31(1) ARSIWA, the general principle is that '*full* reparation' for the injury sustained should be made.[99] International courts and tribunals have long affirmed this general rule.[100] The *locus classicus* for the articulation of the principle of full reparation, frequently referred to in the ARSIWA commentary, is the PCIJ judgment in the *Chorzów Factory* case. In the merits phase of the proceedings, the Court expressed the obligation to make reparation for failure to carry out an engagement in the following terms:[101]

> The essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible*, wipe out all the consequences*

[98] Cf S Besson, 'La pluralite d'Etats responsables Vers une solidarite international?' (2007) 17 RSDIE 13, 21; d'Argent (n 12) 213–14; cf Crawford, *State Responsibility* (n 30) 336–39 for only very extreme cases of coercion should be conceptually excluded from our understanding of State responsibility being based on the principle of independent responsibility. Cf also ARSIWA commentary, 67, para 10.

[99] ARSIWA Article 31(1) and 34; DARIO Article 31(1) and 34 (emphasis added); D Selton, 'Reparations' in MPEPIL (August 2015) MN 2; Gray, 'Remedies' (n 40) 872; but see also other parts of the ARSIWA commentaries referring to this principle in different contexts, eg the characterization of Article 50 ECHR as *lex specialis* because it provides for 'just satisfaction' instead of 'full reparation' (ARSIWA commentary, 94, para 2); the fact that combination of different forms of reparation is essential in some cases because that is the only way to achieve full reparation (ARSIWA commentary, 95, para 2); that flexibility regarding the particular form of reparation to be granted in practice exists as far as the principle of full reparation is not impaired (ARSIWA commentary, 96, para 6); the fact that loss of profit is recognized as compensable damage (Article 36(2) ARSIWA and commentary, 104–105, paras 27-31); and the provision that interest shall be paid when necessary to ensure full reparation (Article 38 ARSIWA).

[100] For example, *Lusitania Cases* (United States/Germany), UNRIAA, Vol VII, 1 November 1923, 32-44 (emphasis in original). The opinion proclaimed that it was 'a general rule in both common and civil law countries … to give complete pecuniary compensation for loss resulting to claimant from death of human being' (ibid).

[101] As the PCIJ judgment in this case is essentially the beginning and the premise of almost every study, paper, or codification effort concerning reparations in international law, it is worth quoting in length.

> *of the illegal act and reestablish the situation* which would, in all probability, have existed if that act had not been committed,[102]

defining the form and measure of reparation as:

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[103]

In view of the remedial undertones of reparation as described above, however, there is no room for punitive or exemplary damages against the responsible State.[104]

Second, the injured party should not end up through reparation having more than it would have had, had the obligation been performed. In other words, the purpose of the obligation to make reparation is not for the injured State to become unjustly enriched; double recovery is expressly precluded.[105] According to Gray the PCIJ's cautious approach in assessing the compensation due to the two injured companies in the *Chorzów Factory* case as a single lump sum provides evidence of '[t]he basic principle that damages should not lead to overcompensation of the victim'.[106] In the end, the injured State is entitled to full

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[102] *Factory at Chorzów (Claim for Indemnity)*, Merits, PCIJ Series A, No 17, 4, 47.

[103] Ibid.

[104] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v* Nicaragua) Compensation, Judgment of 2 February 2018, para 31. But see for an early survey of practice supporting the existence of such damages in international law C Eagleton, 'Measure of Damages in International Law' (1929) 39 Yale Law Journal 52.

[105] See Article 34 ARSIWA and commentary, 96, para 3. See also Article 36 ARSIWA and commentary, 99, para 4, 105, paras 32-33; Article 38 ARSIWA and commentary, 109, para 11; Article 39 ARSIWA and commentary, 110, para 2; more clearly for Article 47(2)(a) ARSIWA and commentary, 125, para 9. See also DARIO Article 48 and commentaries, 76-77. Cheng, *General Principles* (n 27) 235–37.

[106] Gray, *Judicial Remedies* (n 56) 81; 'the two companies formed an economic unit and to attempt separate assessment would involve the risk of compensating the same loss twice.' (ibid).

reparation for the damage suffered as result of the responsible State's wrongful conduct and for that damage only.

On the margins of these two basic principles underlining the obligation to make reparation, the ILC has left some room for the consideration of the interests of the responsible entity. Thus, equity and justice may sometimes dictate that a particular form of reparation or its amount should be decreased or balanced,[107] while the operation of the principle of proportionality as envisaged within the different forms of reparation aims to strike a fair balance of the interests of the different parties involved. Notably though and affirming the centrality of the principle of full reparation proportionality instead of being articulated within that general rule is reserved for consideration within each specific form of reparation.[108]

2. Typologies of multiple responsible actors that all contribute to the same damage

The framework established by the ILC, as described in the previous section, is—for its most part—conceptually based on a bilateralised approach to international relations,[109] and the principle of independent responsibility. A state is considered responsible for the breach of its own international obligations, by means of its own conduct, consisting of acts or omissions attributable to it. As a consequence of such international responsibility, it has to provide reparation for the injury caused by its own internationally wrongful acts, and that is also what the injured state is entitled to.

However, the international community has long stopped operating on such a strictly bilateral basis, if it ever did so in the first place.[110] The traditional international law of coexistence has turned into an international law of cooperation, as situations and cases of

[107] See, for example, ARSIWA commentary, 100, para 7. Fairness is the principle that underlies also the inclusion of Article 39 ARSIWA which requires that the conduct of the injured party shall be taken into account for the assessment of the form and measure of reparation; Crawford, *State Responsibility* 482–85. For the place of proportionality in the *Chorzów Factory* judgment and international investment arbitrations, see Desierto (n 57) 439–47.

[108] ARSIWA commentary, 96, para 5.

[109] Aust, *Complicity* (n 4) 13 and his n 6, 269 –70. Cf G Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations' (2002) 13 EJIL 1083.

[110] Cf Crawford, *State Responsibility* (n 30) 326.

cooperative action among states, international organizations and other actors multiply.[111] The debates taking place in the context of the ongoing conflict in Yemen regarding which States are to be held responsible for violations of international humanitarian law by the Saudi-led coalition is quite telling in that respect.[112] Still this depicts only one type of situations that may involve multiple responsible actors. As Nollkaemper puts it:[113]

> These developments have led to an increase in the number of situations in which it is necessary to ascertain who, among the multiplicity of actors involved in cooperation, is to answer for the failure to live up to promises and abide by agreements, and who is to provide reparation to any injured parties.

The term 'shared responsibility' has been devised to describe this range of cases when multiple actors contribute through their conduct to 'a single harmful outcome' and responsibility for this harmful outcome 'is distributed among more than one of the contributing actors'.[114] The term is used in a descriptive manner, as an umbrella term to

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[111] A Nollkaemper/D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MichILJ 359, 362; A Nollkaemper, 'Introduction' in Nollkaemper/Plakokefalos, *Principles of Shared Responsibility* (n 12) 4-6.

[112] See, for example, R Goodman, 'US Seeks New Assurances from Saudis on Civilian Casualties-but is that even possible?', Just Security, 21 April 2017, available at https://www.justsecurity.org/40173/seeks-assurances-saudis-civilian-casualties-but-possible/; E Robinson, 'Arms Exports to Saudi Arabia in the High Court: what is a "serious violation of international humanitarian law"?', EJIL:Talk!, 3 April 2017, available at https://www.ejiltalk.org/arms-exports-to-saudi-arabia-in-the-high-court-what-is-a-serious-violation-of-international-humanitarian-law/; A Asteriti, 'The Use of Cluster Munitions by Saudi Arabia in Yemen and the Responsibility of the United Kingdom', EJIL:Talk!, 7 March 2017, available at https://www.ejiltalk.org/the-use-of-cluster-munitions-by-saudi-arabia-in-yemen-and-the-responsibility-of-the-united-kingdom/; R Goodman/S Oakford, 'Did U.S. Provide Helicopter Used in Attack of Somali Refugees in Yemen?', Just Security, 24 March 2017, available at https://www.justsecurity.org/39210/united-states-implicated-helicopter-somali-refugees-yemen/.

[113] Nollkaemper, 'Introduction' (n 111) 6.

[114] Ibid 6–7; Nollkaemper/Jacobs (n 111) 366–68. The thesis adopts the terminology of 'shared responsibility' which has been developed in the context of the 'SHARES' project at the University of Amsterdam. The project was envisaged to study and explore 'shared responsibility' and its manifestations and consequences in international law. See for more detail http://www.sharesproject.nl/; A Nollkaemper/D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' SHARES Research Paper No 3 (2011), ACIL 2011-07, available

encompass various types of cases involving multiple responsible actors, and is not meant to prescribe any particular legal consequences for the allocation of such responsibility, eg for the obligation to make reparation. A distinctive feature of the situations captured by the term 'shared responsibility' is that responsibility is conceptualized as falling upon the multiple responsible actors separately and not as a collectivity.[115] For example, if the international responsibility of the EU was engaged because of a violation by the union of an international obligation, for which it has exclusive competence, this situation would not fall within the term's purview.

A prior issue to cases of multiple responsible actors is that damage to a State may occur in certain cases without it necessarily being the result of a violation of an international obligation. Indeed, the ILC dedicated a separate project to the issue of allocation of liability arising out of activities not prohibited by international law.[116] Moreover, the case might be that multiple States may factually cause harm to another State without necessarily all being equally responsible under the law for doing so.[117] Alternatively, it could also be the case that along with one or more States other causes contribute to the occurrence of damage.[118] In that respect, different causes of the same injury may be found in various forms. Adopting the categorization of Bollecker-Stern, Plakokefalos puts multiple causes contributing to the same injury to three different categories: cumulative causation, concurrent or complementary causation, and parallel or pre-emptive causation.[119] These other causes could range from a natural event,[120] to the injured State's own conduct,[121] to

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at http://www.sharesproject.nl/publication/shared-responsibility-in-international-law-a-concept-paper/.

[115] Nollkaemper, 'Introduction' (n 111) 12.

[116] See ILC's work on 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' available at http://legal.un.org/ilc/guide/9.shtml#fout, which was eventually split in two projects one for the 'Prevention of Transboundary Damage from Hazardous Activities' and 'International Liability in case of Loss from Transboundary Harm Arising Out of Hazardous Activities'.

[117] A Nollkaemper, 'Introduction' (n 111) 8.

[118] The existence of multiple causes contributing towards a harmful outcome is called 'overdetermination', see Plakokefalos (n 86) 472.

[119] Plakokefalos (n 86) 472–73 referring to B Bollecker-Stern, *La préjudice dans la théorie de la responsabilité internationale* (1973), 276ff.

[120] For example, *force majeure* could be considered such a circumstance.

[121] See Article 39 ARSIWA.

actions of actors that are not responsible under international law[122] or under the specific international law regime under consideration.[123] When all actors contributing to a single harmful outcome are also responsible under the law for doing so, a case of shared responsibility, as analysed above, arises. In the event of shared responsibility not only international responsibility itself, but also the obligation to make reparation for the single harmful outcome caused is shared among the plurality of actors not as a collectivity but falls upon each one of them individually.[124]

From a taxonomy perspective, a single injury may result from several internationally wrongful acts committed by several actors or may be caused by one internationally wrongful act committed by several actors.[125] In the latter category, the single internationally wrongful act may occur through the concerted action of two or more States or through a common organ established by them.[126] For example, if two riparian States

[122] For example, in the *CME B.V. v Czech Republic*, UNCITRAL, Partial Award, 3 September 2001 the tribunal found that an individual not responsible under international law had assisted the State to violate its treaty obligations towards the investor.

[123] In *El Masri v Former Yugoslav Republic of Macedonia*, App No 39630/09, Judgment of 13 September 2003 (Grand Chamber), for instance, only Macedonia was responsible under the European Convention of Human Rights to which it was a party, whereas the US could not be held responsible under this specific regime by which it was not bound.

[124] A Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' ACIL No 2011-11, 5.

[125] See d'Argent (n 12) 211; Besson (n 98) 22 distinguishes between 'fait conjoint' and 'fait distinct', which may both engage the responsibility of multiple responsible actors for the same damage. Cf Crawford, *State Responsibility* (n 30) 333 who uses the concepts of 'attribution of conduct' and 'attribution of responsibility' to categorise the different situations of joint and collective action of States. For a slightly different categorization see Nollkaemper, 'Introduction' (n 111) 9–11, speaking of 'concurrent responsibility', 'cumulative responsibility' and 'joint responsibility' the first corresponding to our category of several wrongful acts causing a single injury, the third to our second category of one wrongful act committed by several actors causing a single injury, and the second category of 'cumulative responsibility' encompassing cases from both our 1categories.

[126] This was for example the case in the *Eurotunnel Arbitration*, PCA Case No 2003-06, Partial Award, 30 January 2007. See also ASRIWA commentary, 64, para 2 and Article 47 ARSIWA. This coincides with the multiple attribution & concerted conduct paradigm in Crawford's terminology, see Crawford, *State Responsibility* (n 30) 333–34. This could also conceptually encompass situations of 'co-perpetration' if the multiple States are bound by and end up breaching through their individual conduct the same international obligation causing thus a single injury. Cf

have established a river commission to manage a shared watercourse which then violates the obligation to not cause transboundary harm through pollution of the watercourse, there is going to be a single internationally wrongful act attributed to both States causing a single injury.[127] In the first category, the several internationally wrongful acts could be of the same nature for instance when two riparian States pollute a shared watercourse in violation of their customary law obligation to not cause transboundary harm and cause a single injury to a third riparian State.[128] Alternatively, the several internationally wrongful acts could be of a different nature for example in cases of participation of a State in the internationally wrongful act of another,[129] eg in the case of unlawful renditions.[130] According to Besson, the plurality of responsible actors may flow either from a special relationship[131] between them, for example under the circumstances of Articles 16–18 ARSIWA, or each one of them may act independently from the other.[132] These categories are of course not clear-cut, as for example if the aid or assistance is of sufficient gravity to be indispensable for the commission of the principal wrongful act then it may transform into a 'concerted action' type of situation rather than an aid and assistance under Article 16 ARSIWA situation.[133] It is also possible to envisage other bases upon which the aforementioned categorization may be performed. For example, Noyes and Smith have proposed that the most helpful way to categorize cases of multiple State responsibility is by inquiring whether the wrongful act under consideration has been the result of concerted or independent conduct.[134]

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however d'Argent (n 12) 241–44, who argues that situations of co-perpetration are better categorized as 'A-type' situations of shared responsibility, ie they should be considered as several (identical) internationally wrongful acts causing a singly injury rather than one internationally wrongful act committed by several distinct actors.

[127] See for the same example d'Argent (n 12) 212.

[128] This coincides with the multiple attribution & independent conduct paradigm in Crawford's terminology, see Crawford, *State Responsibility* (n 30) 334.

[129] This coincides with the paradigm of a State being 'implicated' in the internationally wrongful act of another State in Crawford's terminology, see Crawford, *State Responsibility* (n 30) 336–39.

[130] See for this example d'Argent (n 12) 212.

[131] Cf for an early account Brownlie, *System of the Law of Nations* (n 29) 191–92.

[132] Besson (n 98) 21. See also ILC, ARSIWA commentary, 64, para 2.

[133] Crawford, *State Responsibility* (n 30) 402; Brownlie, *System of the Law of Nations* (n 29) 191; cf d'Argent (n 12) 212.

[134] J Noyes/B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale Law Journal 225, 228ff.

An important clarification is in order at this point. A discussion of the issue of allocation of the responsibility among multiple responsible actors presupposes that there is a single harmful outcome, which is causally indivisible. If the conduct of each responsible entity causes a distinct part of the harm sustained by the injured State, then there is no issue of responsibility sharing, but rather each actor will be responsible for its own contribution and the portion of the harm that they have caused.[135] Thus, if certain portion of the outcome can as a matter of causation be traced back to one or more of the responsible actors then they will bear responsibility, and consequently the obligation to make reparation for the harm caused, for that severable portion of the damage. If the harm, however, is generally indivisible, as will happen in most cases, apportionment of the harm among the multiple responsible entities will not be, factually or legally possible. Ultimately, whether the harmful outcome is causally divisible or not, is a matter for the causal test,[136] but this issue is significant because in this latter case complex issues arise concerning how the allocation of the obligation to make reparation among multiple responsible actors is to be performed.[137]

2. The allocation of responsibility in case of a plurality of responsible actors in the work of the ILC

In its work on the topic of international responsibility, the ILC did not delve much into the principles applicable to cases involving multiple responsible actors.[138] Generally speaking, although it recognized that often 'internationally wrongful conduct results from the collaboration of several States rather than of one State acting alone'[139], it considered that usually even in cases of collaborative action among States the principle of independent responsibility will apply and responsibility and its consequences will be determined accordingly.[140] This notwithstanding the Commission made sure to highlight that this does

[135] A Nollkaemper, 'Introduction' (n 111) 7–8.

[136] Ibid; For the issue of causation see generally Plakokefalos (n 86); cf Gattini, 'Breach of International Obligations' in Nollkaemper/Plakokefalos, *Principles of Shared Responsibility* (n 12) 25–59, 28–31.

[137] Cf A Nollkaemper/D Jacobs, 'Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility' in A Nollkaemper/D Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 1–35, 3. See also for the same *problématique* Aust, *Complicity* (n 4) 275–76.

[138] Crawford, *State Responsibility* (n 30) 326–27.

[139] ARSIWA commentary, 64, para 2.

[140] ARSIWA commentary, 64, para 5.

not mean that 'other States may not also be held responsible for the conduct in question or for injury caused as a result'.[141]

Additionally, the ILC accepted that it is possible that 'two separate factors may combine to cause damage'.[142] In support of this assertion, the commentary to Article 31 ARSIWA codifying the principle of 'full reparation' referred to two examples from international jurisprudence: the *Tehran Hostages* case,[143] which involved the combination of acts of private individuals and those of a State, and the *Corfu Channel* case,[144] which involved the combination of the acts of two different States. According to the commentary, in these cases that multiple factors, referred to as 'concurrent causes', combine to cause injury international practice and jurisprudence 'do not support the reduction or attenuation of reparation' even if only one of the concurrent causes is ascribable to the responsible State.[145] According to the ILC, there are two exceptions to this principle: The contributory fault of the victim state,[146] and the cases in which the portion of the injury attributable to the responsible State is causally severable from the rest. In this latter case, as explained in the previous section the responsible State will be under an obligation to make reparation for the causally severable part of the damage it has caused.

A special issue are cases of 'derivative responsibility', ie the attribution to a State of responsibility in connection to the internationally wrongful conduct of another State.[147] These are the cases of participation of a State (or another actor) to the internationally wrongful act of another State. Among such cases of derivative responsibility, aid or assistance under Article 16 can be considered the most important one and the one most usually occurring in international law.[148] For these cases, when a State is held responsible

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[141] Article 1 ARSIWA and commentary, 33–34, para 6.

[142] ARSIWA commentary, 93, para 12.

[143] *United States Diplomatic and Consular Stuff in Tehran* (USA *v* Iran) Judgment [1980] ICJ Rep 3.

[144] *Corfu Channel* (UK *v* Albania) Merits [1949] ICJ Rep 4.

[145] ARSIWA commentary, 93, para 12.

[146] Ibid.

[147] ARSIWA Articles 16, 17 and 18; See also DARIO Part II, Chapter IV and Part V. See for an analysis, Fry (n 91); Lanovoy (n 97).

[148] For a thorough discussion of situations of aid or assistance or otherwise know as 'complicity' in international law, as well as its intricacies and limitations see Aust (n 4); V Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart 2016); Lowe, 'Responsibility for the Conduct of Other States' (n 4).

in connection with the internationally wrongful act of another State the ILC only briefly addressed the implications for the allocation of the obligation to make reparation. In the commentary to Article 16, it drew a distinction between cases that the aid or assistance is indispensable to the overall wrongful conduct ('a necessary element in the wrongful act in the absence of which it could not have occurred') and the injury 'can be concurrently attributed to the assisting and the acting State' and cases of aid or assistance that have a minor contribution ('only an incidental factor') to the injury suffered compared to the principal wrongful act.[149] For this latter category the commentary explained that the assisting State 'should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which … flow from its own conduct'.[150] The ILC thus left room for the apportioning of the consequences of the overall internationally wrongful conduct, and in particular of the obligation to make reparation, among the assisting and the assisted States depending on the circumstances of each case and the significance and gravity of the aid provided.[151]

Notwithstanding that the ILC recognized that cases involving multiple responsible actors might arise, the ARSIWA did not expressly spell out what this would mean for the apportionment of the obligation to make reparation. The only provision that could be considered relevant for this issue—apart from certain references in the commentary mentioned above[152] —is Article 47.[153] Article 47, however, is a rule on the invocation of responsibility in case of a plurality of responsible states, rather than a rule or a mechanism for the allocation of such responsibility and the obligation to make reparation. Characteristically, the commentary refers to the *Nauru* case before the ICJ in which the Court highlighted that the fact that Nauru could bring an application against Australia as the sole respondent did not prejudice the matter of whether Australia would also be called to make reparation for the entirety of the damage sustained by Nauru.[154] Thus invocation of responsibility and allocation of the obligation to make reparation are two separate issues. Nonetheless, Article 47 dictates that 'the responsibility of each state may be invoked in relation to [the internationally wrongful] act'[155] in question and then reverts to

[149] ARSIWA commentary, 67, para 10.

[150] Ibid.

[151] Cf Aust, *Complicity* (n 4) 279–81, 289.

[152] ARSIWA commentary, 67, para 10 and 93–94, paras 12–13.

[153] See also Article 48 DARIO.

[154] *Certain Phosphate Lands in Nauru* (Nauru *v* Australia) Preliminary Objections, Judgment [1992] ICJ Rep 240.

[155] Article 47(1) ARSIWA.

the general principle described in the first section of this chapter that the injured state is not entitled 'to recover, by way of compensation, more than the damage it has suffered'.[156] Thus, it reaffirms the general principle of independent responsibility which 'is not diminished or reduced' due to the simultaneous responsibility of other States for the internationally wrongful act.[157] This leaves open the question from which State the injured party can request the payment of compensation for the damage caused, and whether in case one of the responsible States pays the entire amount due there is a right of recourse against the other responsible States.[158] In that respect the commentary is adamant that the provision neither espouses nor rejects a principle of joint and several responsibility as found in many domestic legal orders.[159] This principle will be analysed in more detail in the next section of this chapter.

Finally, Article 47 formally covers only one of the categories that we have described as leading to shared responsibility for a single injury, that caused by one internationally wrongful act committed by several States. The idea that a single injury may be caused also by several internationally wrongful acts is acknowledged in the commentary to Article 47 where it is asserted that in this case of shared responsibility 'the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations'.[160] According to d'Argent the silence of the ARSIWA (and the DARIO) for this type of situations of shared responsibility 'is best explained by the fact that no specific rule is actually required in such cases' and the allocation of the obligation to make reparation is simply done by application of the basic rules of international responsibility.[161]

3. The principle of joint and several liability and how to allocate the obligation to make reparation among multiple responsible actors

The ILC's bare silence when it came to elucidating the rules and principles on the basis of which the allocation of the obligation to make reparation among multiple responsible actors is to be performed, which admittedly stems from the scarcity of international

[156] Article 47(2)(a) ARSIWA.

[157] ARSIWA commentary, 124, para 1.

[158] Article 47(2)(b) ARSIWA.

[159] ARSIWA commentary, 125, paras 5–6.

[160] ARSIWA commentary, 125, para 8. Notably, as an example for international jurisprudence to support this position is cited the *Corfu Channel* case (UK *v* Albania) Judgment [1949] ICJ Rep 4.

[161] D'Argent (n 12) 217.

practice in the field,[162] has left scholars searching for answers to this increasingly urgent question.

Brownlie has asserted that the principles governing joint responsibility are 'as yet indistinct'.[163] As we saw, the ILC in the commentary to Article 47 ARSIWA emphasized that the provision neither espoused a general rule of 'joint and several responsibility' nor excluded that more than one States may 'be responsible for the same internationally wrongful act'.[164] According to the commentary this would depend on the circumstances of each case and the primary rules binding each State under consideration. In that respect the commentary also referred to the so-called domestic analogies and their usefulness in the international law context of State responsibility.[165] Under the domestic legal orders of various States there often exist rules and principles establishing the 'joint and several' or 'solidary' responsibility of joint tortfeasors, ie persons that jointly cause injury to a third party.[166] The principle of 'joint and several responsibility' means that each of the actors engaged in unlawful conduct can be considered 'responsible for the acts of the others ("joint") and may be individually asked to make full reparation ("several")'.[167] However, it is important to not assume that these concepts can automatically be transposed to the international plane not the least because of fundamental terminological differences between the domestic and the international legal orders as well as the lack of a compulsory dispute settlement system in international law.[168] In international law unless it is otherwise

[162] Vermeer-Künzli (n 48) 253; See Noyes/Smith (n 134) 231–36 for some thoughts on the reasons for this very limited practice.

[163] Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 554.

[164] ARSIWA commentary, 125, para 6.

[165] ARSIWA commentary, 124, para 3; Crawford, *State Responsibility* (n 30) 328–31.

[166] ARISWA commentary, at 93, n 471, and at 124, para 3. It has to be noted that the commentary uses the terms 'responsibility' and 'liability' interchangeably in this context most probably because the term 'joint and several liability' comes from common law, but this could lead to confusion regarding the fundamental distinction between responsibility for one's own internationally wrongful conduct and the obligation to make reparation for conduct that is not per se lawful under international law.

[167] ILC, Third Report Crawford, para 272; D'Argent (n 12) 244; See also ARSIWA commentary, 93, n 471 referring to the US pleadings in the *Aerial Incident of 27 July 1955* case before the ICJ according to which the principle of joint and several liability means that '[a]n aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more from them, only the full amount of his damage' (Memorial of 2 December 1958).

[168] See also D'Argent (n 12) 244–46; For the difficulties of this particular analogy see also Besson (n 98) 34–36.

expressly established (usually) under a particular treaty, the principle of independent responsibility is the general rule, each State bearing responsibility and the obligation to make reparation for its own internationally wrongful acts (and the internationally wrongful acts of a State to which it may have participated).[169] Thus, and leaving aside the various terms currently in use,[170] starting from the fundamental premise of independent responsibility a rule of 'joint and several responsibility' in international law would only make sense at the level of the allocation of the obligation to make reparation among multiple responsible States when each one's international responsibility for the damage at issue had already been established.[171]

That being said the principle of 'joint and several responsibility' is not as such unknown to international law.[172] Certain international conventions provide for it in specific contexts. For example, it forms a central tenet of the regime established under the Convention on the International Liability for Damage Caused by Space Objects[173] and the Law of the Sea Convention.[174] In their seminal article on 'State Responsibility and the Principle of Joint and Several Liability' in 1988 Noyes and Smith pled for the necessity in international law of a principle of joint and several liability as found in the domestic legal systems.[175] They considered that any 'mature system of international law must comprehend the responsibility of multiple state actors for a single event—including the responsible states' duties of reparation'.[176] Their study of the scarce state practice and the relevant decisions of international courts and tribunals lead them to conclude that 'sufficient support' existed for a 'principle of joint and several liability in international law' in terms of the obligation to make reparation of multiple responsible States.[177] Orakhelashvili on the other hand has

[169] ARSIWA commentary, 124, para 3; d'Argent (n 12) 247.

[170] For example, Brownlie refers to 'joint and several responsibility' (see Crawford, *Brownlie's Principles* 554), Besson to 'le principe de la solidarité' (Besson (n 98) 34), Noyes and Smith to 'joint and several liability' (n 134).

[171] Cf S Wittich, 'Joint Tortfeasors in Investment Law' in C Binder et al (eds), *Internaational Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 708–23.

[172] See for a summary Crawford, Third Report, paras 272–78.

[173] 29 March 1972, 961 UNTS 187, Articles IV and V.

[174] 10 December 1982, 1833 UNTS 3, Article 139.

[175] Noyes/Smith (n 134) 262–66.

[176] Ibid. See also for a similar point on how the inclusion of Article 16 ARSIWA evidences 'the moral sophistication of international law' see Lowe (n 4) 12–13.

[177] Noyes/Smith (n 134) 226,

even more affirmatively asserted that a rule of joint and several responsibility constitutes positive international law and considered that Article 47 ARSIWA is relevant to situations of aid or assistance.[178] In that respect, Aust has warned that this could lead to the rather unfair situation that the assisting State is held accountable for 'a larger part of the injury than their actual share of contribution'.[179] Perhaps the strongest affirmation of the existence of the concept of joint and several liability in international law has been offered by Judge Simma in his separate opinion in the *Oil Platforms* case concerning the so-called 'generic counterclaim' of the US.[180] After conducting a comparative study on how domestic legal orders approach the issue of multiple parties contributing to a single injury ('multiple tortfeasors'), Judge Simma concluded that various legal systems have addressed this problem with 'striking similarity'.[181] In what he called a 'textbook situation calling for such an exercise in legal analogy',[182] he argued that the principle of joint and several liability existed in international law as a general principle of law under Article 38(1)(c) of the Court's Statute.[183] However, even Judge Simma admitted that this would not necessarily prejudge to what extent the party found responsible upon such a basis had to make reparation for the entirety of the damage sustained.[184]

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[178] A Orakhelashvili, 'Division of Reparation Between Responsible Entities' in J Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) 647–65, 656–59. He accepts however that 'no a priori answer can be given' to the question of the valuation of compensation against the aiding or assisting State 'as everything depends on the level of complicity and participation, the causal link, the capacity of individual States to pay, and the availability of judicial venues' (ibid 659). He concludes his assessment of the topic arguing that 'the law, or at least its application, is currently in many respects uncertain, unsatisfactory, and even chaotic' (ibid 664) and that application does not always happen with a view to effective redress of the injury sustained by the victim (ibid 664–65).

[179] Aust, *Complicity* (n 4) 279–80.

[180] *Oil Platforms* (Iran *v* USA) Judgment, Sep Op Simma [2003] ICJ Rep 324, 342ff, paras 35 et seq.

[181] *Oil Platforms* (Iran *v* USA) Judgment, Sep Op Simma [2003] ICJ Rep 324, 354, para 66. For more detail regarding the argument see Aust (n 4) 274 –75; Crawford, *State Responsibility* (n 30) 329–31.

[182] *Oil Platforms* (Iran *v* USA) Judgment, Sep Op Simma [2003] ICJ Rep 324, 354, para 66

[183] Ibid 354–58, paras 67–74.

[184] Ibid 358, para 73.

The voices advocating for the existence or the need of existence of a principle of joint and several responsibility or liability in international law are far and few between.[185] More sober accounts of the practice of states and international judicial institutions point to other solutions to the problem of the allocation of the obligation to make reparation among multiple responsible actors. From these there are two that are particularly pertinent to the purposes of the present inquiry and also seem to be supported by the practice of the ICJ and affirmed by that of other international courts and tribunals. First, d'Argent having examined the different instances of shared responsibility based on the taxonomy described above (ie same internationally wrongful act committed by several responsible States causing a single injury & several internationally wrongful acts committed by several responsible States contributing to a single injury) and how the ILC 'toolbox' of rules and principles would apply to them comes to the following conclusion.[186] He claims that despite the fact that the ARSIWA (and the DARIO) capture only one of the typologies of shared responsibility and not the whole spectrum, 'orderly' and 'reasoned' application of the basic rules, as well as a qualitative approach towards the wrongful acts in question will assist us in performing apportionment of the obligation to make reparation pursuant to 'equity and logic'.[187] Second, Aust discussing how situations of complicity are best addressed in international law he concludes that there exists what he calls 'a network of rules on complicity' in which rules of state responsibility constitute only the first layer.[188] Thus, there are alternative mechanisms, diverse primary rules, more specialized rules on state responsibility in specific regimes of international law and so forth that may assist us in holding States responsible in cases that a plurality of actors has contributed to the injury sustained, even if the general rules of state responsibility do not offer a satisfactory answer in every case.[189]

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[185] D'Argent (n 12) 245. Very recently in the end product of the SHARES project conducted at the University of Amsterdam and the Amsterdam Centre for International Law (see n 114), the 'Draft Principles on Shared Responsibility', the necessity and usefulness of such a principle has been put forward (see for example the presentation of the Draft Principles at the University of Oxford PIL Discussion Group on 6 March 2018, available at https://podcasts.ox.ac.uk/draft-principles-shared-responsibility). It is doubtful however to what extent this is supported by adequate authority in international law including judicial practice and does not constitute to the contrary a mere policy choice of the project's investigators.

[186] See generally D'Argent (n 12).

[187] Ibid.

[188] Aust, *Complicity* (n 4) 376–418.

[189] Cf ibid.

4. Interim Conclusions

The *cadre juridique* of state responsibility as codified in the ARSIWA is characterized by a persistence on the principle of independent responsibility accompanied by an obligation to make full reparation as a consequence of an internationally wrongful act. As we have seen though there are many cases that States and other actors may share responsibility for a single injury and may be called to make reparation to the injured party. The two primary types of such 'responsibility sharing' in broad brushstrokes occur when on the one hand the injury has been caused by one internationally wrongful act caused by several distinct actors and on the other when the injury has been caused by several internationally wrongful acts caused by several distinct actors. It should be kept in mind, however, that this taxonomy is neither singular nor clear-cut. The most pressing problem for our purposes is that in the event that the injury is not causally divisible the question arises how the obligation to make reparation, especially in the form of monetary compensation, is apportioned among the multiple responsible actors.

The ILC was cognizant of these possibilities but provided very little in terms of applicable rules and principles to deal with such situations, and almost nothing concerning the distribution of the obligation to make reparation. If anything, its approach was to reaffirm that despite the possible existence of several actors contributing to the same damage the principle of independent responsibility applies and each one is responsible for their wrongful conduct and the damage caused thereof.

Given the scarcity of available rules and principles scholars have advocated that a solid normative basis is necessary to apportion the responsibility and its consequences among multiple responsible actors in cases that the harmful outcome is not causally divisible. This normative basis has often taken the form of a general principle for the allocation of the obligation to make reparation for the damage caused, often in the guise of the principle of joint and several responsibility as found in domestic legal systems. It has been argued that all things considered this is the fairer manner in which the consequences of international responsibility are to be apportioned. And that may well be the case. On the other hand, others have argued that the necessary rules and principles that help us address this kind of situations already exist within the *cadre juridique* of international responsibility and that there are different ways beyond the realm of international responsibility to secure that co-responsible actors are held accountable for the consequences of their actions.

Both of these positions have their merits and demerits but at the end the normative basis upon which the obligation to make reparation is to be apportioned will necessarily be a policy choice, taken in light of the wider international legal order and the purposes and outcomes one seeks to achieve.[190] Such a policy choice encompassing the development of a general principle or rule applicable to these situations is beyond the purposes of the present thesis, not the least because of space and time constraints. It is also a different kind of discussion and has been to a certain extent debated elsewhere.[191] The present dissertation seeks to accomplish a different objective. In light of the theoretical and normative background explored so far, including the contours of the obligation to make reparation, the intricacies of remedies in international law, the fundamental principles of the regime of international responsibility, as well as the complexities of situations of shared responsibility, it will turn to the practice of the ICJ to examine how the Court has dealt with the various situations of shared responsibility as described in this chapter.

Three things can be said from the outset. First, the ICJ and other international courts and tribunals seem to have dealt with a variety of cases that damage has been caused by a plurality of actors, ranging from situations that involve multiple responsible States to situations that involve responsible States and non-state actors that cannot be held responsible under international law. Second, neither the ICJ nor other international courts and tribunals have picked up any grand principle to address the allocation of the obligation to make reparation in these situations but have rather taken a flexible, case-specific approach insisting on the application of the basic principles of international responsibility in light of the circumstances of the dispute before them. Finally, it seems that international dispute settlement bodies when dealing with such situations have explored international law beyond the realm of state responsibility in a very creative manner, venturing into the fields of primary obligations. In that respect, they have tried to articulate clearly the obligations that bind each actor that contributes to the damage and have then grounded their responsibility and its consequences in the violation of the said primary obligation.

[190] Cf Noyes/Smith (n 134) 259.

[191] See the volume by A Nollkaemper/D Jacobs, *Distribution of Responsibilities in International Law* (CUP 2015), and the various contributions there.

IV. The International Court of Justice: The obligation to make reparation and a plurality of responsible actors

1. Introductory remarks

It is fitting for the purposes of this dissertation to focus our enquiry into international jurisprudence by examining the case law of the ICJ for two reasons. First, the Court is the principal judicial organ of the United Nations and is hence in a unique position to apply and interpret general international law given its general subject-matter jurisdiction.[192] In the words of Brownlie, '[w]hilst courts of arbitration may make a contribution, it is the Court which, as a mainstream interpreter of general international law, has produced the most important decisions on State responsibility.'[193] Second, as shown in the previous chapter, the work of the ILC on the topic of international responsibility, and in particular state responsibility, was shaped by the decisions of the Court in relevant matters—and has shaped the Court's case law accordingly.[194] Evidently, some of the decisions examined in this chapter pre-date the ILC's work on state responsibility and the formulation of the ARSIWA. However, this exercise is still valuable as to understand the treatment of situations involving multiple responsible actors by the Court we need to situate these decisions within the broader jurisdictional framework and the Court's approach to remedies. We can then better appreciate why the Court has not been itself an advocate of a general rule on the allocation of the obligation to make reparation among multiple responsible actors and whether its practice points to any conclusions on how these situations can be best handled.

The chapter will first start with the competence and the practice of the Court in granting reparation, and in particular compensation. The analysis focuses mostly on the cases that have grappled with compensation rather than restitution or satisfaction for two reasons. First, from a practical perspective complicated questions concerning each actor's contribution that is causally connected to the damage, the extent of the damage, and

[192] See for the seminal work on the matter H Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958).

[193] I Brownlie, 'State Responsibility and the International Court of Justice' (n 64) 11.

[194] Brownlie, 'State Responsibility and the International Court of Justice' (n 64) 11–12. R Higgins, 'Issues of State Responsibility before the International Court of Justice' in M Fitzmaurice/D Sarooshi, *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 1–9, at 2 raised the question of the existence of 'a symbiotic relationship' between the ILC and the ICJ.

valuation will most often arise in claims requesting the award of monetary compensation. Second, despite the fact that in certain situations multiple States may bear international responsibility for the same injury, often only one of them will be in a position to offer restitution,[195] cases of aid or assistance are a pertinent example.[196] For its part, satisfaction as a form of reparation remains somewhat ambiguous and is often considered coterminous with declaratory judgments. The Court itself in the 'vast majority of its decisions involving a claim for reparation, [it] has awarded declarations of wrongfulness (a form of satisfaction), often as the sole remedy.'[197] In these cases, and although certain conceptual issues will still arise concerning the establishment of responsibility of each actor, issues of allocation of the obligation to make reparation will hardly be in question. In any event, as has been mentioned in Chapter II the different forms of reparation operate in combination in order to realize the principle of 'full reparation'. It is because of the accentuated factual, evidentiary, scientific and other difficulties that arise when one attempts to apportion the obligation to make reparation in the form of compensation among multiple responsible actors that these cases have been considered the most appropriate to be studied for the purposes of the present dissertation.[198] Thus, the analysis will focus on cases that the Court has grappled with compensation as a remedy to the injured State.

The chapter will then turn to the jurisdictional framework within which the Court operates and discuss briefly on the one hand the principle of consent and the bilateralised structure of the proceedings before the Court and on the other the *Monetary Gold* principle. The final section will offer some interim conclusions.

2. The Court's competence to pronounce upon the obligation to make reparation and its practice in awarding compensation

a. Competence of the Court

There is no explicit reference in the Court's Statute[199] concerning its competence to award remedies to injured States in cases before it. However, under Article 36(2)(d) the Court's

[195] Besson (n 98) 23.

[196] Aust, *Complicity* (n 4) 277.

[197] J Crawford, 'Flexibility in the Award of Reparation: The Role of the Parties and the Tribunal' in R Wolfrum et al (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015) 690–708, 692.

[198] Cf Besson (n 98) 23.

[199] Statute of the International Court of Justice (26 June 1945) 33 UNTS 933.

jurisdiction to adjudicate a dispute is extended over 'the nature or extent of the reparation to be made for the breach of an international obligation'.[200] Although Article 36(2)(d) is technically applicable only to cases brought to the Court by means of a unilateral application under the optional clause, it has been long accepted that the Court possesses such jurisdiction even for cases that come before it through a *compromis* or a compromissory clause in a multilateral treaty.[201] As already mentioned in Chapter II, the PCIJ in the jurisdictional phase of the *Chorzów Factory* case asserted that jurisdiction to adjudicate the obligation to make reparation forms an essential part of the jurisdiction to adjudicate on the existence of a violation of an international obligation, and that 'there is no necessity for this to be stated in the convention itself'.[202] More recently, the ICJ has confirmed this position in the *LaGrand* case. In this latter case, the Court held

> that a dispute regarding the appropriate remedy for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Courts jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.[203]

Despite this, it is a rare occasion that the ICJ gets to issue a judgment on reparation, including an assessment of compensation due. For one, States that bring their disputes before the Court often opt for declaratory judgments, namely judgments that recognize the illegality of the conduct of the other State or allocate legal rights between the parties, and leave issues of reparation to be determined through diplomatic negotiations—if at all.[204]

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[200] Cf Brownlie, 'Remedies in the International Court of Justice' (n 58) 557.

[201] Namely in cases brought under Article 36(1) of the Statute. Despite the matter has not yet arisen in this context, there is no reason to assume that this would not be the case in the event that the Court is seised of a dispute through application of the doctrine of *forum prorogatum* (Article 38(5) of the Rules of Court). For a discussion of *forum prorogatum* see C Tomuschat, 'Article 36' in A Zimmermann et al (eds), *Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 633 –711, MN 40.

[202] *Factory at Chorzów (Claim for Indemnity)*, Jurisdiction, PCJI Series A, No 9, 1927, 4, 21. For an assessment of the caselaw of the Court regarding this issue following the *Chorzow Factory* judgment and until the early 1980s see Gray, *Judicial Remedies* (n 56) 62–68.

[203] *LaGrand* (Germany *v* USA) Judgment [2001] ICJ Rep 466, 485, para 48.

[204] For a comment and some thoughts on why this is the case see D Akande, 'Award of Compensation by International Tribunals in Inter-State Cases: ICJ Decision in the Diallo Case',

Well known examples of this practice is the *Eastern Greenland* case before the PCIJ,[205] and the *Anglo-Norwegian Fisheries* case before the ICJ.

Second, even if the parties have requested the Court to determine the appropriate remedy or have expressly asked for the award of monetary compensation, the Court has more often than not skillfully avoided grappling with such requests.[206] For example, in order to avoid dealing with complicated issues of valuation or pronouncing on the amount of compensation due the Court has declared that separate proceedings were necessary for such determination in the hope that the parties would come to a settlement in the meantime.[207] Other times, it has conditioned these separate proceedings on the parties failing to achieve an agreement on the amount of compensation, often within certain time-limits.[208] Another 'avoidance technique'[209] is the one employed in the *Gabčikovo-Nagymaros* case[210] where the Court employed the 'intersecting wrongs' approach. It recognized that both Hungary and Slovakia were liable to pay compensation and that both

EJIL:Talk!, 21 June 2012, available at https://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case/. See also Noyes/Smith (n 134) 236.

[205] *Legal Status of Eastern Greenland*, PCIJ, Series A/B, No 53, 22. In this case, Denmark requested the Court to declare that 'the promulgation of the afore-mentioned declaration of occupation and any steps taken in this respect by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid.' (ibid 23) In its application Denmark reserved the right to submit a new application to the Court regarding interim measures of protection and the award of appropriate reparation.

[206] Crawford in *Essays Vukas* (n 197) 693ff. Cf, however, Desierto (n 57), who approvingly refers to the practice of the Court not to frequently award reparation in the form of monetary compensation for international law breaches resulting to economic injuries of States or their nationals.

[207] Such was the case for example in the *Chorzow Factory* proceedings before the PCIJ and the *Tehran Hostages* case before the ICJ. See also D Desierto, 'Reopening Proceedings for Reparations and Abuse of Process at the International Court of Justice', EJIL:Talk!, 16 August 2017, available at https://www.ejiltalk.org/reopening-proceedings-for-reparations-and-abuse-of-process-at-the-international-court-of-justice/.

[208] Crawford in *Essays Vukas* (n 197) 693–94.

[209] Ibid 694.

[210] *Gabčikovo-Nagymaros Project* (Hungary/Slovakia) Judgment [1997] ICJ Rep 7.

were entitled to obtain compensation.[211] However, following this finding, it suggested that:[212]

> Given the fact ... that there have been intersecting wrongs by both Parties ... the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

It has been argued that by employing the 'intersecting wrongs' technique in *Gabcikovo-Nagymaros*, the Court took a 'very imaginative approach to the legal consequences of the internationally wrongful acts'.[213] In the words of Shaw, commenting on the Court's approach to remedies in *Gabčikovo-Nagymaros*, 'the Court is prepared to allocate responsibility as between States and … is currently less tempted to enter into the complex issue of valuation of damages in a way typical of many arbitration proceedings.'[214]

Thus we see that the Court maintains a flexible approach tending to avoid complex determinations when it comes to the award of remedies and in particular compensation. Equally, if not even more interesting for the purposes of our inquiry are the very few cases in which compensation has been actually granted. To this the analysis will now turn.

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[211] Ibid at 81, para 152.

[212] Ibid para 153.

[213] Gray, 'The Choice Between Restitution and Compensation' (n 34) 422. According to Marotti/Palchetti, the Court's approach in the case was consistent with the secondary rules on state responsibility concerning the consequences of an internationally wrongful act, as articulated in the ARSIWA. Additionally, in their opinion the judgment has illustrated the significance of maintaining the flexibility of the aforementioned secondary rules, as well as the importance of the Court's utilization of such flexibility to arrive to a solution that fits best the circumstances of each case. See Marotti/Palchetti (n 47). Cf, however, Crawford in *Essays Vukas* (n 197) 694, where he argues that the amount of compensation due to each party would likely have been different as the acts for which each party was internationally responsible were of different nature and character.

[214] M Shaw, 'The International Court, Responsibility and Remedies' M Fitzmaurice/D Sarooshi (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004) 19–34, 30.

b. The PCIJ practice

According to Gray, during the PCIJ years one third of the cases brought to the Court included a claim for the award of monetary compensation ('damages').[215] However, monetary compensation was awarded only once, in the *SS Wimbledon* case.[216] In that case, an English ship (the 'Wimbledon') chartered by a French company carrying military material and heading to Danzig, was refused passage through the Kiel Canal by Germany. The refusal was based on German neutrality laws and connected to the ongoing war between Poland and Russia. The French government protested to the German government regarding the prohibition of passage and the detainment of the ship under Article 380 of the Treaty of Versailles[217]. The German government insisted upon its position, while following its release the ship headed to Danzig through a different route. The incident was followed by unsuccessful diplomatic negotiations and the dispute was brought before the PCIJ as provided for under Article 386 of the Treaty of Versailles. The PCIJ found that indeed the refusal of Germany to allow passage of Wimbledon through the Kiel Canal was wrongful and thus it was responsible for the damage sustained and had to compensate France on behalf of their national company that had chartered the ship.[218] Notably the Court while assessing the amount of compensation due, it concluded that the head of damages regarding loss of profit incurred because of the contribution that the detained vessel would have otherwise had to the general expenses of the company was not acceptable as '[t]he expenses in question [were] not connected with the refusal of passage.'[219] The Court awarded compensation of the amount of 140,749.35 francs plus interest to be paid by Germany. Eventually, however, the Reparation Commission established under Article 233 of the Treaty of Versailles did not allow the payment to go forward.[220]

The *SS Wimbledon* case is notable with respect to the award of a remedy in the form of compensation and its assessment because of the very limited discussion of the matter in the

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[215] Gray, *Judicial Remedies* (n 46) 77.

[216] *SS Wimbledon*, PCIJ, Series A, No 1, 15.

[217] Article 380 of the Treaty of Versailles provided: 'The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality'.

[218] *SS Wimbledon*, PCIJ, Series A, No 1, 15, 30.

[219] Ibid 31.

[220] DP Myers, *The Treaty of Versailles and After: Annotations of the Text of the Treaty* (US DoS 1947) 690.

decision of the Court.[221] The Court accepted the valuation of the applicant regarding the damage suffered for the heads of damages not contested by the respondent, and rejected the ones that it found were not connected with the refusal of passage (and had also been contested by the respondent). It hardly then spelled out any principles applicable to such assessment, or a reflection on the heads of damages acceptable.[222]

As mentioned, compensation was claimed in many of the other cases brought to the PCIJ albeit never awarded. The only other time that the Court came really close to awarding compensation was the *Chorzów Factory* already mentioned.[223] As we have seen already, in this case the Court discussed in detail the obligation to make reparation as a consequence of an internationally wrongful act, its different forms and the principles applicable to it. The relevant passages from the Court's judgment have been quoted in length in Chapters II and III of this dissertation. It is probably because of the Court's spelling out of the rules and principles governing the duty to make reparation, that the relevant passages from the judgment are the most often-quoted ones whenever a tribunal or legal scholarship grapples with the issue of reparations. The case was eventually settled however and the Court never got the chance to proceed to the actual assessment of the compensation due.[224]

c. The ICJ practice

The practice of the present World Court when it comes to the obligation to make reparation, and in particular awarding compensation, is equally scarce. In the past 70 years the Court has awarded monetary compensation only three times; in its very first case, the *Corfu Channel*, in the *Ahmadou Sadio Diallo* case in 2012, and recently in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area* in February 2018. There are, however, a few cases currently pending before the Court that may end up in an award of reparations. These include among others the continuation of the *Armed Activities on the Territory of the Congo* case,[225] as well as the cases brought before the

[221] See also Gray, *Judicial Remedies* (n 56).

[222] Ibid.

[223] *Chorzów Factory (Claim for Indemnity)*, Jurisdiction, PCIJ, Series A, No 9, 4; Merits, PCIJ, Series A, No 17, 4.

[224] See *Chórzow Factory (Claim for Indemnity)*, Order of 25 May 1929, PCIJ, Series A, No 19, 11.

[225] *Armed Activities on the Territory of the Congo* (DRC *v* Uganda) Judgment [2005] ICJ Rep 168; ICJ Press Release 2015/18.

Court by Iran against the US.[226] Hence, the topic of reparations will acquire bigger significance over the next few years and deserves detailed study and consideration. Given the slightly different focus of the present thesis only a brief overview of the Court's practice in awarding remedies in the form of monetary compensation will be attempted here.

Corfu Channel,[227] the very first case that came before the Court was also the only case in which the Court had awarded monetary compensation for a long time. It was also a case that involved a situation of 'shared responsibility' as defined in Chapter III above. For reasons of clarity and structure, the issues of the judgment pertaining to matters of shared responsibility will not be analysed in this section, but in section 4 below. Here, we will only (as far as possible) grapple with the matters pertaining to the practice of the Court in the award of compensation as a form of reparation.

The events that led to the case are known among international lawyers and will not be repeated here at length. Briefly, in October 1946 two British warships crossing the Corfu Channel struck mines which exploded and caused extensive damage to the vessels, loss of life and physical injuries. After discussions in the UN Security Council, the UK brought the case to the Court by means of a unilateral application. Following a jurisdictional phase in the proceedings, in which Albania raised preliminary objections but the Court found that it had jurisdiction to adjudicate the case,[228] the parties concluded a special agreement (a *compromis*) and asked the Court to adjudicate two questions: First, whether Albania had responsibility for the explosions and the resulting damage and whether there was a duty to pay compensation for the damage caused. Second, whether the UK had violated Albania's sovereignty by crossing Albanian waters without authorization in October 1946 and by subsequently sending UK ships to a mine-sweeping operation in Albanian waters in November 1946, and whether it had therefore an obligation to provide satisfaction as a means of making reparation.[229] In the merits, the Court concluded that mines belonging to a minefield later found in Albanian waters had caused the damage to the British ships.[230] In

[226] *Certain Iranian Assets* (Islamic Republic of Iran *v* USA) Application Instituting Proceedings, 16 June 2016; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Islamic Republic of Iran *v* USA) Application Instituting Proceedings, 16 July 2018.

[227] *Corfu Channel* (UK *v* Albania) Preliminary Objection [1948] ICJ Rep 15; Judgment [1949] ICJ Rep 4; Compensation, Judgment [1949] ICJ Rep 244.

[228] *Corfu Channel* (UK *v* Albania) Preliminary Objection [1948] ICJ Rep 15, 27–29.

[229] *Corfu Channel* (UK *v* Albania) Judgment [1949] ICJ Rep 4, 6, 10–12.

[230] Ibid at 15.

that respect, the Court accepted that Albania could not have laid the mines itself and that there was no evidence to prove collusion in laying the mines between Albania and any third party. Albania's international responsibility was instead engaged because the mines could not have been laid in its territorial waters without its knowledge, given the available evidence and all the circumstances of the case.[231] Given its knowledge Albania had the obligation to notify about the existence of the minefield, 'for the benefit of shipping in general', and to warn the approaching British vessels about the minefield.[232] Having violated these obligations, Albania had international responsibility for the explosions and an obligation to pay compensation for the damage caused as a result.[233] The Court then found that it had competence to assess the amount of compensation due, but that separate proceedings were necessary for that determination.[234] Albania subsequently did not participate in this separate phase of the proceedings for the assessment of compensation as it contested the Court's jurisdiction on the matter. The Court entrusted the assessment of the heads of damages and of the various amounts submitted by the UK to an expert Commission of Inquiry as provided for under Article 50 of the Statute.[235] It finally accepted the experts' report which largely concurred with the amounts of damages requested by the UK and awarded to the latter compensation of £843,947.[236] Notably, it did not delve into a discussion of the relevant matters itself nor did it elucidate the rules and

[231] It is notable that despite the Court stated that it does not derive from 'the mere fact of control exercised by a State over its territory and waters that that State necessarily knew or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known the authors. This fact …neither involves prima facie responsibility nor shifts the burden of proof', it went on to conclude that because of the practical difficulties the victim State may encounter in establishing evidence located in another State's territory, the Court was allowed to draw certain 'inferences of fact' and use 'indirect evidence' (ibid 18). For a comprehensive discussion of the Court's approach with regard to evidentiary issues generally see M Benzing, 'Evidentiary Issues' in Zimmermann et al (n 201) 1234–75.

[232] *Corfu Channel* (UK *v* Albania) Judgment [1949] ICJ Rep 4, 22.

[233] Ibid 23.

[234] Ibid 26. Regarding the question whether the UK had violated Albanian sovereignty through its actions within the latter's territory, the Court concluded that this was indeed the case. In terms of reparation, it found that satisfaction as requested by Albania was given in the form of the judgment recognizing UK's international violation.

[235] For a commentary on the Court's powers under Article 50 of the Statute see Tams, 'Article 50' in Zimmermann et al (eds) (n 201) 1287–99.

[236] *Corfu Channel* (UK *v* Albania) Compensation, Judgment [1949] ICJ Rep 244, 248–50.

principles applicable to causation, when it comes to omissions, or to the valuation of the damage sustained as a result.[237]

More than 60 years later, in *Ahmadou Sadio Diallo* the Court awarded monetary compensation again in what can be characterized as a classical diplomatic protection case. Guinea filed an application to the Court against the Congo for gross violations of human rights committed against its national by the respondent State in the latter's territory. More specifically, Guinea alleged that through the illegal arrest, detention, and subsequent expulsion of Diallo, Congo had violated its obligations under international human rights law[238] and the Vienna Convention on Consular Relations,[239] and had thus international responsibility and the obligation to make reparation for the material and moral damage caused to the individual in the form of compensation and satisfaction. The Court found that the Congo had indeed violated its international human rights obligations under the International Covenant on Civil and Political Rights[240] and the African Charter on Human and Peoples' Rights[241] by illegally arresting, detaining, and expelling Diallo, as well as under Article 36(1)(b) of the Vienna Convention on Consular Relations. For these reasons, it concluded that Congo had to make reparation to Guinea for the injury suffered and that in view of the fundamental character of human rights obligations, reparation had to take the form of compensation apart from a judicial finding of the violations (which the Court seemed to consider a form of satisfaction).[242] The Court deferred the determination of such compensation to a separate phase of the proceedings to allow the Parties to reach a negotiated solution.[243] When negotiations failed Guinea re-approached the Court which eventually rendered its decision on compensation in 2012.[244] To fix the amount of compensation the Court started from the principles enunciated by the PCIJ in the *Chórzow Factory* case, as well as the practice of other international courts and tribunals in applying these general principles. In particular, the Court looked at the caselaw of those courts that

[237] For a criticism to the approach of the Court see Gray, *Judicial Remedies* (n 56); Plakokefalos (n 86) 481.

[238] *Ahmadou Sadio Diallo* (Republic of Guinea *v* DRC) Merits, Judgment [2010] ICJ Rep 639, 662, para 63.

[239] Ibid; Vienna Convention on Consular Relations (24 April 1963) 596 UNTS 261.

[240] 16 December 1966, 999 UNTS 171.

[241] 27 June 1981, 1520 UNTS 217.

[242] *Ahmadou Sadio Diallo* (Republic of Guinea *v* DRC) Merits, Judgment [2010] ICJ Rep 639, 691, para 161.

[243] Ibid para 163–64.

[244] Ibid, Compensation, Judgment [2012] ICJ Rep 324.

had extensively dealt with injuries due to unlawful detention and expulsion.[245] Spelling out its approach to fixing the compensation due the Court stated that it had to first examine whether an injury had been established under each head of damages claimed by Guinea, and then whether such injury was the result of the internationally wrongful act of the Congo.[246] In that respect, the Court had to ascertain whether 'there [was] a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered' by the applicant, as it had concluded in the *Bosnian Genocide* case.[247] As we will later see the issue of the causal link in Bosnian Genocide was instrumental to the allocation of the obligation to make reparation among multiple responsible actors. According to the Court, only if the injury and the causal link were established it would then turn to the issue of valuation.[248]

According to the Court, the non-material injury was 'an inevitable consequence' of the internationally wrongful acts of the DRC and it was 'reasonable to conclude' that these actions had caused moral damage to Mr Diallo in the form of 'significant psychological suffering and loss of reputation'.[249] In that respect assessment of compensation for 'non-material injury necessarily rests on equitable considerations' as confirmed by the case law of other international tribunals, especially human rights courts.[250] In light of these considerations, the Court proceeded to set the amount of compensation for non-material damage, admittedly quite arbitrarily,[251] to the amount of US$85,000.[252] In terms of the material injury suffered by the victim, the Court found that the evidence offered by the Applicant failed to establish that the damage was of the amount claimed. The Court however recognized that Congo's actions must have caused 'some material damage' to Mr

[245] Ibid 331, para 13.

[246] Ibid 331–32, para 14.

[247] Ibid. *Bosnian Genocide*, para 462.

[248] *Ahmadou Sadio Diallo* (Guinea *v* Democratic Republic of the Congo) Compensation, Judgment [2012] ICJ Rep 324, 331–32, para 14.

[249] Ibid 334, para 21.

[250] Ibid para 24.

[251] See for robust criticism see Decl Greenwood [2012] ICJ Rep 391, 393–95, paras 7–11, according to whom 'just as the [moral] damages are no less real because of the difficulty in estimating them, so the determination of compensation should be no less principled because the task is difficult and imprecise. What is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded.'

[252] Ibid, Judgment [2012] ICJ Rep 324, 335, para 25.

Diallo with respect to loss of personal property, and so awarded compensation of US$10,000 based on equitable considerations.[253] The amount of compensation awarded for material damage to Guinea constituted but a tiny fraction of the amount requested. It is striking in all this that the Court did not feel the need to articulate the principles applicable to the valuation of compensation and based its findings purely on 'equitable considerations'. Additionally, one cannot but observe that the Court very quickly bypassed the issue of causation between the internationally wrongful acts and the non-material injury suffered by the victim and plainly assumed that such injury must have been sustained given the nature of the violations.

Finally, in the most recent case that it has awarded compensation, the *Certain Activities Carried Out by Nicaragua in the Border Area*,[254] the Court had to deal with complex scientific issues concerning the assessment of environmental damage. The case arose from a complaint brought before the Court by Costa Rica for breach of its territorial integrity and conduct of unlawful activities, including military occupation and the creation of a channel by unlawfully dredging the San Juan River, by Nicaragua within its territory.[255] Subsequently, Nicaragua also filed an application to the Court alleging that Costa Rica had violated its obligations under international law by constructing a road along the San Juan River including in part along its border with Nicaragua without conducting the requisite environmental impact assessment, causing as a result grave environmental damage.[256] The Court decided to join the proceedings in the two cases as this would allow it to better appreciate the many complex and interrelated issues involved.[257] In the merits the Court found that Nicaragua had international responsibility for having breached Costa Rican territory by conducting unlawful activities in such territory, including excavating channels and stationing military personnel, and had thus the obligation to make reparation for the damage caused as a result. As regards the unlawfulness of the dredging activities that Nicaragua had conducted and which allegedly had caused damage to Costa Rican territory,

[253] Ibid 337– 38, paras 33, 36.

[254] Costa Rica *v* Nicaragua, Judgment of 2 February 2018, available at www.icj-cij.org.

[255] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v* Nicaragua) and *Construction of a Road Along the San Juan River* (Nicaragua *v* Costa Rica) Judgment [2015] ICJ Rep 665, 694, para 63.

[256] Ibid para 64.

[257] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v* Nicaragua) Order of 17 April 2013 [2013] ICJ Rep 166, 170–71, paras 23–24; *Construction of a Road Along the San Juan River* (Nicaragua *v* Costa Rica) Order of 17 April 2013 [2013] ICJ Rep 184, pp 187–88, paras 17–18.

the Court found that the causal link between the reduction in flow of the Colorado River and Nicaragua's dredging activities had not been established. According to the Court, other factors, including decreased rainfall, 'may [have] be[en] relevant to the decrease in flow',[258] and in any event the diversion of water was far from significant to cause harm to Costa Rican territory.[259] It also found that Nicaragua's conduct had breached the 2011 Provisional Measures order, as well as Costa Rica's navigational rights in the San Juan River. In terms of Costa Rica's request that Nicaragua make reparation for the damage caused, the Court held that the declarations concerning Nicaragua's breach of its international obligations provided satisfaction for the non-material injury as had been requested by Costa Rica. It determined that additionally Costa-Rica was entitled to receive compensation for the material damage caused to its territory by the unlawful conduct of Nicaragua, but that the extent of the damage and the amount of compensation were to be assessed in separate proceedings (as both parties had requested), if the Parties had not reached agreement on the matter within 12 months of the handing down of the decision.[260] In the case against Costa Rica, the Court found that the respondent had violated it obligation under international law to conduct an environmental impact assessment prion to commencing construction activities.[261] However, it found that Costa Rica had not breached its obligation under customary international law to not cause significant transboundary harm in Nicaragua's territory as Nicaragua had not adduced sufficient evidence to establish that significant harm had been caused due to the construction of the road.[262] For this reason, it determined that the appropriate form of reparation for Nicaragua was satisfaction in the form of a declaration that Costa Rica had breached its obligation to conduct an environmental impact assessment. The Court did not grant restitution or compensation as it had found that no significant harm had been caused to Nicaraguan territory because of the construction of the road and that Costa Rica had not breached any of its substantive

[258] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v* Nicaragua) and *Construction of a Road Along the San Juan River* (Nicaragua *v* Costa Rica) Judgment [2015] ICJ Rep 665, 712, para 119.

[259] Ibid.

[260] Ibid pp 717–18, para 142.

[261] Ibid p 723, para 162.

[262] Ibid pp 726–37, paras 174–217. We should note here that the occurrence of damage constitutes here a condition for the violation of the primary obligation 'to not constitute significant transboundary harm to another State's territory'. As evident from the Court's reasoning (ibid), factual and legal causation, as well as evidentiary and scientific issues, would thus play a major role in the determination whether the obligation has been breached in the first place.

obligations under international law.[263] On that note it is interesting that the Court took for granted that there was no damage to be compensated at all after having found that there was no breach of the substantive obligations of Costa Rica under customary and conventional international law. But this is not necessarily true in view of the fact that the violation of the obligation to conduct an environmental impact assessment may have caused some financially assessable damage to be compensated despite the fact that the damage may not have been 'significant' enough to reach the threshold of breaching the substantive obligations. This is just one point that reveals the intricacies of the concept of damage for the purposes of international responsibility and the obligation to make reparation as a remedy as well as the complex evidentiary issues involved.

Following the breakdown of negotiations Costa Rica filed a request to the Court for the determination of said compensation due, which the Court eventually set at the amount of US$378,890.59 (including pre-judgment interest) which was substantially lower than the amount requested by Costa Rica (US$6,711,685.26 plus pre-judgment interest at the amount of US$501,997.28). To decide on the proper amount of compensation the Court reverted to its statement in *Ahmadou Sadio Diallo* that it had to determine 'whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant'.[264] It then recognised in a *dictum* highly relevant for the purposes of the present inquiry that in cases of environmental damage establishing damage and causation can be particularly problematic as

> [t]he damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court.

[263] Ibid p 739, para 226.

[264] Judgment of 2 February 2018, para 32. However, the Court did not elaborate on what would constitute a 'sufficiently direct and certain causal link' in the context of environmental damages. See also D Desierto, 'Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Great Caribbean', EJIL:Talk!, 14 February 2018, available at https://www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/.

> Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.[265]

In that respect the Court asserted that even though in certain cases the valuation of material damage may be particularly difficult due to lack of evidence, that does not always preclude the possibility of the award of compensation. The Court may in these cases award compensation on the basis of equitable consideration as it did in the *Diallo* case.[266] In the present case, the Court recognized that environmental damage is indeed compensable and in conformity with the principle of full reparation this includes both damage to the environment as such and the costs incurred by the injured State as a result.[267] However, the Court made sure to highlight that there is no single valuation method for assessing compensation for environmental damage in international law and 'it is necessary…to take into account the specific circumstances and characteristics of each case'.[268] In doing that the Court would be guided by the more general principles applicable to the obligation to make reparation under the law of international responsibility, ie the *Chorzów Factory* principles, 'full reparation', the need for the existence of a 'sufficiently direct and certain causal link', the fact that the existence of concurrent causes does not necessarily preclude the award of compensation, and the operation of 'equitable considerations'.[269] In the end, the Court awarded Costa Rica an amount far lower than the one requested partly as a result of lack of a causal link between the damage and Nicaragua's internationally wrongful conduct and partly because Costa Rica had failed to meet its burden of proof concerning certain heads of damages. The overall reasoning of the Court as well as the valuation methodology employed and the manner of inquiry into scientific evidence in the judgment were quite opaque in some respects and not particularly reasoned.[270] The Court could have definitely made use of scientific experts to assist it in assessing the damage caused to the environment by the unlawful activities of Nicaragua as well as explain further the applicable rules and principles concerning causation and damage in environmental disputes.

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[265] Judgment of 2 February 2018, para 34.

[266] Ibid para 35.

[267] Ibid para 41.

[268] Ibid para 52.

[269] Ibid para 53. The Court said that in order to assess the extent of the damage and the amount of compensation due it 'would be guided by the rules and principles set out in paragraphs 29 and 35', ie the ones mentioned here.

[270] Cf Desierto, at EJIL:Talk! (n 264).

Overall, we can conclude from the cases examined in this section that the Court takes a case- and context-specific approach to the award of compensation, to the assessment of damage and to the existence of the necessary causal link. Its general approach towards remedies seems to be flexible and as far as possible it tends to avoid getting into complex factual, evidentiary, and scientific questions when it comes to concretizing the obligation to make reparation.

3. The broader jurisdictional setting of the Court and its relevance for cases involving multiple responsible actors

The analysis will now turn to the wider jurisdictional setting as this is another instrumental factor that will assist us in appreciating the manner in which the Court deals with situations involving multiple responsible actors and their obligation to make reparation.

International dispute settlement is based before and above all on the principle of consent.[271] This holds true for the Court and its predecessor,[272] for international arbitration proceedings, either inter-State or investor-State, for human rights courts, for ITLOS and so forth. Under Article 36 of the Statute the Court has jurisdiction to adjudicate on disputes brought before it by one of the means stipulated therein. Its competence to pronounce upon the factual and legal issues is delimited by the jurisdictional title at hand and the *non ultra petita* rule.[273] This need not necessarily present particular problems in cases involving multiple responsible actors from a substantive point of view. However, and given that from a procedural perspective only one of the responsible States will be present before the Court for the resolution of the dispute, this will essentially restrict the approach that the latter can take when deciding the matter. Because of the strict confines of the principle of consent the Court is far more likely to take a problem-solving approach entertaining only the particular issues necessary for the resolution of the dispute before it, as it regularly does, rather than venture into assessing the overall context involving possible other States and substantive matters that are not included in the jurisdictional title.[274] This will in turn promote a

[271] G Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume IV, International Judicial Law* (Stevens 1986) 433; Tomuschat, 'Article 36' (n 201) MN 1–6.

[272] Article 36 ICJ Statute; Tomuschat, 'Article 36' (n 201) MN 19.

[273] For the *non ultra petita* rule as a general rule of procedure before the Court see R Kolb, 'General Principles of Procedure Law' in Zimmermann et al (n 201) 871–908, MN 33 et seq.

[274] Cf Paparinskis (n 13) 300–301.

flexible, case-specific approach resolving the matter for the parties before it and hinder the articulation of any general rule aiming at capturing the entirety of the dispute.

Additionally, in terms of access to the Court, only States parties to the Statute, can bring their disputes before the Court in contentious proceedings.[275] Hence, if an actor is not a State but rather an international organization, a multinational corporation, or a private individual she would have no standing before the Court. As we saw in Chapter III often actors other than States have also contributed to the same injury for the purposes of the obligation to make reparation. In this case, even if some of them may bear responsibility under international law for the violation that contributed to the injury, the Court will not have power to pronounce upon their responsibility and consequently upon their obligation to make reparation. This was for example the case in *Bosnian Genocide* as we will later see. The Court's reach in this respect is essentially limited by the fact that it is only empowered to adjudicate on the rights and obligations of States that come before it.[276]

In terms of structure the procedure of the Court is evidently based on a bilateralised approach to dispute settlement and inter-State relations.[277] This is apparent from the scarcity of provisions in the Statute and the Rules of Court that make it possible to accommodate multilateral disputes, as well as by the limited practice of the Court in applying them. For instance, cases are hardly ever joined in proceedings even if the matters addressed in them are of very similar nature or stem from the same factual or legal background.[278] The institution of intervention has been used very few times by States and has even fewer ones been accepted by the Court.[279] This necessarily affects the substantive manner in which the Court will approach any given case involving multiple responsible States or actors as it will seek to resolve the dispute before it confined by this bilateral perspective.

[275] See Articles 34 and 35 ICJ Statute; for a discussion of the conditions of access see P M Dupuy, 'Article 34' in Zimmermann et al (n 201) 585–605; A Zimmermann, 'Article 35' in Zimmermann et al (n 201) 606–32.

[276] Cf Paparinskis (n 13) 300–301.

[277] Cf Paparinskis (n 13) 298–99.

[278] For an appraisal of the limited utilization by the Court of its power under Article 47 of the Rules of Court see Paparinskis (n 13) 303–304.

[279] C Chickin, 'Article 62' in Zimmermann et al (n 201) 1529–72.

Finally, of particular importance for the purposes of our inquiry is the indispensable third party principle, otherwise known as the *Monetary Gold* principle.[280] The principle was first applied by the Court in the *Monetary Gold Removed From Rome* case and leads to a refusal of the Court to exercise its jurisdiction when the legal interests of a State not a party to the dispute before the Court 'form the very subject-matter of the decision'.[281] The principle following that first case and although it has been invoked quite a few times as an objection to the jurisdiction of the Court and the admissibility of the case, it has only been subsequently applied by the Court once, in the *East Timor* case.[282] Hence, its practical importance might seemingly be quite limited. More importantly, the Court rejected in the *Certain Phosphate Lands in Nauru*, as we will see in the next section, the argument that the principle constituted an obstacle to its adjudication of the dispute even though the responsibility of multiple States was potentially at stake. Fontanelli, commenting on the (non-)application of the indispensable third party principle in the recent *Norstar* case before ITLOS accurately identifies the implications that it may have in particular for situations of aid or assistance.[283] Paparinskis attempting to construct the principle so as not to hinder the Court from entertaining cases involving multiple responsible actors, argues that most cases of shared responsibility could be implemented within the 'four corners' of the rule, but that sometimes 'the objection may prove insurmountable'.[284] This is especially true when issues of remedies and enforcement constitute part of the *petitum* and the claims presented to the Court.[285]

Hence, we can fairly non-controversially conclude that cases involving more than one parties either as applicants or as respondents cannot be easily accommodated by the Court's jurisdictional setting as envisaged under its Statute and the Rules of Procedure. States coming to the Court have often themselves recognized as much. For example, Israel

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[280] The principle was first applied in *Monetary Gold Removed from Rome in 1943* (Italy *v* France, UK, USA) Judgment [1954] ICJ Rep 19. For an account see A Orakhelashvili, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: From Monetary Gold to East Timor and Beyond' (2011) 2 JIDS 373.

[281] *Monetary Gold Removed from Rome in 1943* (Italy *v* France, UK, USA) Judgment [1954] ICJ Rep 19, 32–33; Tomuschat, 'Article 36' (n 201) MN 21–22; For a discussion of this challenge to cases of shared responsibility see also Paparinskis (n 13) 305ff.

[282] *East Timor* (Portugal *v* Australia) Judgment [1995] ICJ Rep 90.

[283] F Fontanelli, 'Reflections on the Indispensable Party Principle in the Wake of the Judgment on Preliminary Objections in the Norstar Case' (2017) Rivista di Diritto Internazionale 112, 119.

[284] Paparinskis (n 13) 308ff.

[285] Cf Paparinskis (n 13) 315.

in the *Aerial Incident of 27 July 1955* case,[286] stated in its written pleadings that given that the UK and the US had also brought proceedings against Bulgaria the three governments had sought to coordinate their claims 'to prevent so far as was possible the Bulgarian Government being faced with double claims, leading to the possibility of double damages'.[287] As explained above the prohibition of double recovery is one of the basic tenets of the obligation to make reparation under the law of international responsibility.

4. Interim Conclusions

All this is not meant to assert that it will be procedurally impossible for the Court to adjudicate cases involving multiple responsible actors. It is rather meant to reveal that certain peculiarities and particularities inherent in the nature of international dispute settlement, will necessarily affect the manner that the Court handles such cases and in particular the award of remedies and the allocation of the obligation to make reparation. The foregoing analysis reveals that any rule on the allocation of the obligation to make reparation among multiple responsible actors would need to be situated within the broader approach of the Court towards remedies. The Court's approach with respect to remedies has been generally characterized by flexibility[288] or—viewed from another perspective—'pragmatic, unselfconscious, and somewhat unreflective' creativity.[289] Additionally, despite the fact that rules on reparation and remedies cannot be strictly considered as part of the procedure of the Court and rather fall squarely within the realm of secondary rules on state responsibility,[290] the particular jurisdictional and procedural setting plays a major role in their realization. For one, evidentiary rules will be instrumental on whether damage, its extent and circumstances can be established. The general reluctance of the Court to actively engage in the gathering of evidence and the establishment of the facts would essentially affect the manner in which the Court may deal with damage that has been caused by contributions of different actors.[291] This is so for the simple reason that available

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[286] *Aerial Incident of 27 July 1955* (Israel *v* Bulgaria) Preliminary Objections [1959] ICJ Rep 127.

[287] *Aerial Incident of 27 July 1955* (Israel *v* Bulgaria) Memorial of the Government of Israel (2 June 1958) Pleadings, 45, at 67, para 35, and 106, para 103.

[288] Crawford in *Essays Vukas* (n 197).

[289] Brownlie, 'Remedies in the International Court of Justice' (n 58) 558.

[290] Brown (n 44) 185; but cf Brownlie, 'Remedies in the International Court of Justice' (n 58) 558.

[291] For a recent assessment of the Court's reactive rather than proactive approach to evidentiary issues and fact-finding see J Devaney, *Fact-Finding before the International Court of Justice* (CUP 2016).

evidence will be crucial in establishing the involvement of the various actors as well as factual causation between each one's wrongful conduct and the resulting damage.

For its part, the principle of consent and that of the indispensable third party as well as the power of the Court to entertain cases in which only States are parties will necessarily shape the manner that the Court deals with situations of shared responsibility. Cases such as *Corfu Channel*, *Nauru*, and *Bosnian Genocide* illustrate the point quite well. As demonstrated in section 3 above these observations do not necessarily mean that the Court will be prevented from looking at these situations or from allocating responsibility and its consequences, including the obligation to make reparation. However, when it comes to remedies and reparation, particularly compensation, one should be cautious in trying to adduce and establish general principles, taking into consideration the Court's cautious, flexible, and case-specific approach. According to Brownlie this was one of the main takeaways from the Court's decision in the *Corfu Channel* case.[292] The final chapter of this thesis will study the cases in which the Court has had the chance to grapple with situations involving multiple responsible actors so far. Following that, it will assess whether the case law of other international courts and tribunals in similar situations confirms the practice of the Court with respect to the allocation of the obligation to make reparation among multiple responsible actors.

[292] Brownlie, 'State Responsibility and the International Court of Justice' (n 65) 16: 'The judgment of the Court provides a valuable reminder of the need to avoid generalizing principles and simplistic polarities in the sphere of State responsibility.'

V. Reparation in cases involving multiple responsible actors at the ICJ and beyond

1. The Practice of the ICJ

As mentioned in the previous chapter, the first case in which the ICJ awarded monetary compensation, *Corfu Channel*, was also a case involving multiple responsible actors. The Court found Albania responsible for the injury caused to the UK despite acknowledging that 'the authors of the minelaying remain[ed] unknown'.[293] The finding was based on the fact that in view of the evidence at the disposal of the Court Albania could not not have known about the minelaying in its territorial waters. This finding evidently contradicted the emphatic statement of the Court that 'it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors'.[294] Nonetheless, given its (inferred) knowledge the Court concluded that Albania had violated its own primary obligations independently from internationally wrongful act of any third party that did the actual minelaying. The primary obligations that bound Albania and were breached were according to the Court based on 'certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[295] Aside from the fact that as we mentioned earlier there has been discontent with the basically non-existent discussion on the Court's part of the relevant causation principles and the assessment of damages, we observe that by identifying a self-standing primary obligation binding the respondent before it and by applying the rule of independent responsibility the Court managed to hold Albania accountable for the injury suffered by the UK.

In the *Tehran Hostages* case,[296] the matters were somewhat more complicated as the damage to the applicant had been caused by the combined actions of the respondent State and a group of non-state actors; the latter not being responsible for their actions under

[293] *Corfu Channel* (UK *v* Albania) Merits [1949] ICJ Rep 4, 17.

[294] Ibid 18.

[296] *United States Diplomatic and Consular Staff in Tehran* (USA *v* Iran) Judgment [1980] ICJ Rep 3.

international law. The case arose out of the events that took place in Tehran in from 4 November 1979 onwards when amidst the Iranian revolution a group of militants and students invaded and occupied the US embassy compound in Tehran as well as two US consulates, took hostages diplomatic personnel and private US citizens and destroyed diplomatic property.[297] The US filed an application to the Court alleging that by permitting, encouraging, tolerating and by failing to prevent and punish such conduct Iran had violated its obligations under the Vienna Convention on Diplomatic Relations[298] and the Vienna Convention on Consular Relations as well as under the 1955 Treaty of Amity[299], that it had to immediately release all the hostages and seize all wrongful conduct and also had the obligation to make reparation for the injuries sustained. The central question in the case was whether Iran as a State had international responsibility for the actions and the damage caused by the actions of the non-state actors that carried out the invasion and occupation of the embassy, ie whether the acts of the latter were 'imputable to the Iranian State'.[300] According to the Court the pertinent events fell in two different phases. The first one was the attack to the US embassy on 4 November 1979 performed by the militant and students group, the destruction and damaged caused thereof, the taking of hostages and the occupation of the embassy.[301] Although these actions could not as such be attributed to the Iranian State,[302] the latter had still violated its international obligations under the two Vienna Conventions and the Treaty of Amity by not taking 'appropriate steps' to safeguard the inviolability of diplomatic and consular premises, their property, archives and documents, and the safety and inviolability of the person of diplomatic and consular staff as well as of private US citizens.[303] The second phase consisting of the espousal of the militants' action by the Iranian State which vested it with 'the seal of official governmental approval'[304] and led to the conduct being attributable to the Iranian State as a result and to additional violations of the aforementioned international

[297] Ibid 10–18, paras 14–32 for a summary of the relevant events and the trajectory of the dispute by the Court.

[298] 18 April 1961, 500 UNTS 95.

[299] Treaty of Amity, Economic Relations, and Consular Rights (Iran-USA, 15 August 1955) 284 UNTS 93.

[300] *United States Diplomatic and Consular Staff in Tehran* (USA *v* Iran) Judgment [1980] ICJ Rep 3, at 28–29, para 56.

[301] Ibid para 57.

[302] Ibid at 29–30, paras 58–60.

[303] Ibid 30–33, paras 61–68.

[304] Ibid 34, para 73.

conventions and established rules of general international law.[305] For all these violations, the Court concluded that Iran incurred international responsibility and had to make reparation for the injury caused to the US, but the form and amount of reparation had to be determined in separate proceedings.[306] What is particularly interesting for our purposes is that Iran was held responsible to make reparation for the injury caused to the US 'by the events of 4 November 1979 and what followed from these events'.[307] This is quite unproblematic for the events of the 'second phase' that were attributable to the Iranian State by means of the approval of the actions of the militants as this is a clear case of the operation of the principle of independent responsibility. As long as the damage caused to the US was due to the actions attributable to Iran and constituted simultaneously violation of its international obligations, Iran had international responsibility and the obligation to make reparation. However, it is not as readily clear why Iran was called to make reparation also for the events of the 'first phase' when the actions of the militants, which were the ones that physically caused the damage to the US, were not imputable to Iran. During this 'first phase' Iran had international responsibility for violating its own international obligations under the Vienna Conventions and the Treaty of Amity to take the 'necessary steps' to safeguard and protect the inviolability of the diplomatic and consular premises as well as the safety and inviolability of the person of diplomatic and consular personnel as well as of private US citizens. However, the Court seemed to assume that the failure of Iran to observe its international obligations in that respect was equally connected in terms of causation to the damage sustained by the US. For that damage then Iran was obliged to make reparation. The case was later discontinued following the conclusion of the Algiers Accords and the establishment of the US-Iran Claims Tribunal[308] and so the Court never had the chance to pronounce on the appropriate form of reparation and to assess the amount of compensation due. However, we observe here an application of the rule identified by the ILC that despite the existence of concurrent causes, responsibility is not attenuated merely due to the fact that another cause has contributed to the damage.[309] The responsible State bears international responsibility for its own conduct that has contributed to the damage and has thus an obligation to make reparation in full for the injury caused, notwithstanding the fact that the damage might not even have occurred had it not been for the conduct of another actor. In fact, in the *Tehran Hostages* case, that other actor did not

[305] Ibid 33–37, paras 69–80.

[306] Ibid 41–42, para 90.

[307] Ibid 45, para 5 of the *dispositif*.

[308] See Ibid, Order of 12 May 1981 [1981] ICJ Rep 45.

[309] See Chapter III above.

even bear responsibility under international law for the actions that led to the damage, although the militants may indeed have violated domestic criminal law with their actions. Still through this rule as well as by clearly identifying the obligations of Iran under relevant international conventions the Court managed to hold Iran responsible for the entirety of the injury sustained by the US, although certain questions regarding the causal link between the internationally wrongful actions of Iran in the 'first phase' of events and the damaged sustained thereof remained.

The *Certain Phosphate Lands in Nauru* case is the case that has most closely grappled with some of the jurisdictional issues outlined in the previous chapter. Nauru following independence brought proceedings to the Court against Australia, one of the three State that 'jointly' constituted the Administering Authority of Nauru as a Trusteeship territory. The other two States, New Zealand and the UK, were not parties to the proceedings before the Court. Australia argued that the case was inadmissible and there was no jurisdiction of the Court as any determination of Australia's international responsibility and its obligation to make reparation would necessary implicate the responsibility of two parties that had not consented to the Court's jurisdiction.[310] This was a clear invocation of the indispensable third party principle as enunciated in the *Monetary Gold* case. It is notable in that respect that to the years preceding the commencement of proceedings officials of Nauru had invoked the responsibility of all three governments to make reparation for the damage caused to the island's phosphate resources.[311] To resolve this matter, the Court examined the nature and conditions of the mandate that had been granted to the UK, Australia and New Zealand under the League of Nations system and was in 1947 transformed into a Trusteeship under the UN Charter. The Court observed that during the Mandate the Administrator General of Nauru had always been appointed by Australia and thus received instructions by the Australian government. The other two States were informed about his decisions but they did not have any influence over them. The same system continued under the Trusteeship with Australia having the predominant role over the administration of the territory.[312] In light of these circumstances the Court concluded that the three countries 'constituted… the "Administering Authority"', that the latter 'did not have an international legal personality distinct' from those of the three States, and the Australia played a 'very

[310] *Certain Phosphate Lands in Nauru* (Nauru *v* Australia) Judgment [1992] ICJ Rep 240, 255, para 39.

[311] Ibid 247–50, paras 15–19.

[312] Ibid 256–58, paras 40–46.

special role' as established under the relevant international agreements and 'by practice'.[313] In the Court's view Australia's objection about the admissibility of the case had two aspects. The first one concerned the nature of the responsibility involved. Australia argued that as the administration of Nauru had been performed by the three States jointly any claim concerning such administration had to be brought against all three States jointly, and not any of them individually. Australia also raised the issue whether

> the liability of the three States would be "joint and several" (solidaire) so that any one of the three would be liable to make full reparation for the damage flowing from any breach of the obligations of the Administration Authority or whether each State was responsible only for a part, and not merely a one-third or some other proportionate share.[314]

The Court disposed of this aspect of the objection quickly as it considered the matter to be one for the merits of the case with no effect on whether any one of the three parties could be sued independently.[315]

The second aspect of Australia's objection was according to the Court one related to the Monetary Gold principle as Australia claimed that any determination of her international responsibility would necessarily simultaneously constitute a determination of the international responsibility of the UK and New Zealand, and that would be contrary to the fundamental principle of consent upon which the Court's jurisdiction is founded.[316] Reviewing its jurisprudence concerning the indispensable third party principle the Court stated that it was not precluded to adjudicate on the responsibility of a State by the mere fact that its decision might have implications for the legal position of States that are not party to the proceedings so far as the rights and obligations of the latter do not constitute the 'very subject matter' of the dispute.[317] The absent States are in any event protected under Article 59 of the Statute. It then concluded that the interests of the UK and New Zealand would not form the 'very subject matter' of the dispute as the situation was quite different from the one in the *Monetary Gold* case, as there was no need to make any findings upon the responsibility of the two States in order to make a finding concerning the

[313] Ibid 258, para 47.

[314] Ibid para 48

[315] Ibid.

[316] Ibid 259, para 49.

[317] Ibid 261, para 54.

responsibility of Australia.[318] However, the Court made sure to highlight that this determination had no impact on the manner that the obligation to make reparation was to be allocated, which was an issue for the merits.[319] In that respect, if Australia had been found responsible, reparation would have to be determined in light of the features of the Mandate and the Trusteeship as well as the special role that Australia had played in the administration of the territory.[320] The Court found that it had jurisdiction and that the case was for its biggest part admissible, but never got a chance to decide on the merits as the parties settled the dispute and the case was discontinued.[321] Notably, Australia agreed in the settlement to pay compensation to Nauru equal to the entirety of its claim.

The fourth case to be examined in this section is *Bosnian Genocide*. This case is particularly pertinent to our analysis as it was characterized by extensive interconnectedness of actions between Serbia and the various non-state actors, in the form of paramilitary groups that committed numerous crimes under international humanitarian and human rights law during the conflict. The tragic events during and after the dissolution of the Socialist Federal Republic of Yugoslavia that led to the case before the Court are well known and will not be repeated here. So are the jurisdictional complications relating to state succession and the various phases of the proceedings before the eventual decision in the merits.[322] In the 2007 judgment the Court found Serbia responsible among others for failure to prevent the commission of genocide in Srebrenica in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide[323] but not for having committed genocide in Srebrenica nor for having been complicit in the commission of such genocide or for having incited or conspired to commit genocide.[324] There are two points in the Court's reasoning that are highly relevant to our inquiry.

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[318] Ibid 261–62, para 55.

[319] Ibid 262, para 56.

[320] Ibid.

[321] *Certain Phosphate Lands in Nauru* (Nauru *v* Australia) Order of 13 September 1993 [1993] ICJ Rep 322.

[322] See for example F L Bordin, 'Continuation of Membership in the United Nations Revisited: Lessons from Fifteen Years of Inconsistency in the Jurisprudence of the ICJ' (2011) 10 LPICT 315.

[323] 9 December 1948, 78 UNTS 277.

[324] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) Judgment [2007] ICJ Rep 43, paras 2–5 of the *dispositif*.

First, examining the issue of complicity to the commission of genocide under Article III of the Genocide Convention, the Court turned to Article 16 ARSIWA which it characterized as reflective of customary international law.[325] The Court asserted that Article 16 could provide guidance even in situations that did not involve multiple responsible States but rather a State and non-state actors.[326] This illustrates that despite the fact that the rules in ARSIWA have to their largest part been formulated with inter-State relations in mind, they can accommodate other types of situations too if they are reasonably and clearly applied. However, the Court could not find Serbia responsible for having aided or assisted non-state actors in the commission of genocide as it could not be established that Serbia acted knowingly, ie aware of the *dolus specialis* of the principal perpetrators of genocide, as required for the commission of the crime under international law.

Second, discussing the obligation to prevent genocide under Article I of the Genocide Convention, the Court stated:

> the obligation in question is one of conduct and not of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide; the obligation of State parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible… the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance.

It added that in order for a State to have violated its obligation to prevent genocide, genocide has to have actually been committed.[327] Hence, the Court in fact considered as a necessary prerequisite for the violation of the obligation by the State that some other actor—a concurrent cause—would have committed the genocidal acts. For the Court, this was the manner that all obligations of prevention operate.[328] Given the circumstances of the case and the available evidence, the Court concluded that Serbia had indeed international responsibility for failure to prevent the commission of genocide.[329]

When it came to the obligation to make reparation as a consequence of such international responsibility, the Court in line with its usual practice turned to the *Chórzow Factory*

[325] Ibid 217, paras 419–20.

[326] Ibid.

[327] Ibid 221–22, para 431.

[328] Ibid.

[329] Ibid 223–26, paras 434–38.

principles and stated that in the circumstances of the case *restitutio in integrum* was not appropriate but the declaration that Serbia had violated its obligation under the Genocide Convention to prevent genocide was 'appropriate satisfaction'.[330] However, with respect to the Applicant's claim for compensation the matter was more complicated. As the Court had found that Serbia had not itself committed genocide, nor had it been complicit in such commission of genocide and so forth, it had to establish whether 'the injury asserted by the Applicant [was] the consequence of wrongful conduct by the Respondent, with the consequence that the Respondent should be required to make reparation for it'.[331] That was a matter of the causal link between the actual commission of genocide in Srebrenica and Serbia's failure to 'employ all means in its possession' to prevent such genocide. According to the Court the question was whether there was 'a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant'.[332] And in that respect, the Court felt that it was not able to conclude from the overall circumstances of the case that genocide would not have occurred had Serbia employed 'all means in its possession' to prevent it, and thus the Respondent was under no obligation to pay compensation from the material and non-material damage resulting from the commission of genocide.[333] In the words of the Court 'financial compensation [was] not the appropriate form of reparation for the breach of the obligation to prevent genocide'.[334]

Hence, although the Court found a way to hold Serbia responsible for her omission to prevent the commission of genocide through an examination and articulation of the its primary obligations independently from the actual commission of the crime by non-state actors, the somewhat muddled application of the test of causation prevented it from awarding compensation and to a certain extent from realizing the remedial function of reparation for the victims of genocide.[335]

[330] Ibid 233–34, paras 461, 463.

[331] Ibid para 462.

[332] Ibid.

[333] Ibid.

[334] Ibid.

[335] For the discussion of this problem see Plakokefalos (n 86); A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695.

2. The Practice of Other Courts and Tribunals

Having this admittedly scarce practice of the Court in mind, the analysis will now turn to the practice of other international courts and tribunals to explore whether their approach in dealing with situation involving multiple responsible actors reinforces the approach taken by the Court. Our aim is to inquire whether they also demonstrate a tendency to turn to fundamentals of international responsibility in such situations and whether their practice indicates whether a rule or principle within their specific systems or generally exists governing the allocation of the obligation to make reparation among multiple responsible actors.

Certain other judicial institutions despite being far more remedies-oriented have also yet to articulate a general principle on the allocation of the obligation to make reparation among multiple responsible actors that goes beyond the existing basic principles of the regime of international responsibility. The European Court of Human Rights (ECtHR), for example, is the court that can be considered as the one most often confronted with a plurality of wrongdoing actors,[336] often of a very different nature. There three cases before the ECtHR reaffirming the conclusions to which we have arrived so far. First, in *MSS v Belgium and Greece*, the court was confront with a situation of shared responsibility involving two responsible States both parties to the Convention system.[337] Second, in *El Masri v Macedonia* the responsibility was shared between a States party to the Convention and a State not bound by the Convention.[338] Finally, in *Fadeyeva v Russia* the Court held a State party responsible in connection to the actions of a non-state actor.[339] In all these cases, the ECtHR has turned to the primary obligations of the State party to the Convention before it and despite concerns[340] about the clarity of the reasoning and the exact rules upon which the determination was based it has granted just satisfaction to the victims.

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[336] M den Heijer, 'Procedural Issues of Shared Responsibility in the European Court of Human Rights' (2013) 4 JIDS 361.

[337] *MSS v Belgium and Greece*, App No 30696/09, Judgment of 21 January 2011.

[338] *El Masri v Former Yugoslav Republic of Macedonia*, App No 39630/09, Judgment of 13 September 2003.

[339] *Fadeyeva v Russia*, App No 55723/00, Judgment of 9 June 2005.

[340] See, e.g., Nollkaemper, A., 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?', SHARES blog, 24 December 2012, available at http://www.sharesproject.nl/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/.

Two cases also from the realm of international arbitration illustrate this point. In the *CME v Czech Republic* the investment tribunal dealt with the issue of 'joint tortfeasors', following the conceptual framework set by the ILC in the ARSIWA, 'even [if] in a superficial and sloppy manner' and awarded damages to the investor by utilizing the basic rule that the existence of concurrent causes does not diminishes a State's own responsibility for the breach.[341] The *Eurotunnel* arbitration, on the other hand, demonstrated that in order for the principle of joint and several responsibility to be established one needs to look at the pertinent inter-State relationship, as reflected in an international agreement or otherwise, and to find evidence of the will to establish such a principle of responsibility for the case at hand.[342]

Finally, even in the context of the advisory function which is not technically speaking limited by the strict application of the principle of consent there has been no elaboration of a general rule but rather application of the fundamental rules of state responsibility and utilization of the primary obligations at issue. For instance, if we look at the Seabed Disputes Chamber's *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* advisory opinion, which directly grappled with the principle of joint and several liability between multiple responsible entities, we will see that sponsoring States will be called upon to compensate for damage caused by a sponsored contractors but only in the event that they themselves have not carried out their obligations under the LOSC and relevant regulations of the Seabed Authority including their obligation of due diligence. Their obligation to make reparation will only apply if such violation is causally linked to the damage caused.[343] A similar conclusion was reached by the ITLOS in the *Sub-Regional Fisheries Commission* Advisory Opinion, where the Tribunal concluded that 'the liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations…[but] from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag'.[344] It is notable that both the Seabed Disputes Chamber and ITLOS, in handing down their opinions, have relied on the general rules of

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[341] See Wittich (n 171) 722.

[342] *Eurotunnel Arbitration*, PCA Case No 2003-06, Partial Award, 30 January 2007, para 187.

[343] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, paras 201-204.

[344] *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, 4, para 146.

international responsibility, in particular the principle of independent responsibility, causation, and full reparation, recognizing however some of their limitations.[345]

3. Interim Conclusions

The consequence that follows from this is more or less apparent. Rather than articulating grand principles applicable in each and every case that multiple responsible States or actors have caused a single injury, the ICJ has taken a flexible, context-specific approach directed at resolving the dispute at hand essentially looking at the primary obligations of each actor before it and the basic rules of international responsibility. This practice has been affirmed by that of other international courts and tribunals that follow a similar approach when dealing with cases involving multiple responsible actors.

At the present stage of development of international law, we cannot conclude that the practice of the Court hints to the existence of any general principle or rule regulating the allocation of the obligation to make reparation among multiple responsible actors. The flexibility with which it deals with the question of remedies and reparation is not conducive to the emergence of such grand principle in the near future either. Rather three other points emerge from the Court's practice examined in this chapter. First, the Court despite its very tight *cadre juridique* has not so far shied away from deciding cases involving issues of shared responsibility. Second, its approach—perhaps one could argue overtly traditional—shows a clear preference for dealing with such situations utilizing rules and principles already at its disposal and then turning to the fundamental principles of state responsibility to establish responsibility and find the most appropriate remedy. These include the principle of independent responsibility and 'full reparation'. Finally, any discontent or uneasiness towards the Court's conclusions in these cases stems more from the muddled application of the traditional rules rather than from a feeling that the Court lacks the tools necessary to resolve such situations. The *Corfu Channel* and *Bosnian Genocide* cases, where the not so reasoned award of damages and application of the causal test respectively raised many questions, are two examples of this problem.

[345] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, paras 208–11.

General Conclusions

According to Philipp Heck 'while [the judge] must decide the individual case before him, he does so by applying the entire legal order'.[346] The present dissertation has demonstrated that this is indeed how the ICJ and other international courts and tribunals have so far dealt with situations involving multiple responsible actors.

The obligation to make reparation constitutes the necessary corollary of international responsibility and an essential remedy to the party injured by the internationally wrongful act. As straightforward as this might be the obligation as such is characterized by intricacies and inherent complexities that affect its realization before international courts and tribunals. The diverse approach taken by different adjudicatory bodies towards remedies as well as the flexibility displayed by the ICJ in their award reveals that these matters are complicated and less straightforward than they appear at first sight.

Despite the fact that an increasing number of cases that come before international courts and tribunals involving multiple responsible actors, the review of the practice of the ICJ and beyond reveals that the adjudication of these matters takes place on the basis of the first principles of international responsibility and the primary obligations that bind each responsible actor. Even if this may be considered unsatisfactory from a normative perspective or as a policy choice, it indeed offers the best solution given the circumstances at hand. The ILC in its codification work on the topic of international responsibility offered little guidance on how situations of shared responsibility should be handled and how the obligation to make reparations shall be apportioned among multiple responsible actors. The international practice on the topic is scarce, whereas international dispute settlement is fundamentally based on a bilateral approach to and structure of international relations.

Taking all this into consideration, one cannot but praise the ICJ and other international courts for not shying away from adjudicating cases involving such complex issues, and for handling them by utilizing a network of primary obligations and first principles of international responsibility. This sober approach to such complex questions would be of course enhanced if the Court ventured more into detailed reasoning of its decisions and clearer articulation of the various tools in operation.

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[346] P Heck, *Begriffsbildung und Interessenjurisprudenz* (Mohr 1932) 107, as cited in Simma/Pulkowski (n 25) 498.