

Diffusion of Responsibility

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(20 March 2015)

NOT TO BE CITED

Note to the reader: this is a draft of a first substantive chapter of what will eventually become a monograph on shared responsibility in international law. With shared responsibility, I refer to a responsibility of two or more actors for their contribution to harmful outcomes. This first chapter essentially frames the problem. It will be followed by two chapters that conceptualize a notion of responsibility that is better attuned to practices of cooperation and concerted action; three chapters that explore various substantive principles of responsibility as these may apply to concerted action, and three chapters that discussed responsibility processes and institutions as these can be applied in situations of concerted action.

Diffusion of Responsibility

In this chapter I argue that concerted actions that lead to harmful outcomes may trigger a diffusion of responsibility between states, international organisations and other actors involved in the concerted action, Such diffusion, which in part is facilitated by the prevailing system of responsibility, may reflect the more complex processes of governance, but also may result in a loss of responsibility, with significant costs in terms of the public interests in performance of treaty obligations as well as the interests of injured parties..

Up front, we have to define what we mean with the concept ‘diffusion’. In sociology, diffusion refers to the spread of ideas, policies and practices.¹ This concept can also be applied to legal phenomena. For instance, we can say that the notion of the ‘rule of law’ is diffused across levels of governance. A notion that originally was connected to national legal orders, spreads to international institutions and more generally the international legal order.² Likewise, we can say that responsibility is diffused, if, rather than resting on one person, it is spread over a multitude of persons. This can also be described in terms of causation: in situations of a multiplicity of actors, each individual contribution is only one of a plurality of conditions that together cause a harmful outcome.³ If so, responsibility may spread over multiple actors.

Diffusion of responsibility may (but need not) imply that the actual share of responsibility of each person involved becomes smaller and becomes more difficult to determine.⁴ This dimension of diffusion is well captured in Mark Bovens’ observation that ‘[a]s the responsibility for any given instance of conduct is scattered among more people, the discrete responsibility of every individual diminishes proportionately’.⁵ The plurality of contributions, and their interrelationship, may make it difficult, and sometimes impossible, to determine individual causes and thus to determine who is responsible for what.⁶

This particular, more problematic dimension of the diffusion of responsibility in cases of concerted action is a manifestation of the so-called ‘problem of many hands’. This problem (TPMH) is commonly attributed to a 1980 article by Dennis Thompson; *Moral responsibility of public officials: The problem of many hands*.⁷ Thompson argued that assigning responsibility in the framework of governmental organizations becomes more difficult when

¹ Frank Dobbin, Beth Simmons and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (CUP 2008); Katharina Holzinger, Helge Jörgens and Christoph Knill, *Transfer, Diffusion und Konvergenz: Konzepte und Kausalmechanismen* (Wiesbaden, VS Verlag für Sozialwissenschaften, Springer 2007).

² Michael Zurn, André Nollkaemper and Randy Peerenboom (eds), *The Rule of Law Dynamics in Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2014).

³ Dennis F. Thompson, 'Designing Responsibility: The Problem of Many Hands in Complex Organizations' in Jeroen van den Hoven, Seumas Miller and Thomas Pogge (eds), *The Design Turn in Applied Ethics* (CUP, Cambridge 2012).

⁴ Andrew Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (CUP, Cambridge 2011), 57, 225.

⁵ Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (CUP, Cambridge 1998), 46.

⁶ In this respect the problem of many hands is closely related to the concept of shared responsibility as used for instance by Larry May, who argues that shared responsibility arises when there is no effective possibility to determine causal contributions. See Larry May, *Sharing responsibility* (University of Chicago Press, Chicago 1996).

⁷ Dennis F. Thompson. 'Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74(4) *The American Political Science Review* 905.

more persons – ‘many hands’- are involved in the process that caused harm. Though TPMH has been applied in a variety of different theoretical contexts, such as agency theory,⁸ the collective responsibility,⁹ and public goods,¹⁰ its prime application is in the sphere of responsibility. TPMH can help to explain and understand the difficulty of determining and implementing responsibility in collective settings. It may allow us to identify the conditions and processes that explain when diffusion of responsibility occurs. It also may enable us to identify antidotes to such diffusion, thus pointing the way forward to matters to be discussed in later stages of this book.

While the notion of TPMH mostly has been applied in a domestic context, it is highly relevant in an international context. Examples of cases of diffusion of responsibility are the *Legality of the Use of Force* cases in the ICJ¹¹ or the *Sadam Hussein* case before the ECtHR,¹² in which plaintiffs did not succeed in successfully bringing claims against a multitude of (allegedly) responsible parties. Further examples can be drawn from other issue-areas. If states cooperate to conserve fish stocks beyond their Exclusive Economic Zone but fail to realize agreed objectives, distribution of responsibility among the states and institutions involved likewise will be difficult.¹³ If states or international organizations fail to live up to the collective “responsibility to protect” human populations from mass atrocities¹⁴—a responsibility that rests in part on obligations that are binding on a plurality of

⁸ Kathleen M Eisenhardt, ‘Agency Theory: An Assessment and Review’(1989) 14 *Academy of Management Rev* 57.

⁹ David Miller. ‘National Responsibility and Global Justice’ (2008) 11(4) *Critical Review of International Social and Political Philosophy* 383.

¹⁰ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1971); Thomas C Schelling, *Micromotives and Macrobehavior* (New York: WW Norton & Company 1978).

¹¹ *Legality of Use of Force (Yugoslavia v United States)* (Provisional Measures: Order) [1999] ICJ Rep 916 (9 similar cases were brought by Yugoslavia against other NATO Member States).

¹² *Hussein v Albania* App no 23276/04 (ECtHR, 14 March 2006), para 1.

¹³ See e.g. ‘Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks’ UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (New York 24 July-4 August 1995) (Sept. 8, 1995) UN Doc A/CONF. 164/37. In 2013, the Sub-Regional Fisheries Commission asked an Advisory Opinion to ITLOS, with an aim to clarifying the responsibilities of multiple actors engaged in illegal fisheries, see *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) Case No. 21* (Request to Render an Advisory Opinion, Order of 24 May 2013) ITLOS Reports 2013, 2.

¹⁴ Report of the Secretary-General ‘Implementing the Responsibility to Protect’ (2009) UN Doc A/63/677 [hereinafter R2P Report].

states or organizations¹⁵—it likewise may be difficult to determine which of the actors is responsible.¹⁶

In all such situations, contributions are spread over several actors, so that it may become difficult to determine that the conditions of responsibility are satisfied; sometimes that will be impossible, with the result that no responsibility can be determined.

In this chapter I will first set out the dynamics of cooperation that help understand the situations in which diffusion occurs (section 1). I then will discuss what I will call the politics of diffusion. I will argue that diffusion is not an autonomous effect of wider changes in global governance, but may be an intended consequence of strategic choices by actors participating in a concerted action (section 2). In section 3, I will zoom in on the reasons that explain why in particular cases diffusion may lead to gaps in the responsibility scheme. Finally, I will argue that while such gaps in particular cases may be inevitable and may even be preconditions for getting relevant actors to agree on action, they raise fundamental normative and institutional challenges for the organization and implementation of concerted action (section 4). As such, they prompt us to reconfigure the foundations, principles and process of shared responsibility in international law – a task that will be undertaken in the remainder of this book.

1. United we Stand.....

Cooperation has become a dominant feature in all fields of international law. In a wide variety of issue-areas states, international institutions and other actors group together, and coordinate their policies in pursuit of common objectives.¹⁷ Surely, this trend does not negate the fact that in each of these areas states also continue to act independently. However, the

¹⁵ Diana Amnéus, 'Responsibility to Protect by Military Means—Emerging Norms on Humanitarian Intervention?' (Doctoral Thesis Stockholm University 2008) 502–25; Monica Hakimi, 'State Bystander Responsibility' (2010) 21(2) EJIL, 342–43, 342 n. 5; Arne J. Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander' (2000) 37(4) J Peace Res, 529.

¹⁶ This question has been considered to some extent by the International Court of Justice (ICJ). *Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v Serbia & Montenegro)* (Judgment) [2007] ICJ Rep 43, 379 (discussing the state's responsibility for failure to prevent genocide, one of the mass atrocities that R2P requires states to prevent). See also James Pattison, 'Assigning Humanitarian Intervention and the Responsibility to Protect', in Julia Hoffman & André Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Pallas Publications, Amsterdam University Press 2012) 173.

¹⁷ André Nollkaemper and Ilias Plakokefalos, *The Practice of Shared Responsibility in International Law* (Conclusions: Beyond the ILC Legacy, CUP, 2015, forthcoming).

pervasiveness of concerted action makes that it should be given weight and reflected in the construction of the law of responsibility.

This section will first explain in which types of situations the phenomenon of diffusion can arise (1.1). It then argues that the trend towards concerted action is of a structural nature (1.2), and is reinforced by acceptance of ‘shared responsibilities’ (1.3).

2.1 Situations in which diffusion of responsibility may occur

In this study I am particularly interested in situations where diffusion of responsibility occurs in the context of concerted action. It is clear that diffusion also may occur in situations where multiple actors do not act in concert, yet where parallel actions cause a single harmful outcome. An example is climate change, caused by many actors through largely uncoordinated policies and activities. This will not qualify as concerted action, yet it will be difficult to identify who is responsible for human displacement and environmental harm, and the process indeed can be understood in terms of diffusion of responsibility.¹⁸ However, it is submitted that in situations of concerted action, diffusion of responsibility is especially likely to occur and, where it does, it has particular manifestations that differ from non-concerted action. This is due to the relations between the actors, which generally are absent in situations of non-concerted action.

International law does not have any definition of concerted action, in contrast to some domestic legal systems.¹⁹ But in common language, to say that states engage in a concerted action essentially means that they jointly arrange, plan, or carry out a particular action. States, and other actors, then coordinate their actions with a view to a particular outcome that is agreed between them.

Concerted action can involve a varying number of actors. We can speak of concerted action when only two states are involved (for instance in the *Eurotunnel case*)²⁰ just as well as in the

¹⁸ The question is not entirely hypothetical. See e.g. Richard Lord and others (ed), *Climate Change Liability: Transnational Law and Practice* (CUP, Cambridge 2012). See generally Faure, Michael G. and Nollkaemper, André. 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26(A) *Stan Envtl LJ* 123.

¹⁹ E.g. in the US specific rules on concerted action have been established in a variety of areas; see e.g. 46 USC § 41105.

²⁰ *The Channel Tunnel Group Limited and France-Manche SA v Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland (Eurotunnel) (Partial Award)* [2007]

case when large numbers of states are involved. The differentiation between numbers that are involved in collective action can be relevant to diffusion of responsibility. It is a plausible proposition that risks of diffusion are significantly greater when the number of actors increases, as it then becomes more difficult to determine who is responsible for what. This phenomenon is supported by empirical research on the so-called ‘bystander effect’. In a group of people being confronted with an emergency situation, the more people the group consisted of, the likelihood of the persons interfering decreased.²¹ This may also apply for international affairs.

A fundamental characteristic of the type of concerted action in which I am interested is that the concerted action involves interaction or coordination of conduct between the participating actors. This means that outcomes cannot be explained by individual conduct of individual actors. By engaging in cooperation, states bring about results that they could not have brought about on their own. In particular in cases of larger numbers of actors, we thus can consider concerted action in terms of governance networks, in which individual members (‘network nodes’) mutually influence, limit and control one another in the pursuit of common objectives.²² When multiple actors influence each other, the resulting knot cannot easily be untied. A reductive analysis of the conduct of networks (that is: an analysis that would focus only on individual members) would not be able to account for the collective actions.²³

In modern international governance, there are ample examples of such forms of concerted action in networks. These include international financial collaboration between international financial institutions, concerted military action involving the UN, NATO, the EU, individual states, and private military contractors, which usually are set up for beneficial purposes, yet may fail in their aim and cause harm to civilians. Another example is international governance for the preservation of natural resources, where global organizations such as UNEP and FAO, regional institutions, states and private parties collaborate to ensure sustainable use of natural resources. Such forms of concerted action, which vary widely in

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²¹ John M Darley and Bibb Latané, ‘Bystander Intervention in Emergencies: Dilution of Responsibility’ (1968) 8 *Journal of Personality and Social Psychology* 377, 379. Peter Fischer and others, ‘The Bystander-Effect: A Meta-Analytic Review on Bystander Intervention in Dangerous and Non-Dangerous Emergencies’ (2011) 137(4) *American Psychological Association Psychological Bulletin* 517, 535.

²² Compare A Fischer Lescano and G Teubner, ‘Regime Collisions: the Vain Search for Legal Unity and Fragmentation of Global Law’ (2004) 24 *MJIL* 999.

²³ Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harm and Corporate Rights* (University of Notre Dame Press, 1987); Toni Erskine, ‘Coalitions of the Willing’ and the Shared Responsibility to Protect’ in André Nollkaemper & Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press, forthcoming 2015).

size and scale, can be considered in terms of networks, since they consist of two or more individual members who mutually influence, limit and control one another in the pursuit of common objectives.

As it appears from the above definition and the examples given, concerted action may take a wide variety of different forms. Here three main distinctions can be highlighted; formal/informal, organized/non-organized, and states and international institutions / other actors.

First, concerted action may rest on formal arrangement. From such an arrangement, it can be inferred who is and who is not participating in the concerted action. It also may be relevant in terms of transparency and protection of injured parties. But oftentimes, a formal agreement will be lacking.²⁴ In some cases, it can only be inferred from the facts and in particular from the relations between the actors whether there is some form of concerted action, and who is and who is not participating in a particular concerted action.

Second, concerted action may or may not involve a organizational context. On this point it is useful to recall that, in the original formulation of TPMH, Thompson focussed on governmental organizations. He analysed whether responsibility should be attributed to the highest ranking officials (the hierarchical approach), to the government agency as a whole (the collectivist approach) or to individual officials (the individualist approach) – but all three options presumed the existence of formal, governmental organizations. In some cases the concerted nature of an action indeed can be inferred from the fact that a particular action takes place in the framework of an international organization, for instance NATO, a particular river commission in which all riparian states of an international watercourse participate, a particular peacekeeping operation, or a partnership between international organizations and other actors. However, TPMH can just as well appear in only loosely and non-formalized organizational settings. It is the fact that an individual acts in the framework of a collectivity, which renders attribution of responsibility problematic, for instance because a causal link may be hard to establish when many actors have a hand in the production of certain outcomes.

The distinction between concerted action in the context of international organization and outside such a context may be relevant for the diffusion of responsibility. For instance, an

²⁴ Saskia Hufnagel, *Policing cooperation across borders: comparative perspectives on law enforcement within the EU and Australia* (Ashgate Publishing Ltd 2013).

organization may have promulgated rules that limit the options of individual actors to act in another way, or even may oblige them to act in a way that engages their responsibility.²⁵ In that case, a situation may arise where both the organization and member states incur responsibility,²⁶ raising questions about the allocation and possibly leading to diffusion. Moreover, an organization will possess legal personality that at the same time may make it subject to international claims,²⁷ and may make it difficult for third parties to hold it responsible in national courts. In turn this may lead to blame-shifting (one of the characteristic features of diffusion of responsibility). In addition, the principles of attribution within the law of responsibility differ significantly between situations where states act in the framework of an organization and situations where they act outside such frameworks.

Third, concerted action may involve a wide variety of actors. Above, I mainly referred to situations where states and international institutions engaged in concerted action. But obviously, other actors may be involved as well, such as corporations, rebel movements, individuals, or other non-state actors. Indeed, as will be further explained in the next section, the involvement of private actors is one of the main driving forces underlying the process of diffusion.

The diversity of actors is relevant to the phenomenon of diffusion of responsibility, given the varying degrees in which non-state actors are subject to international obligations and international responsibility. Non-state actors that lack international personality may engage in a concerted action with states and/or international organizations, and in that process contribute to harmful outcomes. If they lack international legal personality, responsibility cannot be in the same way be spread to such actors as may be the case in situations where only international legal persons engage in concerted action. This both follows from the fact that such non-state actors generally will not be subject to international obligations, and from the fact that they will not be subject to international responsibility.

The nature of actors participating in a concerted action thus is relevant for the possibility of diffusion of responsibility. The degree and way in which this is the case, depends in particular on the legal personality and the degree in which these actors are subject to international obligations and can be subject to international responsibility.

²⁵ Thompson, 'Moral Responsibility of Public Officials' (n _____), 913.

²⁶ Articles on the Responsibility of International Organizations, 'ILC Report on the work of its sixty-third session', UNGAOR 66th Session Supp No 10 UN Doc A/66/10 (2011), art 17 [hereon ARIO].

²⁷ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

2.2 Underlying dynamics

Concerted action is not a superficial or incidental phenomenon in international affairs that can be expected to give way to the traditional pattern of individualism. It rather reflects fundamental developments in international society and the international legal order that are bound to persist and eventually should be dealt with at a more structural level.

Here I identify three trends that contextualize the phenomenon of shared responsibility: interdependence, moralization and heterogeneity.²⁸ These trends influence each other in an intertwined way. To some extent the concepts present just different ways of describing the same phenomena. Moreover, they can be both causes and consequences of each other.

The first trend that drives concerted action is interdependence, underlying the passage from a 'society' mainly characterized by coexistence to one also characterized by cooperation.²⁹ This trend is easily overstated, and in many situations, in particular relating to territory, boundaries, use of force and (non-)intervention the prime function of international law continues to be secure coexistence between states.³⁰ Nonetheless, it seems incontrovertible that in many areas, States increasingly have become dependent on each other to pursue common goods, and indeed have felt compelled to address them jointly.

The interdependencies are both of an objective and a subjective nature. As to the former, in certain areas, factual effects extend across borders, creating interdependencies when states wish to address such effects. Transboundary environmental effects, depletion of natural resources, trade in endangered species, piracy, refugee flows, human trafficking, arms trade, and transboundary crime are examples. In each of these areas, human activities cause effects across borders, potentially adversely affecting the interests of multiple states, with none of these states actively being able to effectively address the causes.

In other areas it is merely the perception that has changed, rather than a reality. The recognition that it is no longer acceptable that genocide or mass killings within a particular

²⁸ See for earlier discussion André Nollkaemper and Dov Jacobs. 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MJIL 359, 370-372.

²⁹ See W. Friedman. 'General Course in Public International Law' (1969) 47 Recueil des Cours de l'Académie de Droit International 127. Specifically on interdependence, see e.g. EU Petersmann, 'International Economic Law, 'Public Reason', and Multilevel Governance of Interdependent Public Goods' (2011) 14(1) Journal of International Economic Law 23.

³⁰ G. Abi-Saab. 'Whither the International Community?' (1998) 9 EJIL 248; Pierre-Marie Dupuy. 'International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions' *ibid*278.

state be committed is an example.³¹ The interdependence here does not necessarily arise from a physical cross border dimension, but rather from a shared perception that there is a problem to be solved, combined with the fact that individual actors will not be able to effectively prevent genocide or effectively respond to it when it occurs.

Responding to situations of interdependence by concerted action primarily seeks to enhance the efficiency and effectiveness of such action. In both its subjective and objective manifestations, eventually interdependence rests on the fact that actors depend on each other in terms of ability to address the problem. In the areas indicated above – environmental cooperation, transborder criminal cooperation, and responding to genocide and mass killings -, individual states often will be powerless to make a fundamental difference.

However, interdependence may also stem from the perceived need to enhancing legitimacy of policies. Multilateralism surely does not guarantee legitimacy.³² But when the legality of state action may be contested, acting together may help build an argument that the action is legitimate and perhaps even be legal. A state acting on its own will more easily be open to the criticism of acting for its own interests.³³ This seems to underlie, for instance, the concerted action in relation to ISIS in northern-Iraq and Syria in 2014.³⁴

Interdependence in any of the above ways can drive a variety of forms of cooperation – from loose agreement on objectives to action through a common organ of an international organization. But in a sizeable number of cases, it has led to cooperation that would fall in the category of concerted action, where states and other actors closely coordinate their policies in pursuit of a common aim. Examples are the concerted action in relation to ISIS,³⁵ through

³¹ See Yuval Shany, 'The Road to the Genocide Convention and Beyond' in Paola Gaeta (ed), *The UN Genocide Convention - A Commentary* (Oxford Commentaries on International Law, OUP, Oxford 2009).

³² J Alvarez JE Alvarez. 'Multilateralism and its Discontents' (2000) 11(2) EJIL 393.

³³ P. Buhler, 'Military Intervention and Sources of Legitimacy' in G. Andréani and P. Hassner (eds), *Justifying war? From Humanitarian Intervention to Counterterrorism* (Palgrave MacMillan, 2008) 167 ; Nicholas Tsagourias, 'Cosmopolitan Legitimacy and UN Collective Security' in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP, 2010) 129.

³⁴ See e.g. Sebastian Payne. 'What the 60-plus Members of the Anti-Islamic State Coalition are Doing' *Washington Post* (2014) accessed 5 February 2015, available at <<http://www.washingtonpost.com/news/checkpoint/wp/2014/09/25/what-the-60-members-of-the-anti-islamic-state-coalition-are-doing/>>.

³⁵ See e.g. *ibid* (Sebastian Payne Washington Post Article).

‘coalitions of the willing’ in Libya,³⁶ in AU peacekeeping operations,³⁷ in relation to piracy in the horn of Africa,³⁸ and in international fisheries policy.³⁹

While these forms of cooperation obviously are intended to address and prevent harmful situations, they also may result in harmful outcomes – whether by unintended side effects or simply by a failure to meet expectations. In this sense, interdependence drives the number of situations where ex post facto questions of shared responsibility will arise.⁴⁰

The second trend, directly related to the above noted subjective dimension of interdependence, is ‘moralization’. Moving away from the realist view of international relations in which States seek the protection of their own interests, a variety of actors (including notably European States, international organizations, NGOs and scholars) have construed the international legal order in the direction of an increased “moralization”. They thereby contribute to a paradigm shift from state sovereignty as the cornerstone of the legal order, to a paradigm based on rights of the individual,⁴¹ on the one hand, and the values and interest of international community, on the other.⁴² This trend of moralization is far from

³⁶ See Jeffery H. Michaels, 'Able but not willing: a critical assessment of NATO's Libya intervention' in K. Engelbrekt, M. Mohlin and C. Wagnsonn (eds), *The NATO Intervention in Libya: Lessons learned from the campaign* (Contemporary Security Studies, Routledge, New York 2014) 17.

³⁷ See e.g. Paul D. Williams and Arthur Boutellis. 'Partnership peacekeeping: Challenges and opportunities in the United Nations–African Union Relationship' (2014) 113(451) *African Affairs* 254.

³⁸ Laurie R. Blank. "Rules of Engagement and Legal Framework for Multinational Counter-Piracy Operations" (2014, forthcoming) 46 *Case Western Reserve Journal of International Law*. See also James Kraska and Brian Wilson. 'Combating pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard' (2009) 45 *Stanford Journal of International Law* 243; Regina Asariotis and others. 'Maritime Piracy Part II: An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy' (United Nations Conference on Trade and Development United Nations, 2014) http://eprints.soton.ac.uk/368255/1/dtltfb2013d3_en.pdf.

³⁹ Oran R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Cornell University Press, New York 1989).

⁴⁰ See generally on questions of accountability of global governance institutions Allen Buchanan and Robert O. Keohane. 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405, 437; C. Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law' in G. Anthony (ed), *Values in Global Administrative Law* (Hart Publishing, 2011) 173.

⁴¹ And, by extension, the “peoples”, see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, separate opinion of Judge AA Cançado Trindade; In view of the centrality of the human person in this trend, other authors have referred to this trend as ‘humanisation’ of international law: T. Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) ; Anne Peters. 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) *EJIL* 513.

⁴² Cançado AA Trindade, *International Law for Human Kind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers, 2013) ; Anne Peters, 'Humanity as the A and Ω of Sovereignty' in Volume 20 (2009) 513; Sienho Yee. 'Towards a Harmonious World: The Roles of the International Law of Co-progressiveness and Leader States' (2008) 7 *Chinese Journal of International Law* 99, 102 ('coining the term “co-progressiveness”, defined as ‘a society that is all encompassing (hence “co”), preoccupied with advancements in moral and ethical terms more than in other respects and having human flourishing as its ultimate goal (hence “progressiveness”’).

being universally accepted⁴³ and can be critiqued on the ground that it in fact amounts to an effort of a limited number of actors impose their understanding of community interests on others.⁴⁴ Nonetheless, the trend is pervasive and has been used to propel concerted action in a wide variety of situations.

International law incorporates and reflects this trend, as it highlights community interests over individual action and individual interests. This is reflected in a hierarchy of norms;⁴⁵ and affects the operation of particular rules of interpretation,⁴⁶ and the identification of international customary law⁴⁷ and the law of responsibility.⁴⁸

According to one argument, the moral weight of this set of norms (notably the protection of individuals and individual rights) would not only require and justify the action of single states to try to protect such rights, but would require states to act together.⁴⁹ The normative claims may be contested. Why would these particular interests weigh heavier than, say, extinction of species? And while it may be relatively easy to articulate the negative implications of hierarchically higher values (eg in terms of the invalidity of treaties that deviate from them), it is less easy to explain why they would call for concerted action. Nonetheless, as an empirical matter it can be observed that concerted action, and the corresponding need to shared responsibility arise predominantly in areas that carry heavy moral undertones, such as responsibility to protect, protection of civilians during armed conflict, protection of populations from climate change, and so forth. Moreover, it is precisely in relation to ius

⁴³ See e.g. Jean d'Aspremont. 'The Foundations of the International Legal Order' (2007) 18 *Finnish Yearbook of International Law* 219 and Y. Onuma. 'In Quest of Intercivilizational Human Rights: "Universal" vs. "Relative"' (2000) 1 *Asia-Pacific Journal of International Law* 53.

⁴⁴ See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2007).

⁴⁵ Alain Pellet. 'Can a State commit a Crime? Definitely, yes!' (1999) 10(2) *European Journal of International Law* 425; D. Shelton. 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 *American Journal of International Law* 833, 841 et seq; E. Wyler. 'From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law' (2002) 13(5) *EJIL* 1147; Pierre Klein. 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13(5) *EJIL* 1241.

⁴⁶ Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflicts, Harmony or Reconciliation* (Martinus Nijhof Publishers, 2004).

⁴⁷ For an example in international criminal law, see NJ Arajärvi. 'The Lines Begin to Blur? Opinio Juris and the Moralisation of Customary International Law' (2011) SSRN Working Paper available at <www.ssrn.com/abstract=1823288>.

⁴⁸ For an overview of the historical evolution towards the taking into account of community interests in the law of state responsibility, see 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. See also SM Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (PUF, Paris 2005).

⁴⁹ Toni Erskine, 'Coalitions of the Willing' and the Shared Responsibility to Protect' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP, 2015, forthcoming).

cogens norms, that the ILC has accepted an obligation to cooperate.⁵⁰ Similar to the trend of interdependence, this dimension of moralization thus propels the number of situations where ex post facto questions of shared responsibility may arise.

The third trend relevant to concerted action is the multiplication of actors that participate in international society.⁵¹ In some situations actors other than states are a relevant factor because they themselves contribute to harmful outcomes, and their cooperation thus is relevant for addressing such harm. In other cases they may not at such be a cause of harm, but they are a relevant in terms of their ability to contribute to a solution. It is easy to overgeneralize the role of non-state actors in international cooperation. Yet, from the over 40 subject areas covered in the volume *The Practice of Shared Responsibility*, it appears that in the large majority non-state actors indeed play a key role in one or both of these roles.⁵²

This is most immediately obvious for international organizations. The fact that states now regularly defer to international organizations to 'legislate' on a wide-ranging array of topics, from cultural heritage to health and environmental law,⁵³ can, given the continuing role of states in the development and implementation of decision of international organizations, result in concerted action between multiple organizations and/or between organizations and states. The layered nature of international organizations, which are legal persons but at the same time consist of sovereign states and members facilitates the construction of responsibility for wrongdoing as a shared responsibility between the organization and member states.⁵⁴ The 2011 ARIIO indeed envisage that an organization can be responsible in connection with the wrongful acts of states, for instance on the ground that an organization is responsible for adopting decisions that require states to commit acts that contravene

⁵⁰ Articles of Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA), art 41; Draft Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess, Supp No 10, UN Doc A/66/10 (2011) (ARIO), art 42.

⁵¹ Generally: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP, 1995) ch 3; Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate, 2009) ; Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011).

⁵² André Nollkaemper and Illias Plakokefalos, 'The Practice of Shared Responsibility in International Law' in *Conclusions: Beyond the ILC Legacy* (CUP, 2015, forthcoming).

⁵³ The WTO illustrates this trend, by providing a formal negotiation forum for international trade, thus centralizing discussions on this issue within one institution. In relation to this, see Matthias Kumm. 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907, 914 (arguing that '...the procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law').

⁵⁴ See generally on the layered nature of international organizations Catherine Brölmann, *The International Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Hart Publishing 2007).

international obligations.⁵⁵ Significantly, these Articles acknowledge that in such situations both the organization and the state can be responsible, resulting in a situation of shared responsibility.⁵⁶

In addition to international institutions, the increased role of private actors in international relations can lead to situations of concerted action and a multiplication of questions of shared responsibility. The practice of states of delegating powers to private entities (the use of private military contractors by States is an obvious example) leads to forms of concerted action and will raise questions on the corresponding distribution of responsibility for damages caused.⁵⁷ The same holds for international institutions that rely on public – private partnerships.⁵⁸ While the orthodox position is that as a matter of international law only the delegating state (or organization) can be responsible,⁵⁹ there is an increasing ambition to consider the role and co-responsibility of the private entity itself. Illustrative of this point are the UN guiding principles on Business and Human Rights, which provide for a distribution of responsibilities between States and businesses that operate in delicate human rights situations or conflict-areas.⁶⁰

The involvement of a heterogeneity of actors may lead to what has been called ‘polycentric regulation’, in which states are not the sole locus of authority⁶¹ and cover a range of non-state actors. However, unlike states, which often will be subjected to the same obligations deriving from the same instrument, in this case we have to reckon with different, but substantively potentially overlapping, obligations of varying normative quality, stemming from different

⁵⁵ ARIO (n __), art 17.

⁵⁶ ARIO (n __), art 19.

⁵⁷ E.g. Nigel D. White and Sorscha MacLeod. 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19(5) *European Journal of International Law* 965.

⁵⁸ Lisa Clarke. 'Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships' (2011) 12 *Chi J Int'l L* 55; Laurence Boisson de Chazournes, 'United in Joy and Sorrow: Some Considerations on Responsibility Issues Under Partnerships Among International Financial Institutions' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (OUP, Oxford 2013) 211.

⁵⁹ ARSIWA (n __), art. 5.

⁶⁰ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011) UN Doc. A/HRC/17/31. These guiding principles, in addition to recalling the current obligations of states and businesses under positive law not to contribute to human rights violations, suggests a series of more flexible due diligence obligations that can help anticipate any future violations.

⁶¹ Julia Black. 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

types of instruments. Examples are the human rights ‘obligations’ of multinational corporations⁶² and rules of conduct for private security firms.⁶³

The combined effect of these three trends is that states, international institutions and increasingly other actors increasingly cooperate in response to perceived common problems, thus proportionately increasing the situations where harmful outcomes may result from such cooperation.

2.3 The multiplier effect of ‘shared responsibilities’

The practice of states and other actors to engage in concerted action is further strengthened by recognition of moral, political and legal responsibilities to do so. In relation to many of the areas identified above, states and other actors that engage in concerted action do so in recognition of a ‘shared responsibility’ that they would have in relation to that particular issue. For instance, president Obama said in 2014 to leaders of three Central American countries at the White House on Friday that they share a responsibility with the United States for stemming an influx of children crossing the U.S.-Mexico border.⁶⁴ In December 2014, the Security Council adopted a resolution prompted by the ties between cross-border crime and terrorism and stressed the importance of strengthening trans-regional and international cooperation on a basis of ‘a common and shared responsibility to counter the world drug problem and related criminal activities’.⁶⁵ In relation to climate change, Chili stated in the 2014 General Assembly that world leaders have a ‘collective duty to act’.⁶⁶

Speaking of ‘shared responsibilities’ in this sense means something different than speaking of ‘shared responsibility’ for the purposes of this book, as defined in the introductory chapter of this book. There, I defined shared responsibility as a responsibility that is distributed to

⁶² Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework Volume (2011) UN Doc. A/HRC/17/31 ().

⁶³ E.g. Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (6 October 2008) A/63/467, S/2008/636 [hereafter ‘Montreux Document’].

⁶⁴ Scott Neuman, ‘Obama: US, Central America Share Responsibility for Influx of Minors’ <<http://www.npr.org/blogs/thetwo-way/2014/07/25/335363959/obama-u-s-central-america-share-responsibility-for-influx-of-minors>> accessed 4 November 2014.

⁶⁵ UNSC Res 2195 (19 December 2014) UN Doc S/RES/2195.

⁶⁶ UN News Centre. ‘Leaders from Latin America, Caribbean region urge action to erase inequality, spur development’ <<http://www.un.org/apps/news/story.asp?NewsId=48819#.VNiw76NgXcu>> accessed 9 February 2015.

multiple actors based on their contribution to a single harmful outcome.⁶⁷ In the examples given above, saying that two persons share a responsibility in relation to a particular situation then may mean that these persons both have to take care of that situation. It then concerns an ex ante rather than an ex post responsibility. Though commonly triggered by a perception of harm that is already caused, shared responsibility in this sense is essentially forward looking, rather than relating to a sharing of harm that already has been caused.

The recognition of shared responsibilities in this ex ante sense nonetheless is highly relevant for our topic. They provide a normative underpinning that sustains and propels concerted action. They transform concerted action from ad hoc cooperation, depending on the will and perceived interests of the actors involved, in a cooperation that is expected or required.

We can identify three different strands of these ‘ex ante’ shared responsibilities: moral, political and legal. Of course, the moral, political and legal dimensions of shared responsibility will often intertwine, and the same shared responsibility that in scholarship may be advanced on moral grounds, may be accepted by actors and be transformed into a political and/or a legal principle. The ‘responsibility to protect’ is an example of this cooperation-propelling potential of a mixed moral-political-legal concept of shared responsibility.⁶⁸

The moral, or philosophical, strand has been articulated in the scholarship of such authors as Larry May,⁶⁹ David Miller,⁷⁰ Seumas Millar⁷¹ and Samantha Besson.⁷² In this body of literature, speaking of a shared responsibility for say, human rights, refers to moral requirements of individuals, states or organizations to act for the protection of human rights.⁷³ The literature articulated the grounds on which such responsibilities indeed would be shared between multiple actors, though often, such references to responsibility lack a specific reference to particular actors – for instance in the case of the responsibility of ‘the

⁶⁷ Introduction to this volume at ____.

⁶⁸ Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press, 2013).

⁶⁹ Larry May, *Sharing Responsibility* (University of Chicago Press, Chicago 1996).

⁷⁰ David Miller, *National Responsibility and Global Justice* (OUP, 2007).

⁷¹ Seumas Miller, 'Collective Responsibility' (2001) 15(1) *Public Affairs Quarterly* 65.

⁷² Samantha Besson. 'La pluralité d'Etats responsables: Vers une solidarité internationale?' (2007) 17(1) *Revue suisse de droit international et the droit europeen / Schweizerische zeitschrift fur internationales und europaischees recht* 13.

⁷³ Samantha Besson, 'The Allocation of Anti-Poverty Rights Duties: Our Rights, But Whose Duties?' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (CUP, Cambridge 2013) 408, 424. See also *ibid* 426 on the shared nature of such responsibility.

international community'.⁷⁴ In one understanding of responsibility, responsibilities do not even amount to a (moral) duty to act in relation to a particular person.⁷⁵

The political dimension of shared responsibility refers to situations where actors at a political level agree that they share a responsibility to act in relation to a common interests. The above statement of Obama in relation to the influx of children crossing the U.S.-Mexico border is a case in point.⁷⁶ Other examples are the sharing of responsibility between the US and European partners in NATO,⁷⁷ or the sharing of responsibility between European states in regard to refugee flows from Northern-Africa,⁷⁸

In addition to the moral and the political dimension of shared responsibility, there also is a distinct legal dimension. The impact of interdependence, moralization and multiplicity of actors is sustained and reinforced by the development of international obligations. These obligations are sometimes framed in terms of responsibilities. Examples are Principle 21 of the 1972 Stockholm Declaration that confirms the responsibility of all states to prevent transboundary environmental harm,⁷⁹ or, in some readings, the use of the term responsibility in the 'responsibility to protect'.⁸⁰ But the choice of terms is not decisive – what is relevant is that obligations require states to engage in concerted action, and thereby induce and structure their cooperation.

Acceptance of shared obligations potentially have further multiplier effects in the sense that shared responsibilities, where they do apply, could lead to 'secondary' obligations to provide

⁷⁴ See e.g. Luke Glanville, 'Sovereignty and the Responsibility to Protect: A New History' in (University of Chicago Press, 2013) (discussing unassigned obligations in the context of responsibility to protect).

⁷⁵ Samantha Besson, 'The Allocation of Anti-Poverty Rights Duties: Our Rights, But Whose Duties?' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (CUP, Cambridge 2013) 408, 424.

⁷⁶ Scott Neuman, 'Obama: US, Central America Share Responsibility for Influx of Minors' (*NPR : The Two Way*, 25 July 2014) <<http://www.npr.org/blogs/thetwo-way/2014/07/25/335363959/obama-u-s-central-america-share-responsibility-for-influx-of-minors>>.

⁷⁷ Peter K Foster and Stephen J Cimbala, *The NATO, US and Military Burden Sharing* (Cass Contemporary Security Studies Series, Routledge London 2005); The Guardian, 'NATO Allies must take more responsibility in Afghanistan, says US' (*The Guardian*, 19 February 2009). <<http://www.theguardian.com/world/2009/feb/19/nato-alliesAfghanistan>> accessed 17 March 2015.

⁷⁸ Steve Scherer and Ilaria Polleschi, 'Italy in talks with EU to share responsibility for boat migrants' (*Reuters*, 8 July 2014) <<http://www.reuters.com/article/2014/07/08/us-eu-italy-migrants-idUSKBN0FD1YL20140708>> accessed 17 March 2015.

⁷⁹ United Nations Environment Programme, 'Declaration on the United Nations Conference on the Human Environment' (1972), principle 21.

⁸⁰ On the semantics of the term "Responsibility to protect" (formed by a bundle of primary obligations), see Sandra Szurek, 'Responsabilité de Protéger: nature de l'obligation et responsabilité internationale' in Société française pour le Droit international (ed), *La responsabilité de protéger: colloque de Nanterre* (Pedone, Paris 2007); See also Sigrun I. Skogly, 'Global Responsibility for Human Rights' (2009) 29(4) *Oxford Journal of Legal Studies* 927, 836 (arguing that the notion of shared responsibility should consist both of a preventative and a reactive dimension).

reparation for all of the actors involved.⁸¹ Whether this is the case is a matter to be explored more fully later, but at this stage it can be said that the recognition of shared responsibility, that may be triggered by underlying shared obligations, can lead to a cycle of renewed (shared) obligations.

2 The Politics of Diffusion

Diffusion is not a phenomenon that is ‘out-there’, but rather a process that manifests itself through the conduct and strategies of relevant actors. From the perspective of the participants in a particular concerted action, adding more ‘hands’ to the concerted action, can be a strategy to limit or prevent their own responsibility. Of course, they may well have other motives, since drawing in outside actors may increase the chances of success of cooperation (for instance in the case of climate change). However, adding more partners also may increase the possibility of diffusion, and thus may shield participants from responsibility.

In this section I will first identify the essential political nature of the law of responsibility (and of particular choices on the assignment of responsibility) (2.1); then identify particular strategies for diffusing responsibility (2.2), and focus on blame games that seek to shift blame to one or more other parties (‘buck-passing’) (2.3).

2.1 The role of power in the design of responsibility

There is an intimate connection between power and responsibility. This connection is commonly framed from the perspective that, as Clyde Eagleton famously claimed. ‘power breeds responsibility’.⁸² The phrase is frequently quoted with apparent approval in international legal scholarship.⁸³ Assigning responsibility to states on the basis of power makes sense.⁸⁴ Power refers to the ability of a state to influence or control other actors, and

⁸¹ ARSIWA (n ___), art 31.

⁸² C Eagleton, *The Responsibility of States in International Law* (New York University Press 1928) 206.

⁸³ E Paasivirta, ‘Responsibility of a Member State of an International Organization: Where Will It End?’ (2010) 7 IOLR 49, 51; C Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the “Copy-Paste Approach”’ (2012) 9 IOLR 53, 63; L Clarke, ‘Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships’ (2012) 12 Chi J Int’l L 55, 65.

⁸⁴ For present purposes, I limit myself primarily to the responsibility of states.

thereby get another actor to do what it wants, if needed even against its will.⁸⁵ In this sense power is essentially a relational phenomenon.⁸⁶ In the context of responsibility, a state can exercise power in relation to another person, by making that author to engage in a particular wrongful act. If so, it can be said that it then should be this state that should bear responsibility for the harm, rather than (only) the author of an act. Tracing responsibility to the actor that wields power also is justified on the basis of remedial considerations. If harm is to be prevented, those wielding the power in relation to harmful conduct, should be addressed, rather than those that execute commands. For only the former actors can terminate the wrong or ensure that it is not repeated.⁸⁷

However, there is another dimension to this relationship. Power also shapes the law that determines in which situations, which forms of power trigger responsibility. The form and content of any scheme of responsibility does not automatically follow on the substantive law. They are a matter of conscious design, mostly by states or international organisations but also by international courts. Indeed, rules on responsibility are as much a result of a political choice, as primary rules of conduct pertaining to, say, environmental law, trade law or military matters. The normative and institutional choices reflect ‘productive power’ of relevant actors over others.⁸⁸ States exercise power over international law making or over particular international institutions, in a way that serves their interests. Thereby, they can influence the rules of responsibility that determine whether or not the exercise of a particular type of conduct (including participation in concerted action) does or does not engage the responsibility of a state.

Power, from this perspective, may not only breed responsibility, but may also shield actors from responsibility. The law of responsibility, and the institutions and processes in which it is

⁸⁵ M Weber, *Economy and Society* (University of California Press 1978) 53. See also M S McDougal, ‘Law and Power’ (1952) 46 Am J Int’l L 102, 107-108; C Taylor, ‘Foucault on freedom and truth’ (1984) 12 Pol Theory 152, 158 (the notion of power or domination ‘requires some notion of constraint imposed on someone’). Of course, power can be conceptualized in different ways. See eg A Ballesteros, S Nakhoda, J Werksman and K Hurlburt, ‘Power, responsibility, and accountability: Rethinking the legitimacy of institutions for climate finance’ (2010) 1 Climate Law 261, 265 (referring to power as the capacity to determine outcomes).

⁸⁶ D A Lake, ‘Authority, Coercion and Power in International Relations’ in M Finnemore and J Goldstein (eds), *Back to Basics: State Power in a Contemporary World* (OUP 2013); D A Baldwin, ‘Power and International Relations’ in W Carlsnaes, T Risse and BA Simmons (eds), *Handbook of International Relations* (Sage 2013) 285-286; S Strange, ‘International Economics and International Relations: A Case of Mutual Neglect’ (1970) 46(2) Int’l Affairs 304.

⁸⁷ Miller, ‘Distributing Responsibilities’ (n 4); PJ Kuijper and E Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’ in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).

⁸⁸ M Barnett and R Duvall, ‘Power in global governance’, in M Barnett and R Duvall (eds), *Power in Global Governance* (CUP 2005) 18.

embedded, in itself is the result of choices and practices of states. The ineptitude of international law for dealing with harmful consequences of concerted action serves states and other actors well, by allowing them to engage in blame-avoidance and blame-shifting, thus shielding themselves from responsibility. The relatively high threshold that needs to be met before power actually engages responsibility in effect shields a wide diversity of exercises of power which impact on authors of wrongful acts. International law is for instance agnostic in regard to the exercise of soft power, by which states can affect others ‘through the effective means of framing the agenda, persuading, and eliciting positive attraction in order to obtain preferred outcomes’.⁸⁹ The same holds when states exercise ‘overall control’ over other actors. It was precisely the concern over the range of power not covered by effective control that prompted the International Criminal Tribunal for Yugoslavia (ICTY) to opt for the less demanding standard of overall control in *Tadic*.⁹⁰ The fact that the ICJ in the *Bosnian Genocide* reconfirmed effective control as the appropriate standard,⁹¹ confirms the shielding function of the standard of attribution, working against the proposition that power breeds responsibility. The high thresholds set by the ARSIWA and the ARIO make it perfectly possible that a state exercises (soft) power to influence, in a concerted action, private actors or other states, without this leading to attribution of such acts to the state and thus without leading to (shared) responsibility.⁹² The result may be that responsibility is shifted to other actors.

A related point is that the law of responsibility, itself the product of power, feeds back to constitute and legitimize particular exercises of power. International obligations do not only prohibit but also legitimize doing what is not prohibited.⁹³ This applies equally to rules of responsibility. The prohibition on aid and assistance with regards to the commission of a wrongful act may, for instance, legitimize more than it prohibits.⁹⁴

2.2 Diffusion strategies

⁸⁹ J S Nye, *The Future of Power* (Public Affairs 2011) 20-21.

⁹⁰ *Prosecutor v Tadic* (Judgment) ICTY-94-1 (26 January 2000), paras 120, 122, 131, 145.

⁹¹ *Bosnian Genocide* (n ____), paras 402-406.

⁹² Christine Chinkin. 'A Critique of the Public/Private Dimension' (1999) 10(2) EJIL 387.

⁹³ D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005) ____.

⁹⁴ V Lanovoy, 'Complicity in an Internationally Wrongful Act' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014 forthcoming).

States and international institutions can engage in a wide variety of strategies with the aim of diffusing responsibility. These not be undertaken with a view to shield themselves and pass the buck to someone else. However, that may well be the result. Moreover, in some cases it may precisely be the intention of actors that seek to diffuse responsibility to ensure that they themselves are protected from claims.

To some extent, concerted action in itself can be considered in terms of diffusion strategies. Partnerships between international institutions and other actors are a good example. Partnerships engaged by the WHO or the World Bank involve a great many different actors. When no clear arrangements have been made on the assignment of responsibility, it becomes difficult to determine who is responsible for what.⁹⁵

International practice shows a variety of other strategies by which states can diffuse (or shift) responsibility to other actors. These can be grouped in three categories; direction/control, delegation and aid/assistance. The boundaries between these categories are not fixed, and often one particular strategy may be considered as belonging in various categories.

The relevance of direction and control is well recognized in existing law of international responsibility.⁹⁶ The legal consequences that international law attaches to direction and control are precisely that responsibility is not placed in one actor only, but can be shared between the directing or controlling state, on the one hand, and the actor that is controlled, on the other.⁹⁷

There are various variations on the theme of direction and control. In relation to international organizations, the concept of ‘circumvention’, represents a strategy by which international organizations can work through states,⁹⁸ or, conversely, by which states can act, in a concerted action, through international organizations.⁹⁹

⁹⁵ L Boisson de Chazournes ‘United in Joy and Sorrow: Some Considerations on Responsibility Issues under Partnerships among International Financial Institutions’ in M Ragazzi (ed) *Responsibility of International Organization – Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers Leiden 2013) 215-216; L Clarke ‘Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships’ (2011) 12 CJIL 55, 65.

⁹⁶ ARSIWA (n ___), art 17.

⁹⁷ ARSIWA (n ___), art 19. But see for a contrary view C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 284-288.

⁹⁸ ARIIO (n ___), art 17.

⁹⁹ ARIIO (n ___), art 61.

Yet another alternative concept is orchestration – a term that has been conceptualized as referring to indirect and soft ways in which international institutions act through intermediaries.¹⁰⁰ Orchestration need not be (and commonly will not be) a strategy expressly aimed to achieve diffusion, but this may well be the result. In particular cases, the result may well be intended.

Delegation presents another strategy. By delegation states and international institutions can act with and through others, with potential limiting effects on the scope of their own responsibility.¹⁰¹ A variant is the phenomenon of ‘outsourcing’ of tasks, possibility with accompanying responsibility, to other actors, such as private security corporations.¹⁰²

A third category consists of aid and assistance. While this may fall short of direction or control, an actor can effectively guide another actor towards a particular conduct which, if relevant criteria are fulfilled, may lead to a diffusion of responsibility over both the aided and the aiding actor.

2.3 Blame games

The strategies identified above need not be designed to evade responsibility or shift it to other actors. However, in particular cases this may well be intended. Diffusion strategies often take the form of blame games, a term referring to situations ‘where multiple players are trying to pin the responsibility on one another for some adverse event, acting as blamers to avoid being blamees’.¹⁰³ The concept of blame is wider than responsibility (it is ‘taken to mean the act of attributing something considered to be bad or wrong to some person or entity’),¹⁰⁴ but certainly includes assignment of responsibility.

Two main blame game strategies can be distinguished. A first strategy is to ‘blunt’ responsibility by collectivizing it.¹⁰⁵ The relevant actor structure powers and tasks in such a

¹⁰⁰ E.g. Kenneth W Abbott and others, "Orchestration: Global Governance Through Intermediaries" in Kenneth W. Abbott and others (ed), *International Organizations as Orchestrators* (CUP 2014).

¹⁰¹ See e.g. D Sarooshi, 'Conferrals by States of Powers on International Organizations: The Case of Agency' (2004) 74 *The British Year Book of International Law* 291.

¹⁰² Corinna Seiberth, *Private Military and Security Companies in International Law* (Intersentia 2013); Simon Chesterman and Angelina Fisher, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (OUP 2009).

¹⁰³ Christopher Hood, *The Blame Game. Spin, Bureaucracy and Self-Preservation in Government* (Princeton University Press, Princeton 2011) 7.

¹⁰⁴ Hood (n _____), 6 ch 7 nt 1.

¹⁰⁵ Hood (n _____), 100.

way, that they are spread over multiple actors, as a result of which in the outside actors cannot easily identify who is to blame for any particular event. Partnerships between international institutions and other actors have precisely this effect. It may be unclear whether diffusion of responsibility, and deflection of blame is an intended aim of such partnerships, or simply an unintended consequence. However, if no clear arrangements have been made on the assignment of responsibility, responsibility rests on all, and as a result perhaps on no one. A comparison can be drawn with Jeremy Bentham's proposition that, in view of the blame-spreading potential of collective decision-making, boards could be seen as 'screens'.¹⁰⁶ Such strategies do not make the call for responsibility (or 'blaming') in situations of harmful outcomes disappear, but they do make it unclear who did what 'and leave potential blamers nonplussed by the complexity of the organizational arrangements.'¹⁰⁷ David Miller's observation that, "an undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way",¹⁰⁸ is relevant for diffused responsibility.

An alternative strategy is individualizing blame.¹⁰⁹ Rather than collectivizing blame (and extending it all), blame is then shifted to one or a few actors, in effect shielding the blamers. As noted by Hood, this strategy 'is about shifting rather than reducing or preventing blame.'¹¹⁰ In the Srebrenica cases, which sought to hold the Netherlands and the United Nations responsible in relation to the eviction of persons from the U.N. compound in Srebrenica, both defendants denied responsibility; they thus effectively placed the blame on each other, and they both attempted to shift blame onto the Bosnian Serbs and the FRY.¹¹¹

In international affairs blame shifting is not a regularly practice, at least not between allies. Blame avoidance may be politically more attractive.¹¹² This may be different, however when there are alternative actors to whom blame can be shifted without the accompanying risk that this practice may at one point backfire.

¹⁰⁶ Cited in Hood (n _____).

¹⁰⁷ Hood (n _____), 83

¹⁰⁸ David Miller, 'National Responsibility and Global Justice' in (OUP, 2007), 99-100.

¹⁰⁹ Hood (n _____), 100.

¹¹⁰ Hood (n _____). See also Christopher Hood, 'The Risk Game and the Blame Game' (2002) 31 Gov't & Opposition 15.

¹¹¹ See generally André Nollkaemper, 'Multilevel accountability in international law: a case study of the aftermath of Srebrenica' in Yuval Shany, Broude and Tomer (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing, Oxford 2008).

¹¹² This is also the conclusion in Sara B. Hobolt and James Tilley, *Blaming Europe? Responsibility Without Accountability in the European Union* (Oxford University Press, 2014)101. See also Kent R. Weaver. 'The Politics of Blame Avoidance' (1986) 6(4) Journal of Public Policy .

3. Causes of Responsibility Gaps

Diffusion of responsibility arises when a multitude of actors contribute to harm, and responsibility is spread over this multiplicity of actors. In principle, this need does not adversely affect the possibility to determine responsibility. Diffusion simply may align responsibility better with the spread of public authority across multiple actors.

Two points support the proposition that diffusion as such need not undermine responsibility of actors that would be responsible if they would act alone, rather than in concert. First, individual actors retain their individual obligation, even when they act in concert. Second, in principle, the fact that more than one actor is engaged in a particular wrongful act, does not release each individual actor from its responsibilities. It may be useful to recall in this context Raz's comment that 'one causes harm if one fails in one's duty to a person or a class of persons and that person or a member of that class suffers as a result. That is so even when one cannot be blamed for harming the person who suffered because the allocation of the loss was determined by other hands.'¹¹³ This was, in a simple two-party setting, recognized in the *Corfu Channel* case, where the Court was apparently faced with a harm caused by two parties, but only one appeared before it as a defendant, and it decided to neglect the other party and put all responsibility and all compensation on Albania.¹¹⁴ In the *East Timor* case, Judge Weeramantry, dissenting with the majority judgment, noted that "[e]ven if the responsibility of Indonesia is the prime source, from which Australia's responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility."¹¹⁵ Australia's own role in regard to the treaty was therefore sufficient for its (independent) responsibility.

However, in particular situations, diffusion may actually lead to the undermining of responsibility. This will in particular the case when it cannot be determined who is responsible for what and/or because the conditions for such responsibility are not satisfied.¹¹⁶ Another way of saying this is that the conditions that have been specified, are not attuned to

¹¹³ Joseph Raz, *The Morality of Freedom* (OUP 1986), 416.

¹¹⁴ *Corfu Channel Case* (n____).

¹¹⁵ See *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 172 (dissenting opinion of Judge Weeramantry).

¹¹⁶ Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2), art. 1-2 (ARSIWA); ARIO art 1-2. Depending on the norm that is breached and the nature of the harm, also fault, capabilities and causal connection between the conduct and the injury can be relevant conditions.

the specific nature of concerted action. In this respect relevant to recall that in several other systems of law, such as tort law¹¹⁷ and international criminal law,¹¹⁸ specific conditions have been developed seeing the multiple wrongdoers. If these sets of principles would not exist, clearly a gap would arise, that would feed back on the nature of the obligation themselves. In international law such principles are virtually absent,¹¹⁹ making it less likely that the existing principles are well attuned to the determination of responsibility in situations of concerted action.

In this section I will identify three reasons that help explain why this can be the case: the normative problem of determination of obligations and attribution in collective settings (3.1), institutional gaps in situations of concerted action (3.2) and informational gaps (3.3). As already suggested in the previous section, it will appear for each of these ‘causes’, that diffusion of responsibility in cases of concerted action is not just an unintended consequence of the increasing complexity of international cooperation.

3.1 The normative gap

In its original formulation, TMPH was framed as a normative problem. Thompson developed his theory of TPMH from the viewpoint of moral responsibility.¹²⁰ From this perspective, TPMH arises from the fact that it is morally problematic to attribute responsibility to individuals where that could not be justified on moral grounds.¹²¹

This normative condition of diffusion of responsibility can be transposed to the legal domain. Diffusion of responsibility arises when responsibility cannot be assigned or determined

¹¹⁷ European Group on Tort Law, ‘Principles of European Tort Law’ (2005) available at <<http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf>>.

¹¹⁸ HG van der Wilt, ‘The Continuous Quest for Proper Modes of Criminal Responsibility’ 2009 7(2) J Int Criminal Justice 307; Koi Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5(1) J Int Criminal Justice 159; Elies van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’ (2007) 5(1) J Int Criminal Justice 184.

¹¹⁹ Roger P Alford, ‘Apportioning Responsibility Among Joint Tortfeasors for International Law Violations’ (2011) 38(2) Pepperdine Law Review 233.

¹²⁰ Thompson, ‘Moral Responsibility of Public Officials’ (n _____).

¹²¹ Thompson, ‘Designing Responsibility’ (n _____); Ibo Van de Poel and others. ‘The Problem of Many Hands: Climate Change as an Example’ (2012) 18 Sci Eng Ethics , 64.

because the *legal* conditions for responsibility (in particular breach of an international obligation and attribution of the conduct in question) have not been (fully) met.¹²²

The difficulty of identifying who is responsible for a harmful outcome in a collective setting then may be due to the fact individual contributions may be too small or otherwise be insufficient to meet criteria for responsibility. The principle of independent responsibility dictates that responsibility is only assigned to actors whose individual contributions to the harm are sufficiently significant to pass the threshold that is required for responsibility. However, in situations of many hands, tasks may be chopped up, so that multiple actors perform small tasks which combine to larger (harmful) outcomes.¹²³ Individual actors then may not meet the conditions for responsibility.

Three situations in particular can be identified where a normative gap may arise that leads to diffusion of responsibility: not all contributing actors may be bound by relevant international obligations; the structure of (secondary) obligations may be such that these obligations are assigned to a collectivity, rather than to particular actors; and the conditions for determining responsibility may be divided over multiple actors. A common feature of all cases is that the contents and structure of primary and secondary norms may allow states and international organisations to duck question of responsibility.

A first situation in which diffusion may lead to a responsibility gap arises when not all actors involved are bound by primary obligations may lead to a diffusion of responsibility. This is in particular relevant for concerted action involving international organizations, which may not in a similar degree as states be bound by treaty or customary obligations. It is precisely this feature that has given rise to the idea of circumvention: the possibility that states circumvent their own obligations by acting through an international organization, as a result of which their own responsibility may be mitigated or precluded. Article 61 of the ARIO, which seeks to assign (shared) responsibility to states that so seek to circumvent their responsibility, is a somewhat ill-conceived attempt to preclude such diffusion of responsibility.¹²⁴

¹²² ARSIWA (n _____), art 1-2; ARIIO (n _____), art 1-2. Depending on the norm that is breached and the nature of the harm, also fault, capabilities and causal connection between the conduct and the injury can be relevant conditions.

¹²³ Larry May, *Sharing Responsibility* (n _____), 7, 8 and 73.

¹²⁴ See e.g. Ana Sofia Barros and Cedric Ryngaert. 'The Position of Member States in (Autonomous) Institutional Decision-Making: Implications for the Establishment of Responsibility' (2014) 11(1) *International Organizations Law Review* 53; Jean d'Aspremont. 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4(1) *IOLR* 91.

Similar normative gaps may occur when states act with or through other non-state actors that may not at all be bound by international obligations, for instance paramilitary groups, private military contractors or security firms that are hired to protect ships against piracy.¹²⁵ While the fact that these actors are not similarly bound by international obligations need not be the motive for states to engage in such concerted action, the result of such ‘acting through others’ may well be a diffusion of responsibility. This indeed appears to be fundamental feature of partnerships among international institutions, such as UN Aids, where not all partners in the partnership will be bound by the same obligations.¹²⁶

This can be illustrated by the *Nicaragua* case. Nicaragua had argued that the contras were bands of mercenaries recruited, organised, paid and commanded by the government of the United States who would have no real autonomy in relation to that government.¹²⁷ The Court found that the act of the contras could not be treated as acts conducted by the United States¹²⁸ and noted that “the *contras* remain responsible for their acts”.¹²⁹ However, it is quite unclear what this responsibility would mean in practice. Comparable examples may be taken from other situations where non-state actors are part of a concerted action. In relation to the claims against Shell for the oil spill damage caused in Nigeria, as a matter of international law, only Nigeria could be held responsible. Responsibility under international law could not be shifted to Shell, even though the contribution by Shell could arguably be relevant to the question of compensation.¹³⁰ In relation to private military contractors, the question has arisen whether the US government and private military contractors operating in Iraq shared responsibility in relation to wrongful conduct of the contractors. Again, at the international level no (shared) responsibility of these contractors would arise, and in that respect one could not speak of diffusion.

¹²⁵ Jessica NM Schechinger, ‘Responsibility for human rights violations arising from the use of privately contracted armed security personnel against piracy: Re-emphasizing the primary role and obligations of flag states’ (2014) Amsterdam Center for International Law SHARES Research Paper No 58, <<http://www.sharesproject.nl/wp-content/uploads/2014/11/ACIL-2014-30-Responsibility-for-Human-Rights-Violations-JS.pdf>> accessed 24 February 2015.

¹²⁶ Boisson L de Chazournes, ‘United in Joy and Sorrow: Some Considerations on Responsibility Issues Under Partnerships Among International Financial Institutions’, in Ragazzi, Maurizio (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (OUP 2013); Davinia Aziz, ‘Global Public-Private Partnerships in International Law’ (2012) 3 Asian Journal of International Law 339.

¹²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America (hereinafter: USA))* (Merits) [1986] ICJ Rep 14 (*Nicaragua* case) para 15.

¹²⁸ *Nicaragua* case (n ____), para 109 and 115.

¹²⁹ *Nicaragua* case (n _____), para 116.

¹³⁰ See discussion in Liesbeth Enneking, ‘The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case’ (2014) 10 Utrecht Law Review 44.

The second cause of a normative gap is when secondary obligations are structured as ‘unsigned obligations’. Diffusion of responsibility can undermine the forward looking potential of the law of responsibility by making it unclear who is to respond to a breach. This is in particular relevant for obligations to prevent¹³¹ and obligations of result which may be structured in a way that makes it difficult to determine who is responsible for what, and may allow states to escape their responsibility by pointing to the non-performance of obligations by others.¹³² David Miller’s observation that, “an undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way”,¹³³ is relevant for diffused responsibility. In effect, this may lead to a bystander effect.¹³⁴ Examples that support this phenomenon is the position of member states of international institutions who as a collectively may be required to act to terminate wrongs by the organisation,¹³⁵ or the position of third states in response to aggravated responsibility.¹³⁶

This phenomenon is less likely to arise when actors have structured their cooperation obligations of conduct, which precisely detail what each actor has to do.¹³⁷ An example are emission targets under the Kyoto protocol.¹³⁸ As long as each individual actor has individual obligations of conduct, the fact that there is a multitude of actors does not affect such obligations or make it more difficult to determine the responsibility of each individual actor. Para. 430 of the *Genocide case* illustrates the point.¹³⁹ The responsibility of Serbia for the genocide was to be established on its own terms, irrespective of the obligations or conduct of

¹³¹ Orna Ben Naftali, ‘The Obligation to Prevent and to Punish Genocide’ in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009).

¹³² On obligations of result in international law, see Economides (n _____); Dupuy (n _____). More generally; responsibility as obligations may directly influence ‘responsibility-as-blameworthiness, see Ibo Van de Poel and others (n _____), 52.

¹³³ David Miller, ‘National Responsibility and Global Justice’ in (OUP, 2007), 99-100.

¹³⁴ Darley and Latané argued that diffusion of responsibility seems the most likely explanation for the bystander effect: if an individual is alone when he notices an emergency he is solely responsible for coping with it. If he believes others are also present, he may feel that his own responsibility for taking action is lessened, making him less likely to help. See John M Darley and Bibb Latané, ‘Group Inhibition of Bystander Intervention in Emergencies’ (1968) 10(3) *Journal of Personality and Social Psychology* 215, 215.

¹³⁵ This holds for instance for situations where international organizations would violate individual rights, but where due to immunity no remedies against the organisation can be taken.

¹³⁶ Pierre Klein, ‘Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law’ (2002) 13(5) *EJIL* 1241.

¹³⁷ See Constantin Economides, ‘Content of the Obligation: Obligations of Means and Obligations of Result’ in Crawford, J. Pellet, A. and Olleson, S. (ed), *The Law of International Responsibility* (OUP, Oxford 2010) 271 ; Pierre-Marie Dupuy. ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10(2) *Eur J Int’l L* 371.

¹³⁸ Kyoto Protocol to the Framework Convention on Climate Change (opened for signature 16 March 1998, entered into force 16 February 2005) (1998) *ILM* 22 (hereon Kyoto Protocol); Daniel Bodansky, ‘The UNFCCC: A Commentary’ (1993) 18 *Yale J Int’l L* 451; Jennifer Kilinski, ‘International Climate Change Liability: A myth or a Reality?’ (2008) 18 *J Transnat’l L & Policy* 377; Faure and Nollkaemper (n _____), 142-143.

¹³⁹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia and Montenegro)* (n _____).

other states.¹⁴⁰ Alternatively, states can agree ex ante on a specific assignment of responsibility.

The third and for present purposes most relevant situation arises when the conditions for responsibility cannot be met, because tasks and conduct is chopped up. While harmful outcomes may occur, no single actor may be held responsible. Partners then together can produce a result that would have been wrongful if it would have been produced by one of them. An example is the The ECtHR's judgment in *Sari v Turkey and Denmark*. The case concerned the length of criminal proceedings which were consecutively instituted in Denmark and Turkey against a Turkish national for crimes committed in Denmark, Mr. Sari complained that the criminal proceedings were not settled within reasonable time: eight years, seven months and twenty-two days had lasted between the indictment by a Danish Court and the sentence delivered by the Turkish Court. Although the Court held the length of the proceedings to fall under the 'joint responsibility' of Denmark and Turkey, the Court did not find a violation of Article 6 on the part of either State. The Court reasoned that the delays could not be attributed to either State, because they resulted, rather, from "a system of mutual assistance under which the requesting State is dependent on the co-operation of the other State".¹⁴¹

It is relevant to recall that under the principle of independent responsibility, the state, or international organization, as the case may be, is responsible for its *own* conduct and its *own* wrongs.¹⁴² It is not responsible for the conduct of someone else. The principle of independent responsibility is firmly established in the ARSIWA¹⁴³ and in the relatively scarce case-law, such as the *Corfu Channel*,¹⁴⁴ the *Certain Phosphate Lands in Nauru* case,¹⁴⁵ *M.S.S. v.*

¹⁴⁰ Although the Court did add that "it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, *the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.*" *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia and Montenegro)* (n _____), 430 (emphasis added).

¹⁴¹ *Sari v Turkey and Denmark* App no 21889/93 (ECtHR, 8 November 2001), para 92.

¹⁴² See Commentary to Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), commentary to art 47, para 8.

¹⁴³ The basic principle embodied in articles 1 and 2 ASR ("every internationally wrongful act of a State entails the international responsibility of that State" and "There is an internationally wrongful act of a State when conduct consisting of an action or omission" is attributable to the State and constitutes a breach of an obligation of the State) underlies the ARSIWA as a whole. ARSIWA (n _____), art16-18 to some extent form an exception.

¹⁴⁴ *Corfu Channel Case (United Kingdom v Albania)* (Judgment) [1949] ICJ Rep 244.

*Belgium and Greece*¹⁴⁶ and the *Eurotunnel* case.¹⁴⁷ While independent responsibility certainly can be relevant in situations of concerted action, reducing complex relationships to the responsibility of an individual state may be unlikely to result in a satisfactory outcome. In combination with the procedural limitations of dispute settlement, the conceptual tools of exclusive individual responsibility of states have led courts to reduce complex cooperative schemes to binary categories, without resulting in principled discussions of the shared nature of responsibility.¹⁴⁸

Three specific situations can be identified when normative conditions of responsibility of multiple actors engaged in a concerted action may not be fulfilled. The first arises when the relevant obligations stipulate particular conditions, which are spread over multiple actors. For instance, preventative obligations may be triggered by states having the capacity or knowledge to engage in a particular conduct. When capacity and knowledge are spread over many different actors, none of the actors individually might all the conditions that would be required for triggering such obligations (and subsequent responsibility).¹⁴⁹

The second situation is that to some extent the law of responsibility leans towards a preference of exclusive, rather than shared responsibility. The first is that conduct is in principle attributed to one actor only. Dual attribution is very rare. Although a few scholars have defended the possibility of dual attribution, in particular in the context of peacekeeping operations,¹⁵⁰ practice remains rare.¹⁵¹ The commentary to Article 6 of the ARIIO emphasizes

¹⁴⁵ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections, Judgment) [1992] ICJ Rep 240.

¹⁴⁶ *M.S.S. v Belgium and Greece* [GC] App no 30696/09 (ECtHR 21 January 2011).

¹⁴⁷ *Eurotunnel Arbitration* (n _____), para 187.

¹⁴⁸ *Corfu Channel*, *supra* note 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, I.C.J. Reports 1986, 14; *Nauru*, *supra* note 78; *East Timor (Portugal v Australia)*, Judgment, I. C.J. Reports 1995, 90; and *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 826.

¹⁴⁹ Helen Nissenbaum, 'Accountability in a Computerized Society' (1996) 2 *Science and Engineering Ethics* 25, 29; See also Ibo Van De Poel and others (n _____), 50.

¹⁵⁰ L. Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire' (1995) 78 *Rivista di diritto internazionale* 881 and L. Condorelli, 'Le statut des forces des Nations Unies et le droit international humanitaire' in C Emmanuelli (ed) *Les casques bleus: policiers ou combattants?* (Wilson and Lafleur 1997) 87; N. Tsagourias, 'The Responsibility of International Organisations for Military Missions' in M. Odello and R. Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff Publishers, forthcoming), who discusses the criterion of effective control as a prerequisite for attribution of wrongful conduct and recognizes the possibility of multiple attribution of conduct to both international organizations and troop-contributing states in case of application of this criterion; T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard International Law Journal* 113; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 *Human Rights Law Review* 151.

that in principle the attribution of wrongful conduct is made on an individual basis and that attribution is an exclusive operation.¹⁵² It also can be noted that in those cases where a state is not responsible for its own acts, but can be responsible in connection with the wrongful act of another state,¹⁵³ it has been argued that responsibility of one actor excludes responsibility of the other.¹⁵⁴ Illustrative is the *Sadam Hussein* case before the ECtHR,¹⁵⁵ in which Saddam Hussein brought a case against twenty-one states that were allegedly implicated in the invasion of Iraq and that were responsible for his arrest, detention and ongoing trial.¹⁵⁶ The ECtHR considered that the responsibility of any of the respondent states could not be invoked “on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.”¹⁵⁷ Another noteworthy example is the decision of the ECtHR in *Behrami*. The Court attributed all acts and omissions relating to the failed demining operations in Kosovo exclusively to the United Nations, and not its member states, without considering the possibility of a more nuanced solution in which responsibility would be shared.¹⁵⁸ Also in relation to the role of UNMIK in Kosovo, responsibility was channeled to the UN rather than (also) Kosovo, effectively undermining a role of Kosovo in the eventual rebuilding process.¹⁵⁹

Third, the law of responsibility sets a high threshold before participation of one state in the wrongful act of another state can engage the responsibility of the former state. This makes

¹⁵¹ See e.g. *HN v Netherlands* (Ministry of Defence and Ministry of Foreign Affairs), First instance judgment of 10 December 2008, District Court of the Hague, ILDC 1092 (NL 2008), par 47-49. However, the Court of Appeal departed from this holding, and found that one act could both be attributed to the Netherlands and the UN. See *Nuhanović v Netherlands*, Gerechtshof, 5 July 2011, LJN BR 0133; and A. Nollkaemper, ‘Dual attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’ (2011) 9 *Journal of International Criminal Justice* 1143.

¹⁵² ARIO, with commentaries, *supra* note 93, commentary to art. 6, par 1 (‘specific conduct of the lent organ or agent is to be attributed to the receiving organization or to the lending State or organization’) and par 9.

¹⁵³ ASR, *supra* note 16, art. 16-18.

¹⁵⁴ Robert Ago, Special Rapporteur, *Eighth Report on State Responsibility*, 31st session (1979) UN Doc A/CN.4/318 and Add. 1-4 (F), par 45. C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 284-288. However, the ILC decided otherwise: ARSIWA, *supra* note ____, art. 19

¹⁵⁵ *Hussein v Albania* App no 23276/04 (ECtHR, 14 March 2006), para 1.

¹⁵⁶ *Hussein v Albania* (n _____), para 1.

¹⁵⁷ *Hussein v Albania* (n _____), para 1. See Maarten den Heijer, ‘Issues of Shared Responsibility Before the European Court of Human Rights’ (2013) 60(3) *Netherlands International Law Review* 411.

¹⁵⁸ *Behrami v France* App nos 71412/01 & 78166/01 (ECtHR, 2 May 2007).

¹⁵⁹ Matthew W Saul, ‘Internationally Administered Territories in PA Nollkaemper (ed), *Practice of Shared Responsibility in International Law* (_____ 2015, forthcoming). **Who is the publisher? I could not find it online.**

that under international law, a state can freely encourage or incite wrongful acts by another state, or participate in decision-making of the latter state, without such involvement leading to international responsibility.¹⁶⁰ For instance, the prohibition of aid and assistance, set the standard high – states can lawfully provide information or material assistance of a wrong of another state when they are not bound by the same norm, as long as they do not all have knowledge of the circumstances of the wrong and as long as the assistance is not given for the purpose of such a wrong. More importantly, international law seems to include some de minimis standard before aid turns into complicity; it is not difficult to see that multiple states could contribute in small amounts, each contribution falling below the threshold, but cumulatively exceeding the threshold.¹⁶¹

The common element of the above examples is that international law structures its primary and secondary rules in a way that makes it relatively easy for each of multiple parties to contribute to a wrong, yet remain below the threshold where its responsibility would be engaged.

3.2 The institutional gap

A second set of factors that may contribute to diffusion of responsibility is the institutional setting in which concerted action is embedded. Particular institutional structures may not be attuned to a diffusion of responsibility, and may sustain responsibility gaps by making it difficult to identify who did what and who was responsible for what.

One problem relates to the set-up of international adjudication. Though questions of responsibility are not typically brought in international courts (but rather are settled in negotiations), there is a not insignificant body of case law on questions of international responsibility involving multiple responsible parties, in particular in the ICJ¹⁶² and the

¹⁶⁰ ILC Report by the Special Rapporteur James Crawford, 'Seventh Report on State Responsibility' (29 March 1978) UN Doc A/CN.4/307.

¹⁶¹ Compare Mark Gibney, Katarina Tomasevski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harv Hum Rts J 267, 293-4: Commenting on the threshold of complicity, the authors state that a large gap exists in which states can go unpunished for the facilitation of human rights violations in other states, even with the knowledge that they are being committed.

¹⁶² See M Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4 Journal of International Dispute Settlement 295; A Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', in E Rieter and H de Waele (eds), *Evolving Principles of International Law, Studies in Honour of Karel C. Wellens* (Leiden: Martinus Nijhoff Publishers, 2011).

ECtHR.¹⁶³ However, the present system of international dispute settlement is not well designed to deal with multilateral disputes.¹⁶⁴ This has relevance for adjudication of questions of harm arising out of concerted action. For instance, given that international dispute settlement mechanisms are based on the consent of States, the mere fact that one responsible State has not consented to the judicial process may suffice to exclude a case of harm arising from concerted action from judicial scrutiny. Likewise, if one of the wrongdoing actors is an international organization other than the EU or the Seabed Authority, questions of shared responsibility may be deemed inadmissible before the ICJ, the WTO DSU, the LOSC DSP and the ECtHR, which do not have jurisdiction over (other) international organisations.

Perhaps the most visible barrier to adjudication of claims arising out of concerted action is that a court may not be able to proceed against one actor, if the other actors involved in the concerted action are not part of the litigation. A court may be required to protect the interests of co-responsible parties who are not party to the dispute, by deciding that it has no jurisdiction over the claim against the actor over which it otherwise would have jurisdiction. The *Monetary Gold* principle, as it operates in the practice of the ICJ is the prime manifestation of this rule.¹⁶⁵

Institutional limitations may also apply in respect of supervisory mechanisms, outside the sphere of international adjudication. Problems of many hands may be counteracted by monitoring and supervision arrangements that make it possible to identify the contribution of each actor. An example are the detailed reports compiled within the framework of the Convention on International Trade in Endangered Species (CITES) on the roles and infractions by individual parties who, collectively, contribute to the extinction of particular species.¹⁶⁶ However, there are considerable differences in the existence of such mechanisms and their ability to obtain the relevant information, with direct consequences for diffusion of responsibility. In situations where no institutional mechanisms have been set up to determine relevant fact and to identify who did what, this will increase the possibility of diffusion of responsibility.

¹⁶³ See M den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 *Journal of International Dispute Settlement* 363.

¹⁶⁴ Lori Damrosch F., 'Multilateral Disputes' in *The International Court of Justice at a Crossroads* (ASIL, Dobbs Ferry, New York 1987) 376.

¹⁶⁵ Alexander 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 *Journal of International Dispute Settlement* 373.

¹⁶⁶ (CITES) (n _____).

The structural features of the primary and secondary rules thus can be buttressed by the absence or weakness of institutional supervisory procedures and adjudicatory procedures that often are not able to adjudicate claims against all responsible parties.

3.3 The information gap

A directly related third cause of diffusion of responsibility is that ‘many hands’ make it difficult to identify who did what. For outsiders, ‘it is usually very difficult, if not impossible, to know who contributed to, or could have prevented, a certain action, who knew or could have known what.’¹⁶⁷ It even ‘may not be clear ‘even to the members of the collective itself who is accountable.’¹⁶⁸ So conceived, the problem of many hands is an epistemological problem: the problem of identifying who is responsible for what arises from a lack of knowledge, or information.¹⁶⁹

The practical problem arose clearly in *Legality of the use of force cases*¹⁷⁰ and in the *Saddam Hussein case*¹⁷¹ where it was next to impossible for the plaintiffs to identify who did what. It also is well illustrated by the fact that painstaking research made clear that 54 states participated in the US rendition policy.¹⁷²

This problem is increased by the informal nature of arrangements in collaborative action. Informality leads to responsibility gaps. Examples abound, including transborder police cooperation,¹⁷³ financial arrangements within the Basel committee,¹⁷⁴ the rules of the nuclear suppliers group, and command and control structures in military operations.¹⁷⁵ Information

¹⁶⁷ Ibo Van de Poel and others (n _____), 61.

¹⁶⁸ Helen Nissenbaum (n _____), 29.

¹⁶⁹ Ibo Van De Poel and others (n _____), 61.

¹⁷⁰ *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Judgment) [2004] ICJ Rep 279.

¹⁷¹ *Hussein v Albania* (n _____), para 1.

¹⁷² Open Society Justice Initiative, ‘Globalizing Torture: CIA Secret Detention and Extraordinary Rendition’ (Open Society Foundation, 2013) <<http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>> accessed 24 February 2015. Dick Marty report ‘Secret Detentions and Illegal Transfers of detainees involving Council of Europe Member States’, Doc. 11302 rev., 11 June 2007 ‘CoE Rendition Report (2007)’; statement by T. Hammarberg in ‘Rights chief: Europe “complicit” in U.S. torture’, *CBS News*, 1 September 2011.

¹⁷³ Saskia Hufnagel, *Policing cooperation across borders: comparative perspectives on law enforcement within the EU and Australia* (Ashgate Publishing, Ltd., 2013).

¹⁷⁴ David Zaring. ‘Informal procedure, hard and soft, in international administration’ (2004) 5 *Chi.J.Int'l L.* 547.

¹⁷⁵ Matteo Tondini, ‘The “Italian Job”: How to Make International Organizations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States’ in Jan Wouters, Eva Brems and Stefaan Smis (ed), *Accountability for Human Rights Violations of International Organizations* (2010).

gaps also may exist in relation to joint action on piracy, where rules of engagement usually will be beyond the reach of plaintiffs and cross border joint policy operations.

4 Costs of Diffusion

Having set out in the previous sections the factors that contribute to diffusion of responsibility, the question now can be addressed how we normatively should assess this phenomenon. Is diffusion of responsibility a problem we should care about, and that would call for a reconsideration of the role and contents of responsibility in situations of concerted action? Or is it a regular part of responsibility processes that simply reflects the nature and loci of international governance? In other words: is ‘the problem of many hands’ really a problem?

Diffusion in itself is a neutral term that frames and describes the spread of ideas, institutions or, as in the case of responsibility, legal principles and processes. Whether that is a good development depends on several questions: is responsibility in itself a positive value; does it fit in the variety of other contexts to which it is diffused;¹⁷⁶ if not, are there proper alternatives, and so on. Saying that ‘responsibility’ is diffused in itself is just a way of framing and describing processes of governance that may or may not be evaluated in positive terms.

The present assessment will proceed on the largely uncontroversial assumption that responsibility as such fulfills important, positive functions – both in domestic societies and in international law. I abstract here from the way the concept of responsibility has been given meaning in the ILC texts, which in several respects is problematic.¹⁷⁷ However, saying that the ILC may have gotten it wrong, does not mean that there is something wrong with the notion of responsibility as such. It is hard to conceive of an international legal order where actors are *not* responsible for harm that they cause.

If responsibility indeed is a positive value, it follows that diffusion of responsibility in principle is a positive development. It allows responsibility to be better attuned to processes

¹⁷⁶ Compare for the international rule of law: Jeremy Waldron, ‘The Rule of International Law’ (2006) 30(1) *Harvard Journal of Law & Public Policy* 15.

¹⁷⁷ Philip Allott, ‘State Responsibility and the Unmaking of International Law’ (1988) 29(1) *Harv Int'l LJ*, 1; Christine Chinkin, ‘A Critique of the Public/Private Dimension’ in Volume 10 (1999) 387.

of governance which have become diffused or, as coined by Nico Krisch, become ‘liquid’.¹⁷⁸ The fact that responsibility also has become diffuse may match better the places where decisions are actually made. Responsibility (or the broader term ‘accountability’ of which it is a part) then is dispersed over a multitude of public and private actors that engage in concerted action and governance. Thus, it may correspond better to the nature of concerted action. While such accountability will not always in the form of legal responsibility in ‘the ILC sense’, that is an inevitable reflection of the processes that are actually going on in practice.

However, as noted in the preceding section, in particular situations diffusion may have the intended or unintended consequence that responsibility gaps result. If so, this diffusion of responsibility raises fundamental questions. These are in part of a doctrinal nature. Responsibility is a basic feature of the notion of law as such.¹⁷⁹ There is no lack of authorities that accept the intimate connection.¹⁸⁰ Anzilotti postulated that ‘the existence of an international legal order postulates that the subjects on which duties are imposed should equally be responsible in the case of a failure to perform those duties’.¹⁸¹ Reuter noted that ‘responsibility is at the heart of international law’.¹⁸² Koskenniemi notes: ‘most lawyers would not hesitate to affirm that ‘State responsibility’ is a necessary aspect of international law’s being ‘law’.’¹⁸³ Pellet notes that in the international legal order, responsibility is the corollary of law itself: ‘no responsibility, no law’,¹⁸⁴ and that responsibility is the best proof

¹⁷⁸ Nico Krisch, ‘The Structure of Postnational Authority’ (2015) SSRN Working Paper available at <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2564579> .

¹⁷⁹ However, the proposition that diffusion affects or undermines the quality of obligations should not be taken in absolute terms. Responsibility only flows from a breach of obligations that by their nature lend themselves to such responsibility. Ian Brownlie, *System of the Law of Nations: State Responsibility* (Clarendon Press, Oxford 1983). See also Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 88 (distinguishing various types of norms, such as permissions, requirements and prohibitions – not all of these can trigger responsibility).

¹⁸⁰ Crawford and Watkins, *International Responsibility* (n ____); HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford 1968); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 28. PCIJ, *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A No 9, 21. See also Sienho Yee, ‘Member Responsibility’ and the ILC Articles on the Responsibility of International Organizations: Some Observations’ in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, 2013) 325, 323. (noting that that ‘A mature and fair international legal system would maintain a “circular whole”, under which international legal relations are defined by rights and obligations and any rupture of those relations must be cured by restoring the status quo ante, or in a better way.’)

¹⁸¹ Pellet, ‘The Definition of Responsibility in International Law’ (n ____).

¹⁸² Pellet, ‘The Definition of Responsibility in International Law’ (n ____), 3.

¹⁸³ Martti Koskenniemi, ‘Doctrines of State Responsibility’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (New York, OUP 2010).

¹⁸⁴ Alain Pellet, ‘The Definition of Responsibility in International Law’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 3.

of the existence of international law.¹⁸⁵ While domestic legal orders may be familiar with more diverse and flexible responses to wrongdoing, Pellet observes that the decoupling of obligations from responsibility in the international legal order is particularly problematic.¹⁸⁶ This follows from the dual role of sovereignty, which internally may be supreme, but externally needs to be reconciled with the sovereign equality of all states – both in terms of ability to incur responsibility, and to invoke responsibility of others.¹⁸⁷

This does not imply embracing an ‘Austinian’ position that makes the legal quality of international law dependent on the availability of enforcement mechanisms.¹⁸⁸ The above proposition does not connect obligations with enforcement, but with the requirement of legality and reparation that are implied by responsibility. This is also the weakness of approaches that consider law, or legalization, exclusively in such properties as source and contents.¹⁸⁹

If we indeed accept that in principle there is a close connection between obligations and responsibility, this immediately exposes the potential impact of diffusion of responsibility are, in situations of concerted action. Prima facie, it would seem that a situation in which states and international institutions could, in a concerted action, engage with others in certain conduct that circumvents their own obligations with the effect that their own responsibility would be spread to others and would be prevented, would remove the essential connection between obligations, conduct and responsibility. After all, an internationally wrongful act is an act that is forbidden, disallowed by a legal rule.¹⁹⁰ Without the automatic requirement of cessation, the obligation would become meaningless.

Also if it is accepted that responsibility is only one of the features that make an obligation into a legal obligation, and its absence does not necessarily preclude that a particular norm on the basis of other considerations still could be considered a legal obligation, diffusion of responsibility would still feed back on the nature of the norm. In one approach, the legal

¹⁸⁵ Pellet, 'The Definition of Responsibility in International Law' (n _____).

¹⁸⁶ Pellet, 'The Definition of Responsibility in International Law' (n _____), 4.

¹⁸⁷ Pellet, 'The Definition of Responsibility in International Law' (n _____), 4.

¹⁸⁸ John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law (Vol I)* (reprint Thoemmes Press, Bristol 2002).

¹⁸⁹ See for example Kenneth W Abbot and others, 'The Concept of Legalization' (2000) 54(3) *International Organizations* 401.

¹⁹⁰ Crawford and Watkins (n _____). Articles of Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA), art 30-31.

nature depends on source, contents and control.¹⁹¹ If we consider responsibility as part of control and remove that factor, it still could be considered in terms of law.

Diffusion that results in responsibility gaps may also have more specific, and practically relevant consequences. In this chapter I focus on three categories of costs of diffusion: costs in terms of the value of accountability itself (section 4.1); in terms of the performance of obligations (section 4.2) and in terms of injured parties (section 4.3).

4.1 The value of accountability

While traditionally the prime function of responsibility in international law was the protection of rights of states (and to some extent other subjects of international law), and more general the stability of the system, in our modern understanding of international law as part of global governance, responsibility also represents a more independent value. Responsibility in international law can be connected to, and is part of, our expectations of how public authority is exercised. As such, it belongs in the same basket of terms such as legitimacy, transparency, democracy and more generally good governance.¹⁹² In this respect, responsibility in international law can be compared to accountability as a concept of governance. As Bovens notes, while accountability started as an instrument to enhance the effectiveness and efficiency of public governance, it has become a goal in itself.¹⁹³

Perhaps the most relevant dimension of responsibility in this sense is answerability. To say that a person is responsible means that it can be called to account for their conduct and made to respond to any moral or legal charges that are put.¹⁹⁴ If we require holders of public power to be answerable for the way they exercise authority, that should apply no less in situations of concerted action. While dominant in modern literature on accountability, this dimension also was considered part and parcel of the traditional concept of responsibility. Bin Cheng wrote

¹⁹¹ Myers S McDougal and Michel W Reisman, 'The Prescribing Function in World Constitutive Process: How International Law is Made' (1980) 6(2) *Yale Studies in World Public Order* 249; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *Am J Int'l L* 596; Bodansky, *The Art and Craft of International Environmental Law* (n _____) 102 (discussing a typology of international environmental norms).

¹⁹² Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (n _____).

¹⁹³ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447.

¹⁹⁴ James Crawford, James and Watkins, Jeremy, 'International Responsibility' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford UP, 2010) 283; J. R. Lucas, *Responsibility* (OUP, Oxford 1995), 5-12; John Gardner, 'The Mark of Responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 157.

that to say that someone is responsible in law means ‘that this person is the author of an unlawful act and is answerable in law to the injured party for the act’s prejudicial consequences’.¹⁹⁵ In traditional law of responsibility, the idea was that the wrongdoing actor would have to answer to injured party, notably in the narrow sphere of treatment of aliens. But we can abstract from these narrow origins. Responsibility as answerability conforms to what many expect from the exercise of public authority, whether by states, international institutions or other actors.¹⁹⁶ The value of answerability is dominant in much of the modern discourse on shifts in governance, in particular towards international institutions and private actors. As to the former, the discussions on lack of accountability of international organization hinges not only on concern for protection of rights, but in large part on the lack of accountability in the sense of answerability.¹⁹⁷ As to the latter, the debates on multinational corporations in large part concern the problem of accountability as answerability.¹⁹⁸

Answerability in this sense is no longer, as it perhaps was in the times of Bin Cheng, a matter of protecting the rights of individual injured parties, which fitted in the traditional ‘private-law’ paradigm of state responsibility. Rather, it recognizes that a wider public has a legitimate interest in the way public authority is exercised.

It can be argued that diffusion can undermine this feature of responsibility. That is: it may be unclear who has to answer for what. Thereby it can raise serious questions from the perspective of the legitimacy, or simply acceptability, of such governance. Illustrative examples were the diffusion of responsibility, which undermined the value of responsibility, in the cases of the involvement of states in the US rendition policy,¹⁹⁹ in the operation of multinational military operations,²⁰⁰ and in the global financial crisis.²⁰¹

¹⁹⁵ Bin Cheng, *General Principles of Law* (Stevens & Sons, London 1953) 169-170.

¹⁹⁶ Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (CUP 1998) 23-24. For an overview of the various forms of accountability, only some of which are based on legal rules, see RW Grant and RO Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Review* 29; Peter Cane, *Responsibility in Law and Morality* (Bloomsbury Publishing 2002) 31; Anthony Duff, ‘Legal and Moral Responsibility’ (2009) 4(6) *Philosophy Compass* 978; Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Bloomsbury Publishing 2007)

¹⁹⁷ Report on the Accountability of International Organizations, ‘Final Report – Berlin Conference’ in *International Law Association Report* (London 2000, New Delhi 2002, and Berlin 2004) available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/9>>.

¹⁹⁸ UNOCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (16 June 2011).

¹⁹⁹ Helen Duffy and Stephen A Kostas, ‘“Extraordinary Rendition”: a Challenge for the Rule of Law’ in Ana María Salinas and others (eds), *Counter-Terrorism: International Law and Practice* (OUP 2012).

²⁰⁰ MC Zwanenburg, *Accountability Of Peace Support Operations* (Leiden: Martinus Nijhoff Publishers 2005).

²⁰¹ Seumas Miller, ‘The Global Financial Crisis and Collective Moral Responsibility’ in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP, forthcoming 2015).

While answerability is a value in itself, and diffusion of such answerability is sufficient reason to care, there are also practical implications. The efficacy of the international legal order as a system for regulating conduct, presumes that international law generally is accepted and followed. Responsibility (and more generally accountability) are increasingly seen as a key condition for international law to be followed, and indeed as a condition for effective governance. If, as a result of diffusion, no one is answerable, this may affect the ability of the wider international legal system to fulfill its functions. Diffusion can blunt the accountability that can be said to be at the heart of effective governance.²⁰² The accountability deficits that have been exposed by the *Kadi*-saga,²⁰³ will also apply in cases of concerted action – where multiple actors do more than they could do on their own, yet where responsibility for the results is feeble.

However, two caveats should be made. First, it is oversimplifying to apply the standard of ‘accountability as answerability’ unqualified to international affairs and foreign relations. The traditional tension between democracy and foreign relations is relevant here as well.²⁰⁴

Second, the effects of diffusion on answerability may well differ between various interested parties. In an international setting, institutions have multiple audiences. In a situation where multiple states, or states and international institutions and other actors jointly engage in a concerted action in the sphere of, for instance, global health or peace operations, in any case three audiences can be distinguished. These include, first, the parties that cooperate in a concerted action (e.g. the partners in a public-private partnership, or the participants in a multinational military operation), second, any individuals that are potentially affected by the conduct of these actors and, third, the wider international community. This phenomenon can be labelled as ‘the problem of many eyes’.²⁰⁵ Once it is recognized that concerted action may have different effects on various actors, it becomes necessary to differentiate between the expectations and entitlements of such parties, and between the accountability processes of which they are a part. Determining the impact of diffusion thus eventually will require a context-specific assessment of accountability relations.

²⁰² Christopher Hood, *The Blame Game: Spin, Bureaucracy and Self-Preservation in Government* (Princeton University Press 2013) *supra* at _____

²⁰³ Gráinne de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’ (2010) 51(1) *Harvard Int’l L J* 1.

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²⁰⁵ Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave 2003); Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (n _____).

4.2 Impact on the performance of international obligations

A second angle for assessing the impact of diffusion is that responsibility is a central element of international obligations and their performance. Diffusion of responsibility can undermine the assignment and performance of obligations and thereby the achievement of objectives. The objectives may relate to specific interests of the actors involved, but may also represent broader interests, such as public goods.

It is a plausible proposition that diffusion of responsibility can undermine incentives for action. If no one can be meaningfully called to account after the event 'no one need feel responsible beforehand'.²⁰⁶ This may reduce the possibility that individual actors perform obligations and that the interests that the law seeks to protect are actually protected.

Whether diffusion indeed will undermine the incentives of actors to perform their obligations presumes, as a first step, that that obligations matter at all for the conduct of relevant actors²⁰⁷ and, as an extension, that the perspective of being held responsible is a relevant factor in changing the conduct of states and international institutions. Thus, while responsibility presumes the existence of obligations, it also is more than that, and its incentives-effects may go beyond those of obligations.

Three more specific reasons can be identified that would support such an impact. One is that responsibility may strengthen the internalization of obligations – one of the main factors that supports compliance with international obligations.²⁰⁸ A second factor is that responsibility may impact on the reputational impact of international law.²⁰⁹ State may care about the reputational effects of non-compliance, but may do so even more when such non-compliance

²⁰⁶ Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* 49 (1998). M.A.Wallach, N. Kogan & D.J. Bem, *Group influence on individual risk taking*, 65 *J. of Abnormal & Social Psychology* 75 (1962); M.A.Wallach, N. Kogan & D.J. Bem, *Dilution of responsibility and level of risk taking in groups*, 68 *J. of Abnormal & Social Psychology* 263(1964).

²⁰⁷ Eric A. Posner & Alan O. Sykes, *The Economic Foundations of International Law* (2013); Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

²⁰⁸ Bodansky (n ____); Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 622.

²⁰⁹ Andrew T. Guzman, *Reputation and International Law*, 34 *Ga. J. Int'l & Comp. L.* 379 (2005).

may trigger their international responsibility. A third factor is that reparation, notably obligations of restitution and compensation provide incentives for compliance.²¹⁰

Whether one or more of these factors indeed make responsibility is a prominent factor in the calculations of states whether or not to perform their obligations is a matter of some uncertainty. The two last mechanisms may be supported by a not insignificant body of modern scholarship that is premised on theories of rationality which somehow seems to presume that states, make calculating decisions in their own self-interest.²¹¹

This impact of diffusion on incentives may have wider ramifications in the form of collective action problems. If actors do not individually feel the consequences in terms of being held responsible, they may be tempted to look for others to do the job. This will be particularly relevant when the participation of multiple states is necessary for addressing a perceived problem and for producing a common good, for instance in situations involving transborder effects in areas such as global health, financial markets, the environment, or organized crime, where any single state is quite powerless to provide answers.²¹² Collective action problems are based on the premise that there is no proper incentive for individual action. Precisely because obligations and responsibilities are not specifically assigned, and responsibility is not likely to be forthcoming, actors may be inclined to wait for each other, with the result that nothing happens. One can recall Olson's argument, developed the theory in the economic context of public goods, that as members of a large group generally hold the assumption that someone else in the group can and will provide the public good, the incentives for these members to provide for it themselves are weakened.²¹³ Diffusion of responsibility may strengthen this phenomenon. If persons do not individually feel the consequences in terms of being held responsible, members may be tempted to look for others to do the job, or simply not care. Game-theoretical analysis indeed suggests that imposing consequences upon behaving as a 'free rider' seems the most effective method to counter the problem.²¹⁴

²¹⁰ Eric A Posner and Alan O Sykes, "An Economic Analysis of State and Individual Responsibility Under International Law" (February 2006) U Chicago Law & Economics Olin Working Paper No. 279 available at <http://ssrn.com/abstract=885197>.

²¹¹ Eric A Posner & Alan O Sykes, *The Economic Foundations of International Law* (Harvard University Press 2013); Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008).

²¹² On financial markets, see for example, Frederic Mishkin, *Over the Cliff: From the Subprime to the Global Financial Crisis* (2011) 25(1) J Econ Perspec 49, 68. On transnational environmental harm, see for example, Michael Mason, *The Governance of Transnational Environmental Harm: Addressing New Modes of Accountability/Responsibility* (2008) 8(3) Global Env'tl Pol 8. On transnational crime, see for example, Felicia Allum and Stan Gilmour, 'Introduction' in Felicia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (London, Routledge 2012) 1, 1–2.

²¹³ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Massachusetts, Harvard University Press 1968) 44.

²¹⁴ Russell Hardin, 'Collective Action As an Agreeable n-Prisoners' Dilemma' (1971) 16(5) Behavioral Science 472, 479. See further _____

Such collective action problems will in particular affect public goods - values that everyone has an interest in, yet individual states have insufficient incentives to protect them and tend to rely on the efforts of others.²¹⁵ This will hold in particular for 'aggregate-effort' goods, which require action by all actors involved.²¹⁶ In these areas, 'the outcome that each agent desires cannot be achieved unless everyone performs his or her contributory action. Here the action of each agent is directly causally necessary for realization of the desired outcome, so the outcome is of necessity aimed at qua collective end.'²¹⁷ Diffusion then may undermine the actual realization of the common aims.

However, three caveats should be added to the proposition that diffusion of responsibility may undermine the incentives to perform obligations. First, the impact on the latter two mechanisms would seem to depend on the presence of third parties (notably international institutions) that actually determine responsibility – the doctrine that responsibility automatically follows on non-compliance may matter little in terms of behavioral incentives if not accompanied by third-party determinations.

Second, the proposition does not necessarily depend on formal responsibility in the sense of determinations of wrongful acts. If it is true that states' conduct may be influenced by a determination of responsibility, it is plausible that it cares equally about third-party determinations that it failed to comply with an obligation, even if that does not entail a formal determination of responsibility. Thus, the wide variety of soft accountability mechanisms may be equally relevant.

The third and more fundamental caveat is that responsibility can also have a chilling effect. Indeed, it should be recognized that a designed problem of many hands, that leads to such absence of responsibility, may well have benefits. On the premise that states generally do not like to be held responsible for wrongful acts (if only for reputational reasons),²¹⁸ the willingness of states to accept obligations, may be dependent on their ability to prevent responsibility. If so, they may have several strategies available. One is to make substantive obligations sufficiently undemanding, so that there is little risk that they cannot comply. Another strategy is to prevent access to judicial proceedings where responsibility could be

²¹⁵ M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Revised edition ed.) (1971)

²¹⁶ Hirshleifer, 'From Weakest-link to Best-shot: The Voluntary Provision of Public Goods', 41 *Public Choice* (1983) 371, at 372; S. Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (2007) 74.

²¹⁷ Seumas Miller, 'Collective Responsibility' in Volume 15 (2001) 65, 73.

²¹⁸ See generally on reputation Andrew T. Guzman, *Reputation and International Law*, 34 *Ga. J. Int'l & Comp. L.* 379 (2005)

determined, for example by declining to accept jurisdiction of a particular court. Yet another strategy is to tinker with the content or process of responsibility.²¹⁹ Diffusion of responsibility is a strategy that falls in this latter box. If such strategies, including diffusion, are not available to relevant actors, they may be unwilling to engage in cooperation in the first place. Cole notes with reference to climate change that using liability to promote mitigation of greenhouse gas emissions could prove counterproductive; rather than inducing cooperation, it might reduce incentives for states to participate in international regimes, i.e., to share responsibility.²²⁰ The possibility that the ARIO would have a chilling effect on the activities of international organizations indeed was a concern by some international organizations on the debate in the ILC on responsibility of international organizations.²²¹

In terms of costs-benefit assessment, diffusion of responsibility then may be beneficial: action without, or with ‘diluted’ responsibility may produce better outcomes than no action at all.²²² Hood notes in this context that the outcome of concerted action may result in outcomes that is superior to what any organization could ever conceivably muster on its own for the complex problem at hand. After all, more angles of vision may be brought to bear than would apply in a single-organizational structure, and more interests are likely to be considered as well.²²³

Whether states indeed would make their willingness to engage in cooperation conditional on their ability to escape responsibility is easier raised than answered. In many of the examples where diffusion occurs, it remains somewhat speculative whether or not such diffusion actually matters in terms of the incentives of relevant actors to agree to ambitious international obligations. Do we know whether states now set ambitious targets (eg in fisheries, pollution control etc) that they would not normally do if there would be a risk

²¹⁹ This is the focus of the critique in Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) Harv Int'l LJ, 1;

²²⁰ Daniel H Cole, 'The Problem of Shared Responsibility in International Climate Law' in André Nollkaemper and Dov Jacobs, *Distribution of Responsibility in International Law* (CUP 2015, forthcoming).

²²¹ At 214. on draft article 13 (aid and assistance) the World Bank commented that the provision 'is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients.' Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637)

²²² Obviously, this potential benefit of diffusion only applies in relation to situations in which states and other actors engage in concerted action for beneficial purposes. It does not apply to situations where actors intentionally cause harm, for instance in the case of rendition policy (in which over fifty states are said to have participated) or state-sponsored terrorism. While diffusion may occur in these situations, and parties may make such diffusion a consideration in their decision to engage in these activities, diffusion then does not have beneficial, but rather detrimental effects.

²²³ Hood (n ____)

responsibility upon breach? To answer this question affirmatively it would not only need to be demonstrated that the risk of responsibility is a consideration that is relevant to state conduct at all, but also that the prospect of diffusion of responsibility is a relevant consideration for states to engage in cooperative action, in which they would not engage without such diffusion. The point is not entirely implausible. There are ample of indications that suggest that states care about preventing responsibility (and partly for that reason opt for modes of governance and substantive obligations that reduce the change of being held responsible), and it is plausible that the higher the risk of responsibility in case of non-performance, the more cautious they will be in accepting obligations. If so, we should be cautious in adopting a one-dimensional critique on diffusion, and not uncritically resort to antidotes (such as joint and several responsibility) that may improve responsibility in situations of concerted action, yet undermine such action in the first place.

4.3 Private costs

A third angle to review the effects of diffusion of responsibility concerns the position of injured parties. It is, in addition to the role of responsibility in creating incentives for action, one of the central aims of responsibility to provide redress to injured parties.²²⁴ As such, it provides a key criterion for evaluating the impact of diffusion of responsibility.

Prima facie, it would seem that diffusion can undermine a key function of attributing responsibility: to ensure justice to victims.²²⁵ This holds both for injured states and injured individuals. If harm is caused, yet the conditions for individual responsibility are not satisfied or responsibility cannot be determined for other reasons, and it also is not possible to bring an effective claim against the collectivity as such, injured parties will be without redress.²²⁶ In effect, the loss will then be left where it falls – with the victim, rather than being transferred back to one or more responsible actors.²²⁷

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²²⁵ Ibo Van De Poel et al., *The Problem of Many Hands: Climate Change as an Example*, 18 *Science and Engineering Ethics* 49, 64 (2012); Mark Bovens, *The Quest for Responsibility. Accountability and Citizenship in Complex Organisations* 49 (1998).

²²⁶ See eg Stöckle P, "Victims Caught Between a Rock and a Hard Place: Individual Compensation Claims against Troop-Contributing States" (2013) 88 *Journal of International Peace and Organization*.

²²⁷ Crawford, James and Watkins, Jeremy, 'International Responsibility' in Besson, Samantha and John Tasioulas (eds), *The Philosophy of International Law* (Oxford UP 2010) 286

One reason why the position of victims tend to be weaker in situations of concerted action is that it may be more difficult for private parties to determine which actors play which role in a particular concerted action. This in particular the case where information is spread over many actors and moreover of an informal nature – for instance in the case of partnerships between international institutions and private parties.²²⁸

The effect on injured parties has both a procedural and a substantive dimension. As to the former, diffusion of responsibility over multiple parties will limit access of injured parties to courts in relation of all or the main actors involved in a concerted action. There often is a mismatch between the concerted nature of action, on the one hand, and the available remedies against the actors involved in that action, on the other. The principles of individual responsibility are accompanied by processes for implementation and enforcement that match the characteristics of individual rather than shared responsibility.²²⁹ However, in the increasingly complex character of international relations, ‘legal disputes between States are rarely purely bilateral’.²³⁰ The present system of international dispute settlement is hardly designed to deal with multilateral disputes.²³¹ Procedures may not be able to capture all parties involved and may not do justice to the complexity of a context consisting of multiple responsible actors. For instance, given that international dispute settlement mechanisms are based on the consent of States, the mere fact that one State involved has not consented to the judicial process may suffice to exclude any case of shared responsibility from judicial scrutiny. Likewise, if one of the wrongdoing actors happens to be an international organization, questions of shared responsibility will be deemed inadmissible before most international judicial bodies given that acts of international organizations are not judiciable before them.

Diffusion of responsibility also may affect substantive entitlements. If contributions are spread over multiple actors, relative contributions of individual actors will be relatively small. In the absence of a principle of joint and several responsibility, individual actors may not be able, or may not be required, to provide a full remedy. When reparation consist of restitution

²²⁸ Laurence Boisson de Chazournes, 'United in Joy and Sorrow: Some Considerations on Responsibility Issues Under Partnerships Among International Financial Institutions' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (OUP, Oxford 2013) 211.

²²⁹ See on the connection between substance and procedure Martinez, 'Process and Substance in the "War on Terror"', 108 *Columbia Law Review* (2008) 1013; Benzing, 'Community Interests in the Procedure of International Courts and Tribunals', 5 *The Law and Practice of International Courts and Tribunals* (2006) 369.

²³⁰ Separate Opinion Judge Shahabuddeen in Nauru, *supra* note 78, 270.

²³¹ L. Fislser-Damrosch, 'Multilateral Disputes' in L. Fislser-Damrosch (ed), *The International Court of Justice at a Crossroads* (Hotei Publishing 1987) 376-400.

or specific performance, individual responsible actors may not be able to provide the remedy that is required.

A specific example is the position of victims in relation to alleged wrongs committed by the International Criminal Court and the Netherlands, as a host state, where victims have a hard time finding procedural and substantive remedies that do justice to the respective role of the Court and the host state.²³²

A final aspect that can be qualified as a ‘cost of diffusion’ concerns the relationship between responsible parties. In situations where multiple parties jointly are responsible for a harmful outcome, and only one or a few can be held responsible, the effect will be that the burden will rest on them only. This may lead to an unequal distribution of burdens in situations of shared responsibility. This may be most visible in relation to questions of compensation. However, it also applies in situations where one or only a few of a multiplicity of actors assume a obligation to act in relation to an alleged breach. One example is the position of Belgium in relation to the facilitation of provisional release of suspects of the ICC. Belgium concluded an agreement with the ICC, in which Belgium accepts on its territory provisionally released persons, on a temporary basis and under conditions to be established by the competent Chamber.²³³ From a perspective of burden-sharing it can be said to be unfair if Belgium were the only state party to accept provisionally released.

The chapter has demonstrated that diffusion of responsibility may result in responsibility gaps and that such gaps in part are explained by the dominant paradigm of individual responsibility. It also argued that that these gaps may have significant costs in terms of the accountability of the exercise of public authority, in terms of performance of international obligations, and in particular in terms of the protection of the rights of injured parties. Against this background, in the next chapters of this study I will construct a concept of relational rather than individual responsibility, that is better attuned to the nature of concerted action, and explore ways in which the international legal order can better deal with harmful outcomes resulting from conduct of multiple wrongdoers.

²³² Emma Irving, ‘Protecting Witnesses at the International Criminal Court from *Refoulement*’ (2014) 12(5) J Int Criminal Justice 1141.

²³³ See ICC press release of 10 April 2014, ‘Belgium and ICC sign agreement on interim release of detainees’, ICC-CPI-20140410-PR993, available at <http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr993.aspx>; Goran Sluiter – this was in the email to insert at footnote 243. Not sure.