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Articles

State Responsibility and the Principle of Joint and Several Liability*

John E. Noyes†
and Brian D. Smith‡

Introduction

The law of multiple state responsibility is undeveloped. The scholarly literature is surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility.¹ Judicial or arbitral decisions addressing a state's assertions that other states share responsibility are essentially unknown. Given this lack of attention to multiple state responsibility, it is not surprising that the issue of reparation in such circumstances has received even less attention. Yet, a mature system of international law must comprehend the responsibility of multiple state actors for a single event—including the responsible states' duties of reparation.

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† Professor of Law, California Western School of Law. J.D., University of Virginia, 1977.

‡ Partner, Pettit and Martin, San Francisco, CA. J.D., University of Virginia, 1977; Ph.D., Trinity College, Cambridge University, 1986.

1. See 2 F. GARCÍA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS* 765-840 (1984) (reprinting numerous efforts to codify principles of state responsibility by the League of Nations Committee of Experts for the Progressive Codification of International Law, the Hague Codification Conference, the International Law Commission, Inter-American and other regional groups, and private institutions, none of which address multiple state responsibility). *But see* I. BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (Part I) 189-92 (1983).

State practice presents a host of fact situations that make consideration of multiple state responsibility appropriate and inevitable. When two or more states join together to attack a third state or collaborate to launch a space vehicle that crashes and causes injury in a third state, for example, an essential issue arises: If both acting states are responsible in international law, what is the reparation obligation of each to the victim state? If a compensation obligation arises, should joint and several liability apply—with either state obligated to pay full compensation to the injured state—or should each state be liable only in part? The same questions may be posed with respect to the violation of any international norm. The participation of more than one state in, for example, failure to honor multilateral treaty obligations, a violation of the territorial sovereignty of another state, damage to the territory or property of another state by polluting activities, injury to diplomats of another state, or mistreatment of nationals of another state all raise issues of multiple state responsibility.

This article categorizes the situations in which multiple state responsibility may arise, discusses the procedural and political impediments explaining why this issue has not been more prevalent in the international arena, and then surveys the various possible consequences of a breach of an international law duty. Although the position of international law on the subject of compensation in a multiple responsibility context is “indistinct,”² an examination of the limited body of decisions, state practice, municipal analogies, and accepted principles of the international legal system leads to the conclusion that significant support exists for the principle of joint and several liability in international law when more than one breaching state owes a duty of compensation. Use of this principle will depend on the nature of the claims that are raised and the characteristics of the dispute resolution mechanisms employed to address these claims.

I. Circumstances of Multiple State Responsibility

A. *Basic Principles of State Responsibility*

State responsibility arises when one state breaches its international law duty by infringing on the rights of another state. The International Law Commission (“I.L.C.”)³ adopted the following as its first and basic

2. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 456 (3d ed. 1979).

3. The I.L.C., established in 1947 by the General Assembly, drafts treaties and issues studies and reports on international topics. For discussion of the I.L.C.’s role as a contributor to the development and codification of international law, see M. SHAW, *INTERNATIONAL LAW* 92-93 (2d ed. 1986). The I.L.C. has consistently addressed the general rules of state responsi-

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statement on state responsibility: "Every internationally wrongful act of a State entails the international responsibility of that State."⁴ Thus, state responsibility exists when: "(a) Conduct consisting of an action or omission is attributable to the State under international law; and (b) That conduct constitutes a breach of an international obligation of the State."⁵ This article assumes that each state against which a claim of multiple state responsibility might be brought has engaged in conduct attributable to that state and that each state has breached an international obligation. The fact that "[t]raditionally, international law is . . . essentially bilateral

bility rather than more specific substantive rules, the breach of which would lead to state responsibility. See, e.g., *Report of the International Law Commission Covering the Work of Its Fifteenth Session, 6 May-12 July 1963, Annex I*, U.N. Doc. A/CN.4/152 (1963), reprinted in [1963] 2 Y.B. INT'L L. COMM'N 227, 227-28, U.N. Doc. A/CN.4/SER.A/1963/Add.1.

4. *Report of the International Law Commission on the Work of Its Thirty-first Session, 14 May-3 August 1979*, U.N. Doc. A/34/10 (1979), reprinted in [1979] 2 Y.B. INT'L L. COMM'N, 91 (part 2), U.N. Doc. A/CN.4/SER.A/1979/Add.1 (part 2) [hereinafter 1979 I.L.C. Report].

The I.L.C. is also exploring an area that it terms "international liability," which concerns liability of states for harmful transnational environmental effects of internationally lawful activities. See Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability,"* 80 AM. J. INT'L L. 305 (1986). The nature of the acts that would be subject to international liability is controversial. Some commentators have criticized the notion of a doctrinal division between state responsibility and international liability, maintaining that cases of international liability can be treated as examples of ultrahazardous activities of states under the existing doctrinal heading of state responsibility. See, e.g., I. BROWNLIE, *supra* note 1, at 50. The I.L.C. is separately studying the non-navigational uses of international watercourses, a topic that includes some activities that otherwise would fall within the topic of international liability. See, e.g., Evensen, *First Report on the Law of Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/367 (1983), reprinted in [1983] 2 Y.B. INT'L L. COMM'N, 155 (part 1), U.N. Doc. A/CN.4/SER.A/1983/Add.1(part 1).

5. *Report of the International Law Commission on the Work of Its Twenty-fifth Session, 7 May-13 July 1973*, U.N. Doc. A/9010/REV.1 (1973), reprinted in [1973] 2 Y.B. INT'L L. COMM'N 161, 179, U.N. Doc. A/CN.4/SER.A/1973/Add.1 (I.L.C. draft article 3). Ago, writing as Special Rapporteur to the I.L.C., concluded that there is essential consensus in the literature that these two elements—conduct attributable to a state (characterized as the "subjective" element) and conduct constituting a breach of an international obligation (characterized as the "objective" element)—are the sole prerequisites of state responsibility. Ago, *Second Report on State Responsibility*, U.N. Doc. A/CN.4/233 (1970), reprinted in [1970] 2 Y.B. INT'L L. COMM'N 177, 187-88, U.N. Doc. A/CN.4/SER.A/1970/Add.1.

Some commentators contend that "injury" or "damage" is also required. See, e.g., C. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 37, 55-56 (1967) (limited to state responsibility for injury to aliens); de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW*, § 9.01, at 534 (M. Sørensen ed. 1968). The breach of any international obligation, however, entails at least moral or political injury. As Ago persuasively argues,

Every breach of an engagement *vis-à-vis* another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State. As Anzilotti stated in his first work on the topic, international responsibility derives its *raison d'être* purely from the violation of a right of another State and every violation of a right is a damage.

See Ago, *supra*, at 195 (referring to D. ANZILOTTI, *TEORIA GENERALE DELLA RESPONSABILITÀ DELLA STATO NEL DIRITTO INTERNAZIONALE* 89 (1902)); accord B. BOLLECKER-STERN, *LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE* 36-49 (1973).

mind⁶ ought not suggest that a single event or set of facts may never give rise to multiple relationships. The conduct of several states with respect to one event may place each in a position of responsibility vis-à-vis an injured state.

Following its breach of an international obligation, a state is under a legal obligation to make appropriate amends. As Eagleton states, "Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent state."⁷ In the *Chorzów Factory* case, the Permanent Court of International Justice noted: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."⁸ The legal obligation to make reparation must follow each breach of an international norm, even in situations in which multiple states are in breach.

B. *Multiple State Responsibility: Concerted or Independent Action*

Multiple state responsibility may arise in numerous circumstances.⁹ In order to illustrate these circumstances and to facilitate analysis of the consequences of this responsibility, it is helpful to organize the circumstances into two categories: concerted conduct and independent conduct. The first category involves situations in which states engage in

6. Riphagen, *Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc. A/CN.4/354 & Add.1-2 (1982), reprinted in [1982] 2 Y.B. INT'L L. COMM'N 22, 36 (part 1), U.N. Doc. A/CN.4/SER.A/1982/Add.1 (part 1) (footnote omitted).

7. C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* § 5, at 22 (1928). According to Eagleton,

Historically, the idea of a responsibility between states may be traced back to the vague origins of rights and duties which have always been regarded as fundamental by mankind. Among these is the conviction that reparation should be made for an injury committed; and this idea of responsibility, whether between persons or states, is as old as morality itself.

Id. § 4, at 16; see also García-Amador, *Draft Articles on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens*, reprinted in F. GARCIA-AMADOR, L. SOHN & R. BAXTER, *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS* vii, 8-9 (1974); Riphagen, *Second Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc. A/CN.4/344 (1981), reprinted in [1981] 2 Y.B. INT'L L. COMM'N, 79, 91 (part 1), U.N. Doc. A/CN.4/SER.A/1981/Add.1 (part 1).

8. *Chorzów Factory Case (Claim for Indemnity; Jurisdiction)* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21. For a more detailed discussion of reparation and its relationship to multiple state responsibility, see *infra* notes 47-66 and accompanying text.

9. Joint responsibility may arise, for example, in cases of joint participation in breaches of neutrality or acts of aggression, in cases of transferred or loaned officials or organs, in cases of dependent states where the "dependent" state retains powers, in licensor-licensee cases, and in cases in which the prior joint occupation or administration of territory leads to subsequent joint conduct. See I. BROWNLIE, *supra* note 1, at 189-92. In theory, however, the circumstances in which issues of multiple state responsibility may be implicated are far more diverse.

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concerted conduct in breach of an international obligation.¹⁰ To borrow from municipal legal parlance, this is the circumstance of joint tortfeasors participating in a common breach of obligation. For example, two states may participate in a commercial joint venture that causes environmental damage in a third state.¹¹ Or two states may conduct a wrongful joint military invasion of a third state. In such situations, the joint responsibility would arise from concerted action.

The second category consists of situations in which states engage in independent breaches of obligation with respect to a single event.¹² Three examples illustrate situations in which independent breaches may combine to contribute to one injury. First, a state may be responsible for complicity when it renders aid to a state that breaches an obligation. The I.L.C. has noted that complicity is properly characterized as a breach independent of that of the recipient state, thus falling squarely in the category of a distinct breach relating to a single event.¹³ Second, several states may independently pollute the environment in a way that, in the aggregate, seriously damages another state.¹⁴ Third, consider a case in which military agents of state A enter the territory of state B and, pursuant to state A's orders, attack the diplomatic mission of state C.¹⁵

10. The I.L.C. distinguishes acts of assistance or participation from acts in concert: "[T]he parallel commission of identical offences by two or more States is altogether different from participation by one of those states in an internationally wrongful act committed by the other." *Report of the International Law Commission on the Work of Its Thirtieth Session, 8 May-28 July 1978*, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. INT'L L. COMM'N 1, 99 (part 2), U.N. Doc. A/CN.4/SER.A/1978/Add.1 (part 2) [hereinafter *1978 I.L.C. Report*].

11. From the I.L.C.'s perspective, if no wrongfulness is involved, the example would involve a case of international liability. See Magraw, *supra* note 4, at 329-30.

12. For discussion of the distinction between joint and independent tortfeasors, see generally P. JAMES & D. BROWN, *GENERAL PRINCIPLES OF THE LAW OF TORTS* 349-51 (4th ed. 1978); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* §§ 46-48, 52, at 322-32, 345 (5th ed. 1984) [hereinafter *PROSSER AND KEETON ON TORTS*]; G. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* §§ 1-7, at 1-23 (1951); W. ROGERS, WINFIELD AND JOLOWICZ ON TORT 604-06 (12th ed. 1984).

13. *1978 I.L.C. Report*, *supra* note 10, at 98-105. The issue of complicity concerns the legal consequence of acts or omissions that assist another state in the breach of its international obligations. Complicity is different from joint participation in a concerted act that is internationally wrongful. See *supra* note 10. In fact, the issue of complicity may arise when the conduct of the assisting state, viewed independently, breaches no international legal rules. *1978 I.L.C. Report*, *supra* note 10, at 99. For example, providing arms or military technology or siting foreign forces on state territory may not violate any international obligation. When such conduct helps another state to breach an international obligation (for example, by aggression), however, the otherwise innocent conduct may trigger state responsibility. See *id.* "[T]he aid or assistance must have been rendered with *intent* to facilitate the commission of that internationally wrongful act by another." *Id.* at 104 (emphasis in original).

14. For discussion of the wrongfulness of conduct causing environmental injury, see B. SMITH, *STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION* 67-128 (1988).

15. For an example of an assertion of multiple responsibility against the actor organ's state and the territorial state, consider the Soviet Union's protests to the United States, Turkey, and

Responsibility for the attack certainly lies with state A. If, however, state B has failed to exercise due diligence to prevent such conduct, it too may be held responsible to state C.¹⁶

In each of the preceding illustrations of independent breaches, the target state experienced a single injury.¹⁷ The conduct of several responsible states, however, may lead to distinct types of injury. For example, a state's blameworthiness for not punishing the perpetrators of a delict is distinct from a state's responsibility for contributing to the original delict. Consider a case involving the same facts as the last example in the preceding paragraph, but assume (1) that the attackers are private citizens of state A acting without state A's knowledge or approval who return home following the attack and (2) that state A has made no effort to apprehend or punish the individuals. State B may still be responsible for a failure of due diligence. The conduct of the private attackers, however, cannot be attributed to state A. Yet state A may now bear responsibility for breach of its independent obligation to punish. If a state's exercise of due diligence could not have prevented a material injury, that state is nevertheless responsible for the "moral" and "political" injury resulting from the breach of its obligation of due diligence.¹⁸ Hence, in this

West Germany regarding the launching of alleged reconnaissance balloons by the United States from the territory of the latter two States. See *Report of the International Law Commission on the Work of Its Twenty-seventh Session (5 May-25 July 1975)*, U.N. Doc. A/10010/REV.1 (1975), reprinted in [1975] 2 Y.B. INT'L L. COMM'N 47, 84, U.N. Doc. A/CN.4/SER.A/1975/Add.1.

16. Reflecting the potential for dual responsibility, article 12 of the I.L.C. draft text states that the acts of organs of one state in the territory of another state are not attributed to the latter (without prejudice, however, to the possible breach by the latter of due diligence or other obligations). See *id.* at 83; see also G.A. Res. 3314 (XXIX), annex art. 3(f)(1974), reprinted in 15 UNITED NATIONS RESOLUTIONS 392, 392 (D. Djonovich ed. 1984) (listing among the acts qualifying as acts of aggression "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State"). For further discussion of the consequences of a lack of due diligence, see *infra* note 18 and accompanying text.

17. G. WILLIAMS, *supra* note 12, § 5, at 16 ("The *damnum* is single, but each commits a separate *injuria*.").

18. When a duty to make reparation follows a breach of the duty to exercise due diligence to prevent an injury, a causal relationship generally exists between the state's omission and the harm resulting from private conduct. See, e.g., *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 31-33 (Iran could have prevented attack on U.S. embassy); *Kummerow, Otto Redler & Co., Fulda, Fischbach & Friedericy Cases (Germ. v. Venez.)*, 10 R. Int'l Arb. Awards 369, 400 (1903) (no responsibility because no reasonable degree of diligence could have prevented damage by insurgents). A state's *ex post facto* failure to punish, however, cannot logically have any direct causal connection with the private conduct. Even if punishment is conceived of as a means of contributing to prevention by enhancing respect for legal processes and deterring private wrongdoers, a causal relationship between a failure to punish and the prior conduct of the private offender is difficult to draw. In such cases, the appropriate measure of compensation, therefore, remains in dispute. Under one extreme perspective, logical but without support in the cases, compensation should reflect only damages caused directly, i.e., the opportunity lost by the victim to recover damages

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example, out of a single set of facts, states A and B stand responsible to state C for two quite different species of injury.

Even when the injury caused is single or undifferentiated, the conduct of the several responsible states may differ materially in terms of its blameworthiness or its causal contribution to the injury.¹⁹ Such distinctions based on blameworthiness or causal contribution should not obscure the fact of multiple responsibility arising out of an event. The *consequences* of responsibility may vary among the states based on such distinctions, but each state should nonetheless be deemed to be responsible.

C. *Problems of Process*

Before turning to the consequences of state responsibility, it is important to identify and consider reasons for the paucity of legal claims and

from the wrongdoer because of the state's failure to punish; a judgment-proof offender, therefore, would mean no compensation. See Sohn & Baxter, Convention on the International Responsibility of States for Injuries to Aliens (Final Draft with Explanatory Notes), reprinted in F. GARCIA-AMADOR, L. SOHN & R. BAXTER., *supra* note 7, at 338-39. The *Janes* case represents a centrist approach, assessing damages for the victim's relatives' "indignity, grief, and other similar wrongs" and for the general "mistrust and lack of safety" caused by the failure to punish. *Janes v. United Mexican States (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 82, 89 (1925). But see 1 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 40-46 (1937) (criticizing the *Janes* case). Most publicists, however, reject the search for an independent basis for damages, concluding that the consequences of the private conduct that has gone unpunished or insufficiently punished should provide, at least, the basic guideline for the measure of reparation. See Ago, *Fourth Report on State Responsibility*, U.N. Doc. A/CN.4/264 & Add.1 (1972-1973), reprinted in [1972] 2 Y.B. INT'L L. COMM'N 71, 98, U.N. Doc. A/CN.4/SER.A/1972/Add.1 (nonpunishment treated as failure to prevent); Brierly, *The Theory of Implied State Complicity in International Claims*, 9 BRIT. Y.B. INT'L L. 42, 49 (1928) (State assessed as a party to conduct by "condonation"); Eagleton, *Measure of Damages in International Law*, 39 YALE L.J. 52, 54-61 (1929) (all "due diligence" damages measured by private conduct consequences); 1 M. WHITEMAN, *supra*, at 38-69 (empirical conclusion based on cases). Freeman persuasively argues that the search for "causal" logic in the cases in this area is futile: the real force that animates the decisions regarding the measure of damages is the desire to penalize the state to deter future failures to punish. A. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 622-23 (1938).

A similar set of questions as to the appropriate measure of compensation arises with respect to other breaches in which a causal relationship to material injury is absent. Material injury is not, after all, a requisite element of all breaches of international obligation. A state whose conduct lacks a causal connection to material damage might still be responsible for breach of an obligation and have certain consequential duties. These duties, however, would be unrelated to the material damage. If, for example, the exercise of due diligence would not have prevented a material injury, the state is not responsible for the injury, but it should nevertheless stand responsible for the "moral" and "political" injury attendant to the breach of its obligation of due diligence. For a discussion of injury and its consequences, see *supra* note 5; *infra* text accompanying notes 56-61.

19. An insufficient causal connection, of course, may preclude responsibility for specific harm. See *infra* note 55. Each of several causes of a single injury, however, may contribute in unequal degrees. If the causal contribution of more than one state may be defined as proximate or material, multiple responsibility exists with respect to the injury.

judicial and arbitral decisions concerning multiple state responsibility. Such reasons relate to the process by which international claims arise and are pursued. An examination of international legal process is essential not only to an understanding of why the law regarding the circumstances of multiple state responsibility is undeveloped, but also to an analysis of the contours of a progressive regime that addresses the appropriate consequences of multiple state responsibility.

First, and most important, the vast majority of international claims do involve only two states—the victim state and the offending state. Significantly, multiple responsibility is particularly rare in one area that has dominated and influenced the jurisprudence of state responsibility—the “treatment of aliens.”²⁰ Furthermore, state responsibility claims based on violation of a treaty or damage to property by armed forces most often involve the wrongful conduct of only one state.²¹

Second, diplomatic initiatives asserting responsibility are far more common than formal methods of dispute settlement. Diplomatic efforts are most often and most effectively conducted on a bilateral basis.²² Even in situations of possible multiple state responsibility, the tendency would be to make a single assertion of responsibility against the most blatant, or perhaps politically accessible or responsive, wrongdoer. It may also make diplomatic sense for a state to concede its sole responsibility for a wrongdoing rather than to resist such a concession and risk reprisals or the uncertain outcome of a judicial or arbitral decision.²³ In the Shuster incident, for example, the United States sent a diplomatic note to Persia on behalf of a U.S. national for breach of the national's

20. Ago, *First Report on State Responsibility*, U.N. Doc. A/CN.4/217(1969), reprinted in [1969] 2 Y.B. INT'L L. COMM'N 125, 127, U.N.Doc. A/CN.4/SER.A/1969/Add.1; I. BROWNIE, *supra* note 1, at 8-9.

21. Brownlie notes as evidence of the absence of a rule of joint and several liability that claims against Axis powers were made against individual states, ignoring the common purpose of Axis war efforts. I. BROWNIE, *supra* note 2, at 456. But these “single” claims might have expressed only a view as to the nature of the alliance; as to the specific subjects of the claims, the conduct was not deemed concerted.

22. Most claims of state responsibility are made via diplomatic correspondence or conducted through bilateral treaties settling outstanding claims. See, e.g., I. BROWNIE, *supra* note 1, at 90-123.

23. In addition, the decision to pursue arbitral or judicial solutions involves risks, including the risks that the decisionmaker will not understand the issues or will be biased. The formal legal pronouncements resulting from judicial or arbitral decisions may not address the true underlying problems and tensions of which the legal dispute is only a symptom. States may also believe that in a judicial dispute or arbitration a claimant either wins or loses, whereas diplomacy allows compromise solutions. For more complete discussion of these issues, see Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 3 (T. Carbonneau ed. 1984); Gross, *Underutilization of the International Court of Justice*, 27 HARV. INT'L L.J. 571, 591-96 (1986).

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contract with Persia.²⁴ Persia agreed to settle, despite the fact that the tortious acts of a superior power, Russia, had contributed to or induced the breach of contract. Persia's payment may have been prompted by a fear of reprisals had it attempted to place the blame on Russia. In addition, a state against which a diplomatic assertion has been made also may be able to "save face" by payment *ex gratia* while stating that responsibility lies with another state. In the 1881 Bey of Tunis dispute, for example, Italy pressed a claim at a joint committee of inquiry investigating whether injuries to Italian nationals and the Italian consulate at Sfax, Tunisia, were the result of actions of French troops and French bombardment, or of looting and theft by Tunisian insurgents.²⁵ Italy pressed most strongly its claim against France. France, in response, stated that it was willing to pay *ex gratia*, but argued that if a question of responsibility were involved, responsibility lay with Tunisia and not France.²⁶ If a state does not admit responsibility, yet makes an *ex gratia* payment to another state that fully compensates for injuries suffered by the claimant state's citizens, it is highly likely, for practical and political reasons, that the claimant state will no longer pursue another responsible state.

Third, even if a decision is made to seek a judicial resolution, municipal tribunals will probably be unavailable. Such fora will rarely hear claims involving issues of state responsibility.²⁷ Doctrines of sovereign immunity or act of state, for example, would preclude most claims against foreign states.²⁸

Fourth, the procedures of available formal international mechanisms of dispute settlement historically have reflected and perhaps reinforced the practice of asserting only single state responsibility. Provisions governing the Permanent Court of Arbitration,²⁹ terms of the International

24. Bôuvé, *Russia's Liability in Tort for Persia's Breach of Contract*, 6 AM. J. INT'L L. 389, 407 (1912).

25. Ago, *Third Report on State Responsibility*, U.N. Doc. A/CN.4/246 & Add.1-3 (1971), reprinted in [1971] 2 Y.B. INT'L L. COMM'N 199, 270-71 (part 1), U.N. Doc. A/CN.4/SER.A/1971/Add.1 (part 1).

26. *Id.* at 271.

27. For discussion of an exception to this general proposition, see *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. 553, 554 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955) (suit brought against one state only), discussed *infra* text accompanying notes 70-73.

28. See, e.g., M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 266-79 (1988); M. SHAW, *supra* note 3, at 372-93.

29. See Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, arts. 37-90, 36 Stat. 2199, 2220-34, T.S. No. 536, at 41-50, 205 Parry's T.S. 233, 240-48; Convention for the Pacific Settlement of International Disputes, July 29, 1899, arts. 15-57, 32 Stat. 1779, 1788-98, 187 Parry's T.S. 410, 416-22; see also M. HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, at §§ 1-32 (1943); S. ROSENNE, THE WORLD COURT 14-19 (1962).

Law Commission's Model Rules on Arbitral Procedure,³⁰ and terms of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States³¹ envision only single state responsibility. The Statute of the International Court of Justice reflects the same assumption of a two-party dispute in its procedures relating to provisional measures, document production, and non-appearance.³² A survey of the types of arbitral tribunals authorized by twenty recent multilateral treaties similarly reveals structures that assume two-party arbitrations.³³ Arbitral tribunals have resisted procedural mechanisms that bring in multiple parties, such as provisions for the consolidation of claims that can be found in municipal judicial systems.³⁴ One reason is that the competence of arbitral tribunals cannot reach beyond the scope of the specific arbitral clauses or agreements on which their competence is based.³⁵

30. See *Report of the International Law Commission Covering the Work of Its Tenth Session, 28 April-4 July 1958*, U.N. Doc. A/3859, reprinted in [1958] 2 Y.B. INT'L L. COMM'N 78, 82-86.

31. See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965*, art. 25, 17 U.S.T. 1270, 1280, T.I.A.S. No. 6090, at 10, 575 U.N.T.S. 159, 174; *id.* art. 37(2)(b), 17 U.S.T. at 1285, T.I.A.S. No. 6090, at 15, 575 U.N.T.S. at 184.

32. See *Statute of the International Court of Justice* arts. 41(1), 43(4), 53(1), 59 Stat. 1055, 1061-62; 3 Bevans 1179. The Court may approve intervention by other states pursuant to article 62, but the Court's decision can bind only the parties. *Id.* art. 59; see also *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K. & U.S.)*, 1954 I.C.J. 19, 33. *But see infra* note 36 (discussing new joinder provision).

33. In addition to a few tribunals providing for a single arbitrator, Sohn has noted three other basic types of arbitral tribunals: three-member tribunals, with one member selected by "each side" and one neutral member; five-member tribunals, with one member selected by each side and three neutral members; and five-member tribunals with two members selected by each side and one neutral member. Sohn, *The Role of Arbitration in Recent International Multilateral Treaties*, 23 VA. J. INT'L L. 171, 179 (1983).

34. An arbitral tribunal of the International Chamber of Commerce (ICC) recently noted the absence of specific multiple respondent procedures in the ICC rules. The tribunal, however, made note of the benefits of such provisions. See *Westland Helicopters Ltd. v. Arab Org. for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab Brit. Helicopter Co. (Interim Award on Jurisdiction, Mar. 5, 1984)*, reprinted in 23 I.L.M. 1071, 1088 (1984) ("It is indeed in the interest of good administration of justice to deliver a single decision applicable to all, so as to avoid either contradictions or conflict between decisions."). Since the case was filed in 1980, the ICC has adopted a short guide for multi-party arbitration that focuses on large-scale construction, public works, and industrial projects and stresses the need for a contractual basis for multi-party arbitration proceedings. INTERNATIONAL CHAMBER OF COMMERCE, *GUIDE ON MULTI-PARTY ARBITRATION UNDER THE RULES OF THE ICC COURT OF ARBITRATION* (1982) [hereinafter ICC GUIDE].

35. See A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 141-45 (1986); Bartels, *Multiparty Arbitration Clauses*, 2 J. INT'L ARB. 61 (June 1985); Hascher, *Consolidation of Arbitration by American Courts*, 1 J. INT'L ARB. 127 (Mar. 1984). If an arbitral procedure were consolidated in a manner not in accordance with the agreement of the parties, recognition and enforcement of awards could be denied. See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, art. V(1)(d), 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. 38, 40, 42; UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, June 21, 1985, art. 36(1)(a)(iii)-(iv).

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These clauses and agreements reflect a bias towards bilateral dispute resolution.

Although a few tribunals recently have adopted provisions for multi-party dispute resolution,³⁶ they have rarely considered claims against multiple states.³⁷ Conceptually, the issue of joint and several liability may arise in cases in which compensation is sought and only one of several responsible states is present before a tribunal.³⁸ Without the presence of all states, however, the tribunal is not likely to address the issue directly. Further, in some of the infrequent multiple party cases, no compensation was sought. In the *North Sea Continental Shelf Cases*, for example, three states agreed to join two cases to allow the International Court of Justice to determine principles to guide the parties in delimiting maritime boundaries.³⁹ Responsibility for wrong was not at issue.

International judicial tribunals have almost always lacked procedures that could allow the mandatory joinder of parties or compulsory jurisdiction over multiple defendant states. One exception was the Central American Court of Justice, which was in existence between 1907 and 1917. The Court had compulsory jurisdiction over all disputes submitted to it by Guatemala, Honduras, Nicaragua, El Salvador, or Costa Rica

36. In a 1978 revision of its rules, the International Court of Justice adopted article 47, which states:

The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects.

International Court of Justice Rules of Court, art. 47 (1978); *see also* Treaty Establishing the Caribbean Community, *done* July 4, 1973, annex art. 12(5), 946 U.N.T.S. 17, 32 (recognizing the possibility of multiparty disputes in arbitrator selection provisions); London Court of International Arbitration Rules, art. 13.1(c) (giving the tribunal power to "allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them"); ICC GUIDE, *supra* note 34.

37. Exceptions are the Samoan Claims Arbitration (Germ. v. U.S. & U.K.), 9 R. Int'l Arb. Awards 15 (1902), *see infra* notes 67-69 and accompanying text, and *Westland Helicopters Ltd. v. Arab Org. for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab Brit. Helicopter Co.* (Interim Award on Jurisdiction, Mar. 5, 1984), *reprinted in* 23 I.L.M. 1071 (1984).

A few instances of claims by multiple states against one state exist, although the claimant states sometimes have been treated as a single party. *See, e.g.,* M. HUDSON, *supra* note 29, §§ 11-12, 24 (reviewing cases before tribunals of the Permanent Court of Arbitration). The more typical practice involves the settlement of claims by bilateral agreement or bilateral arbitration, even where several states have been involved in an incident. *See, e.g.,* 1 R. LILlich & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 166-67 (1975) (discussing bilateral agreements between the U.A.R. and Great Britain and the U.A.R. and France arising out of 1956 deprivative measures taken by Egypt).

38. *See infra* text accompanying notes 88-89 (discussing the *Corfu Channel* case).

39. *North Sea Continental Shelf Cases* (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3. The Court did not feel compelled to reach identical conclusions as to the joined cases, since they concerned different areas of the North Sea continental shelf. *Id.* at 19.

that had not been resolved by the foreign offices of these states.⁴⁰ During the ten years of its operation, however, the Court considered only one case involving a claim against more than one state.⁴¹ In that case, which involved Honduras' claim for compensation against Guatemala and El Salvador for fomenting a revolution in Honduras, the Court ruled for Guatemala and El Salvador on the merits. The Court thus did not need to rule on whether the two states would be jointly and severally liable. The development of more systems of compulsory dispute resolution is unlikely unless states overcome their reluctance to submit to binding judicial or arbitral dispute resolution.⁴²

Fifth, even if procedural obstacles are overcome, an arbitral or judicial tribunal may not have the competence to reach a decision on compensation or the possibility of joint and several liability. For example, the parties in their *compromis* may restrict the types of reparation the tribunal is entitled to award, perhaps limiting the tribunal's competence to the declaration of substantive rights. As Mann states,

[I]t must be emphasized that, whatever form of reparation the claimant State may be entitled to claim, it may be satisfied with something less or different and that the question of remedies is to be clearly distinguished from that of entitlement. Remedies depend on the jurisdiction and procedure of the tribunal. They may not always coincide with the substantive right.⁴³

40. Convention for the Establishment of a Central American Court of Justice, *done* Dec. 20, 1907, art. 1, 3 MARTENS NOUVEAU RECUEIL (ser. 3) 105, 106. The Court also had compulsory jurisdiction in cases brought by an individual of one state against any other state. *Id.* art. 2. See generally H. CORY, COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES 90-98 (1972); M. HUDSON, *supra* note 29, §§ 39-62; Hill, *Central American Court of Justice*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 41 (1981).

41. *Hond. v. Guat. & El Sal.* (1908), translated in 3 AM. J. INT'L L. 434-36, 729-36 (1909).

42. For critical reviews of the experience of the International Court of Justice with its compulsory jurisdiction, see Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144 (1987); Janis, *The Role of the International Court in the Hostages Crisis*, 13 CONN. L. REV. 263 (1981); Scott & Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT'L L. 57 (1987); see also Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 461, 463 (L. Gross ed. 1976) (arguing that states prefer not to submit disputes to the I.C.J. or other forms of formal dispute resolution for reasons of "political psychology"); Gross, *supra* note 23, at 596-97 (arguing that the I.C.J.'s location at the Hague, its differentiation between justiciable and nonjusticiable disputes, and governments' fears of "losing control" are not sufficient explanations for underutilization of the I.C.J., and that "[I]ack of confidence in the composition of the Court, the law which it applies and the manner in which it carries out its judicial functions have been significant factors in the . . . non-use of the [C]ourt").

43. Mann, *The Consequences of an International Wrong in International and National Law*, 48 BRIT. Y.B. INT'L L. 1, 5 (1977); accord de Aréchaga, *supra* note 5, § 9.22 (indicating that international arbitral tribunals have refrained from imposing punitive damages since they go "beyond the jurisdiction conferred on them by the parties" and are "incompatible with the basic idea underlying the duty of reparation"); Riphagen, *supra* note 7, at 83-85.

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Sixth, and more generally, the law of state responsibility is less well developed than international law in other areas. In the commercial area, for example, states have long considered it to be in their long-term self-interest to agree in advance upon rules that create a stable environment for trade and commerce. In the area of state responsibility, however, specific obligations and the consequences of breaches have less frequently been specified in advance. For example, examination of existing treaties related to the prevention of maritime collisions or marine or river pollution reveals that, even though the interaction of states and the occurrence of damage is foreseeable in such situations, states have resisted defining with precision the details of liability.⁴⁴ To date, incentives for the adoption of a more mature system of joint and several liability have been inadequate.

Finally, it may be that inertia in international practice has slowed the assertion of claims of multiple state responsibility. The pattern of state assertions of single responsibility, even in circumstances suggesting multiple responsibility, is so familiar and well-established as to discourage deviation.

The fact that practice has generally reflected a rudimentary approach to state responsibility does not deny the propriety of more complex claims consistent with established principles of responsibility. As the International Court of Justice has observed, "There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation."⁴⁵ If more than one state breaches its international obligations in the course of an event,

44. Such treaties typically require parties, among other things, to inform the other parties of accidents, to consult each other on matters of risk, to undertake national legislative programs to reduce risk, and to establish investigative commissions. *See, e.g.*, Convention on the Protection of the Rhine Against Chemical Pollution, Dec. 3, 1976, 16 I.L.M. 242 (1977); Convention for the Prevention of Marine Pollution from Land-Based Sources, June 4, 1974, 13 I.L.M. 352 (1974); Agreement Concerning Cooperation in Measures Dealing with Pollution of Oil by Sea, Sept. 16, 822 U.N.T.S. 311 (1972); Agreement for the Cooperation in Dealing with Pollution of the North Sea by Oil, June 9, 1969, 704 U.N.T.S. 4 (1969); Convention Concerning the Regime of Navigation on the Danube, Aug. 18, 1948, 33 U.N.T.S. 181 (1949); *see also* Int'l Law Association, *Report of the Sixtieth Conference Held at Montreal* (1983) (proposals concerning transfrontier pollution and drainage basin rules do not discuss multiple state responsibility or its consequences). A notable exception to the failure to specify in advance the consequences of multiple state responsibility is the Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187 [hereinafter Space Objects Convention]. *See infra* notes 77-87 and accompanying text.

45. *Case Concerning Barcelona Traction Light & Power Co., Ltd. (Second Phase) (Belg. v. Spain)*, 1970 I.C.J. 3, 45; *accord* Mann, *supra* note 43, at 14 ("[A] wrong committed by the standards of objective law does not become a right by virtue of the impossibility of pursuit or unwillingness to pursue it.").

each breaching state is in a position of responsibility vis-à-vis the injured state. As the variety and frequency of cooperative state endeavors and the interaction of technological activities expand, international rules and processes must develop to address situations of multiple state responsibility.⁴⁶

II. Consequences of State Responsibility

The juridical consequence of the breach of *any* international obligation is the creation of a duty to make reparation.⁴⁷ The language of the Permanent Court of International Justice in the *Chorzów Factory* case represents the classic articulation of the content of this duty:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.⁴⁸

Three categories of reparation exist: restitution, compensation, and satisfaction. Although inconsistent terminology in the literature has blurred the boundaries of these categories,⁴⁹ it is possible to define the core nature of each. Restitution, in the broad sense of *restitutio in integrum*, represents the obligation to eliminate the effects of the breach—to restore the situation to its pre-breach state. Restitution in kind, the return of persons or property wrongfully taken, constitutes a specific subset of the general *restitutio* obligation.⁵⁰ In certain cases, of course,

46. See Magraw, *supra* note 4, at 329-30 (citing examples of joint state activities that may lead to harm in other states and suggesting that the I.L.C. should focus on joint activities in its future studies).

47. See *supra* notes 7-8 and accompanying text.

48. *Chorzów Factory Case (Merits) (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47; *accord*, e.g., *Opinion in the Lusitania Cases (U.S. v. Ger.)*, 7 R. Int'l Arb. Awards 32, 35 (1923). For discussion of reparation, see generally I. BROWNLIE, *supra* note 2, at 457-64; I. BROWNLIE, *supra* note 1, at 199-240; B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 233-40 (1953); J. PERSONNAZ, *LA RÉPARATION DU PRÉJUDICE EN DROIT INTERNATIONAL PUBLIC* (1938); 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 653-81 (3d ed. 1957); de Aréchaga, *supra* note 5, §§ 9.17-.23; Eagleton, *supra* note 18; Mann, *supra* note 43, at 1-5; Riphagen, *supra* note 7, at 87-100. See also Gray, *Is There an International Law of Remedies?*, 56 BRIT. Y.B. INT'L L. 25, 30-31 (urging the need to stress state practice and to avoid a court-centered view when investigating the consequences of breaches of international law).

49. As to the terminological confusion, see I. BROWNLIE, *supra* note 2, at 457-58; Riphagen, *supra* note 7, at 88.

50. Another subset of *restitutio in integrum* is legal restitution. Thus, for example, a state's declaration that its action violates international law may be considered broadly as a form of legal restitution, necessary for the victim state to achieve full reparation. See I. BROWNLIE, *supra* note 2, at 461-63. See generally Mann, *supra* note 43, at 2-5. The potential

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restitution in kind may be inapplicable or impossible given the nature of the breach and its consequences. Restitution in kind “should be discarded when there is absolute impossibility of envisaging specific performance, or when an irreversible situation has been created.”⁵¹

Payment of compensation may be required when it is needed as a supplement to restitution, when restitution in kind is impossible, or when it is prohibited by a *compromis*.⁵² *Chorzów Factory* summarizes the principle of compensation:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁵³

Viewing restitution in kind as the primary right of a claimant state vis-à-vis a responsible state may affect the measure of the compensation obligation. To the extent monetary compensation represents a substitute for restitution in kind, the cost of replacement of damaged property, rather than the property's value at the time of accident, may well be the appropriate measure.⁵⁴ Issues of causation, remoteness, and foreseeability also play a key role in the delimitation of damages attributable to the breach and, thus, compensable by the breaching state.⁵⁵ Particular problems are

overlap of the concepts of legal restitution and satisfaction is apparent. To maintain the integrity of the distinction, it is perhaps best to characterize only legal acts that directly remedy the wrong (such as a declaration rescinding wrongful legislation) as legal restitution.

51. *Texaco Overseas Petroleum Co./Cal. Asiatic Oil Co. v. Government of the Libyan Arab Republic (Compensation for Nationalized Property)*, para. 112, 17 I.L.M. 1, 36 (R. Dupuy arb. 1978).

52. Riphagen argues that when the injury to the state is through an injury to a national, the state responsible should have the option of restitution or compensation. Riphagen, *supra* note 7, at 94-96, 99-100. This argument is of particular relevance to wrongful expropriation. Conversely, some commentators have suggested that the claimant state has the option to elect either compensation or restitution. See, e.g., 1 G. SCHWARZENBERGER, *supra* note 48, at 660. For discussion of the uncertainty in the literature as to whether restitution is available by right in the nationalization context, see I. BROWNLIE, *supra* note 1, at 210-22.

53. *Chorzów Factory Case (Merits) (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47. For discussion of the issue of damages in *Chorzów Factory*, see 2 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1529-46 (1937).

54. See *Texaco Overseas Petroleum Co./Cal. Asiatic Oil Co. v. Government of the Libyan Arab Republic (Compensation for Nationalized Property)*, para. 105, 17 I.L.M. 1, 35 (R. Dupuy arb. 1978); de Aréchaga, *supra* note 5, § 9.18.

55. For a general discussion of the basic requirement that the harm for which the state is deemed responsible must bear a material causal relationship to the state's conduct, see B. BOLLECKER-STERN, *supra* note 5, at 180-359; B. CHENG, *supra* note 48, at 241-53; 3 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1767-1832 (1943). A variety of causal factors and the nature of the primary obligations that are breached also may affect the measure of damages. See Riphagen, *Fourth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc A/CN.4/366/Add. 1 (1983), reprinted

encountered in the assessment of the measure of the award when the injury experienced is non-material or only involves the "moral" or "political" injury attendant to every breach of an obligation.⁵⁶ Few guidelines help to quantify loss when the breach consists, for example, of a violation of territory or, perhaps, a failure to punish, when no economic loss has occurred.⁵⁷

Satisfaction, the third form of reparation, is often associated with such non-material injuries.⁵⁸ Satisfaction is not used only in moral or political injury cases. Nor is it used to the exclusion of other forms of reparation in such cases.⁵⁹ The forms of satisfaction may include formal apology or declaration of responsibility, guarantees against repetition, punishment of individual actors, and other measures fashioned appropriately to the facts.⁶⁰ And, as Brownlie logically suggests, pecuniary awards predominantly designed to express apology are properly viewed as cases of satisfaction rather than compensation in the strict sense.⁶¹

Another obvious obligation relating to responsibility rarely receives specific mention in the literature: the duty to stop the conduct constituting a breach of obligation. As Riphagen, writing as a Special Rapporteur to the I.L.C., submits, "It does not seem relevant whether one considers this duty as a consequence of the continuing 'validity' or 'force' of the primary obligation or as a duty which arises as a consequence of the breach."⁶² Nor, if defined as a consequential obligation, does it matter whether the duty is viewed as subsumed in the notion of *restitutio in*

in [1983] Y.B. INT'L L. COMM'N 3, 7 (part 1), U.N. Doc. A/CN.4/SER.A/1983/Add.1 (part 1) (arguing that "proportionality" exists between, on the one hand, the source, content, and purpose of an obligation, and the circumstances of individual cases in which an internationally wrongful act has been committed, and, on the other hand, the legal consequences flowing from the breach of the obligation); *infra* note 64 and accompanying text.

56. I. BROWNLIE, *supra* note 1, at 199.

57. See 1 M. WHITEMAN, *supra* note 18, at 42-44.

58. See, e.g., García-Amador, *International Responsibility: Sixth Report*, U.N. Doc. A/CN.4/124 & Add.1 (1961), reprinted in [1961] 2 Y.B. INT'L COMM'N 1, 19-20, U.N. Doc. A/CN.4/Ser.A/1961/Add.1.

59. See, e.g., *I'm Alone Case* (Can. v. U.S.), 3 R. Int'l Arb. Awards 1609 (1933 & 1935) 1 M. WHITEMAN, *supra* note 18, at 155 (both apology and cash award recommended as "material amends" for wrongful sinking of vessel); I. BROWNLIE, *supra* note 2, 460-61.

60. For discussion of the nature of satisfaction, see I. BROWNLIE, *supra* note 1, at 208-09; 1 G. SCHWARZENBERGER, *supra* note 48, at 658-59; de Aréchaga, *supra* note 5, at § 9.23; Riphagen, *supra* note 7, 89-91, 98-99.

61. I. BROWNLIE, *supra* note 2, at 459; I. BROWNLIE, *supra* note 1, at 223. Thus, an affront to territory, with no further material consequences, might yield an apology payment properly denominated "satisfaction." Payments arising out of a failure to punish present a more difficult case because of the differing perspectives on the character of the "injury" caused. See *supra* note 18.

62. Riphagen, *supra* note 7, at 87.

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integrum or as an independent remedy. Without question, a state in a position of responsibility must cease its violative conduct.⁶³

The selection of the appropriate form of reparation in a particular case, of course, depends on the facts, i.e., the specific nature of the breach and its consequences.⁶⁴ This article does not consider the manner in which the suitable measure or type of reparation is determined. Rather, the concern is with how circumstances of multiple state responsibility affect the determination of reparation.

With respect to all forms of reparation other than pecuniary compensation, the circumstances of multiple state responsibility should exert no effect on the determination of reparation. Consider the example of an attack by representatives of state A on the diplomatic mission of state B in the territory of state C. Assume that official documents are stolen, hostages are taken, and state C has failed to exercise due diligence to prevent the attack. The analysis of the appropriate forms of reparation, other than compensation, due to state B from states A and C is the same whether the assertion is of single or multiple responsibility. As to state A, in either procedural posture the initial duty is to cease the wrongful conduct—to release the hostages and return the documents. Application of the principle of *restitutio in integrum* also, of course, could lead to the duty of restoration. Appropriate measures of satisfaction, including perhaps formal apology and a token payment to support such apology, could also be required. The analysis with respect to state C is similar. If one views the breach of obligation as a general failure to provide adequate protection to diplomats, state C must cease the violative conduct by providing due protection. In any event, satisfaction might be demanded in the form of an apology, token payment, and perhaps a guarantee of future protection. The measures of noncompensatory reparation required of each breaching state may be determined independently in a multiple responsibility situation.

Compensation, on the other hand, requires consideration of the circumstances of multiple state responsibility. By definition, a principal ob-

63. See also *International Law Commission Summary Records of the Thirty-third Session*, [1981] 1 Y.B. INT'L L. COMM'N 136, 137, U.N. Doc. A/CN.4/SER.A/1981 (comments of Mr. Pinto) [hereinafter *1981 Summary Records*]. The essence of the I.L.C. approach toward international liability, see *supra* note 4, may be that freedom of action requires that certain "lawful" injury-producing activities be allowed to continue as long as compensation is paid. "Wrongfulness," the touchstone of state responsibility, however, traditionally has connoted prohibition of injury. See B. SMITH, *supra* note 14, at 122.

64. See Riphagen, *supra* note 55, at 7; Riphagen, *supra* note 7, at 88-89, 93; *supra* notes 49-61 and accompanying text. The consequences of wrongfulness and state responsibility need not invariably lead to a rule of prohibition of wrongful injury. See B. SMITH, *supra* note 14, at 122-23; *1981 Summary Records*, *supra* note 63, at 251 (comments of Mr. Aldrich).

jective of compensation is to make whole the state that has experienced loss. The aggregate compensation received by the injured state ought not exceed the measure of that loss, even when the conduct of more than one state bears a causal connection to the injury.⁶⁵ Compensation also ought not result in the unjust enrichment of victim states.⁶⁶ But how is the burden of compensation to be borne? Will one state be jointly and severally liable to the injured state? It is to this rather unexplored territory that the discussion now turns.

III. Joint and Several Liability: State Practice

Examples of state practice in the area of multiple state responsibility, although few, are nonetheless highly instructive. The *Samoan Claims* arbitration, for example, represents implicit support for the general conclusion that joint enterprises that cause injury share responsibility for compensation.⁶⁷ In particular, the tribunal assigned responsibility to the United States and the United Kingdom in settlement of claims for injuries to German citizens resulting from joint U.S.-U.K. military activities in Samoa at the turn of the century. Although the tribunal reached no final decision with respect to the allocation or sharing of responsibility,⁶⁸ the two states subsequently agreed each to pay one-half of the sums found to be owed to the subjects of other states, and each to assume sole responsibility for injuries to its own citizens.⁶⁹

The issue of joint and several liability of states has been discussed in a few more recent cases and arbitral decisions. Although these cases support the proposition that multiple responsibility may exist, they generally have reached results that did not demand a decision on whether one of several breaching states would be responsible for the full amount of the damages. In *Anglo Chinese Shipping Co. v. United States*, for example, a Hong Kong corporation asserted a claim against the United States for the use of a vessel seized by Japan during World War II and retained

65. See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 I.C.J. 174, 186; *Chorzów Factory Case (Merits)* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 49; García-Amador, *supra* note 58, at 43-44.

66. See *Cook Case (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 213, 217 (1927) (Van Volenhoven, concurring); *Fabiani Case (Fr. v. Venez.)* (1896), *quoted in* 3 M. WHITEMAN, *supra* note 55, at 1786; García-Amador, *supra* note 58, at 44; *cf.* *Chorzów Factory Case (Merits)* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 31.

67. *Samoan Claims Arbitration (Germ. v. U.S. & U.K.)*, 9 R. Int'l Arb. Awards 15 (1902); see 3 M. WHITEMAN, *supra* note 55, at 1778-81.

68. The arbitrator "reserv[ed] for a future Decision the question as to the extent to which the two Governments, or each of them, may be considered responsible" for the losses. 9 R. Int'l Arb. Awards at 27. The reserved question was never decided.

69. See Penfield, *The Settlement of the Samoan Cases*, 7 AM. J. INT'L L. 767, 770 (1913).

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until 1950 by order of the Allied forces occupying Japan.⁷⁰ The U.S. Court of Claims denied the claim, holding that Japan retained “possession” of the vessel at all times, notwithstanding the ultimate authority of the Allies over the use and disposition of the vessel.⁷¹ But the Court also noted in *dictum* that the United States could not, in any event, be deemed solely responsible for Allied conduct:

The occupation of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; and whatever benefit the occupying powers derived from the use of plaintiff’s vessel in the laying and repairing of submarine cables was derived by all of them in common and not by any one more than another.⁷²

Hence, implicit in the Court’s decision is the notion that responsibility for the conduct of the several states acting in concert would be multiple and shared. Although the Court went on to note the uniform municipal rule of joint and several liability, it found no need to decide “whether this rule should be applied to sovereign nations engaged in a joint enterprise.”⁷³

Assertions of joint and several liability have been made in other cases. In the *Case of the Treatment in Hungary of Aircraft and Crew of United States of America*,⁷⁴ the United States asserted joint and several responsibility in its separate pleadings against Hungary and the Soviet Union before the International Court of Justice. The United States demanded from each state the full measure of damages arising out of the alleged cooperation of Hungary and the Soviet Union in the interception and detention of a U.S. military plane and its crew.⁷⁵ The claimant in

70. *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. 553 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955).

71. *Id.* at 557. One may make a credible argument that this case provides an example of a case in which responsibility was denied because a more “blameworthy” party was not before the court. In fact, however, both the defendant and the third party might properly have been deemed responsible. See generally *infra* notes 92-93 and accompanying text.

72. 127 F. Supp. at 554.

73. *Id.* at 557. In subsequent U.S. cases involving claims for money damages against the United States when the United States allegedly had contributed with other governments to cause injury, plaintiffs have pursued claims under U.S. law. Thus, in a number of takings cases, U.S. courts have held that, if the United States has a “sufficiently direct and substantial” involvement with the injury-causing activity of another state, a taking has occurred under U.S. law and the United States is liable. See, e.g., *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985) (citing, *inter alia*, *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), and *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. 553 (Ct. Cl. 1955), in support of this proposition). No consideration has been given explicitly to international law. See, e.g., *id.* at 1573.

74. (*U.S. v. Hung.*), 1954 I.C.J. 99 (Order of July 12, 1954); (*U.S. v. U.S.S.R.*), 1954 I.C.J. 103 (Order of July 12, 1954).

75. Application Instituting Proceedings Against the Hungarian People’s Republic (*U.S. v. Hung.*), 1954 I.C.J. Pleadings (Treatment in Hungary of Aircraft and Crew of United States of America) 8-10, 38-39 (Feb. 16, 1954); Application Instituting Proceedings Against the Union

Westland Helicopters Ltd. v. Arab Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt & Arab British Helicopter Co., a recent multiparty arbitration involving breach of contract claims, similarly alleged that the states named were jointly and severally liable.⁷⁶

The most fertile area of state practice on the subject of multiple party compensation in cases of concerted activity relates to activities in outer space. Specifically, the 1972 Convention on International Liability for Damage Caused by Space Objects⁷⁷ sets forth concrete provisions regarding multiple responsibility. Article V of the Convention provides that the states jointly participating in the launch of a space object "shall be jointly and severally liable for any damage caused."⁷⁸ States deemed to be jointly participating in a launch include states engaging in or procuring a launch and states from whose territory or facility the launch occurs.⁷⁹ A right of contribution among the launching states is then established: "A launching state which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching."⁸⁰ Prior to the Convention, there was substantial discourse in the literature as to whether the state from whose territory an object is launched or the state whose facility is used for launching ought to share the full burden of joint and several responsibility.⁸¹ Debate on

of Soviet Socialist Republics (*U.S. v. U.S.S.R.*), 1954 I.C.J. Pleadings (Treatment in Hungary of Aircraft Crew of United States of America) 42, 43-44, 58-59 (Feb. 16, 1954). The Court dismissed the proceedings because neither Hungary nor the Soviet Union had consented to the Court's jurisdiction. Treatment in Hungary of Aircraft and Crew of United States of America (*U.S. v. Hung.*) 1954 I.C.J. 99, 101 (Order of July 12, 1954); Treatment in Hungary of Aircraft and Crew of United States of America (*U.S. v. U.S.S.R.*), 1954 I.C.J. 103, 105 (Order of July 12, 1954).

76. (Interim Award on Jurisdiction, Mar. 5, 1984), reprinted in 23 I.L.M. 1071, 1074-75 (1984). Although the parties agreed to conduct the arbitration under Swiss law, it is possible that Swiss law would look to international law to determine whether joint and several liability applied to States. See generally Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U.L. REV. 929 (1986).

77. Space Objects Convention, *supra* note 44.

78. *Id.* art. V(1). For similar liability rules in analogous contexts, see article 4 of the International Maritime Organization's recent Draft Convention on Liability and Compensation in Connexion with the Carriage of Noxious and Hazardous Substances by Sea, I.M.O. Doc. LEG/CONF.6/3 (Jan. 13, 1984), reprinted in 23 I.L.M. 150, 153 (1984) (joint and several liability of shipowners when damage not reasonably separable) [hereinafter Draft I.M.O. Convention], and article 3(5) of the European Convention on Products Liability in Regard to Personal Injury and Death (Council of Europe), opened for signature Jan. 27, 1977, reprinted in 16 I.L.M. 7, 8 (1977) (several liability for defective products).

79. Space Objects Convention, *supra* note 44, arts. I(c), V(3).

80. *Id.* art. V(2).

81. See, e.g., C. JENKS, SPACE LAW 283-85 (1965); M. MCDUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 613-20 (1963); J-D. THÉRAULAZ, DROIT DE L'ÉSPACE ET RESPONSABILITÉ 264-69 (1971); Malik, *Liability for Damage Caused by Space Activities*, 6 INDIAN J. INT'L L. 335, 348-53 (1966). Article 7 of the Treaty on Principles

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the subject continued throughout the course of the Convention proceedings, with several states proposing variations on the theme of subsidiary or secondary liability.⁸² The final text of the Convention, however, reflects the view that although participating states may choose to apportion liability unevenly by *inter se* agreement, joint and several liability is appropriate for the protection of the injured state.⁸³ Article V(2) reads:

The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.⁸⁴

The Space Objects Convention also embraces joint and several liability with respect to compensation by independent wrongdoers. Article IV provides that a third party injured as a consequence of the collision of two space objects may claim compensation for the total injury from any or all of the "launching States" of either space object.⁸⁵ One distinctive characteristic of the regime is that, vis-à-vis an injured third party, the launching states of space objects are categorically deemed responsible.

Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 18 U.S.T. 2410, 2415, T.I.A.S. No. 6347, at 6, 610 U.N.T.S. 205, 209, imposed liability on four categories of states (launching states, states procuring launchings, states from whose territory an object is launched, and states whose facility is used for launching), but failed explicitly to refer to the nature of the "shared" liability. *See also Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, G.A. Res. 1962 (XVIII), art. 8 (1963), *reprinted in* 9 UNITED NATIONS RESOLUTIONS 205, 205-06 (D. Djonovich ed. 1974) (joint and several liability not specified as a consequence).

82. For discussion of the debate on joint and several liability, see sources cited in Cheng, *International Liability for Damage Caused by Space Objects*, in 1 *MANUAL ON SPACE LAW* 83, 120 n.226 (N. Jasentuliyana & R. Lee eds. 1979); Foster, *The Convention on International Liability for Damage Caused by Space Objects*, 10 *CAN. Y.B. INT'L L.* 137, 163 n.84 (1972). Many proposals suggested that the state from whose territory the object was launched should be liable only if the states launching or procuring the launch are not parties to the treaty. *See, e.g.*, Proposal Concerning the State Responsible and Joint and Several Responsibility, U.N. Doc. A/AC.105/C.2/L.36, 10 June 1968 (France); Proposal, U.N. Doc. A/AC.105/C.2/L.39, 12 June 1968 (Australia). In the International Maritime Organization's recent Draft Hazardous Substances Carriage Convention a regime of subsidiary liability is presupposed for shippers: shippers may be jointly and severally liable among themselves, but only if a shipowner is unable or not required to pay full compensation. *See* Draft I.M.O. Convention, *supra* note 78, art. 7.

83. *See* N. MATTE, *AEROSPACE LAW: FROM SCIENTIFIC EXPLORATION TO COMMERCIAL UTILIZATION* 162 (1977); Wiewiorowska, *Some Problems of State Responsibility in Outer Space Law*, 7 *J. SPACE L.* 23, 29-30 (1979).

84. Space Objects Convention, *supra* note 44, art. V(2). This provision tracks the municipal model of compensation obligations in the context of concerted activities. *See infra* notes 118-122, 135-36, 148 and accompanying text.

85. Space Objects Convention, *supra* note 44, art. IV; *see* Cheng, *supra* note 82, at 121-22; Foster, *supra* note 82, at 167-68.

Even if one launching state is responsible and exclusively at fault, another launching state would be liable to the injured third state for the entire amount of compensation.⁸⁶ As between the two launching states, the Convention adopts a regime of contribution based on comparative fault. "[T]he burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them."⁸⁷

The issue of joint and several liability may arise when only one of two or more states that has caused an injury is before a court or arbitral tribunal. The compensatory obligations of one member of such an enterprise, in an action against only that member, are unaffected by another state's complicity. Brownlie, commenting on the *Corfu Channel* case,⁸⁸ notes that, in imposing liability on Albania, the International Court of Justice was "untroubled by the possibility that another State [Yugoslavia, acting in concert with Albania, according to British submissions] had laid the mines in Albanian waters."⁸⁹ Given the Court's conclusions that (1) the authors of the mine laying were unknown and (2) Albania's breach was in knowingly allowing its territory to be used to harm other states, the decision may point to several liability among *independent* wrongdoers for the entire amount of compensation.

Joint and several liability of course will not be imposed in a multiple state situation if only one state is in fact responsible for an injury. In "transferred servant" cases, for example, in which officials of one state have acted wrongfully under the complete direction and authority of a second state to which the officials were "loaned," the second state has been deemed solely responsible. Ago describes the governing principle in such cases as follows: "[A]n act or omission committed by the organ of one State in the performance of functions on behalf of another State, in whose interests it has been requested to act, must be considered at the international level as an act of that other State."⁹⁰ Similarly, in

86. Absolute (no-fault) liability governs compensation for damage on the earth's surface or to aircraft. Space Objects Convention, *supra* note 44, art. IV(1)(a). Fault on the part of at least one of the colliding objects is a prerequisite to liability for damage to other space objects. *Id.* art. IV(1)(b).

87. *Id.* art. IV(2). Fawcett states that the responsibility of constituent member states for the wrongful conduct of international organizations—a topic beyond the scope of this article—depends on the specific "constitutive instrument." J. FAWCETT, *INTERNATIONAL LAW AND THE USES OF OUTER SPACE* 46 (1968).

88. *Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. 4.

89. I. BROWNLIE, *supra* note 2, at 456.

90. Ago, *supra* note 25, at 269.

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“dependent state” cases, the dependent state typically has been exonerated without even an acknowledgment of the possibility of multiple responsibility. Thus, Ago states, “[W]henver a State has been held indirectly responsible for the act of another State, the former has always been required to answer *in place* of the second and not *in parallel* with it.”⁹¹ Although multiple state responsibility may exist and joint and several liability could be a consequence in dependent states cases—if, for example, a dependent state retains freedom of action⁹²—claims typically have not been pressed against all possible wrongdoing states in such cases.⁹³

International practice also indicates that a state’s liability will be equitably adjusted if non-state actions have contributed to an injury. When multiple independent causes have led to divisible damage and the portion of the damage for which a particular state is responsible is evident, the state will be liable only for that portion.⁹⁴ In addition, when multiple independent causes have contributed to an undifferentiated total damage, when only one of the causes appears to have been the illicit acts of a state, and when the state’s actions alone did not cause the full damage, international tribunals have not held the breaching state liable for the full damage.⁹⁵ Although the United States was required to pay compensation for damage caused by a crew on shore leave in the *Zafiro* case, for example, interest was disallowed based on a finding that a portion of

91. Ago, *Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318 & Add.1-4 (1979), reprinted in [1979] 2 Y.B. INT’L L. COMM’N 3, 26 (part 1), U.N. Doc. A/CN.4/SER.A/1979/Add.1 (part 1) (emphasis in original).

92. “La logique et l’équité exigeraient que les États qui se trouve dans [une] situation dépendante ne fussent responsables de leurs actes à l’égard des gouvernements étrangers qu’en proportion de leur liberté d’action.” 1 F. DE MARTENS, TRAITÉ DE DROIT INTERNATIONAL 379 (A. Léo trans. 1883); see *Chevreau Case* (Fr. v. U.K.), 2 R. Int’l Arb. Awards 1113 (1931); *R.E. Brown Case*, 6 R. Int’l Arb. Awards 120 (1923); *Prince Sliman Bey v. Minister for Foreign Affairs*, [1959] D. JUR. 357 (Trib. admin. Paris 1959), translated in 28 Int’l L. Rep. 79 (1963); see also 1979 I.L.C. Report, supra note 4, at 105 (“[T]he attribution of international responsibility for a State which has the power of direction or control over a certain area of the activities of another State or which has coerced another State into committing a wrongful act should not automatically preclude the responsibility of the State subject to that power or coercion.”).

93. See *Restitution of Household Effects Belonging to Jews Deported from Hungary* (Germany) Case (Berlin Ct. App. 1965), translated in 44 Int’l L. Rep. 301 (1972) (Germany exonerated though clearly a co-participant and catalyst to Hungarian conduct because Hungary was more responsible); I. BROWNLIE, supra note 1, at 187-88.

94. See *Alliance Case* (U.S. v. Venez.), 9 R. Int’l Arb. Awards 140, 143 (1903) (damages for physical harm to vessel attributable to storm, and damages for detention of vessel attributable to wrongfully detaining state).

95. For discussion of such “complementary” or concurrent causes, each of which causes a part of the damage, see B. BOLLECKER-STERN, supra note 5, at 281-85.

claimed looting damage was caused by unidentified wrongdoers.⁹⁶ Compensation in the *Martini* case was also reduced to a fraction of the total damages experienced by a foreign company during the Venezuelan civil war.⁹⁷ In that case, two independent causes, the acts of revolutionaries and the fact of a condition of war, combined with the state's wrongs to produce the injury.

Cases in which damage awards have been reduced because the injured state contributed to its own injury illustrate an important final point. International tribunals have long engaged in precisely the type of analysis of relative or proportional responsibility essential to any regime contemplating several liability or a right of contribution. As Judge Azevedo noted in dissent in the *Corfu Channel* case, for example, when the injured state contributes to the occurrence of its own injury, "the conduct of the victim can be taken into account by reducing the degree of responsibility [of the offending state] and consequently apportioning the damages."⁹⁸ Although certain earlier international decisions reflected an older, common law view denying any responsibility in the event of a contribution by the injured party,⁹⁹ many more recent examples in international judicial practice demonstrate acceptance of the principle of comparative apportionment of compensation in circumstances of contributory conduct.¹⁰⁰ The apportionment, and in earlier cases the denial, of compensation generally reflects an analysis of relative causation.¹⁰¹ There are cases, however, in which the compensation appears to be apportioned on the basis of relative "blameworthiness" in a broad, moral sense. Thus, Whiteman

96. *Earnshaw & Others Case (Zafiro Case)* (U.K. v. U.S.), 6 R. Int'l Arb. Awards 160, 164-65 (1925).

97. *Martini Case* (Italy v. Venez.), 10 R. Int'l Arb. Awards 644, 666-68 (1930); *accord Petrocelli Case* (Italy v. Venez.), 10 R. Int'l Arb. Awards 591, 592 (1903).

98. *Corfu Channel Case (Merits)* (U.K. v. Alb.), 1949 I.C.J. 4, 95 (Azevedo, J., dissenting).

99. See 1 M. WHITEMAN, *supra* note 18, at 217; see also B. BOLLECKER-STERN, *supra* note 5, at 341-42 (arguing that if injury is caused by the combination of the conduct of the injured victim and another state, there is no liability).

100. See J. PERSONNAZ, *supra* note 48, at 107; 1 G. SCHWARZENBERGER, *supra* note 48, at 662-63; de Aréchaga, *supra* note 5, § 9.19, at 569; García-Amador, *supra* note 58, at 44.

In municipal practice, the dominant trend is toward comparative apportionment. See J. HAZARD, W. BUTLER & P. MAGGS, *THE SOVIET LEGAL SYSTEM* 456, 461, 466 (3d ed. 1977); 1 F. LAWSON & B. MARKESINIS, *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* 131-34 (1982); G. WILLIAMS, *supra* note 12, § 63, at 256-59; SALMOND AND HEUSTON ON THE LAW OF TORT § 197 (R. Heuston & R. Chambers 18th ed. 1981); PROSSER AND KEETON ON TORTS, *supra* note 12, § 67, at 471. As in the context of *inter se* contribution among wrongdoers, see *infra* note 135, municipal practice as to the basis upon which comparative fault is to be determined—causation versus blameworthiness—remains inconsistent. See Weir, *Complex Liabilities*, 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pt. 2, ch. 12, § 86 (A. Tunc ed. 1983).

101. See, e.g., B. BOLLECKER-STERN, *supra* note 5, at 317-44; 1 M. WHITEMAN, *supra* note 18, at 216-22.

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notes that compensation in arrest, detention, and imprisonment cases is “influenced considerably by the conduct of the claimant.”¹⁰² In the *Garcia and Garza* case, for example, the measure of compensation awarded for the unjustified shooting by U.S. officials of a Mexican national illegally crossing the border was expressly reduced due to the knowingly wrongful character of the victim’s conduct.¹⁰³ Similarly, the “imprudent” conduct of Americans’ firing into the air for fun led the *Kling* case tribunal to mitigate the damages otherwise payable for the wrongful shooting of one of the Americans by Mexican troops.¹⁰⁴ Such recourse to relative blame appears consistent with the undisputed submission of Great Britain in the 1872 *Alabama Claims* arbitration (U.S. v. U.K.) “that the arbitrators should . . . take into account not only the loss incurred but the greater or less gravity of the default itself.”¹⁰⁵ In summary, as Schwarzenberger states, “In establishing the amount of compensation, international judicial institutions admit more freely than in discharging other functions of a similar kind the equitable character of their jurisdiction.”¹⁰⁶ Tribunals deciding international cases possess the discretion, capacity, and relevant experience to allocate the burden of compensation among multiple responsible states.

IV. Joint and Several Liability: Municipal Practice

A. *The Relevance of Municipal Practice*

An analysis of the response of municipal legal systems to multiple party responsibility for harm occasioned by wrongful conduct can assist in the identification and development of international rules to govern the consequences of multiple state responsibility. To the extent that municipal rules exhibit characteristics of “general principles of law recognized by civilized nations,” they may serve as a source of international law.¹⁰⁷ Cheng states that general principles of law are not “specific rules formulated for practical purposes, but . . . general propositions underlying the various rules of law which express the essential qualities of juridical truth itself.”¹⁰⁸ If a rule of joint and several liability does not constitute a

102. 1 M. WHITEMAN, *supra* note 18, at 375.

103. *Garcia & Garza Case (Mex. v. U.S.)*, 4 R. Int’l Arb. Awards 119, 123 (1926).

104. *Kling Case (U.S. v. Mex.)*, 4 R. Int’l Arb. Awards 575, 585 (1930) (Alfaro, Arb., concurring).

105. 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 623 (1898).

106. 1 G. SCHWARZENBERGER, *supra* note 48, at 661 (footnote omitted).

107. Statute of the International Court of Justice, art. 38(1)(c), 59 Stat. 1055, 1060; see Mosler, *General Principles of Law*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 89 (1984); cf. C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 83-91 (1965).

108. B. CHENG, *supra* note 48, at 24.

"general proposition" rising to the level of a general principle, it nevertheless may constitute a component or subsidiary rule of the accepted general principle of law recognizing full reparation for injury.¹⁰⁹

Even if municipal legal rules are not general principles of law, such rules may provide analogies useful for the progressive development of international law.¹¹⁰ According to de Visscher, the process of using municipal law to develop or elucidate international law "is never a pure and simple transfer of elements of municipal law into international law," but instead involves "identifying in their convergence a principle derived from common social necessity."¹¹¹ Consequently, "what is decisive is not the external similarity of the institutions or rules that are being compared . . . [but] rather the underlying principle that is common to them and explains them."¹¹² International and municipal law appear to share such identical underlying principles in the area of allocating compensation obligations: to make the injured party whole through pecuniary compensation for loss, and to channel the cost or burden of the injury to its author in order to deter repetition.¹¹³

Two additional factors may make municipal analogies particularly relevant to an analysis of multiple state responsibility. First, municipal law on the subject of multiple party liability has been developed in the private law context. As Lauterpacht observes, municipal private law belongs to the same "genus" as international public law: each "regulates the relations of legal entities in a state of co-ordination," as distinct from that of subordination.¹¹⁴ Reference to municipal systems, as a source of either general principles of law or relevant analogies, may therefore prove especially helpful in evaluating the consequences in international law of multiple state responsibility.¹¹⁵ Second, international law and literature reveal the absence of a significant body of state practice or established principles concerning the consequences of multiple state responsibility.

109. *Id.* at 233-40; *see supra* text accompanying note 48

110. *See* F. VALI, *SERVITUDES OF INTERNATIONAL LAW: A STUDY OF FOREIGN TERRITORY* 51 (2d ed. 1958).

111. C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 400 (P. Corbett trans. rev. ed. 1968).

112. *Id.*

113. *See supra* text accompanying note 48; *infra* text accompanying notes 138-39.

114. H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* § 34, at 81 (1927).

115. *See* H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 66, 77-79 (1933). *But see* I. BROWNLIE, *supra* note 2, at 456 (stating that municipal analogies are "unhelpful" in the context of multiple responsibility). *See also* Gray, *supra* note 48, at 46-47 (suggesting that it may not be possible "to evolve a set of general rules [about remedies] applicable in all cases and specific enough to give guidance" and that recourse either to a *particular* municipal system for guidance or to a "case by case approach" may be "inevitable").

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When addressing the issue of the consequences of multiple state responsibility, recourse to municipal law would, therefore, not threaten any established international norm.

B. *Content of Municipal Rules*

At the most basic level, all municipal systems approach multiple party responsibility as a juridical fact and possess substantive and procedural regimes designed specifically to manage such situations.¹¹⁶ The issue of the consequences of multiple responsibility is a subset of the more general problem of concurrent claims. This article focuses on the municipal law of concurrent claims in which a victim has claims against two or more different responsible persons, rather than on the situation in which a victim has or may have two or more claims for compensation against the same person.¹¹⁷

The treatment of multiple responsibility in municipal systems is remarkably consistent. As Weir states,

It is the very general rule that if a tortfeasor's behavior is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause.¹¹⁸

This rule is firmly established with respect to wrongdoers engaged in concerted conduct. Joint tortfeasors are, in both the common and civil law tradition, uniformly held to be jointly and severally liable; a claim may be made for the entire amount of compensation due the injured party against any or all of the joint participants in an injurious act.¹¹⁹

The same general rule of joint and several liability applies to wrongdoers acting independently with respect to a single event. If the harm occasioned by the conduct of an independent wrongdoer may be separately identified, the measure of each wrongdoer's responsibility will be limited to compensation for the specific harm caused. If, however, the injury is

116. See P. JAMES & D. BROWN, *supra* note 12, at 23-24, 349-73; PROSSER AND KEETON ON TORTS, *supra* note 12, §§ 46-52; G. WILLIAMS, *supra* note 12; Weir, *supra* note 100, §§ 79-104.

117. See Weir, *supra* note 100, §§ 1, 79-104.

118. *Id.* § 79. One can compare tort law with those portions of contract law that involve claims for compensation. Weir notes that references to "tortfeasors" generally "include those liable for breaches of contract." *Id.* § 78. Commentators have identified four traditional circumstances of joint and several liability in U.S. tort law. These include cases of concerted conduct, cases involving independent wrongdoers producing an indivisible injury, situations in which multiple parties failed to perform a common duty owed to the plaintiff, and situations in which a master has been found vicariously liable along with the master's agent. Note, *Recent Developments in Joint & Several Liability*, 24 SYRACUSE L. REV. 1319, 1319-25 (1973).

119. See PROSSER AND KEETON ON TORTS, *supra* note 12, § 46; G. WILLIAMS, *supra* note 12, § 2; Weir, *supra* note 100, § 84.

not so divisible, both common and civil law systems deem the contributing independent tortfeasors severally liable to the injured party for the entire amount of compensation due.¹²⁰ Prosser and Keeton summarize:

Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant has been a cause in fact, it is likely that the apportionment will be made. Where no such basis can be found, the courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.¹²¹

Joint and several liability is also the general rule in cases of indivisible harm, even if the actions of one defendant acting alone would not have caused the entire harm.¹²²

Non-Western legal systems also accept joint and several liability. The Soviet Union, for example, accepts the principle of joint and several liability in order to compensate victims and to deter future tortious conduct by exerting an "educational influence on the violator."¹²³ Article 455 of the 1984 revision of the Soviet Civil Code states, "Persons who jointly cause harm shall bear joint liability to the victim."¹²⁴ Under Soviet law, joint causation exists where the "loss is the inseparable result of the actions of two or more persons," and "it is not necessary to show that the persons conspired to perform the wrongful act or that each person knew of the other's act or even that their acts were performed at the same time."¹²⁵ In one early case, for example, the owner of an enterprise and his contractor each violated safety rules that resulted in injury to a

120. See G. WILLIAMS, *supra* note 12, §§ 1-2; ONRECHTMATIGE DAAD [Tortious Acts] §§ 312-313 (1982) (Dutch law); Weir, *supra* note 100, § 79 (citing commentators, along with statutes and cases, from Argentina, Brazil, Germany, Hungary, Ireland, Italy, Mexico, Poland, Saskatchewan, Sweden, Switzerland, and the United Kingdom).

121. PROSSER AND KEETON ON TORTS, *supra* note 12, § 52; *accord* Weir, *supra* note 100, § 83.

122. See Weir, *supra* note 100, § 85. *But see* 1 CIVIL CODE 394-95 (H. Emami ed. 1959) (under Shi'ite Islamic law, an injured party can recover only a proportion of his damages from each of multiple tortfeasors if the actions of each tortfeasor were not a sufficient cause of the entire harm).

123. Krasavchikov, *Concept of the Obligation to Compensate Harm*, in 2 SOVETSKOE GRAZHDANSKOE PRAVO 363 (O. Krasavchikov ed. 1969), *quoted in* J. HAZARD, W. BUTLER & P. MAGGS, *supra* note 100, at 441, 442.

124. *Quoted in* J. HAZARD, W. BUTLER & P. MAGGS, *supra* note 100, at 441. Joint and several liability also existed under article 455's predecessor—article 408 of the Civil Code.

125. E. FLEISHITS & O. IOFFE, KOMMENTARII K GRAZHDANSKOMY KODEKSY R.S.F.S.R. [Commentary on the Civil Code of the R.S.F.S.R.] 678-79 (2d rev. ed. 1970), *translated in* Osakwe, *An Examination of the Modern Soviet Law of Torts*, 54 TUL. L. REV. 1, 61 (1979); *see also* Protocol No. 2 of the Conference of the Members of the GKK, Feb. 4, 1927 [Svdebniaia Praktika (Court Practice) 1927 No. 7, p. 21], *quoted in* Holman & Spinner, *Bases of Liability for Tortious Injury in Soviet Law*, 22 IOWA L. REV. 1, 28 (1936).

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worker; the owner and contractor were found jointly and severally liable.¹²⁶ Although social insurance and public health legislation currently protect accident victims in the Soviet Union, tort law remains important in two circumstances. First, a "still significant portion of the population" is not fully covered by social insurance, and such individuals can recover for personal injuries under general tort law provisions.¹²⁷ Second, the social insurance agency that pays benefits may sue the tortfeasor for recoupment of its payments as the subrogee of the rights of the victim.¹²⁸

The Shi'ite branch of Islamic law also recognizes joint and several liability to further the goal of victim compensation. The basic rules regarding responsibility and liability in tort derive from the tradition of Mohammed, who said, "There can be no loss or harm without compensation."¹²⁹ Thus, one causing harm or loss must compensate the victim.¹³⁰ In cases of joint responsibility, the Shi'ite branch of Islamic law holds each tortfeasor liable only for his respective portion of the damage if his acts could not have caused the entire harm. Joint and several liability, however, is the rule when a plaintiff's harm is caused by the acts of two tortfeasors, either one of which alone would be sufficient to produce the harm. In such a case, the plaintiff can sue one of the tortfeasors for the entire amount of damages.¹³¹

Municipal law exceptions to the general rule of joint and several liability are few. Admiralty law has not completely accepted joint and several liability. Following the lead suggested by the Brussels Collision Liability Convention of 1910,¹³² virtually all leading maritime states apportion the original liability for property damage suffered by an injured party on the

126. *Ezhenedel'nik Sovetskoy Iustitsii* (The Soviet Law Weekly) 1926 No. 20, quoted in Holman & Spinner, *supra* note 125, at 30-31; see 1 V. GSOVSKI, *SOVIET CIVIL LAW* 530 (1948).

127. J. HAZARD, W. BUTLER & P. MAGGS, *supra* note 100, at 437.

128. *Id.* at 438. For discussion of Soviet tort law, see generally Minan & Morris, *Unraveling an Enigma: An Introduction to Soviet Law and the Soviet Legal System*, 19 *GEO. WASH. J. INT'L L. & ECON.* 1, 28-31 (1985); Osakwe, *supra* note 125.

129. "La Zarara va la Zerara fi al Islam" (translated by Ali Moslehi), *discussed in M. ANSSARI, BOOK OF SALES* 246-50 (1973).

130. Two specific principles in Shi'ite law are the "Etlof," under which a tortfeasor is liable for all harm resulting directly from his conduct, and the "Tashbib," under which a tortfeasor is liable for injury or damage resulting from his indirect action only when he is at fault. For a discussion of the concepts of "Tashib" and "Etlof," see M. AL-HILLI, *SHARA'I AL-ISLAM* 387 (1955).

131. 1 *CIVIL CODE*, *supra* note 122, at 394; conversation with Ali Moslehi, former Dean and Professor, National University of Tehran Law School (Oct. 21, 1987).

132. *Conventions pour l'unification de certaines régles en matière d'abordage et en matière d'assistance et de sauvetage maritimes*, Sept. 23, 1910, art. 4, 7 *MARTENS NOUVEAU RECUEIL* (ser. 3) 711, 719.

basis of comparative fault.¹³³ Even in admiralty, however, joint and several liability is the established practice for personal injuries or death.¹³⁴ In addition, the United States and the United Kingdom, two of the major maritime states, apply joint and several liability to claims by innocent third parties for damage to cargoes¹³⁵ or vessels.¹³⁶ Other exceptions to the joint and several liability rule have been minor and extremely uncommon: partial liability exists, for example, in British Columbia in highway collision cases brought by a guest passenger, in Switzerland in cases where the guardian of a vehicle is strictly liable, and in Colombia in cases brought against owners of a house that collapses.¹³⁷

The theoretical justifications for the general rule of joint and several liability in cases of indivisible harm are straightforward. The primary justification is the general tort law policy of affording "the victim of the harm the maximum possible chance of having his harm properly and fully compensated."¹³⁸ The importance of compensation, in turn, depends primarily on the objective of indemnification of the loss suffered. Compensation may also achieve secondary functions, including "punishment of the wrongdoer, satisfaction for the injured party, declaration of violated rights, deterrence and prevention of enrichment," but such functions are usually just "incidental by-products of indemnification."¹³⁹ A

133. The Brussels Convention rule of no joint and several liability for damage to cargo passed narrowly and has been attributed to a "peculiar accident" of English law. The "accident" was *The "Milan,"* 167 Eng. Rep. 167 (1861), a much criticized decision which held that despite the prevailing rule of joint and several liability, an innocent cargo could recover only half of its damages from the noncarrier in a both-to-blame collision. See Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759, 770-71, 797-98 (1977).

The United States, which is not a party to the Brussels Convention, applied a rule of equal division of damages in cases involving harm to vessels until 1975, when it adopted the approach of apportionment according to comparative fault. See *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); Recent Decision Comment, 16 VA. J. INT'L L. 202 (1975) (authored by John E. Noyes).

134. Weir, *supra* note 100, § 82.

135. See *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935) (innocent cargo owners seeking general average contributions); *The Chattahoochee*, 173 U.S. 540, 542, 549-52 (1899) (innocent cargo owners seeking damages for physical injury); *The "Atlas,"* 93 U.S. 302 (1876) (cargo on innocent third vessel; *in rem* proceeding against one of two at-fault vessels).

136. See *The "Alabama" & The "Game-cock,"* 92 U.S. 695 (1875) (claim by innocent third vessel; decree against two at-fault vessels is for one-half damages each, but libellant can obtain amounts uncollectable from one vessel from the other); *The Cairnbahn*, [1914] P. 25 (C.A.) (claim by innocent third vessel); G. WILLIAMS, *supra* note 12, § 8 (noting a lacuna in U.K. legislation that implements the Brussels Convention, Maritime Conventions Act, 1911, 1 & 2 Geo. 5, ch. 57, § 1, which applies apportionment to third-party claims for cargo damage but allows joint and several liability for claims for damage to innocent vessels or to cargo on board such vessels); Owen, *supra* note 133, at 804-06.

137. See Weir, *supra* note 100, § 82.

138. 1 F. LAWSON & B. MARKESINIS, *supra* note 100, at 126; accord Weir, *supra* note 100, § 79.

139. Stoll, *Consequences of Liability: Remedies*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pt. 2, ch. 8, § 135 (A. Tunc ed. 1983).

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related and often raised statement of the indemnification justification for joint and several liability is the desire to protect the victim from the possible insolvency of one tortfeasor or from the unavailability of one tortfeasor on jurisdictional grounds.¹⁴⁰ Some have criticized the general joint and several liability rule, arguing that a system of partial liability of tortfeasors more fairly weighs and balances the various contributions of multiple tortfeasors to an injury.¹⁴¹ Certainly, as with property damage in admiralty, apportionment could precede compensation; each wrongdoer could be deemed liable to the injured party only to the extent of its ultimate, post-contribution liability under the existing system.¹⁴² Because the system of partial liability would undercut the victim's compensation interests, the world's legal systems have not incorporated it. The victim, Weir states,

would be required, in order to obtain full compensation, to sue all those responsible for every cause of the harm, even when the legislator has made one of them strictly liable.

• • • •

• • • To require the victim to sue all those possibly liable is to go too far, especially if only one of them, by being criminally or strictly liable, offers the victim facilities of procedure or proof.¹⁴³

But does the rule of joint and several liability in municipal legal systems depend upon the availability of a system of contribution, whereby defendants ultimately may adjust their liability among themselves according to relative degrees of fault or causal contribution to the injury?¹⁴⁴ Since contribution claims depend on principles of prevention of unjust enrichment,¹⁴⁵ there appears to be no necessary unity between the compensatory function of tort law and the function of contribution. Furthermore, under common law, a joint tortfeasor burdened with the full claim

140. See Weir, *supra* note 100, § 79. Historical reasons that may have contributed to the acceptance of joint and several liability at common law appear less central than the compensation/indemnification justification. See Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1935) (noting that common law concept of unity of cause of action prevented jury from apportioning damages, and noting the perception that division of damages was impossible).

141. See Weir, *supra* note 100, § 80.

142. See *supra* text accompanying notes 132-33.

143. Weir, *supra* note 100, § 81.

144. The basis of the apportionment among wrongdoers in the contribution context is disputed. Two interpretations have been advocated. Some argue that the share of responsibility should be determined on the basis of relative causation, while others advocate spreading responsibility based on blameworthiness (i.e., fault in its broadest sense). See generally W. ROGERS, *supra* note 12, at 608; SALMOND AND HEUSTON ON THE LAW OF TORTS, *supra* note 100, § 168; G. WILLIAMS, *supra* note 12, § 44, at 157; Weir, *supra* note 100, § 132. "The normal approach is to take into account both fault and causation." *Id.*

145. Weir, *supra* note 100, § 106.

possessed no right to seek contribution from its fellow wrongdoers.¹⁴⁶ Nevertheless, the availability of contribution does make a system of joint and several liability more palatable, and apparently helps to obviate the need for doctrines that would exculpate defendants who are only slightly at fault from liability to an injured plaintiff.¹⁴⁷

No particular scheme of contribution appears necessary for the vitality of joint and several liability in municipal legal systems. Although some form of contribution or indemnity is available in all legal systems,¹⁴⁸ the conditions to its availability vary significantly. For example, in different legal systems, contribution may derive from wide-ranging sources, including subrogation, independent right, or statutory terms. In some systems, contribution may not be available unless a claim has formally been reduced to judgment, or unless all the joint tortfeasors have been named in the complaint or the judgment. In addition, the amount or availability of contribution varies among legal systems when one tortfeasor has settled with the plaintiff.¹⁴⁹

Theoretical criticisms of the doctrine of contribution may have contributed to the absence of uniformity among different municipal legal systems' regimes of contribution. Proponents of an economic analysis of law, who advocate the development of tort rules that minimize the sum of accident, accident avoidance, and administrative costs, have criticized contribution on two grounds: first, that "there is no evidence that contribution is a more efficient rule than no contribution," and, second, that a rule allowing contribution from joint tortfeasors when they are not named in the complaint or judgment "is almost certainly less efficient than no contribution."¹⁵⁰ Others have argued that the strict liability goal of imposing liability on enterprises or institutions best able to "spread the loss" is undercut when an institutional defendant, initially sued alone and jointly and severally liable to an injured victim, can recover contribution from individual tortfeasors who are not good loss spreaders.¹⁵¹

146. See PROSSER AND KEETON ON TORTS, *supra* note 12, § 50.

147. See, e.g., Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1798-99 (1985).

148. "In all systems of law there are some circumstances in which a person who has satisfied a victim's claim may recoup himself from another party who was liable for the same harm and who has been liberated from liability by the payment made." Weir, *supra* note 100, § 105.

149. See, e.g., Weir, *supra* note 100, §§ 109-140.

150. Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 550 (1980).

151. See James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Weir, *supra* note 100, § 107. For discussion of various possible meanings of "spreading the loss," see G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 21 (1970).

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A few recent developments have led to criticisms of the use of joint and several liability in particular situations. For example, Epstein argues that joint and several liability should not be used in complex mass tort cases in which only one of many defendants in fact caused the harm suffered by an individual plaintiff.¹⁵² In such cases a rule of joint and several liability may insufficiently “marry the demand for administrative simplicity with the need to create the right set of incentives upon all actors for controlling harm.”¹⁵³ A rule that limits the liability of joint tortfeasors to a proportionate share of the harm, Epstein argues, could help

minimize the sum of . . . (1) the administrative costs of the rule, and (2) the error costs of the rule, that is the costs of holding someone liable for harms not done, or not holding someone liable for harms he did do, within the substantive constraints imposed by general product liability law.¹⁵⁴

In addition, a few recent “tort reform” statutes in the United States have limited the joint and several liability exposure of defendants in particular fact situations or for noneconomic injury.¹⁵⁵ Such statutes typically have responded to the concern that cities or small businesses may be liable for high damages when they are only slightly at fault and are sued jointly with insolvent individual defendants from whom contribution cannot be obtained.¹⁵⁶

None of the criticisms just mentioned is likely to affect the use of joint and several liability in international law. Examples of multiple state responsibility most likely will arise when only a few states have injured another state; mass tort claims against multiple defendants are the products of complex domestic societies with complex legal procedures. Furthermore, cases of multiple state responsibility are likely to involve situations in which responsible and identifiable states each have injured another state.¹⁵⁷ Finally, the need to limit joint and several liability because of the perception that a responsible state cannot (as opposed to

152. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377 (1985).

153. *Id.* at 1378.

154. *Id.* at 1379. Much of Epstein’s argument also relates to the approach in several mass tort alternative liability cases that allows individual defendants to introduce exculpatory evidence. “The administrative costs of a market share rule with exculpation are greater than the costs of the same rule without exculpation. Similarly, the error rate will be higher when exculpation is allowed than with the pure market share rule.” *Id.* at 1381-82.

155. See, e.g., Fair Responsibility Act of 1986, § 3, CAL. CIV. CODE § 1431.2(a) (West Supp. 1986); D. DOBBS, R. KEETON, D. OWEN & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 1-2 (5th ed. Supp. 1988).

156. See, e.g., *Russell v. Superior Court*, 185 Cal. App. 3d 810, 819-20, 230 Cal. Rptr. 102, 108 (1986).

157. Claims against a set of state actors for damage of indeterminate origin are plausible, however, in the context of international environmental harm.

being unwilling to) pay compensation appears unlikely. To say that certain objections to a rule of joint and several liability in municipal law will not apply in international law, however, is far different from saying that the presence of such a rule in municipal practice supports the existence of a similar rule in international law. The next section explores the prospect of formulating a progressive regime of international law based on the fragments of state practice that do exist, general principles of law, and municipal analogies.

V. A Progressive Regime

A. *A Prefatory Note*

The international rules of compensation for multiple state responsibility are not yet mature. Nonetheless, on the basis of the available international and municipal literature and precedent, one can suggest both the logical contours of such rules and the circumstances in which a progressive regime is most likely to achieve consensus among states. It is important to note in preface, however, two distinct characteristics of the international system—each a corollary of the principles of equality and independence of states—that will affect an analysis of the utility of any municipal analogy, particularly the municipal analogy of joint and several liability.

First, dispute settlement in the international system depends on the will of the states involved. There is no truly compulsory method to obtain a resolution or judgment regarding a claim of responsibility.¹⁵⁸ Even the putative “compulsory jurisdiction” of the International Court of Justice operates only when states have affirmatively expressed their consent to the Court’s jurisdiction, often coupling such consent with reservations and conditions that severely limit the effective scope of the compulsory jurisdiction.¹⁵⁹ The absence of a mandatory process of dispute settlement can affect both injured and breaching states in the multiple responsibility context. The former may find no state or only one state—because of either prior consent to judicial process or simply moral, political, or economic susceptibility—responsive to a claim for compensation. A wrongdoer similarly may find no fellow wrongdoer willing or obligated to entertain a claim for contribution. Such disabilities, unique to the international plane, temper any instinct to adopt municipal principles in a wholesale fashion.

158. See I. BROWNIE, *supra* note 2, at 705.

159. See J. BRIERLY, *THE LAW OF NATIONS* 354-61 (H. Waldock 6th ed. 1963); 1 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 364-421 (1961).

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The second characteristic, somewhat more abstract, relates to the lack of legislative authority in the international legal system. Joint and several liability reflects a municipal policy decision to protect the injured party by imposing upon each wrongdoer an obligation to pay compensation for the entire injury, even for that share of the harm ultimately defined as the responsibility of another party. Nothing inherent in international society would preclude a parallel system. The international community, however, lacks a legislative authority to make such global policy decisions or to dictate rules designed for the collective good. International law remains the product of common perceptions of private good.¹⁶⁰ A principal impediment to the development of effective international law is that states continue to equate any diminution of the prerogatives of "independence" with private detriment.¹⁶¹ An international rule of joint and several liability, by imposing on one state a measure of liability conceptually attributable to another state, certainly would encroach on such independence. This fact impugns neither the logic nor the propriety of joint and several liability, however, since all of international law encroaches on independence. In postulating a rule of joint and several liability, one must simply respect the force of and justify qualifications to the notion of independence.

B. *Contours of the Regime*

Despite the foregoing cautions, joint and several liability, as evident in municipal systems and reflected in international convention, represents an appropriate rule for the international system when states are engaged in a wrongful common enterprise. The objections to burdening one state with the entire measure of due compensation in the context of a concerted action do not outweigh the objective of providing injured states with the greatest opportunity to achieve compensation. Considerations of state "independence" are mitigated in this circumstance; participation in an enterprise to achieve a common benefit renders the correlative costs or consequences of the enterprise common to all wrongdoer participants vis-à-vis an injured state. Moreover, if a regime involving joint and several liability were clearly established, states would expect and implicitly consent to the attendant risks and burdens by entry into the concerted

160. Lasswell argues that the privatism that now dominates the international community will give way to a collective orientation as states increasingly perceive shared values, risks, and characteristics. See Lasswell, *Future Systems of Identity in the World Community*, in 4 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 3, 26 (C. Black & R. Falk eds. 1972).

161. For excellent discussions of the importance and role of the principle of sovereign independence, see C. DE VISSCHER, *supra* note 111, at 89-106; A. LARSON & C. JENKS, *SOVEREIGNTY WITHIN THE LAW* 1-28, 433-71 (1965).

activity. The notion of independence at most suggests the propriety of a right of contribution; each state should ultimately bear only the consequences of its share of the common enterprise. States participating in a common activity have the opportunity to establish a mechanism for "compulsory" dispute settlement through prior *inter se* agreements,¹⁶² and they can establish specific contribution or indemnity obligations representing their own views of the appropriate allocation of risk.¹⁶³ The right to contribution finds support, in any event, in the underlying policy objective of deterrence through channeling costs to the responsible states and in general considerations of fairness and avoidance of unjust enrichment.¹⁶⁴

These factors supporting joint and several liability for participants in common enterprises do not apply when independent actors produce a single harm. By definition, such independent wrongdoers have neither the prior opportunity to establish substantive or procedural rights with respect to the sharing of liability nor the communal benefits and expectations present in the situation of concerted conduct.¹⁶⁵ The relationship of independent wrongdoers is established only by and upon the event of the injury; no pre-existing or even expected linkage exists between the states' conduct. To impose joint and several liability on independent wrongdoers (as is done on the municipal plane), therefore, would require a policy decision that the objectives of securing adequate compensation for injured states outweighs the breaching state's uncertainty of contribution and qualified independence.

If one is persuaded that imposing joint and several liability on independent wrongdoers is unacceptable, municipal admiralty practice in cases of damage to property suggests an alternative to joint and several liability in these circumstances.¹⁶⁶ Following the admiralty model, the obligations of each state to compensate the injured state would be limited

162. For discussion of jurisdiction of a judicial institution based upon an agreement preceding the particular dispute, see *Ambatielos Case (Preliminary Objection) (Greece v. U.K.)*, 1952 I.C.J. 28; 1 S. ROSENNE, *supra* note 159, at 332-35.

163. See *supra* text accompanying notes 80, 87; *infra* note 177 and accompanying text (discussion of Space Objects Convention).

164. See Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189, 1253-54 (1965).

165. The situation of complicity may represent an exception, suggesting that for these purposes complicity perhaps should be treated as a circumstance of "concerted" activity. See *supra* note 13 and accompanying text; see also Note, *supra* note 118, at 1319-25.

An exception, of course, exists when states may anticipate injury arising out of the conjunction of certain independent acts—for example, the placement and operation of space objects—and reach agreement as to the sharing of liability and rights of indemnity. See *supra* text accompanying notes 85-87. In such cases, the same logic applicable to concerted conduct supports the imposition of joint and several liability.

166. See *supra* text accompanying notes 132-36.

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to a proportional share based on fault. This approach has two obvious merits: it avoids the perils of the contribution process,¹⁶⁷ and it satisfies even expansive notions of independence by limiting each state's liability to a share of the harm for which it alone is deemed responsible.

Despite such advantages, a serious inequity arises if an "apportioned liability" approach is adopted to protect the interests of breaching states that have acted independently. The central question is who is to bear the risk of loss arising out of injury: the injured state (through a denial of compensation) or the members of the set of wrongdoers (through lack of contribution)? On both the municipal and international planes the manifest concerns with assuring adequate compensation for injuries combine with concerns of deterrence and corrective justice to suggest that, as between an injured party and any wrongdoer, the burden of loss should fall upon the latter. Hence, a regime of joint and several liability, coupled with a right of contribution, should also be adopted with respect to independent wrongdoers producing a single harm.

Whether allocation of proportional liability among multiple responsible states is made part of a process of contribution or an aspect of a regime of "apportioned liability," one may identify the probable character of such allocation procedures. As in international practice with respect to contributory conduct,¹⁶⁸ apportionment would likely be premised upon causation, blameworthiness, or both, depending upon the facts of the specific case. A number of factors or guidelines inevitably will affect any such apportionment. The character of each state's intent in breaching its international obligation, for example, would affect the decisionmaker's attribution of degrees of fault. Thus, specific intent to cause a wrong would likely be treated more harshly than negligence. Among states engaged in concerted wrongful conduct, the apportionment decision would reflect the character of each state's financial participation, decisionmaking authority, and expected benefit in the enterprise.¹⁶⁹ In addition, in many cases of independent wrongdoers, the measure of each state's legal authority or jurisdiction over the injury-producing conduct—often a shorthand definition of its effective control of an event—will be of paramount importance in apportioning degrees of fault. The inquiry into legal authority and control is perhaps best viewed as an expression of the criterion of causality: the state with the greater

167. See *supra* text accompanying notes 149-51. These perils are exacerbated by the procedural limitations in dispute settlement among states.

168. See *supra* notes 98-106 and accompanying text.

169. See *Goldie*, *supra* note 164, at 1254; see also *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. at 554 (quoted *supra* at text accompanying note 72).

measure of jurisdiction to control conduct is deemed to possess a greater causal connection to the consequences of such conduct.¹⁷⁰ In addition, such apportionment on the basis of authority to control contributes to deterrence by imposing the burden of compensation in proportion to the relative capacities of the states to prevent repetition of the injurious event. Similarly, a state actor would be attributed a greater degree of fault than a state whose responsibility arises out of its failure to prevent the state actor from inflicting the injury. In a situation in which a state organ authors the conduct that directly inflicts injury, as opposed to one in which a state is responsible for a failure of due diligence, a mere exercise of self-control would suffice to prevent the injury.¹⁷¹ In sum, principles of causation and relative fault likely will shape either a regime of several liability or a regime of contribution following joint and several liability.¹⁷²

C. *The Development and Implementation of a Rule of Joint and Several Liability*

Several features of international legal process suggest scenarios in which an international regime of joint and several liability is most likely to be recognized, developed, and implemented in international practice. First, joint and several liability is most likely to be accepted when the action of any one of the breaching states would have caused the harm suffered, and when the fault of the breaching states appears approximately equal. Fixing each state with the entire original compensation obligation presents the least difficulty in situations in which the acts of any one of the independent wrongdoers would have been sufficient to cause the entire harm.¹⁷³ Problems of policy are far greater when harm

170. See generally C. EAGLETON, *supra* note 7, §§ 2, 6; M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 29 (1962); 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 217D (2d ed. 1945); 2 *id.* § 285A; Friedmann, *The Growth of State Control Over the Individual, and Its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y.B. INT'L L. 118 (1938); Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525, 531-35 (1980); Lenoble, *Responsabilité Internationale des Etats et Controle Territorial*, 16 REV. BELGE DE DROIT INTERNATIONAL 95 (1981-1982).

171. Perhaps the clearest illustration is, again, the circumstance of an attack by state A on a diplomatic mission in state B, accomplished because state B failed to exercise due diligence. See *supra* text accompanying notes 15-17. As between the two responsible states, state A would be assigned the greater degree of fault.

172. The possible alternative of apportionment on a pro rata basis could lead to the unjust enrichment of a responsible state, could fail to channel costs to the state best able to prevent repetition of injurious conduct, and could impinge on the independence of a state that pays more than its equitable share of compensation.

173. See, e.g., PROSSER AND KEETON ON TORTS, *supra* note 12, § 52.

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is the consequence only of the combination of conduct essentially equivalent in terms of causation and blameworthiness.¹⁷⁴ Most troubling are situations in which joint and several liability would result in placing total liability on a state with a relatively minor degree of responsibility whose actions were not alone sufficient to cause the harm—particularly if the state lacks any effective means to obtain contribution.¹⁷⁵ When a state is only slightly at fault, therefore, concerns of fairness and existing state practice suggest application of a *de minimis* rule: only the state or states materially at fault would be deemed responsible, and issues of joint and several liability and contribution would not arise with respect to the excluded state.¹⁷⁶

Furthermore, the availability of contribution, whether by agreement of the responsible state or by adoption of the practice in tribunals that look to municipal analogies, seems essential to a regime of joint and several liability to protect concerns of state independence. The Space Objects Convention, for example, adopted contribution based on comparative fault both in cases of concerted and independent conduct. Provision for contribution apparently was essential for acceptance of the principle of joint and several liability in the Convention.¹⁷⁷ The implementation of contribution in international practice would require decisionmakers to

174. Consider the case of two acts of pollution, harmless in themselves, that combine through predictable chemical processes to cause damage. *See id.* Rest views joint and several liability as appropriate in this situation if the originators were aware of each other's contributions or deliberately caused the injurious result, or if the activities were ultrahazardous. Rest considers joint and several liability more problematic, however, where damage results from the "accidental" accumulation of nonultrahazardous independent single actions. *See A. REST, CONVENTION ON COMPENSATION FOR TRANSFRONTIER ENVIRONMENTAL INJURIES (DRAFT WITH EXPLANATORY NOTES) 47-50 (1976).*

175. For example, the Space Objects Convention does not make subject to joint and several liability minor contributors to the launch of a space vehicle that subsequently causes damage. *See STAFF OF SENATE COMM. ON AERONAUTICAL AND SPACE SCIENCES, 92d Cong., 2d Sess., REPORT ON CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, ANALYSIS AND BACKGROUND DATA 29 (Comm. Print 1972).* In some other conventions liability is placed on a single readily identifiable party deemed capable of having avoided the damage; states found to have only a slight connection to damage escape findings of responsibility altogether. Article XVIII of the Vienna Convention on Civil Liability for Nuclear Damage, *opened for signature*, May 21, 1963, *reprinted in* 2 I.L.M. 727, 742 (1963), and article II of the Brussels Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, *reprinted in* 57 AM. J. INT'L L. 268, 269 (1963) (not yet in force), for example, impose liability first upon the operators of nuclear installations and vessels, respectively. If the operators' payments are deficient, the licensing states must indemnify victims for a shortfall. No joint liability is imposed on the manufacturer or supplier of a nuclear ship or installation, perhaps because it is easier to identify operators and because the involvement of a state in which a nuclear ship or installation is manufactured is considered minimal compared to the involvement of the operator. *See Malik, supra* note 81, at 350.

176. *See Handl, supra* note 170, at 534-35; *supra* notes 90-93 and accompanying text.

177. Space Objects Convention, *supra* note 44, art. IV(2); *see supra* notes 77-87 and accompanying text; *see also* Interim Agreement Between Australia, United Kingdom of Great Britain and Northern Ireland, and the European Organisation for the Development and

grapple with the difficult problem of the apportionment of compensation liability. As in municipal practice, the attribution of degrees of responsibility among states could rarely be accomplished with mathematical precision.¹⁷⁸ Yet, international decisions with respect to the impact of the contributory conduct of injured parties, *force majeure*, or non-state actors show that international tribunals possess the experience and capacity to make determinations of relative responsibility.¹⁷⁹

Because indemnification for loss is the fundamental reason behind the principle of joint and several liability,¹⁸⁰ the principle is most likely to be recognized where states perceive and accept a special need or demand for compensation of injured parties. The Space Objects Convention again provides an example. In discussing why the Convention adopted provisions favorable to victims such as absolute liability for injuries caused by space objects, Matte notes a particular need for effective compensation:

[T]he potential victim's position is very unfavourable; his knowledge of the techniques involved and his control over the space activity is minimal, he cannot foresee the risks and, therefore, does not know how or to what extent to protect himself. It is only fair to translate this inequality of positions into a regime which places the burden of the loss on the stronger party, the launching State.¹⁸¹

The same concern for the victim state prompted adoption of the rule of joint and several liability for launching states.¹⁸²

In addition, a state might find joint and several liability most acceptable in circumstances in which the state need not admit that it has engaged in wrongful or, worse, morally blameworthy conduct.¹⁸³ The reluctance of states to admit wrongdoing so often seen in the diplomatic context may be increased by a rule of joint and several liability that requires payment of "extra" compensation—even if other states must later contribute their share. When state responsibility exists but a state can avoid conceding that it has acted in a morally blameworthy manner, a state may be willing to agree either before or after an injury to accept joint and several liability. The Space Objects Convention, which

Construction of Space Vehicle Launchers for the Conduct of the Phase I Firing of the Initial Programme of the Organization, *cited in* C. JENKS, *supra* note 81, at 368-74.

178. See G. WILLIAMS, *supra* note 12, § 44 (noting this fact but concluding, "We have to act more or less arbitrarily because the alternative is not to act at all.").

179. See *supra* text accompanying notes 94-106.

180. See *supra* text accompanying note 138.

181. N. MATTE, *supra* note 83, at 159.

182. See *supra* text accompanying note 83.

183. "Wrongful conduct" simply refers to situations in which a state has breached a norm and is responsible under international law. "Morally blameworthy" conduct may be viewed as a subset of wrongful conduct in which the actor state has engaged in ethically reprehensible behavior.

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recognizes joint and several liability both for concerted and independent conduct of launching states, includes provisions for placing responsibility without blame. The launching of a space object is generally viewed as a proper and beneficial activity, and an obligation to pay can arise without concession of blameworthiness.¹⁸⁴

Finally, a principle of joint and several liability most likely will be embraced when the claim against the multiple states is directly akin to a claim recognized under municipal law, such as a tort or breach of contract claim. These claims may arise in two procedural contexts. First, an individual victim, on its own account, may pursue states for wrongs parallel to municipal law violations.¹⁸⁵ Second, states themselves may rely on municipal analogy and seek reparation for injuries to their citizens on a representative basis with the true objective of providing reparation for the injured citizen.¹⁸⁶ For example, in the course of the *Samoan Claims* arbitral case,¹⁸⁷ which found the United States and the United Kingdom responsible for harm to German citizens in Samoa,¹⁸⁸ the U.S. and British Commissioners referred to municipal law in formulating a decision on the amount of damages owed and the types of injuries for which damages could be awarded. The Commissioners explained, “[N]or does there seem to be any reason why as between nations liability for wrong-doing should not be assessed in accordance with the rules observed in municipal courts, and which are found to work substantial justice as between all parties.”¹⁸⁹ Frequently, however, as Schwarzenberger states, “[T]he damage suffered by a victim . . . is merely one of the items included in the

184. See *supra* note 86 and accompanying text. A similar situation may exist, and joint and several liability may be appropriate, with respect to states participating in joint ventures. See Goldie, *A General View of International Environmental Law: A Survey of Capabilities, Trends and Limits*, in HAGUE ACADEMY OF INTERNATIONAL LAW, COLLOQUIUM 1973: PROTECTION OF ENVIRONMENTAL AND INTERNATIONAL LAW 25, 90 (C. Kiss ed. 1975); Handl, *supra* note 170, at 535 n.47. Situations said to involve “international liability,” in which states engage in lawful conduct that causes transnational environmental harm, may provide other examples in which states can avoid conceding blameworthy conduct. See *supra* note 4.

185. See *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. 553 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955); *Westland Helicopters Ltd. v. Arab Org. for Indus.*, 23 I.L.M. 1071, 1074-75 (1984).

186. See, e.g., *Admin. Decision No. V, Mixed Claims Comm’n (U.S.-Germ.)*, 7 R. Int’l Arb. Awards 119, 152 (1924).

187. *Samoan Claims Arbitration (Germ. v. U.S. & U.K.)*, 9 R. Int’l Arb. Awards 15 (1902).

188. See *supra* notes 67-69 and accompanying text.

189. Joint Report No. II, Aug. 12, 1904, *quoted in* 3 M. WHITEMAN, *supra* note 55, at 1778. The Commissioners claimed that municipal law principles of compensation or damages include principles applicable to the international sphere. As Brownlie states, however, “In the sphere of international relations there are to be found important elements, including the rules as to satisfaction, which would look strange in the law of tort and contract.” I. BROWNLIE, *supra* note 2, at 457 (footnote omitted).

international claim for adequate reparation.”¹⁹⁰ Where state claims for compensation relate to breaches of primary rules of state responsibility that have no clear parallels in municipal law, such as claims for failure to punish, tribunals may be less willing to apply and states may be less willing to accept a principle developed from municipal analogy. Furthermore, if a state can obtain full reparation for its injuries through measures of satisfaction, the principle of joint and several liability will not affect the character of each breaching state’s reparation obligation.¹⁹¹

Given the realities of international legal process and the resistance of states to rules that appear to infringe on their independence, joint and several liability is likely to be accepted first in those limited situations in which the offense to independence is minimal and indemnification appears most compelling. In particular, joint and several liability in international practice is likely to be most favorably received when the relative degrees of fault of multiple responsible states appear approximately equal, when contribution is available, when compensation is perceived to be a particularly important concern in relation to the activity under consideration, when states can avoid conceding wrongful or morally blameworthy conduct, and when claims appear analogous to claims under municipal law.

VI. Conclusion

Any mature legal system governing the conduct of actors in a society must contemplate multiple party responsibility for wrongs. The focus of this article has been on the “simple” case of multiple state responsibility in which the actions of a few states violate their international obligations with regard to indivisible injury. Even in the simple case, the nature of international legal process, including the difficulty of insuring contribution among wrongdoing states, explains why joint and several liability is not currently widespread in international practice. The absence of an international legislative authority also impedes the widespread adoption of such a rule. A legislative authority could more easily make the difficult policy choices necessary to formulate a detailed comprehensive legal regime in this area. For example, what should happen, in circumstances of multiple state responsibility, if one jointly responsible state pays less than the full amount of compensation? Should the liability of the remaining wrongdoing state or states be extinguished, be reduced by the dollar amount of the settlement, or be reduced by an amount proportion-

190. 1 G. SCHWARZENBERGER, *supra* note 48, at 663.

191. *See supra* text accompanying notes 64-66.

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ate to the settling state's degree of fault?¹⁹² It seems neither productive nor possible at this stage, however, to predict all the complex "fine tunings" that may be necessary in resolving certain aspects of the multiple state responsibility problem.

Despite procedural and political reasons that may impede the acceptance or limit the scope of application of joint and several liability, many considerations support its recognition as an international law rule governing the consequences of multiple state responsibility. The international community's concern with deterring wrongful conduct by channeling the cost of an injury to its author and with making an injured party whole through pecuniary compensation for loss is well reflected in international law rules of reparation. Municipal analogies, viewed either as general principles of law or as tools in the progressive development of international law, suggest that joint and several liability is the most appropriate method to achieve these objectives. Finally, state practice, although limited, evidences that joint and several liability has achieved a measure of acceptance in international law, demonstrates that tribunals deciding international cases have the requisite will and capacity to allocate the burden of compensation among multiple responsible states, and points toward favorable international reception of a principle of joint and several liability.

192. Cf. Weir, *supra* note 100, §§ 97-103 (surveying the variety of municipal practice on the issue).