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# *Introduction: Procedural Aspects of Shared Responsibility in International Adjudication*

ANDRÉ NOLLKAEMPER\*

The procedural rules of international courts are key to the ability of such courts to adjudicate questions of shared responsibility. These procedural rules, as well as the practice of international courts, vary widely and have not yet been subject of systematic study. To provide a basis for studying the degree in which international courts can effectively adjudicate claims against multiple responsible actors, this contribution will provide an analytical framework. This framework consists of four elements: a definition of ‘shared responsibility’ and ‘procedural rules of international adjudication’; a typology of procedural rules that are relevant to judicial handling of questions of shared responsibility; an identification of procedural rules that are specific to questions of shared responsibility, and of those procedural rules that are more generally typical for multilateral dispute settlement; and an identification of factors that account for differences between international courts in terms of their ability to handle questions of shared responsibility.

## *1. Introduction*

The collection of articles in this issue of the *Journal of International Dispute Settlement* addresses whether and to what extent procedural rules of selected international courts<sup>1</sup> allow such courts to adjudicate questions of shared responsibility.<sup>2</sup> For instance, do procedural rules allow courts to determine the responsibility of one actor, in a situation where not all co-responsible actors are party to the proceedings? Do they allow courts to join proceedings against

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<sup>1</sup> I will use the term ‘courts’ to refer to both courts and tribunals.

<sup>2</sup> The concept of ‘shared responsibility’ refers to situations where multiple actors (states, international organizations and other non-state actors) have contributed to a harmful outcome, and where questions have arisen about their *ex post facto* responsibility for that contribution, see Section 2 below.

multiple responsible parties, so as to capture the shared nature of responsibility? Or are procedural rules devised for bilateral dispute settlement, and not fully capable to address a responsibility, which does not rest on one but on multiple actors? The articles that follow this introductory contribution will discuss these and other questions for the International Court of Justice (ICJ),<sup>3</sup> arbitral tribunals,<sup>4</sup> adjudication under the WTO Dispute Settlement Understanding (WTO DSU),<sup>5</sup> the dispute settlement procedures under the Law of the Sea Convention (LOSC DSP)<sup>6</sup> and the European Court of Human Rights (ECtHR).<sup>7</sup>

The number of cases involving questions of shared responsibility in these courts in relation to shared responsibility varies widely. Whereas the ICJ and the ECtHR have a relatively significant practice in relation to cases of shared responsibility, the number of cases in arbitral tribunals, the WTO DSU and LOSC DSP are very limited. Yet, each of the latter three courts has had to deal with questions of shared responsibility, and the possibility that in the future more questions of shared responsibility may be litigated is by no means hypothetical.

A study of the ability of international courts to address questions of shared responsibility is justified in view of the apparent increase in the number of cases involving multiple responsible actors that have been considered by international courts. The unprecedented degree of international co-operation in the past decades has enhanced the number of situations in which multiple actors may be held responsible for harmful outcomes. Examples include joint military actions between states<sup>8</sup> and/or states and international organizations (eg in the context of peacekeeping),<sup>9</sup> extraterritorial processing of refugee claims<sup>10</sup> and climate change.<sup>11</sup> The multiplicity of states that are involved in such situations

<sup>3</sup> Martins Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) in this issue 4 JIDS, 295–318.

<sup>4</sup> Freya Baetens, 'Procedural Issues Relating to Shared Responsibility in Arbitral Proceedings' (2013) in this issue 4 JIDS, 319–341.

<sup>5</sup> Lorand Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) in this issue 4 JIDS, 343–359.

<sup>6</sup> Ilias Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) in this issue 4 JIDS, 385–405.

<sup>7</sup> Maarten den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) in this issue 4 JIDS, 361–383.

<sup>8</sup> This question was raised after the invasion by the United States and the UK in Iraq in 2003; see, eg Christine Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008). For an example of a joint operation by two international organizations, see the African Union and United Nations mission in Darfur: SE Kreps, 'The United Nations-African Union Mission in Darfur: Implications and Prospects for Success' (2007) 16 Afr Security Rev 65.

<sup>9</sup> See eg L Condorelli, 'Le Statut des Forces de l'ONU et le Droit International Humanitaire' (1995) 78 Rivista di Diritto Internazionale 881; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harv Intl LJ 113–92; Bérénice Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping' (2012) 25 LJIL 521.

<sup>10</sup> Maarten den Heijer, 'Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010); E Papastavidris, 'Fortress Europe and FRONTEx: Within or Without International Law?' (2010) 79 Nord J Intl L 75.

<sup>11</sup> The question is not entirely hypothetical, as thought has been given to the possibility of claims that vulnerable states or populations may make against states that would be responsible for (part of) the problem. Michæl G Faure and André Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate

will affect the nature of disputes. As Judge Shahabuddeen noted, in the increasingly complex character of international relations 'legal disputes between States are rarely purely bilateral'.<sup>12</sup> Though questions of responsibility are not typically brought in international courts (but rather are settled in negotiations), there is a not insignificant body of case law on questions of international responsibility involving multiple responsible parties, in particular in the ICJ<sup>13</sup> and the ECtHR.<sup>14</sup>

It has been suggested that the present system of international dispute settlement is not well designed to deal with multilateral disputes.<sup>15</sup> This proposition would have relevance for adjudication of questions of shared responsibility, which after all are a particular type of a multilateral dispute. For instance, given that international dispute settlement mechanisms are based on the consent of states, the mere fact that one responsible state has not consented to the judicial process may suffice to exclude a case of shared responsibility from judicial scrutiny. Likewise, if one of the wrongdoing actors is an international organization other than the European Union (EU) or the Seabed Authority, questions of shared responsibility may be deemed inadmissible before the ICJ, the WTO DSU, the LOSC DSP and the ECtHR, which do not have jurisdiction over (other) international organizations.

However, care should be taken in making generalized statements on the ability or inability of international courts to handle questions of shared responsibility. There is very little scholarship available that has examined the procedural rules of international courts from this particular perspective.<sup>16</sup> Moreover, given the differences between international courts, it is unlikely that the situation will be the same for all international courts and tribunals. For instance, while the jurisdictional barriers in the ICJ may make litigation against multiple responsible states sometimes difficult, arbitral rules are flexible and may precisely be used to allow such complex types of adjudication. The degree in which there indeed are differences in the ability of individual courts has not been subjected to systematic study.

It is the aim of the present collection of articles to contribute to our understanding of how international courts address questions of shared responsibility that arise in international litigation. The collection will present a comprehensive assessment of the degree in which the five selected courts are

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for Climate Change' (2007) 43 *Stanford J Intl L* 124; Richard Lord and others (eds), *Climate Change Liability* (CUP 2012).

<sup>12</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, Separate Opinion Judge Shahabuddeen 298.

<sup>13</sup> See Paparinskis (n 3) André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law, Studies in Honour of Karel C. Wellens* (Martinus Nijhoff Publishers 2011) 199.

<sup>14</sup> See den Heijer (n 7).

<sup>15</sup> Lori Fisler-Damrosch (ed), 'Multilateral Disputes' in *The International Court of Justice at a Crossroads* (Transnational Publishers 1987) 376.

<sup>16</sup> Exceptions are Fisler-Damrosch (n 15) and Markus Benzing, 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 *Law Prac Intl Cts Tribunals* 369. See generally on procedural aspects of international litigation: I Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013).

able to adjudicate claims against multiple responsible actors, and will assess the main facilitating or limiting factors.

To frame the scope of this collection of papers and to identify the issues that will be explored in the individual contributions, in this introductory contribution I will provide an analytical framework for examining international adjudication of questions of shared responsibility. This analytical framework will guide, to the extent relevant, the individual contributions on, respectively, the ICJ, arbitral tribunals, adjudication under the WTO DSU, the dispute settlement procedures under the LOSC and the ECtHR. The formulation of the framework also draws on information provided in the individual articles, and as such serves to identify common elements and differences.

The analytical framework consists of four elements:

- (1) A definition of ‘shared responsibility’ and ‘procedural rules of international adjudication’. This definition allows us to determine what rules and practices are relevant to, and subject of the inquiry (Section 2).
- (2) A typology of procedural rules that are relevant to judicial handling of questions of shared responsibility. This typology allows us to assess a particular court in terms of its ability to adjudicate questions of shared responsibility (Section 3).
- (3) An identification of procedural rules (part of the typology) that are specific to questions of shared responsibility, and of those procedural rules (part of the typology) that are more generally typical for multilateral dispute settlement. This element of the analytical framework allows us to identify, whether a particular procedural rule that facilitates or limits the possibility of a court to adjudicate a question of shared responsibility is intrinsically related to shared responsibility, or whether it similarly arises in relation to other aspects of multilateral dispute settlement (Section 4).
- (4) A tentative identification of factors that account for differences between international courts in terms of their ability to handle questions of shared responsibility (Section 5).

## 2. Key Definitions

The present inquiry necessitates as a preliminary matter a conceptual clarification of the two concepts on which this collection of articles is based: ‘shared responsibility’ (A) and ‘procedural rules of international adjudication’ (B).

### A. Shared Responsibility

For purposes of this collection of articles, I define the concept of ‘shared responsibility’ by three features.<sup>17</sup> First, the concept refers to the responsibility of multiple actors. In the context of the international courts that are addressed

<sup>17</sup> A fourth feature of shared responsibility (contributions to harm cannot be allocated based on attribution) is left aside here. See André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2011) SHARES Research Paper 03, ACIL 2011-07 (revised May 2012), forthcoming in the *Mich J Intl L* (2013).

in the individual articles, these actors primarily include states and international organizations. The ICJ only addresses question of shared responsibility of states; the WTO dispute settlement procedure can consider shared responsibility of states and the EU. In the future that also will hold for the ECtHR. Arbitration tribunals and the Law of the Sea Tribunal can also address questions of responsibility involving non-state actors—such responsibility likewise can be part of a shared responsibility.

Second, the term ‘shared responsibility’ refers to the responsibility of multiple actors for their contribution to a single harmful outcome. It thus is based on a concept of responsibility that is linked to harm.<sup>18</sup> Such a harmful outcome may take a variety of forms, including material damage to third parties (as in the *Nauru* case decided by the ICJ),<sup>19</sup> and legal injury.

The third defining feature of shared responsibility is that the responsibility of two or more actors for their contribution to a harmful outcome is distributed to them separately, rather than resting on them collectively.<sup>20</sup> Thus, in the *Nauru* case, even though the alleged wrong originated from conduct of an organ common to Australia, New Zealand and the UK, the responsibility was not allocated to these three states collectively, but to Australia and potentially to the two other states individually.<sup>21</sup> Conversely, responsibility of the EU for a trade measure that falls under its exclusive competences,<sup>22</sup> is not a shared responsibility, since the EU is a single, collective actor.

There is a wide variety of situations that fall under this definition of shared responsibility. A number of distinctions illustrate this diversity. Shared responsibility can both result when two or more actors commit the same wrongful act, and when they commit different wrongful acts that result in a single harmful outcome. This distinction is relevant for the question of reparation, and for procedural questions that may arise in that context.<sup>23</sup>

Shared responsibility can both result when two or more actors commit a wrongful act (whether the same wrongful acts or separate wrongful acts), and when one actor participates in the wrongful act of another actor.<sup>24</sup> This distinction likewise may have procedural ramifications, for instance when only the participating state, and not the principal wrongdoing state is party to the proceedings.

And finally, shared responsibility can both arise out of concerted action and out of non-concerted action. The former type of cases can be referred to as *co-operative responsibility*. Examples are a situation where a Member State of the

<sup>18</sup> See for conceptualization of responsibility in terms of contribution to harm, eg Joel Feinberg, ‘Collective Responsibility’ (1968) 65 J Phil 674; David Miller, ‘National Responsibility and Global Justice’ (2008) 11 CRISPP 383; Tony Honoré, *Responsibility and Fault* (Hart Publishing 1999) 27 (defining outcome responsibility in terms of responsibility for the good and bad outcomes of a person’s conduct).

<sup>19</sup> *Certain Phosphate Lands in Nauru* (n 12) 244.

<sup>20</sup> Larry May, *Sharing Responsibility* (University of Chicago Press 1996) 37–43.

<sup>21</sup> *Certain Phosphate Lands in Nauru* (n 12) [55]–[57].

<sup>22</sup> See Bartels (n 5) 352.

<sup>23</sup> Art 47 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) adopted at the 53rd Session (Yearbook of the International Law Commission 2001 Vol II) UN GAOR Supplement No 10 UN Doc A/56/10 chapter IV.E.1 (hereafter Articles on State Responsibility, ASR); and art 48 ILC Draft Articles on the Responsibility of International Organizations (2011) adopted at the 63rd session (Yearbook of the International Law Commission 2011 Vol II) UN Doc A/66/10 (hereafter Articles on the Responsibility of International Organizations, ARIO).

<sup>24</sup> Art 16 ASR (n 23).

EU enacts a measure implementing an EU directive, where this would lead to a violation of both the EU and the Member State. Another example is responsibility of two or more states that have set up a joint organ, as was at issue in the *Nauru* case,<sup>25</sup> or between two states that sponsor a deep seabed mining operation that may lead to damage and liability under the Law of the Sea Convention.<sup>26</sup> The latter type of cases (when there is no concerted action, yet two or more actors contribute, in causal terms, to a harmful outcome) can be referred to in terms of *cumulative responsibility*. An example considered in the contribution on the ECtHR is *MSS v Belgium and Greece*, where Belgium and Greece committed unconnected acts, contributing to a single harm. An example discussed in the contribution on the WTO is the granting of subsidies by different states that together cause injury to a third state.<sup>27</sup> Also this distinction may be relevant for how international courts handle, from a procedural perspective, cases involving multiple wrongdoing actors. For instance, the consent by a state to a collective action (in case of co-operative responsibility) may justify holding that state responsible for the entirety of the harm, where that might not be justified in case of an unconnected contribution to harm. This will enable a court to prevent complex questions relating to the role of absent (co-)responsible parties, which it otherwise might have to address.

The key point thus is that procedural questions may differ, depending on the nature of shared responsibility at issue. Where relevant, distinctions between various types of shared responsibility will be drawn in the individual articles.

## B. Procedural Rules

This collection of articles focusses primarily on the *procedural* law of international courts that determines how such courts handle questions of shared responsibility, rather than on questions, or principles of shared responsibility itself. Examples of such procedural rules are rules on joinder, evidence and fact-finding. Questions of the contents of the law of shared responsibility (eg whether or not international law allows for multiple attribution)<sup>28</sup> are not subject of analysis. However, the distinction is not always clear-cut, and a few preliminary comments are in order to frame what is, and what is not, subject of analysis in the present collection of articles.

Before examining the specific relation between procedural law and the law of (shared) responsibility, I will first identify the relation between procedural law and substantive law generally. A useful starting point for this purpose is provided by Salmond:

The law of procedure may be defined as that branch of the law which governs the process of litigation ... All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject-matter ... Procedural law is

<sup>25</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240.

<sup>26</sup> Plakokefalos (n 6) 395.

<sup>27</sup> See for the last example: Bartels (n 5) 348.

<sup>28</sup> See eg Francesco Messineo, 'Multiple Attribution of Conduct' (2011) SHARES Research Paper 11 <<http://www.sharesproject.nl/publication/multiple-attribution-of-conduct/>> accessed 27 February 2013.

concerned with affairs inside the courts of justice; substantive law deals with matters in the world outside.<sup>29</sup>

The question is whether this distinction holds in international law. Rosenne appears to answer this question in the negative, observing that ‘international law does not recognize a sharp distinction between substantive and adjectival law’.<sup>30</sup> While there is more than a grain of validity in this observation, it would complicate things if we were to throw out the distinction altogether. In many cases the dividing lines between procedural and substantive law are clear and relevant. All international courts have a set of rules that they label as ‘procedural’ and which govern the process of adjudication—not, at least not directly, the substance of the rights at issue.

The distinction between procedure and substance is not sharp, however: ‘[t]he assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality’.<sup>31</sup> While some questions that present themselves in international adjudication are obviously questions of procedure (such as the time period for submitting a memorial) or substance (such as the right of a state to discharge mercury in a transboundary watercourse), not all questions can easily fit into one of these two categories.

More useful than a binary distinction between procedure and substance is a distinction that includes a third, middle category, which deals with the introduction of a claim and the jurisdiction of the court or tribunal in regard to that claim. This middle category would for instance include rules on the admissibility of a claim based on a multilateral treaty, or on the standing of a state to bring such a claim. In many jurisdictions, and also in many textbooks, admissibility is treated as part of the procedures of courts.<sup>32</sup> Yet, the question of whether a claimant state is an injured state requires an assessment of whether the defaulting state owed an obligation towards the claimant state, which is a question of substantive law.<sup>33</sup> The International Law Commission (ILC) treated the question as an aspect relating to the implementation of state responsibility,<sup>34</sup> which has both substantive and procedural dimensions.

Also, questions of jurisdiction can be treated neither as questions of substance nor as questions of procedure and are better placed in the third, middle category. While in some systems of domestic law jurisdictional

<sup>29</sup> Sir John William Salmond, *Jurisprudence: or the Theory of Law* (Stevens and Haynes 1902) 577–78, cited in D Michael Risinger, ‘“Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions”’ (1982) 30 UCLA L Rev 189, 191, 196–97.

<sup>30</sup> Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1996* (3rd edn, Martinus Nijhoff Publishers 1997) 1063.

<sup>31</sup> Thomas O Main, ‘The Procedural Foundation of Substantive Law’ (2010) 87 Wash Univ L Rev 801, 816; see also Edgard H Ailes, ‘Substance and Procedure in the Conflict of Laws’ (1941) 39 Mich L Rev 392, 404 (defining the dichotomy as a useful ‘tool of thought’ (at 407) rather than a clear distinction between mutually exclusive categories).

<sup>32</sup> For example, MN Shaw, *International Law* (6th ed, CUP 2008) 319–20, 362–67, 342, 352, 360, 362, 380, 382, 393, 379–80, 413, 416–17; B Simmons and A Danner, ‘The International Criminal Court’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 239, 242.

<sup>33</sup> James Crawford, ‘Multilateral Rights and Obligations in International Law’ (2006) RdC 325, 421–22. See also RM Cover, ‘For James Wm. Moore: Some Reflections on a Reading of the Rules’ (1975) 84 Yale Law School Faculty Scholarship Series 718, 730; Carlos Manuel Vázquez, ‘Treaty-Based Rights and Remedies of Individuals’ (1992) 92 Columbia L Rev 1082, 1141 (noting that the standing doctrine addresses the issue ‘whether the duty imposed by the treaty gives rise to a correlative primary right of the litigant such that the litigant may enforce the rule in court’).

<sup>34</sup> Art 42 ASR (n 23).



questions appear to be treated as procedural,<sup>35</sup> for the ICJ, jurisdiction falls under section II of the Statute, on the competence of the Court, whereas section III deals with procedure. The Statute stipulates that the Court can adopt its own (procedural) rules for carrying out its function (article 30), but this clearly does not empower the Court to change the basis of its own jurisdiction. Still, jurisdiction is quite separate from the substantive rules that define the rights, obligations and responsibilities of states.

A rule of thumb for distinguishing rules of procedural law in the narrow sense from rules dealing with the introduction of a claim, is that procedure in the narrow sense can be promulgated and changed by courts themselves,<sup>36</sup> while procedure relating to the introduction of claims is so tied up with the substance of adjudication, that states generally reserve the power of development to themselves (though they may not be able to exclude a role of courts in interpreting such rules).<sup>37</sup> For instance, the Statute of the ICJ stipulates that the Court can adopt its own (procedural) rules for carrying out its function (article 30), but this clearly does not empower the Court to change the basis of its own jurisdiction. For present purposes, rules in this middle category (notably jurisdiction and admissibility) will be considered as part of the category of procedural rules, broadly conceived.

The principles of shared responsibility, including those that relate to reparation by multiple wrongdoing actors, are better placed in the category of substantive law than in the category of procedural law (whether in the narrow or in the broad sense).<sup>38</sup> To define reparation in terms of procedure would be 'to confound the remedy with the process by which it is made available'.<sup>39</sup> Indeed, the *Articles on State Responsibility* and the *Articles on Responsibility of International Organizations* formulate reparation largely, though not entirely, in terms of substantive rather than procedural law.<sup>40</sup> This collection of papers will in principle not focus on questions of responsibility, and will rather treat principles of responsibility as independent variables, the

<sup>35</sup> In the Netherlands, civil jurisdiction is embodied in arts 1–14 of the Dutch Civil Procedure Code (Wetboek van Burgerlijke Rechtsvordering). Dutch criminal jurisdiction is laid down in arts 2–8 of the Criminal Code (Wetboek van Strafrecht) in conjunction with arts 1–5 of the Code of Criminal Procedure (Wetboek van Strafvordering). In the United States, the Federal Rules of Civil Procedure contain some rules concerning the jurisdiction of courts (for example, Rule 12(h)(3)). Similarly, with respect to criminal law, 18 USC chap 211 (titled: 'Jurisdiction and Venue') is part of Part II of 18 USC (titled: 'Criminal Procedure').

<sup>36</sup> Art 30 Statute of the International Court of Justice (concluded 26 June 1945, entered into force 24 October 1945) 1 UNTS 993; art 26 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (hereafter European Convention on Human Rights, ECHR).

<sup>37</sup> However, the distinction is not sharp. In the ICC and the WTO, for example, the political bodies retain oversight over all procedural rules; see art 51 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (hereafter ICC Statute) and art 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the Agreement Establishing the WTO (WTO DSU).

<sup>38</sup> Also, Bentham interpreted the definition of the possible range of remedies that might be accorded for a violation of a right as being part of the substantive law. See Risinger (n 29) 191. See also ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [60]; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) [2012] General List No 143, [100] (stating that 'whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation').

<sup>39</sup> Salmond (n 29); contra: Roger P Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 *Pepperdine L Rev* 233, 247 (remedy is procedure).

<sup>40</sup> Art 31 ASR (n 23); art 31 ARIO (n 23).

main focus being on the procedural law that may, or may not facilitate determination of such responsibility.

This distinction between the substantive law of responsibility and the procedural law of international adjudication is fundamental to the analysis of the ability of international courts to address questions of shared responsibility. Where substantive law does provide for shared responsibility, there is no automatic connection with procedural law. Adjudicative law may have been set to serve different interests and even may impede the realization of substantive law of responsibility. Whereas shared responsibility may not always be reducible to bilateral schemes,<sup>41</sup> the classic objective of inter-state judicial procedure is the preservation of individual rights of states. In particular in the ICJ there is a tension between the collective, multilateral nature of substantive principles that the Court may be asked to litigate, and the bilateral nature of its procedures.<sup>42</sup>

However, the separation between the principles of shared responsibility as being of a substantive nature on the one hand, and the procedural rules of international adjudication on the other hand, needs to be qualified in two respects. First, as noted above, several aspects of responsibility have substantive and procedural aspects, for example the rules pertaining to invocation of responsibility (such as the local remedies rule<sup>43</sup> and acquiescence in the lapse of a claim<sup>44</sup>) and the principle of joint and several liability.<sup>45</sup>

Second, procedural law can feed back on the substantive law of shared responsibility. It is apparent from the differences in the way principles of responsibility are applied in different courts, that there is a strong connection between the substance of principles of responsibility on the one hand, and the procedures of the particular court in which they are applied, on the other hand.<sup>46</sup> Another example is that procedural rules on standing or intervention may affect the construction of substantive law pertaining to the rights of third parties to bring a claim against one or multiple wrongdoing actors. It rightly has been said that '[p]rocedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights'.<sup>47</sup>

The broader point here is that it can be expected that the development of procedural law to some extent follows the development of substantive law of responsibility, and *vice versa*. In one of the rare, albeit extremely short, discussions of the relation between international substantive and procedural

<sup>41</sup> Benzing (n 16) 374; Fislser-Damrosch (n 15) 376.

<sup>42</sup> Fislser-Damrosch (n 15) 376. An example of the latter is the judgment of the ICJ in *Jurisdictional Immunities* (n 38) [100].

<sup>43</sup> Art 44(b) ASR (n 23). See on the procedure-substance debate in connection with the local remedies rule the position of Ago in ILC, *Ybk Intl L Commission* (1977), vol II, pt 2, 47 (local remedies as substance) versus the later work of the ILC on State Responsibility (local remedies as procedure). See Drafting Committee, 'Summary Report of the 2622<sup>nd</sup> Meeting' (17 May 2000) UN Doc A/CN.4/SR2662, 25–26. The procedural approach has been confirmed in international case law; see eg ICISID *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (Merits) Case No ARB(AF)/98/3 (19 June 2003) 811, [149].

<sup>44</sup> Art 45 ASR (n 23).

<sup>45</sup> JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale J Intl L* 225, 251.

<sup>46</sup> See eg for the rather particular approach of the ECtHR on questions of reparation, M Pellonpää, 'Individual Reparation Claims under the European Convention on Human Rights' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhoff Publishers 1999) 109, 112–25. See generally Christine Gray, 'The Choice Between Restitution and Compensation' (1999) 10 *EJIL* 413, 418, 422–23.

<sup>47</sup> See Main (n 31) 802.

law, Jenks noted that it is to be expected that procedural law follows substantive law, and *vice versa*:

In every legal system law and procedure constantly react upon each other. Changes in the substantive law call for new procedures and remedies; new procedures and remedies make possible changes in the substantive law. So it is in international law; if we wish so to develop the law as to respond to the challenge of our times, our procedures and remedies must be sufficiently varied and flexible for the purpose.<sup>48</sup>

In view of this complex relationship between procedure and substance of shared responsibility, the articles in this issue of *JIDS* also explore how particular procedural arrangements have allowed the concerned court to contribute to the development of substantive questions of international responsibility. Particular procedural principles may lead or assist a court to formulate particular substantive principles of responsibility, or deny it the possibility to do so. Putting the procedural rules in the context of such substantive principles will provide a richer analysis and aid understanding of the function of the procedural rules.

### 3. *Procedural Rules Relevant to Shared Responsibility*

The procedural rules that are relevant to shared responsibility, and that therefore will be considered in the articles on the individual international courts, can be grouped into three categories. The first category consists of rules that determine whether it is possible to bring all responsible parties before the court (A). The second category consists of rules that determine how a court handles proceedings in a situation where multiple responsible parties are before the court (B). The third category consists of rules that govern how a court deals with absent (responsible) parties (C).

#### *A. How to Bring All Parties before a Court*

Perhaps the most fundamental procedural question pertaining to shared responsibility is whether a court can exercise jurisdiction over all responsible parties.<sup>49</sup> This question can be differentiated in four more specific questions.

A first question is whether the court is able to exercise jurisdiction over all *types of actors* that are co-responsible for a particular harm. Here, considerable differences exist between international courts. In the ICJ only states can be parties in proceedings.<sup>50</sup> If a (co-)responsible party is an organization, a company or private individual, these cannot be brought before the Court. In contrast, the dispute settlement procedures of the International Tribunal for

<sup>48</sup> C Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons Ltd 1964) 184.

<sup>49</sup> See generally on the jurisdiction of international courts, CF Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International 2003). Amerasinghe observes at p 51 'The idea of jurisdiction in fact runs through the whole of a court's judicial activity. The question whether a tribunal has the authority to commence and continue the examination of a dispute (as opposed to the actual examination of the dispute on the merits) is regarded as much a matter of jurisdiction as is the question whether a tribunal may interpret a judgment once given or review it. The dissimilar question whether a tribunal may exercise judicial authority over a third party who seeks to intervene and whether a tribunal may only issue a declaration of rights and obligation rather than go further have both been described as questions of jurisdiction.'

<sup>50</sup> Arts 34 and 35 of the ICJ Statute (n 36).

the Law of the Sea (ITLOS) are also open to ‘entities other than States Parties’.<sup>51</sup> The WTO dispute settlement procedure can hear claims against states and the EU.<sup>52</sup> The ECtHR at present can only hear claims against states, but in the future will be able to decide claims against the EU. For arbitral tribunals, everything depends on the terms of the arbitration agreement, and there is no *a priori* limitation to the actors that can be brought before such tribunals.

Second, within the category of actors that in principle can be brought before an international court, only those actors can appear as defendants that have consented to the jurisdiction of the court, through a bilateral or multilateral treaty or otherwise.<sup>53</sup> Here, crucial distinctions exist between situations where states and/or international organizations have given their consent before a questions of shared responsibility arises (this will apply in any case to the ECtHR and the WTO dispute settlement procedure, potentially also for the other international courts), on the one hand, and situations where no such *a priori* consent has been given. In the latter case, it is more likely that one or a few, but not all co-responsible parties can be brought before the court.

Third, the powers of courts for determining responsibility of multiple responsible parties depend on the applicable law.<sup>54</sup> Given that all international courts can only apply a certain set of rules, the potential responsibility of an actor under another set of rules is irrelevant for that particular court. For instance, the LOSC DSP will in principle only be able to adjudicate claims under the Law of the Sea Convention. If one of the potentially co-responsible parties has, by its contribution to the single harmful outcome, acted in contravention of a human rights treaty that might ‘objectively’ make it co-responsible, but the LOSC DSP will not be able to adjudicate claims on that basis.

Fourth, the question whether all responsible parties may be brought before an international court may depend on the standing of a state, or other actor, to present a claim against two or more responsible actors, over which the court in principle has jurisdiction. In the ICJ, if a state has no legal interest in the subject matter of his claim (a right that is potentially violated by a particular party), the state lacks standing and the court will not deal with the substantive questions of that particular claim.<sup>55</sup>

While standing may at first sight seem less relevant to questions of shared responsibility, as it relates primarily to the plaintiff rather than to the responsible parties, rules on standing can in particular cases present a barrier to litigation of questions of shared responsibility. A plaintiff may have a right to bring a claim against one, but not against all responsible parties. In regard to proceedings in the ICJ, if the obligations breached by separate responsible parties are different, it may be the case that a claimant has standing *vis-à-vis*

<sup>51</sup> Art 20 of the Statute of the International Tribunal for the Law of the Sea, which is Annex VI to the Law of the Sea Convention (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

<sup>52</sup> Bartels (n 5) 344.

<sup>53</sup> See eg JG Merrills, *International Dispute Settlement* (CUP 2005) 119–23.

<sup>54</sup> I thank Lorand Bartels for pointing out this particular point.

<sup>55</sup> This may be different in other courts, such as the WTO, see *EC – Regime for the Importation, Sale and Distribution of Bananas (Banana's III)* WT/DS27/AB/R AB-1997-3 (rejecting a requirement of legal standing).

some responsible parties, but not against others.<sup>56</sup> Another example is a case based on diplomatic protection, where remedies can have been exhausted in some, but not in all responsible states. In the ECtHR, the admissibility criteria contained in the Convention may prevent standing of individuals who are not under the jurisdiction of all responsible parties, or who are not a victim of breaches by all responsible states.<sup>57</sup>

These four questions will guide individual analyses of international courts to assess whether a court can exercise jurisdiction in relation to all responsible parties. It is to be added that the role of actors whose responsibility cannot be determined by an international court on any of the above grounds, can still be relevant in terms of its causal contribution to a particular harmful outcome, and as such may be relevant to questions of reparation.

### B. *How to Handle Multiple Party Proceedings*

A second set of questions relates to how an international court can handle the involvement of multiple defendants in respect to which it exercises jurisdiction. Two scenarios present themselves. On the one hand, cases against multiple defendants can be adjudicated in separate proceedings. On the other hand, cases can be litigated in one proceeding against multiple defendants. Either the plaintiff can list all responsible parties as defendants in one case,<sup>58</sup> or if that is not done, a court may join the proceedings into one case.

The choice between these two options depends of course first and foremost on the question whether an international court has the power to join cases. Except for arbitration,<sup>59</sup> few barriers exist. For instance, both the ECtHR<sup>60</sup> and the ICJ have the power to join proceedings.<sup>61</sup> The more difficult question is on what grounds they should decide.<sup>62</sup> The prime question is whether in a case of shared responsibility the connection between the responsible parties is such that joinder is justified—either pragmatically [as it may prevent duplicative (and costly) proceedings], or more principally given the connection between the cases. The interrelationship between wrongfulness, responsibility and reparation may be better dealt with in one proceeding. Whether this is the case may depend on the nature of shared responsibility. In a case of cumulative, unrelated shared responsibility, separate proceedings can be expected (even though in such a case reasons of judicial efficiency may justify joinder). But in the case of co-operative responsibility, and certainly in case

<sup>56</sup> Paparinskis (n 3).

<sup>57</sup> den Heijer (n 7) 368.

<sup>58</sup> This is quite rare—in the ICJ this has happened only once in *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Objections) [1954] ICJ Rep 19.

<sup>59</sup> 'In general international arbitrations there is limited scope for joinder, separation or regrouping of claims. For, the *compromis* upon which they are based may itself contain provisions joining, separating or regrouping claims. Claims arbitrations, on the other hand, have developed a more or less settled practice in this regard.' VS Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers 1980) 144.

<sup>60</sup> Rule 42 (1) and (2) of the Rules of the European Court on Human Rights (July 2009). An example is *Behrami and Behrami v France and Saramati v France, Germany and Norway* (App nos 71412/01 and 78166/01) ECHR, 2 May 2007. See also den Heijer (n 7) 370. *France and Saramati v France, Germany and Norway* (App nos 71412/01 and 78166/01) ECHR, 2 May 2007. See also den Heijer (n 7) 370.

<sup>61</sup> Paparinskis (n 3) 393.

<sup>62</sup> Generally Mani (n 59) 145–46.

there is a single wrongful act, there is much reason to consolidate separate cases in one procedure.

However, the interest that may be served by joinder in the sense of capturing the shared nature of the responsibility may have to be balanced against the interests of the defendants, who may prefer separate over joined proceedings, which gives them more control over litigation strategy. For instance, they may argue particular points of evidence that relate to co-responsible states, who are not party to the proceedings. The ICJ in particular appears to attribute much importance to the views of the parties regarding the desirability of the joinder.<sup>63</sup>

One specific procedural issue related to multiple responsible states is the position of (ad hoc) judges nominated by the defendant state. The right of defendant states to appoint a judge may, in the case of the ICJ and arbitration, lead to large number of judges which does not necessarily facilitate proceedings. Procedural solutions may be thought of (eg in the case of arbitration a sole arbitrator to be appointed by all responsible parties,<sup>64</sup> or the common interest judge in the ECtHR<sup>65</sup>). However, interests of defendant states may lead them to prefer separate proceedings, with the possibility to appoint their own (*ad hoc*) judge.<sup>66</sup>

The papers in this collection will consider whether and in what circumstances joinder is possible in situations of shared responsibility, in what cases it has been used, and what counter-veiling interests may be relevant in opposing joinder of procedures.

### *C. The Position of Absent Parties*

The third set of questions relates to how adjudication of claims against one or more responsible states is affected by the fact that one or more other (co-)responsible states are absent from the proceedings. Here, in particular three aspects can be distinguished: the indispensable parties rule, intervention and questions of evidence.

The most important question is whether a court can proceed at all in the absence of particular co-responsible parties. The question may arise whether the procedural rules allow, or even require, the court to protect the interests of co-responsible parties who are not party to the dispute, by deciding that it has no jurisdiction over the claim against the actor over which it otherwise would have jurisdiction. The *Monetary Gold* principle, as it operates in the practice of the ICJ is the prime manifestation of this rule.<sup>67</sup>

Where the principle applies, its scope is subject of some uncertainty. A distinction may need to be drawn between states and other actors who in principle can be within the jurisdiction of a court, and entities that as a matter

<sup>63</sup> Paparinskis (n 3) 304. Compare the situation in arbitration Baetens (n 4) 332 and in the LOSC DSP Plakokefalos (n 6) 393.

<sup>64</sup> Baetens (n 4) 325.

<sup>65</sup> den Heijer (n 7) 370.

<sup>66</sup> Rule 30 of the Rules of the ECtHR foresees in the appointment of a single 'common interest' judge.

<sup>67</sup> Alexander Orakhelashvili, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from *Monetary Gold* to *East Timor* and Beyond' (2011) 2 JIDS 373.

of principle cannot be within the jurisdiction of that court. For example, in the ICJ the question is whether the principle applies to international organizations or other non-state actors, who may be co-responsible, but who cannot be brought within the jurisdiction of the court.<sup>68</sup>

The principle is not limited to the ICJ. In the *Case concerning the Delimitation of Maritime Areas between France and Canada*, the Court of Arbitration declined to address the delimitation of the continental shelf beyond 200 nautical miles, stating that this would have involved international organs entrusted with the administration and protection of the Area which were not represented in the proceedings.<sup>69</sup> While it appears from the individual contributions that the indispensable parties rule does not play a significant role in any of the other courts and tribunals, it is by no means excluded that it will not arise in the context of arbitration, ITLOS or WTO dispute settlement. In the ECtHR we see comparable constructions that, while different from the *Monetary Gold* principle, likewise seek to protect the interests of parties that are not before the court. An example is the ECtHR's repeated emphasis that it does not make any determinations of responsibility of states who are not a party to the ECHR, for instance in extradition cases where questions arise on the protection of human rights in the state to which a person will be extradited.<sup>70</sup>

The question of intervention<sup>71</sup> is relevant since judicial decisions against particular actors may indirectly implicate co-responsible parties who are not party to the proceedings. A possible determination of the liability of one state might entail the effective determination of the liability of another state.<sup>72</sup> Unless a court resorts to an indispensable parties principle, intervention may be necessary to protect such peripheral effects.

It is therefore important to assess how international courts have construed the right of intervention. If the right of intervention would be interpreted narrowly, this would limit the possibility of co-responsible states to protect their legal interests, 'particularly if combined with an equally narrow interpretation of the *Monetary Gold* principle that permits the case itself to proceed'.<sup>73</sup> In the ICJ these concerns have not materialized in practice, however. Also in the WTO the right to intervention appears to be sufficiently broadly construed to allow (in the rare cases of shared responsibility in the WTO) co-responsible parties to intervene to defend their interests.<sup>74</sup> In the ECtHR, not only co-responsible states party to the Convention, but also international organizations, which cannot be a party to the proceedings, can intervene.<sup>75</sup>

<sup>68</sup> Paparinskis (n 3) 316.

<sup>69</sup> *Delimitation of Maritime Areas between France and Canada* (Decision) (10 June 1992) 31 International Legal Materials 1145, [78]–[79]; Rüdiger Wolfrum, 'Enforcing Community Interests through International Dispute Settlement: Reality or Utopia' in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 1132, 1141–43.

<sup>70</sup> den Heijer (n 7) 373.

<sup>71</sup> See on intervention Amerasinghe (n 49) 314–39.

<sup>72</sup> *Certain Phosphate Lands in Nauru* (n 12), Dissenting Opinion Judge Schwebel, 329; *Monetary Gold* (n 58) 32.

<sup>73</sup> Paparinskis (n 3) 306.

<sup>74</sup> Art 10 of the WTO DSU (n 37); see Bartels (n 5) 354.

<sup>75</sup> den Heijer (n 7) 375.

A separate set of questions relates to evidence.<sup>76</sup> When some, but not all, responsible parties are involved in the proceedings, the question arises whether the court can make the necessary factual determinations.<sup>77</sup> The absence of co-responsible parties may adversely affect the interests of both plaintiff and respondents, 'both by its inability to obtain needed evidence and by the differential levels of obligation that could be created when some but not all of the involved States are bound by the Court's judgment'.<sup>78</sup> The question then is what powers are available to obtain evidence of co-responsible parties who are not a party to the dispute before the court or tribunal in question.<sup>79</sup> Has the court or tribunal in question a 'right to seek information', extending to actors who are not parties to the particular dispute, and how can this be relevant in situations of shared responsibility?<sup>80</sup> The powers of various courts and tribunals differ. For instance, the ICJ may request information from international organizations<sup>81</sup> or may appoint experts. In the WTO DSU system, panels have broad powers and have an express right to seek information.<sup>82</sup> In the ECtHR, all contracting parties (also those that are not party to the case) and the applicant are obliged to assist the Court in implementing investigative measures.<sup>83</sup> Moreover, the President of the Chamber may invite or grant leave to 'any third party' to participate in an investigative measure.<sup>84</sup>

#### 4. *The Broader Context: Multilateral Dispute Settlement*

Procedural rules that specifically and exclusively apply to litigation of questions of shared responsibility are quite rare. Most of the rules that are relevant to such litigation, as identified in the previous section, are part of a broader set of rules that relates to multilateral aspects of international dispute settlement. It is helpful to disaggregate the category of procedural rules that is relevant to shared responsibility in four sub-categories.<sup>85</sup>

First, some rules relate to the structure of dispute settlement as such. An example is the principle of consent to jurisdiction.<sup>86</sup> This principle is relevant

<sup>76</sup> See generally on evidence CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005).

<sup>77</sup> Benzing (n 16) 383; Chester Brown, *A Common Law of International Adjudication* (OUP 2007) ch 3; Mani (n 59) 194; Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 *Law Prac Intl Cts Tribunals* 119; Philip Leach, Costas Paraskeva and Gordana Uzelac, 'Human Rights Fact-Finding: the European Court of Human Rights at a Crossroad' (2010) 28 *NQHR* 41; Natalie Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor Case*' (1996) 21 *Yale J Intl L* 305, 329.

<sup>78</sup> Fislser-Damrosch (n 15) 391.

<sup>79</sup> Benzing (n 16) 384; M Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court' in Emmanuel G Bello and Bola A Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (Martinus Nijhoff Publishers 1992) 205.

<sup>80</sup> Art 13 WTO DSU (n 37); see also Bartels (n 5) 356.

<sup>81</sup> Art 34(2) ICJ Statute (n 36) provides that: 'The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative'.

<sup>82</sup> Art 13 WTO DSU (n 37).

<sup>83</sup> Art 38 ECHR (n 36), r A2(1) Annex to the Rules of the ECtHR.

<sup>84</sup> Rule A1(6) Annex to the Rules of the ECtHR.

<sup>85</sup> I thank Martins Paparinskis for pointing out the relevance of this distinction.

<sup>86</sup> Consent of states is vital. See on consent eg ch 3, 'Consent as the Basis of Jurisdiction of International Tribunals' in Amerasinghe (n 49). At p 70 Amerasinghe states that '[t]heir [international tribunals - added] jurisdiction in contentious matters certainly, whether they are *ad hoc* tribunals, long standing *ad hoc* tribunals, such as the Iran-US Claims Tribunal or Claims Commissions, or established or standing courts, such as the ICJ or ITLOS, is based on the consent of states which are generally parties to the dispute, or have some connection



to litigation of questions of shared responsibility, as it may imply that an injured party may be able to bring a claim before the ICJ, the Law of the Sea Tribunal or an arbitration tribunal against one responsible state, but not against co-responsible states who have not accepted the jurisdiction of such courts or tribunals. For this reason the principle of consent will be considered in the separate contributions. However, obviously the principle of consent has a bearing on many other aspects of international adjudication, and thus cannot be considered to be distinctive for shared responsibility.

The same might hold for questions of evidence. Paparinskis notes: ‘while cases of shared responsibility might illustrate the evidentiary challenges in particularly clear terms, the challenges are those of evidence in the ICJ (and international dispute settlement) more broadly and would have to be dealt with in terms of those debates’.<sup>87</sup>

Second, some procedural rules may relate to the involvement of multiple parties in international adjudication, whether or not these relate to responsibility. For example, bilateral delimitation of territory between two states may have effects on third states, and third states may for that reason wish to intervene. Yet, no question of responsibility needs to arise. This scenario raises questions (such as the scope of the right to intervene) that may be relevant to questions of shared responsibility, and as such they need to be studied. However, they are not specific or exclusive for situations of shared responsibility.

Third, some rules relate to multiple parties that are involved in responsibility, but that do not necessarily involve questions of shared responsibility. For instance, the *Monetary Gold* case before the ICJ involved multiple parties,<sup>88</sup> but did not involve a question of shared responsibility. Yet, the principle that was laid down in that case is highly relevant for questions of shared responsibility, and is considered in all individual contributions to this special issue.<sup>89</sup> Similarly, in particular cases where multiple states are injured, multiple states may bring a case against one responsible state. Again, no question of shared responsibility needs to arise, yet the principles that apply to such invocation may be relevant.

Fourth, there exists a category of rules that specifically apply to, and has relevance for, questions of shared responsibility. The prime example is the principle of joint and several liability, that allows an injured party to claim damages from each of the (co-)responsible states.<sup>90</sup> Another example is particular evidentiary rules that pertain to causal determinations in relation to multiple responsible states.<sup>91</sup>

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through consent in some form with the establishment of the tribunal and the formulation of its jurisdiction, e.g., if one party to the dispute is not a regular international legal subject but is, for instance, an individual. This is the general principle.’

<sup>87</sup> Paparinskis (n 3) 307.

<sup>88</sup> *Monetary Gold* (n 58).

<sup>89</sup> Paparinskis (n 3) 308.

<sup>90</sup> See Section 5 below.

<sup>91</sup> See Section 5.

It thus appears that the category of procedural rules that is relevant to shared responsibility in large part consist of rules that are not *exclusively* relevant to shared responsibility. That does not in any way diminish their relevance for shared responsibility, and thus the relevance of the inquiry of the present special issue. However, it does mean that reflections on the justifications of such rules, and the possibility or desirability of a change in such rules, cannot be limited to their effects on shared responsibility, but have to take into account the broader set of interests that are served by such rules, and the wider set of circumstances that is affected by them.

### 5. *Accounting for Differences*

The procedural rules of the five selected international courts, and the practice related to the application of such rules, have one major feature in common: for none of the courts, the procedural rules envisage in a relevant extent the possibility of co-responsible actors. Just as the principles of international responsibility developed by the ILC barely recognize the possibility of shared responsibility, the procedural rules of international courts have very little to say on the situation where there is not one responsible state, but multiple responsible states acting as defendants. Thus, the procedural rules that apply to litigation of shared responsibility are the ordinary procedural rules, that have to be adjusted to fit the specific characteristics of shared responsibility and, more generally, multilateral dispute settlement.

The need for such adjustment arises only sparsely. While the number of situations before international courts that can be characterized in terms of shared responsibility appears to increase, most of such situations are litigated as cases of individual responsibility, and no procedural questions of adjudication of shared responsibility arises.

To the extent that the need for adjustment to the specific contest of shared responsibility does arise, the picture that emerges is above all one of diversity. The procedural rules and their application in practice show substantial differences. Notable differences exist in the type of actors whose shared responsibility is engaged that can be brought before the court, in the role of consent as a precondition to the exercise of jurisdiction over co-responsible states, in the scope of the applicable law as a manifestation of jurisdiction, in the requirements of standing, in the practice of joinder, in the role of the indispensable parties rule and in the powers of the courts to obtain evidence from actors that are not party to the proceedings.

From such differences it can be inferred that we cannot identify a body of general principles of procedural law that equally apply to all international courts.<sup>92</sup> Rather, the procedural rules are regime specific, each negotiated by the parties, and filled in by the judges, in the context of the specific normative and institutional context in which that court functions.

<sup>92</sup> Cf R Kolb, 'General Principles of Procedural Law' in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006).

In the diverse spectrum, some courts are better able to handle questions of shared responsibility than others. In the ICJ, in particular the *Monetary Gold* principle and the rule and practice of joinder may complicate determinations on shared responsibility. In the ECtHR, both these rules are less problematic, but other problems exist here, notably the requirements of a jurisdictional link and the victim requirement.

The question then is what accounts for such differences. Perhaps the most important factor is that the degree in which a treaty regime protects particular public values influences the way that questions of shared responsibility will be adjudicated. In a horizontal, bilateral setting, consent in relation to jurisdiction (and joinder) remains more dominant, and the powers of courts and tribunals *vis-à-vis* actors that are not before the court are more limited. It is this factor that explains why the procedure in the ECtHR displays a relatively large degree of openness towards multilateral dispute settlement. However, the example of the ECtHR shows that the public law nature of the regime does not provide a comprehensive explanation of the ability of the court to address questions of shared responsibility—other barriers such as jurisdiction and the victim requirement call for different explanations. Each of the regimes has been developed with a view to cater for distinct and diverse interests. Litigation of shared responsibility was not among those. The degree in which any particular set of procedural rules allows an international court to adjudicate claims of shared responsibility, thus necessarily requires a broader assessment of the nature and functions of international courts.