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.

* The authors thank Mark Janis and Howard Berman for their helpful comments on earlier drafts. This Article is an expanded and modified treatment of a subject introduced in B. Smith, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION (1988).
† 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.
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," 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.") adopted the following as its first and basic

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-
Joint and Several State Liability

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

1. Joint and Several State Liability

statement on state responsibility: “Every internationally wrongful act of a State entails the international responsibility of that State.”

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.”

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...
minded”⁶ 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

---

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.

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 L. 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.
Joint and Several State Liability

contected conduct in breach of an international obligation. 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. 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. 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. Second, several states may independently pollute the environment in a way that, in the aggregate, seriously damages another state. 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.


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.


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 sited 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).


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.\textsuperscript{16}

In each of the preceding illustrations of independent breaches, the target state experienced a single injury.\textsuperscript{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.\textsuperscript{18} Hence, in this


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

230
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. 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); Briefly, 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 nonetheless 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.

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.” 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.

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. 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. 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


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. BROWNLIE, 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. BROWNLIE, 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).
Joint and Several State Liability

contract with Persia. 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. 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. 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. Doctrines of sovereign immunity or act of state, for example, would preclude most claims against foreign states.

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, terms of the International

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.
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 States\(^{31}\) 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.\(^{35}\)


\(^{32}\) 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].

Joint and Several State Liability

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

Although a few tribunals recently have adopted provisions for multi-party dispute resolution, they have rarely considered claims against multiple states. 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. 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. 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 multi-party 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.


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. LILICHH & 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. During the ten years of its operation, however, the Court considered only one case involving a claim against more than one state. 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.

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.

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).


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 unterutilization of the I.C.J., and that "[l]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.
Joint and Several State Liability

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. 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." If more than one state breaches its international obligations in the course of an event,


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-breath 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); I 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
Joint and Several State Liability

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.”

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. 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.

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. 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.

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.


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., I 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.


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. 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.

Satisfaction, the third form of reparation, is often associated with such non-material injuries. 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. 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. 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.

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." 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. BROWNLE, supra note 1, at 199.
57. See 1 M. WHITEMAN, supra note 18, at 42-44.
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. BROWNLE, supra note 2, 460-61.
60. For discussion of the nature of satisfaction, see I. BROWNLE, 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. BROWNLE, supra note 2, at 459; I. BROWNLE, 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.
Joint and Several State Liability

*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. Compensation also ought not result in the unjust enrichment of victim states. 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. 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, 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.

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

---


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.

Joint and Several State Liability

until 1950 by order of the Allied forces occupying Japan. 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. 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.

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."

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, 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. The claimant in


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.


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.  

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 Objects 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." 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. 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." 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. Debate on


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.


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

80. Id. art. V(2).

Joint and Several State Liability

the subject continued throughout the course of the Convention proceedings, with several states proposing variations on the theme of subsidiary or secondary liability. 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. 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.

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. 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. Jasentuliya & 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.


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. As between the two launching states, the Convention adopts a regime of contribution based on comparative fault. "The burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them."  

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, 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." 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." 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).
89. I. BROWNLIE, supra note 2, at 456.
90. Ago, supra note 25, at 269.
Joint and Several State Liability

"dependent state" cases, the dependent state typically has been exonerated without even an acknowledgment of the possibility of multiple responsibility. Thus, Ago states, “[W]henever 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

92. “La logique et l’équité exigeraient que les États qui se trouvent dans [une] situation dépendante ne fussent responsables de leurs actes à l’égard des gouvernements étrangers qu’en proportion de leur liberté d’action.” 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. BROWNIE, 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.\textsuperscript{96} Compensation in the \textit{Martini} case was also reduced to a fraction of the total damages experienced by a foreign company during the Venezuelan civil war.\textsuperscript{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 \textit{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."\textsuperscript{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,\textsuperscript{99} many more recent examples in international judicial practice demonstrate acceptance of the principle of comparative apportionment of compensation in circumstances of contributory conduct.\textsuperscript{100} The apportionment, and in earlier cases the denial, of compensation generally reflects an analysis of relative causation.\textsuperscript{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

\textsuperscript{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).
\textsuperscript{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 \textit{combination} of the conduct of the injured victim and another state, there is no liability).
\textsuperscript{100} See J. PERSONNAZ, supra note 48, at 107; I G. SCHWARZENBERGER, supra note 48, at 662-63; de Aréchaga, supra note 5, § 9.19, at 569; García-Amador, supra note 58, at 44.

\textsuperscript{101} See, e.g., B. BOLLECKER-STERN, supra note 5, at 317-44; 1 M. WHITEMAN, supra note 18, at 216-22.
Joint and Several State Liability

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.
105. 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN PARTY 623 (1898).
106. 1 G. SCHWARZENBERGER, supra note 48, at 661 (footnote omitted).
"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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{109} \textit{Id.} at 233-40; see \textit{ supra} text accompanying note 48

\textsuperscript{110} See F. \textsc{Valli, Servitudes of International Law: A Study of Foreign Territory} 51 (2d ed. 1958).

\textsuperscript{111} C. \textsc{de Visscher, Theory and Reality in Public International Law} 400 (P. Corbett trans. rev. ed. 1968).

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} See \textit{ supra} text accompanying note 48; \textit{infra} text accompanying notes 138-39.

\textsuperscript{114} H. \textsc{lauterpacht, Private Law Sources and Analogies of International Law} \S 34, at 81 (1927).

\textsuperscript{115} See H. \textsc{lauterpacht, The Function of Law in the International Community} 66, 77-79 (1933). \textit{But see I. Brownlie, supra} note 2, at 456 (stating that municipal analogies are "unhelpful" in the context of multiple responsibility). See also Gray, \textit{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 \textit{particular} municipal system for guidance or to a "case by case approach" may be "inevitable").
Joint and Several State Liability

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. 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.

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.'

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.

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


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. 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. 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. 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.” Article 455 of the 1984 revision of the Soviet Civil Code states, “Persons who jointly cause harm shall bear joint liability to the victim.” 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.” 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; Onrechmatige 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).


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.

Joint and Several State Liability

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.
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, Shar‘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 règles 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.\textsuperscript{133} Even in admiralty, however, joint and several liability is the established practice for personal injuries or death.\textsuperscript{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 cargoes\textsuperscript{135} or vessels.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{139}

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.


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.

Joint and Several State Liability

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. 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. 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. 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.

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? Since contribution claims depend on principles of prevention of unjust enrichment, 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; Salmon 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. 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.

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, 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.

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.” 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.

146. See Prosser and Keeton on Torts, supra note 12, § 50.
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.
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. 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.”

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.

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. 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.

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. Finally, the need to limit joint and several liability because of the perception that a responsible state cannot (as opposed to

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.
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 cer-
tain 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 pros-
pect 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 responsibil-
ity are not yet mature. Nonetheless, on the basis of the available interna-
tional and municipal literature and precedent, one can suggest both the
logical contours of such rules and the circumstances in which a progres-
sive regime is most likely to achieve consensus among states. It is impor-
tant 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 sev-
eral liability.

First, dispute settlement in the international system depends on the
will of the states involved. There is no truly compulsory method to ob-
tain a resolution or judgment regarding a claim of responsibility. Even
the putative “compulsory jurisdiction” of the International Court of Jus-
tice 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. 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 eco-


158. See I. Brownlie, supra note 2, at 705.
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 conse-
quencces 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, and they can establish specific contribution or indemnity obligations rep-
resenting their own views of the appropriate allocation of risk. 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.

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 expecta-
tions present in the situation of concerted conduct. 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 contribu-
tion and qualified independence.

If one is persuaded that imposing joint and several liability on in-
dependent wrongdoers is unacceptable, municipal admiralty practice in
cases of damage to property suggests an alternative to joint and several
liability in these circumstances. 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 pre-
ceeding the particular dispute, see Ambatielos Case (Preliminary Objection) (Greece v. U.K.),
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
165. The situation of complicity may represent an exception, suggesting that for these pur-
poses 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 conjunc-
tion 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.
Joint and Several State Liability

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{173}

Problems of policy are far greater when harm
Joint and Several State Liability

is the consequence only of the combination of conduct essentially equivalent in terms of causation and blameworthiness. 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. 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.

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. 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.\textsuperscript{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.\textsuperscript{179}

Because indemnification for loss is the fundamental reason behind the principle of joint and several liability,\textsuperscript{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:

\begin{quote}
The 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.\textsuperscript{181}
\end{quote}

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

\begin{quote}
\end{quote}

\textsuperscript{178} See G. Williams, \textit{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.”).

\textsuperscript{179} See \textit{supra} text accompanying notes 94-106.

\textsuperscript{180} See \textit{supra} text accompanying note 138.

\textsuperscript{181} N. Matte, \textit{supra} note 83, at 159.

\textsuperscript{182} See \textit{supra} text accompanying note 83.

\textsuperscript{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.
Joint and Several State Liability

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186} For example, in the course of the \textit{Samoan Claims} arbitral case,\textsuperscript{187} which found the United States and the United Kingdom responsible for harm to German citizens in Samoa,\textsuperscript{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."\textsuperscript{189} Frequently, however, as Schwarzenberger states, "[T]he damage suffered by a victim . . . is merely one of the items included in the

\textsuperscript{184} \textit{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. \textit{See Goldie, A General View of International Environmental Law: A Survey of Capabilities, Trends and Limits,} in \textit{Hague Academy of International Law, Colloquium 1973: Protection of Environmental and International Law} 25, 90 (C. Kiss ed. 1975); \textit{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. \textit{See supra} note 4.


\textsuperscript{188} \textit{See supra} notes 67-69 and accompanying text.

\textsuperscript{189} \textit{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." \textit{I. Brownlie, supra} note 2, at 457 (footnote omitted).
international claim for adequate reparation."\textsuperscript{190} Where state claims for compensation relate to 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.\textsuperscript{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 blame-worthy 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-

\textsuperscript{190} I G. SCHWARZENBERGER, \textit{supra} note 48, at 663.
\textsuperscript{191} See \textit{supra} text accompanying notes 64-66.
Joint and Several State Liability

ate to the settling state's degree of fault?\textsuperscript{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.

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