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On the Benefit of Reinventing the Wheel: The Notion of a Single Internationally Wrongful Act

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Abstract

This article is a critical reaction to the 2020 EJIL Foreword titled 'Guiding Principles on Shared Responsibility in International Law'. It focuses on Principle 3, concerning a 'single internationally wrongful act', and it is divided into its constitutive elements: the meaning of same conduct (Section 2), the attribution to multiple persons (Section 3), the breach of obligations (Section 4) and the indivisible injury (Section 5). The main criticism is that the Guiding Principles make things more complex than they already are. The established principles of international responsibility provide simpler and more effective answers. This is particularly the case for Principle 3, which concerns multiple responsibilities arising from the same conduct. There are two main elements through which the Guiding Principles on Shared Responsibility seek to provide guidance in the case of a plurality of internationally responsible persons. First, they employ the comprehensive notion of an internationally wrongful act, while ARSIWA and ARIO distinguish between the two elements of attribution of conduct and the breach of an obligation. Second, the Guiding Principles consider the injury to be a constitutive element included in the definition of shared responsibility, while ARSIWA and ARIO only employ it in the context of reparation and countermeasures. There are no actual benefits coming from these attempts of clarification.

1 Introduction

My critical reaction to the 2020 EJIL Foreword titled 'Guiding Principles on Shared Responsibility in International Law' (hereinafter 'Guiding Principles')[1] focuses on the case of shared responsibility in which the same conduct is attributed to more than one

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1 Nollkaemper, d'Aspremont, Ahlborn, Boutin, Nedeski, and Plakokefalos, 'Guiding Principles on Shared Responsibility in International Law', 31 *European Journal of International Law* (*EJIL*) (2020) 15 (hereinafter 'Guiding Principles').

international person. This circumstance is called a 'single internationally wrongful act' by Principle 3:

> International persons share responsibility for a single internationally wrongful act when the same conduct consisting of an action or omission: (a) is attributable to multiple international persons; and (b) constitutes a breach of an international obligation for each of those international persons; and (c) contributes to the indivisible injury of another person.[2]

The following sections will dissect this principle, discussing the meaning of same conduct (Section 2), the attribution to multiple persons (Section 3), the breach of obligations (Section 4) and the indivisible injury (Section 5).

My comments specifically refer to Principle 3, but in many cases are applicable to the Guiding Principles as a whole. In general, my main critique concerns their complexity. I believe that the Guiding Principles make things more difficult than they already are. I understand that the project that led to the Guiding Principles is based on the idea that international responsibility does not adequately regulate the cases in which multiple perpetrators are involved and that it aims to clarify and provide guidance.[3] However, I do not think that the Guiding Principles do a better job than the articles of the International Law Commission on international responsibility in providing effective answers.[4] This is particularly the case for multiple responsibilities arising from the same conduct. The established principles of international responsibility provide the same answers, but they do so in a simpler way. Simplicity, which is different from being simplistic, is the goal of the following pages.

2 'International persons share responsibility for a single internationally wrongful act when the same conduct consisting of an action or omission'

The attribution of the 'same conduct' to a plurality of international persons characterizes the notion of 'single internationally wrongful act' under the Guiding Principles. This is a well-established phenomenon. It was first identified by Roberto Ago in 1978.[5] In his Seventh Report, he discussed the cases of participation by a state

[2] *Ibid.*, at 28.

[3] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (2013) 359. Throughout the article, I will refer to the 'SHARES Project' to mention the broader framework under which the Guiding Principles were written. See Research Project on Shared Responsibility in International Law, www.sharesproject.nl/ (last visited 15 Dec. 2020) (hereinafter 'SHARES Project').

[4] Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 3 August 2001, reprinted in 2 *International Law Commission Yearbook* (*ILC Yb*) (2001) 26 (hereinafter 'ARSIWA'); Articles on the Responsibility of International Organizations, UN Doc. A/66/10, 2(2) *ILC Yb* (2011) 40 (hereinafter 'ARIO').

[5] Roberto Ago, Special Rapporteur, Seventh Report on State Responsibility, UN Doc. A/CN.4/307, 29 March, 17 April, and 4 July 1978, 2 *ILC Yb* (1978) 31, at 54, para. 59.

in an internationally wrongful act of another state. His aim was to define complicity, and, in order to do so, Ago distinguished it from the case of attribution of the same conduct to more than one international person: '[I]t must be emphasized that there can be no question of the participation of a State in the internationally wrongful act of another State in cases of parallel attribution of a single course of conduct to several States.'[6] Ago referred to the example of a joint organ, whose conduct is attributable to several states at the same time. Indeed, this is the most recognized factual circumstance, applicable in situations such as the joint administration of the island of Nauru.[7] The essential characteristic of this case is that the international persons commit separate, although identical, wrongful acts. Therefore, the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) do not include a rule on multiple attribution, because the articles do not need to duplicate something that derives from the established criteria on the attribution of conduct.

The Guiding Principles take a different road to cover the same scenario. Leaving aside the controversial element of indivisible injury (discussed below in Section 5), Principle 3 on the single wrongful act covers the elements identified by Roberto Ago: a single conduct, the attribution of this conduct to multiple international persons and the violation of an obligation by each of all the persons involved. Indeed, the SHARES Project did not deviate from the definition of internationally wrongful act used in international responsibility, consisting in an attribution of conduct and a violation of an international obligation.

In addition, Principle 3 qualifies the wrongful act with the very unclear adjective 'single'.[8] The commentary to Principle 3 quotes a relevant passage from ARSIWA to define single wrongful act as follows: '[A] "single wrongful act" arises when two or more international persons engage in "a single course of conduct [that] is at the same time attributable to several [international persons] and is internationally wrongful for each of them".'[9] However, ARSIWA uses the adjective 'single' to refer to the conduct, and not to the wrongful act. If the conduct is wrongful 'for each of them', it is clear that there are multiple wrongful acts. As is well established in the law of international responsibility, each actor is separately responsible for the conduct attributable to it employing the several criteria on the attribution of conduct. Another sentence in the same paragraph of ARSIWA leaves no doubt: 'In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2.'[10]

6 *Ibid.*

7 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240, paras 45–47.

8 In the context of the shared project, the distinction between 'same' (interpreted as 'single') and 'multiple' acts is made in d'Argent, 'Reparation, Cessation', in A. Nollkaemper and I. Plakokefalos, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 208.

9 Guiding Principles, *supra* note 1, at 29; ARSIWA, *supra* note 4, Art. 47, commentary para. 3.

10 ARSIWA, *supra* note 4, Art. 47, commentary para. 3.

It is also important to note that the expression 'same internationally wrongful act' used in Article 47 ARSIWA and Article 48 of the Articles on the Responsibility of International Organizations (ARIO) does not mean 'single', but 'identical'. As discussed by Crawford in its Third Report, quoting Ago: 'two or more States will concurrently have committed separate, although identical, internationally wrongful acts.'[11]

Principle 4 on multiple wrongful acts is defined in the commentary as 'shared responsibility resulting from a situation in which international persons separately commit internationally wrongful acts'.[12] This general claim is also valid for Principle 3, under which the same conduct is attributed to a plurality of international persons and causes a plurality of internationally wrongful acts. It is not the single/multiple wrongful act(s) that distinguish Principle 3 from Principle 4, but the same/different conduct(s). Principle 3 is characterized by the same conduct attributed to several international persons. Principle 4 is characterized by several conducts attributed to several international persons, which are connected by additional elements (aid and assisting, direction and control, etc.).

Actually, there is a scenario in which multiple responsibilities derive from a single wrongful act, but it depends on the nature of the obligation and it is not an issue that falls in the application of the Guiding Principles (I will discuss this in Section 4 below).

In sum, the notion of 'single internationally wrongful act' is wrong, and its distinction from 'multiple internationally wrongful acts' cannot be upheld. 'Single' does not refer to the commission of only one wrongful act but to a single course of conduct. The clarification of international responsibility offered by the Guiding Principles is cast in terms of internationally wrongful acts, rather than separating the two elements of attribution of conduct and violation of an obligation. There is no actual benefit from this theoretical operation, which actually makes things more complicated.

3 '[A]ttributable to multiple international persons'

It is clear that under Principle 3 a separate test of attribution needs to be performed for each of the international persons involved, which are separately responsible for the same conduct. The attribution to a plurality of states of the conduct of a joint organ, mentioned by Roberto Ago, might be the oldest and most evident example, but several other circumstances have arisen in practice, and many more are theoretically possible. As recognized in the commentary to Principle 3, the multiple attribution of the same conduct is based on the application of Articles 4–11 ARSIWA (from which we should exclude Article 6) and Articles 6–9 ARIO. These criteria are too numerous and too different from each other to be effectively regulated by one norm.

[11] James Crawford, Special Rapporteur, Third Report on State Responsibility, UN Doc. A/CN.4/507 and Add.1–4, 2(1) *ILC Yb* (2000) 3, para. 267. See also J. Crawford, *State Responsibility: The General Part* (2013), at 333. In the context of the SHARES Project, see also Nollkaemper and Jacobs, *supra* note 3, at 388.

[12] Guiding Principles, *supra* note 1, at 34.

In the context of the SHARES Project, the cases of multiple attribution were presented by Francesco Messineo, who drew a table consisting of 21 theoretical hypotheses.[13] However, his count only considered the combination of hypotheses arising from Articles 4, 5, 8 ARSIWA and Article 6 ARIO, with the additional hypothesis of an actor directed, or controlled, by an international organization. Considering all the theoretical possibilities of multiple attribution mentioned in Principle 3, the count rises to 66. This number is only indicative, because it does not consider that more than one state or more than one organization might be involved (as is often the case in practice). It only considers hypotheses of attribution to two subjects, but not more.

Clearly, it is unlikely to encounter all 66 hypotheses in practice. Many circumstances are only theoretical possibilities, such as the same conduct attributed to an insurrectional movement that becomes the new government of two states (Article 11 ARSIWA). Out of the 66 hypotheses, four are the most useful and most often discussed (also mentioned in the commentary to Principle 3): (i) a joint organ created by two states (Article 4 ARSIWA); (ii) a joint organ of a state and an international organization (Article 4 ARSIWA, Article 6 ARIO); (iii) an organ of a state whose conduct is under the effective control of an organization (Article 4 ARSIWA, Article 7 ARIO); and (iv) an organ of an organization whose conduct is under the direction and control of a state (Article 6 ARIO, Article 8 ARSIWA).

In order to be effective, the Guiding Principles should have provided clear guidance on how to apply at least these four fundamental hypotheses of multiple attribution, maybe with separate provisions. However, the commentary briefly presents three scenarios through examples, without being exhaustive.

The commentary discusses multinational military operations in the context of the United Nations.[14] The application of the Guiding Principles to this example is very controversial. The commentary states that Article 7 ARIO on effective control is applicable to attribute the conduct to both international organizations and states when 'factual circumstances show that both parties exercised control over the contingent'.[15] This is not motivated and I believe is wrong.[16] Clearly, Article 7 ARIO attributes the conduct only to international organizations and cannot be extended to states; or, at least, a justification should be provided. Moreover, it is not established what 'control' entails, and it seems clear that the notion cannot be equated to 'direction and control' under Article 8 ARSIWA.[17] Finally, it is unclear why simpler and more effective solutions are discarded, such as recurring to the definition of 'organ' rather than the notion of 'effective control', and verifying whether militaries

[13] Messineo, 'Attribution of Conduct', in Nollkaemper and Plakokefalos, *supra* note 8, at 60, 68–69.

[14] Guiding Principles, *supra* note 1, at 30.

[15] *Ibid.*

[16] I believe the Guiding Principles owe this argument to Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control', 18 *Melbourne Journal of International Law* (2017) 154, at 171.

[17] Okada, 'Effective Control Test at the Interface Between the Law of International Responsibility and the Law of International Organizations: Managing Concerns over the Attribution of UN Peacekeepers' Conduct to Troop-Contributing Nations', 32 *Leiden Journal of International Law* (*LDJI*) (2019) 275.

are organs of a state under Article 4 ARSIWA and peacekeeping missions are sub-organs of the UN under Article 6 ARIO.[18]

Then, the commentary mentions the *Nauru* case and the joint organ scenario, which does not pose much trouble and clearly falls under the hypothesis of a joint organ created by a plurality of states (Article 4 ARSIWA), as already mentioned.[19]

The commentary also describes the case of a 'joint enterprise'.[20] Under this category, it analyses the interpretation given by Serbia and Montenegro in the *Legality of Use of Force* case (only considering states' responsibility and excluding the relationship with the North Atlantic Treaty Organization (NATO)) and the case regarding anti-piracy operations carried out by joint naval patrols.[21] It is not self-evident which hypotheses of shared responsibility should apply to these examples. In the *Legality of the Use of Force* case, Serbia and Montenegro accused NATO and its members of creating a joint enterprise, constituted by different conducts. The case of joint naval patrols also involves a plurality of conducts individually attributed to several actors, unless anti-piracy operations are created as joint organs. In both cases, if there are parallel conducts attributed to several actors rather than single conducts, the issue is whether they are regulated by Principle 3 or 4. One could claim that the 'same' conduct under Principle 3 does not mean a 'single' conduct. Consequently, Principle 3 would also include parallel identical conducts attributed to several international persons. However, this does not seem to be the argument made in the commentary.[22]

4 '[C]onstitutes a breach of an international obligation for each of those international persons'

The breach of an international obligation is the second constitutive element of international responsibility, and, as such, is also considered by the SHARES project. There are no differences in this regard, except for the relevance of the nature of certain obligations that involve a plurality of actors.

Under the Guiding Principles, the breach of an obligation is not used to distinguish between the hypotheses, and Principle 3(b) is identical to Principle 4(b).[23] In both provisions, the number of obligations breached is not relevant, because the essential element is whether there is the same or multiple conduct. As implied in Principle 3(b) and 4(b), a plurality of international persons always breaches a plurality of obligations.

[18] Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire', 78 *Rivista di diritto internazionale* (*RDI*) (1995) 881.

[19] Guiding Principles, *supra* note 1, at 30. See also *Certain Phosphate Lands in Nauru*, *supra* note 7.

[20] Guiding Principles, *supra* note 1, at 31.

[21] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)* (Oral Proceedings) (Public Sitting 12 May 1999), Verbatim Record 1999/25; Papastavridis, 'Piracy', in A. Nollkaemper and I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 316, at 343.

[22] Guiding Principles, *supra* note 1, at 31. It is interesting to note that d'Argent (*supra* note 8) considers this hypothesis as involving multiple wrongful acts.

[23] Guiding Principles, *supra* note 1, at 29, 34.

This does not depend on whether there were one or more conducts. The relationship between the injured entity and the responsible entities is always individual and never collective. Concerning Principle 3, it is possible that the injured person suffered the violation of several obligations depending on the legal relationship with each of the responsible parties. This would happen, for instance, if a state is responsible for the violation of a human rights treaty and an international organization is responsible for the violation of a norm of customary international law. It is also frequent that an injured party suffers several violations of the same obligation; but even in this case there is not a single breach, because the obligation is possessed individually by each of the responsible subjects. This is another reason why the notion of 'single wrongful act' should be disregarded. ARSIWA and ARIO are simpler and more effective by distinguishing between the two elements of conduct and obligation.

The commentary to Principle 3 mentions a peculiar case in which the primary obligation borne by a plurality of international persons is called 'indivisible shared obligation'.[24] It is defined as a 'positive obligation of result that obliges all of its bearers to achieve a common result'. This hypothesis would require further definition and clarification, perhaps through a dedicated principle in the guide. At first glance, it seems that the essential characteristic of this hypothesis is that the same conduct that breaches this obligation is an omission attributable to more than one subject. However, this would not be a special circumstance, as each responsible subject would then bear the positive obligation. Paragraph 5 of the commentary to Principle 4 also mentions indivisible obligations, again in a rather unclear way. It states that an indivisible obligation is an exceptional case in which the breach of the same obligation would not result in shared responsibility for multiple wrongful acts but in shared responsibility for a single wrongful act. However, as already discussed, the essential element that differentiates single and multiple wrongful acts is the attribution of the same or a plurality of conducts. Obligations do not play a role.

If the nature of the obligation matters for shared responsibility, the Guiding Principles should have included separate provisions on particular obligations, such as *erga omnes* or due diligence. In the context of the SHARES Project, Gattini affirmed that this is a topic on which shared responsibility should differentiate itself from international responsibility.[25] However, the only particular case mentioned by the Guiding Principles concerns the *jus cogens* norms in Principle 13, which are also covered by Articles 40, 41 ARSIWA and Articles 41, 42 ARIO.

A very controversial hypothesis that is not addressed by Principle 3 is the case in which an international organization and its member states enter into a treaty and assume an obligation stating that the organization will also be responsible for the conduct of its member states. This is the only case in which multiple responsibilities could derive from a single wrongful act. It was mentioned by the ILC Special Rapporteur Giorgio Gaja, contesting the existence of a special norm on the attribution of conduct

[24] *Ibid.*, at 32.

[25] Gattini, 'Breach of International Obligations', in Nollkaemper and Plakokefalos, *supra* note 8, at 25.

to the European Union.[26] He claimed that the EU and its member states could enter into a treaty and include provisions indicating that regardless of to whom the conduct is attributed, the EU and its member states would be jointly responsible: 'It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible.'[27] Gaja called it 'attribution of responsibility rather than attribution of conduct', and mentioned Article 6(2) of Annex IX to the United Nations Convention on the Law of the Sea (UNCLOS):

> Any State Party may request an international organization or its member States which are States Parties for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability.[28]

5 '[C]ontributes to the indivisible injury of another person'

Aside from the employment of the notions of single and multiple wrongful acts, the element of indivisible injury is the remaining distinctive feature of the Guiding Principles. Nevertheless, the benefit of introducing this constitutive element is not evident, especially regarding the hypothesis of attribution of the same conduct to a plurality of actors.

Curiously, the Principle 1 of the Guiding Principles defines 'injury', but not 'indivisible injury', which is only addressed in the commentary of Principle 2. Even here, the definition is confusing, maybe because the commentary defines what is divisible, rather than what is indivisible. I quote the definition in full, to avoid mistakes in paraphrasing:

> International persons thus do not share responsibility pursuant to these Principles when they contribute to an injury that is divisible. An injury is divisible when contributions to that injury can be distinguished from each other by using a factual test of causation. This will be the case when an internationally wrongful act qualifies as the single necessary and sufficient cause of a certain injury: that injury would not have occurred but for the wrongful act (hence, it was necessary), and the wrongful act was sufficient on its own to bring about that injury. In such a situation, the international person committing that internationally wrongful act would not incur shared responsibility but independent international responsibility. Such independent responsibility would be established under the generally accepted rules of international responsibility.[29]

[26] Giorgio Gaja, Special Rapporteur, Second Report on Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004, 2 *ILC Yb* (2004) 1, at 5–6, para. 11.

[27] *Ibid.*

[28] UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Annex IX, Art. 6 (hereinafter 'UNCLOS').

[29] Guiding Principles, *supra* note 1, at 24.

The notion of indivisible injury is very complex, particularly because it mixes the element of conduct with the notion of an internationally wrongful act. Under Principle 1(d), 'contribution' means the causal relationship between a conduct and an injury and it makes sense that an injury is indivisible when the conducts cannot be distinguished from each other in terms of causation.[30] However, the role of the wrongful act is unclear, because causality and the production of an injury is an issue that concerns the conduct and not whether the conduct is in breach of an obligation. If I understood correctly, the definition creates a problem in the case of shared responsibility caused by a *single* contribution to the injury, which cannot be distinguished from any other contribution. Probably, in this case, the Guiding Principles assume that the injury is necessarily indivisible. Thus, it is not a constitutive feature of Principle 3 and it could be omitted. Actually, we would obtain a simpler rule, which also reflects international responsibility.

At this point, the only purpose of the notion of indivisible injury is to exclude from the application of the Guiding Principles the case of an injury that is neither material nor moral, but legal. I do not see the benefit of this exclusion, which means that shared responsibility is only relevant when there is a reparation to make.[31] International responsibility achieves the same results in a less complicated way. Indeed, the element of injury is relevant to apportioning reparations to the actors involved, but there is no benefit of including it in the constitutive element of responsibility.

Concerning reparations, Principle 10 of the Guiding Principles contends that each international person sharing responsibility is under the obligation to make full reparation, regardless of its contribution to the injury, except when this contribution is negligible.[32] It does not matter whether shared responsibility arises from the same conduct or from a plurality of conducts: the responsible subjects are under the same obligation to make a full reparation.

This is probably the boldest and most important argument of the Guiding Principles, but it is not entirely correct. Principle 10 affirms that it is possible to distinguish the different contributions to an indivisible injury, up to the point that the negligible perpetrator is exempted from reparation. This is not consistent with the definition of indivisible injury, and means that the full reparation is not based on the indivisibility of the injury, but on causation.

The central element of the full reparation used by the Guiding Principles is not the injury but the conduct. The Guiding Principles contend that indivisible injuries arise from three types of situations: 'individual contribution', when 'a single contribution caused the injury by itself'; 'concurrent contributions', when 'each of the contributions could have caused the injury by itself'; and 'cumulative contributions', when 'the conduct of multiple international persons together results in an injury that none could have caused on their own'.[33] These three situations are identified on the basis

[30] *Ibid.*, at 22.
[31] Crawford, *supra* note 11, at 487.
[32] Guiding Principles, *supra* note 1, at 53.
[33] *Ibid.*, at 25.

of the conduct. If the same conduct is attributed to a plurality of international persons (individual contribution), they all contributed 100% to the injury.[34] This is also the case for 'concurrent contributions', in which each of the conducts is sufficient to cause the injury by itself.[35] For instance, the omissions attributed to two states which lead to the failure to prevent the death of migrants at sea cause an indivisible injury, to which all conducts contribute 100%. However, this is not the case for 'cumulative contributions', in which conducts accumulate and jointly produce an injury. It could be that they contribute 50/50, or 90/10, and so on. A case of cumulative contributions is aiding and abetting, in which one conduct would not have produced the injury without a second conduct defined as complicity.

As acknowledged by the Guiding Principles, in the case of multiple attribution of the same conduct or multiple attributions of parallel conducts (individual and concurrent contributions), the obligation to make a full reparation derives from the rules on reparation of international responsibility.[36] There is no need to attempt analogies with domestic law and speak in terms of joint and several liability.[37] Conversely, the only way to claim that an obligation of full reparation arises from cumulative contributions is to demonstrate the existence of a customary norm. It is important to point out that the commentary mentions practice that does not concern cumulative contributions only, but also individual and concurrent contributions, which do not justify the existence of a general norm on full reparation in every case.

Finally, in the case of cumulative contribution, it is very difficult to decide whether an injury is divisible or not. The commentary to Principle 4 mentions the *Mothers of Srebrenica* case before Dutch courts, involving the responsibility of the Netherlands for the deaths of 350 men who were not allowed by the Dutch battalion of the UN peacekeeping force to find refuge in the UN compound.[38] The commentary to Principle 4 claims that the District Court of The Hague considered the injury as indivisible, because it found that the Netherlands was fully responsible, while the Court of Appeals and the Supreme Court considered the injury as divisible, because they claimed that the Netherlands is only responsible for a minimal percentage.[39] In this case, the death of the 350 men was directly caused by the act of the Bosnian Serb forces, which the Dutch battalion of the UN could have prevented. Applying the test of causation, it seems clear that the contribution of the Bosnian Serb forces can be distinguished from

[34] *Ibid.*, at 56.

[35] *Ibid.*

[36] *Ibid.*

[37] ARSIWA, *supra* note 4, Art. 47, commentary para. 3.

[38] Guiding Principles, *supra* note 1, at 36.

[39] *Mothers of Srebrenica Association et al. v. The Netherlands*, District Court of The Hague, Judgment, 16 July 2014, ECLI:NL:RBDHA:2014:8748, 16 July 2014, paras 4.330, 4.338; *Mothers of Srebrenica Association et al. v. The Netherlands*, Court of Appeals of The Hague, Judgment, ECLI:NL:GHDHA:2017:3376, 27 June 2017, para. 69.1; *Mothers of Srebrenica Association et al. v. The Netherlands*, Supreme Court of the Netherlands, Judgment, 19 July 2019, ECLI:NL:HR:2019:1284, para. 5.1.

the contribution of the Netherlands–United Nations and, consequently, this is not an indivisible injury. Conversely, it is a case in which the same conduct (an omission) is jointly attributed to the UN and the Netherlands and violates the obligation of prevention.[40] It should have been considered under Principle 3 and the contribution to the injury by the Bosnian Serb force (non-international person) is only relevant for apportioning the reparation.

It seems difficult that in any case of cumulative contribution the injury could be considered as indivisible. The Guiding Principles are not clear and do not provide an example. The only evident case of cumulative contributions mentioned to demonstrate the existence of an obligation to make full reparation is the *Corfu Channel* dispute.[41] However, the commentary does not define the injury as indivisible and the two conducts (laying of the mines and failure to warn) can be distinguished in terms of causation to the injury. In practice, all situations of cumulative contributions do not cause an indivisible injury and do not fall under the Guiding Principles.

6 Conclusion

There are two main elements through which the Guiding Principles on Shared Responsibility seek to provide guidance in the case of a plurality of internationally responsible persons. First, they employ the comprehensive notion of an internationally wrongful act, while ARSIWA and ARIO distinguish between the two elements of attribution of conduct and the breach of an obligation. Second, the Guiding Principles consider the injury to be a constitutive element included in the definition of shared responsibility, while ARSIWA and ARIO only employ it in the context of reparation and countermeasures.

There are no actual benefits coming from these attempts of clarification. Especially in the case of a plurality of responsibilities arising from the same conduct, the Guiding Principles add some complexities. Speaking in terms of wrongful act does not reflect that the conduct is the distinctive characteristic that distinguishes between cases of a plurality of responsible international persons. The distinction between 'single' and 'multiple' wrongful acts, adopted by the Guiding Principles, is confusing. Under international responsibility, it is very rare to have 'single' wrongful acts arising from a plurality of responsible persons, but there are single conducts. International responsibility is individual and each of the actors involved is autonomously responsible for the breach of obligations it owns.

Finally, the element of indivisible injury does not make a difference from the rules on reparation of international responsibility for the cases of individual and concurrent

[40] Condorelli, 'De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlandais', 1 *Questions of International Law* (2014) 3.

[41] *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4; Guiding Principles, *supra* note 1, at 56.

contribution to the same injury. Concerning cumulative contributions, the finding that each of the perpetrators is bounded by an obligation to make a full reparation is not supported by substantive practice. In general, the test of causation for the contribution to an indivisible injury seems very strict, and many relevant cases risk falling outside the definition of shared responsibility provided by the Guiding Principles.