The European Journal of International Law Vol. 31 no. 4

The Guiding Principles on Shared Responsibility in International Law: Too Much or Too Little?

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Abstract

The Guiding Principles on Shared Responsibility aim to 'substantiate the existing rules of the law of international responsibility' as they are codified in the International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts and the 2011 Articles on the Responsibility of International Organizations. This article examines the contribution of the Guiding Principles to the law of international responsibility and analyses some of their more controversial features, where the Guiding Principles seek to significantly expand the scope of the existing rules and, conversely, where they could have been much more ambitious.

1 Introduction

International responsibility is recognized as the 'epicentre of the international legal order'[1] and comprises many rules and principles that provide predictability to states, international organizations and adjudicators. The two documents that set out these rules and principles, the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO), adopted by the International Law Commission (ILC) in 2001 and 2011, respectively, are usually the starting point and the ending point of any analysis on international responsibility.[2] This is even the case where those articles provide

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1 Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', 13 *European Journal of International Law* (*EJIL*) (2002) 1053, at 1079.

2 GA Res. 56/83, 12 December 2001; International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, 2(2) *International Law Commission Yearbook* (*ILC Yb*) (2001) 26 (hereinafter 'ARSIWA'); GA Res. 66/100, 9 December 2011; ILC, Articles on the Responsibility of International Organizations with Commentaries, 2(2) *ILC Yb* (2011) 40 (hereinafter 'ARIO').

little guidance, often deliberately so, owing to the hard compromises that had to be reached within the ILC under the close scrutiny of states before the UN Sixth (Legal) Committee. The reports published by the Secretary General on the practice of states since the UN General Assembly (GA) 'took note' of the ARSIWA in 2001 demonstrate the vibrant character of the law of responsibility, an 'immense laboratory'[3] in the international legal order, and their prolific use by international courts and tribunals and states alike.[4]

The Guiding Principles on Shared Responsibility in International Law (hereinafter 'Guiding Principles'), which have as one of their core objectives the design of a legal framework for cases involving multiple actors that contribute to an indivisible injury, will undoubtedly have an impact on the already immense laboratory of the law of international responsibility.[5] They are the result of a meticulous analysis of international practice, case law and scholarship, and have benefited from numerous expert consultations, including with judges, practitioners and scholars in different areas of international law.

This article will proceed as follows. Section 2 will discuss the notion of shared responsibility and the scope of application of the Guiding Principles. Section 3 will examine the added value of the Guiding Principles, by looking at the provisions that may prove to be controversial or that, for the time being at least, are insufficiently reflected in the practice and *opinio juris* of subjects of international law. It will also point out those areas where the Guiding Principles could have been more ambitious. Section 4 concludes that, despite certain shortcomings, the Guiding Principles have succeeded in devising a more robust and elaborate legal framework for situations of shared responsibility.

2 The Notion of Shared Responsibility and the Scope of Application of the Guiding Principles

The Guiding Principles are intended to apply to situations where two or more states or international organizations (defined collectively as international persons) have contributed to an indivisible injury.[6] The concepts of 'indivisible injury' and 'contribution'

[3] Reuter, 'Principes de droit international public', 103 *Recueil des cours de l'Académie de droit international* (*RCADI*) (1961) 425, at 596 ('La vérité est que la matière de la responsabilité tient la place d'un immense laboratoire').

[4] See, e.g., most recent reports of the Secretary-General to the UN General Assembly (GA), 'Compilation of Decisions of International Courts, Tribunals and Other Bodies', UN Doc. A/71/80, 21 April 2016; GA, 'Comments and Information Received from Governments', UN Doc. A/71/79, 21 April 2016; GA, 'Compilation of Decisions of International Courts, Tribunals and Other Bodies', UN Doc. A/74/83, 23 April 2019. See also Paparinskis, 'The Once and Future Law of State Responsibility', 114 *American Journal of International Law (AJIL)* 618, at 620.

[5] Nollkaemper, d'Aspremont, Ahlborn, Boutin, Nedeski, Plakokefalos, 'Guiding Principles on Shared Responsibility in International Law', 31 *EJIL* (2020) 15 (hereinafter 'Guiding Principles').

[6] *Ibid.*, Principle 2. The Guiding Principles acknowledge that they are 'without prejudice to the possibility that other actors, such as individuals or organized non-state actors, bear international obligations and share responsibility in certain circumstances' but refrain from providing any further guidance on this crucial and delicate matter.

thus principally define the notion of shared responsibility and the scope of application of the Guiding Principles.

A *Injury*

Under international law, the concept of injury (i.e. material or moral damage) is not relevant to the origins of international responsibility, unless of course the primary obligation provides otherwise.[7] The concept of injury is, however, fundamental when invoking responsibility and determining its content under international law, including the availability, form and extent of reparation.[8] The Guiding Principles define an injury as any material and non-material damage caused by an internationally wrongful act, as set out in Article 31 of the ARSIWA. However, they go beyond the ARSIWA and their commentaries by grappling with the difficult reality that, on the ground, an injury may be the result of various factors, and thus cannot in many instances be ascribed to a single cause or a single wrongdoer.[9] The need to devise a more robust legal framework for apportioning responsibility between several actors is all the more pressing as we witness the increase of (or are increasingly aware of) cases where indivisible injuries result from, for example, joint military operations, the administration of territory by a joint organ of two or more states, joint development and financial projects, combined failures to cut the greenhouse emissions and so forth.[10]

The Guiding Principles place the injury at the core of both the origins and the content and implementation of shared responsibility.[11] The injury is part of the assessment of whether there is shared responsibility in the first place, whereas one would otherwise focus only on ascertaining the existence of a single or multiple internationally wrongful acts committed by two or more wrongdoers. This departure from the general regime of international responsibility appears to be aimed at conceptually unifying the analysis of shared responsibility at all of its stages. However, in doing so, the Guiding Principles adopt the existence of an injury as a condition for responsibility to be engaged.

In this author's view, this conceptual departure from the general regime of responsibility was unnecessary. The Guiding Principles could have and should have been

[7] ARSIWA, *supra* note 2, Art. 2, commentary para. 9. See J. Crawford, *State Responsibility: The General Part* (2013), at 54–60; see also Tanzi, 'Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?', in M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* (1987) 1.

[8] ARSIWA, *supra* note 2, Art. 31, commentary paras. 5–6. See Crawford, *supra note* 7, at 485–487.

[9] See ARSIWA, *supra* note 2, Art. 31, commentary para. 12 (indicating that in cases where injury is 'effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault').

[10] See several outstanding contributions in the three volumes published in the framework of the SHARES Research Project on Shared Responsibility in International Law: A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014); A. Nollkaemper and D. Jacobs (eds), *Distribution of Responsibilities in International Law* (2018); A. Nollkaemper and I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017).

[11] See Guiding Principles, *supra* note 5, Parts I and III.

limited to clarifying the forms, content, invocation and implementation of responsibility in cases where multiple actors may have contributed to an indivisible injury, leaving aside the matter of the origins of responsibility, where injury has no role to play unless otherwise provided by the primary rule in question. Multiple actors engage responsibility under international law not because they have caused injury, but because the conduct in question is attributable to them and infringes an international obligation that is binding upon them. Some legal consequences follow not from the injury but simply from the commission of an internationally wrongful act. These consequences comprise the obligation to cease the internationally wrongful act if it is a continuing one and, if appropriate, to give assurances and guarantees of non-repetition. Secondary obligations of cooperation, non-recognition and non-assistance flow from the commission of serious breaches of peremptory norms, irrespective of the injury. The obligation to provide reparation too is an automatic consequence of an internationally wrongful act, even though its actual availability, form and extent depend on the occurrence of the injury.

The Guiding Principles also state that only an indivisible injury can be the trigger (*fait générateur*) for shared responsibility. As set out at paragraph 4 of the commentaries to Principle 2, the distinction between divisible and indivisible injuries is made by examining factual causation:

> 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.[12]

However, it is difficult to apply this definition to individual contributions, which is one of the three types of contributions to an indivisible injury set out in Principle 2(2). The commentaries define an individual contribution as one which 'is attributable to multiple international persons [and] is sufficient to cause the injury on its own'.[13] An individual contribution would always trigger individual responsibility rather than shared responsibility proper, so this category appears to be superfluous. Indeed, the examples provided in the commentaries demonstrate that responsibility would have been engaged on an individual basis, even if the internationally wrongful act may have arisen in a situation where two or more states may have contributed to the injury in question. An easy practical example of what the authors have in mind when they speak of individual contribution is where states *A* and *B* both bomb a hospital. The bombs of states *A* or *B* could on their own have caused the entire injury for which reparation is now sought. In such cases, each state would engage responsibility on an individual basis and thus would be responsible for the entirety of the injury caused, subject of course to the prohibition of double recovery. Thus, it is only in cases of concurrent and cumulative contributions that one can genuinely speak of shared responsibility, i.e.

[12] *Ibid.*, Principle 2, commentary para. 4.
[13] *Ibid.*, Principle 2, commentary para. 6.

cases where an identifiable element of the injury cannot properly be allocated solely to one of several concurrently operating causes.[14] There is certainly room here for a conceptual clarification, but this is not found in the commentaries to the Guiding Principles.

Further, in defining an indivisible injury, the Guiding Principles draw a distinction between shared responsibility arising from a single wrongful act and shared responsibility arising from multiple internationally wrongful acts. The distinction, as such, is not problematic, but situations of shared responsibility arising from a single wrongful act are already adequately covered in Article 47 ARSIWA and Article 48 ARIO. While these provisions are concerned with the invocation of responsibility, the entitlement of the injured party to seek full reparation from either of the wrongdoers appears to be well established in such situations, even if the exact contours of joint and several responsibility in general international law remain controversial.[15] Thus, in this author's view, the Guiding Principles do not provide much added value on this point. Rather, the Guiding Principles add another layer of complexity by introducing a distinction between the shared responsibility for *joint* conduct (Principle 3) as opposed to shared responsibility for *concerted* action (Principle 7). Consider a planned military operation run by states *A* and *B*. A helicopter firing at the civilian population belongs to the armed forces of state *A*. At the same time, the commanders who trigger explosive devices near the civilian population belong to the armed forces of state *B*. Is this a joint conduct or a concerted action? It is hard to imagine a case involving conduct that has been planned and coordinated by two or more entities and that constitutes single or multiple internationally wrongful act(s) for which a distinction between joint conduct and concerted action would be of practical value.

In fact, the vast majority of the Guiding Principles and their commentaries are directed to shared responsibility arising from the commission of multiple internationally wrongful acts. These are the cases where there are two or more wrongdoers that may have committed distinct internationally wrongful acts, yet contributing to a single indivisible injury for which reparation is sought. These are, indeed, the most

[14] ARSIWA, *supra* note 2, Art. 31, commentary para. 13.

[15] See, e.g., *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports (1992) 240, at 258–259, para. 48; *Corfu Channel (United Kingdom v. Albania)*, Merits, ICJ Reports (1949) 4, at 22–23; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports (2003) 161, Separate Opinion of Judge Simma 324, at 358, para. 74 (arguing that 'the principle of joint-and-several responsibility common to the jurisdictions that [he] ha[s] considered can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1 *(c)*, of the Court's Statute'). See also Orekhelashvili, 'Division of Reparation between Responsible Entities', in J. Crawford et al. (eds), *The Law of International Responsibility* (2010) 647, at 657–660; Wittich, 'Joint Tortfeasors in Investment Law', in C. Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 708; Besson, 'La pluralité d'Etats responsables: Vers une solidarité internationale?', 17 *Swiss Review of International and European Law* (2007) 13; Noyes and Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988) 225; I. Brownlie, *System of the Law of Nations: State Responsibility* (1983), at 189 (noting that 'the practice of states is almost non-existent, or, seen differently, strongly suggests by its silence the absence of joint and several liability in delict in state relations').

challenging situations because distinct legal solutions for each breach would otherwise be appropriate, depending on the exact contribution to the injury, the position of each wrongdoer vis-à-vis the injury and the injured party, etc. It is thus understandable why Principles 4–8 try to complement the existing law of international responsibility on this issue by providing additional analysis that could contribute to our understanding of responsibility in cases where indivisible injury flows from multiple internationally wrongful acts. More fundamentally, the distinction between single and multiple wrongful acts as a source of shared responsibility appears to have little impact on the provisions as they are set out in Part III of the Guiding Principles. Thus, in this author's view, the Guiding Principles should have focused exclusively on situations of shared responsibility arising from multiple internationally wrongful acts. This would have enhanced their coherence and complementary character vis-à-vis the general regime of responsibility, which already sufficiently covers the problem of multiple wrongdoers responsible for a single internationally wrongful act.

Finally, as part of their discussion of the notion of indivisible injury, the Guiding Principles introduce an unnecessary dichotomy of divisible and indivisible obligations under international law. Not only does this dichotomy rest on rather shaky theoretical and conceptual grounds, as paragraph 9 of the commentary to Principle 3 and paragraph 5 of the commentary to Principle 4 illustrate, but it is also dangerous from a systemic perspective. An indivisible shared obligation is defined by reference to the common result that shall be achieved, but the Guiding Principles fail to explain this concept of common result. It will be recalled that the ARSIWA abandoned the classification of international obligations, namely between obligations of conduct and result, on the basis that these matters were reserved to the universe of primary rules.[16] The legal consequences of an internationally wrongful act (i.e. the general regime as set out in the ARSIWA and ARIO) are broadly agnostic to the source and classification of international obligations.[17] It is unclear therefore why the rules on shared responsibility should be different. Further, it is difficult to see why the characterization of the obligation as divisible or indivisible should have any impact on the application of secondary rules given that it is only an indivisible injury that matters. One could in fact argue that all international obligations are and should be divisible, including the examples provided in the commentaries (i.e. the obligation of the EU and its member states to reduce carbon dioxide (CO2) emissions by specified amounts by a specified date, an obligation on the part of two riparian states to conclude a bilateral treaty regarding the protection of a transboundary lake or an obligation undertaken by the EU and its member states to provide financial assistance to a third party). Consider a

[16] See Crawford, 'Second Report on State Responsibility', UN Doc. A/CN.4/498 and Add. 1–4, reprinted in 2(1) *ILC Yb* (1999) 3, at 20–29, paras 52–92; Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *EJIL* (1999) 10.

[17] The two possible exceptions in the law of responsibility are: (i) the secondary obligation to cease an internationally wrongful act only arises in respect of a continuing breach of an international obligation, as defined in Article 15 ARSIWA; and (ii) certain additional legal consequences attach only to serious breaches of peremptory norms of international law, pursuant to Article 41 ARSIWA.

member state of the EU that does not take any measures to reduce emissions of CO2 by 2020. If in 2021 the responsibility of that member state is invoked, the causal link between its failure to take any such measures and the injury suffered will be established regardless of the conduct of other member states and the EU itself. To conclude otherwise would mean that the conduct of other duty-bearers of the same obligation would serve as a new circumstance precluding wrongfulness, which is quite a stretch. Be that as it may, while the dichotomy between divisible and indivisible obligations could assist us in understanding when the breach occurs, it does not really assist us in understanding the legal consequences that flow from situations where multiple actors contribute to an indivisible injury.

B *Contribution*

This brings us to the second key element of shared responsibility – the contribution to an indivisible injury. Guiding Principle 1(d) states that a 'contribution to injury' is defined by the existence of a causal relationship between the conduct in question and the injury. While the Guiding Principles acknowledge that different tests exist in practice to establish such a causal relationship, regrettably they do not express a position on the matter. As explained, they 'do not seek to impose a general test of causation between conduct and injury that would define when a particular conduct does or does not constitute a contribution to injury for all situations of shared responsibility'.[18] Certainly, valid and persuasive reasons must have informed this normative choice. The following remarks nevertheless show why this may have been a missed opportunity to contribute to the added value of the Guiding Principles in practice.

First, while it is certainly true that different standards of causation can be identified in decisions of international courts and tribunals, a rather preoccupying trend that has attracted little to no attention among scholars is what the author would consider the rather strict, or even restrictive, construction of the required causal link by the International Court of Justice (ICJ) in its case law. Contrary to some investor–state tribunals and regional human rights courts that have adopted different standards of causation,[19] the World Court as the guardian of international law has consistently applied the standard of directness, or more specifically required a 'sufficiently direct and certain causal link'.[20] As a result of upholding that strict view of causal link or nexus, the Court noted in the *Bosnia Genocide* case that:

[18] Guiding Principles, *supra* note 5, Principle 1, commentary para. 5.

[19] For an overview on causation standards in the practice of investor–state tribunals, see Pearsall and Benton Heath, 'Causation and Injury in Investor-State Arbitration' in C. L. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (2018) 81; Jarrett, 'Extracting Legal Causation from International Investment Law', (2020) *Max Planck Institute Research Paper Series No. 2020–36*. For an overview on causation standards in the practice of regional human rights courts, see Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR', (2018) *Human Rights Law Review* 309; I. Piacentini de Andrade, *La réparation dans la jurisprudence de la Cour interaméricaine des droits de l'homme* (2013), at 137–144.

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, at 234, para. 462 (hereinafter *Bosnia Genocide*).

> Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations [i.e. Art. I of the Genocide Convention[21]]. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.[22]

Since *Bosnia Genocide*, the Court has applied the same standard of causation in a variety of cases, irrespective of the particularities of the underlying legal obligation in question (including cases of injury flowing from the expulsion and detention of an individual and environmental damages).[23] Incidentally, the International Tribunal for the Law of the Sea (ITLOS) appears to follow a similar standard of causation, having recently held that compensation is only due in respect of 'damage directly caused by the wrongful act'.[24] In other words, the approach of the ICJ and ITLOS contradicts the position articulated by the ILC in the ARSIWA commentaries and repeated without more in the Guiding Principles, namely that the exact standard of causation may vary depending on a series of factors such as the nature of the obligation in question, the nature and extent of injury, etc.[25] It is then all the more regrettable that the Guiding Principles have missed this opportunity to say more about the causal relationship and the ways in which it can be ascertained in situations of shared responsibility. In this author's view, the standard of a 'sufficiently direct and certain causal link' between the wrongful act and the injury is inadequate in situations involving multiple contributions to the indivisible injury.[26] The identification of an appropriate standard of causation goes to the heart of the balance that must be struck between two competing concerns underlying reparation in the law of international responsibility. On the one hand, the concern with not making the wrongdoer pay for more than is due to his

[21] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[22] *Bosnia Genocide*, ICJ Reports (2007), at 234, para. 462.

[23] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, 19 June 2012, ICJ Reports (2012) 324, at 332, para. 14; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, 2 February 2018, ICJ Reports (2018) 15, at 26, para. 32.

[24] ITLOS, *The M/V 'Norstar' (Panama v. Italy)*, Judgment, 10 April 2019, reprinted in (2019) 48 *International Law Materials (ILM)* 673, at 722, paras 334–335. See also ITLOS, *The M/V 'Virginia G' (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, ITLOS Reports (2014) 4, at 14, para. 436; ITLOS, *The M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Reports (1999) 10, at 65–66, para. 172.

[25] See ARSIWA, *supra* note 2, Art. 31, commentary para. 10 (concluding that 'the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation').

[26] See V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016), at 272–281.

conduct, and on the other hand to ensure that the victim has recourse to full and adequate reparation. In this author's view, the standard of directness, as applied by the ICJ and ITLOS, is disproportionally weighted in favour of the first of these concerns over the second. Other standards of causation such as proximity, remoteness or foreseeability would be more suitable in this context.

Second, Principle 2(1) aims to distinguish between different types of contributions to the indivisible injury, namely individual, concurrent or cumulative contributions. However, closer scrutiny of the commentaries to this provision reveals that this is nothing more than factual causation in disguise. The Guiding Principles and their commentaries do not address the standard of legal causation, or how to ascertain whether the contribution is not too remote from the indivisible injury or, if one were to prefer the foreseeability test, whether the indivisible injury could or should have been foreseeable to the contributing wrongdoer at the time of its contribution.[27] Considering that the Guiding Principles had as a goal the substantiation of the existing rules on international responsibility, an in-depth discussion of the standards of causation would have brought a direct and most significant contribution to the work of international courts and tribunals. This is particularly so where, aside from the ICJ and ITLOS, other international dispute settlement mechanisms, including claims commissions[28] and investor–state arbitral tribunals,[29] have applied less exacting standards of causation such as proximity, remoteness and foreseeability.

3 The Added Value of the Guiding Principles

The purpose of this section is twofold. First, it will address those instances where the Guiding Principles departed from the existing rules of international responsibility or may have added an unnecessary level of complexity (Section 3.A). Second, in addition to the analysis of the required standard of causation in situations of shared responsibility that has been addressed above, the author will identify other aspects of shared responsibility where the Guiding Principles could have been more ambitious in addressing certain ambiguities that exist in the law of international responsibility (Section 3.B).

[27] See, e.g., Alexandrov and Robbins, 'Proximate Causation in International Investment Disputes', in K. P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009* (2009) 317, at 331; Rovine and Hanessian, 'Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission', in R. B. Lillich (ed.), *The United Nations Compensation Commission* (1995) 235.

[28] See, e.g., Eritrea-Ethiopia Claims Commission, Decision No. 7 (Guidance regarding *Jus ad Bellum* Liability), 27 July 2007, reprinted in 26 *United Nations Reports of International Arbitral Awards* (*UNRIAA*) (2008) 10, at 15, para. 13. See also *Affaire relative à la concession des phares de l'Empire ottoman (Grèce c. France)*, Decision, 24/27 July 1956, reprinted in 12 *UNRIAA* (1963) 155, at 217; *Responsabilité de l'Allemagne à raison de dommages causés dans les colonies portugaises du sud de l'Afrique (Portugal c. Allemagne)*, Award, 31 July 1928, reprinted in 2 *UNRIAA* (1949) 1011, at 1031.

[29] See, e.g., ICSID, *Joseph Charles Lemire v. Ukraine*, Award, 28 March 2011, ICSID Case no. ARB/06/18, paras 170 and 208; ICSID, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Bolivia*, Award, 16 September 2015, ICSID Case no. ARB/06/2, para. 383; UNCITRAL, *CME Czech Republic B.V. v. Czech Republic*, Partial Award, 9 September 2001, paras. 584–585.

A *Too Much?*

In this author's view, there are three main aspects where the Guiding Principles have, either through interpretation or in the apparent pursuit of progressive development, stretched the boundaries of the existing law. These are unsurprisingly also the areas where the practice of states and international organizations is not yet well established.

First, the Guiding Principles have lowered the threshold of the mental element that is required for the responsibility for aid or assistance to arise. Principle 6(2) posits that either actual ('knew') or constructive ('should have known') standard triggers responsibility in situations where an international person has rendered aid or assistance to another international person that went on to commit an internationally wrongful act. The provision on the responsibility for aid or assistance codified at Article 16 ARSIWA, on the other hand, speaks of knowledge of the circumstances of an internationally wrongful act. Much ink has already been spilled on attempts to reconcile these terms with the nebulous explanation provided by the ILC in its commentaries that something more is required (i.e. intent that the aid or assistance be used for the commission of an internationally wrongful act).[30] Scholars have been unable to agree on the exact standard required, but on balance there are stronger legal and policy justifications for dissociating the responsibility for aid or assistance from the requirement of intent, unless such is provided for by an underlying primary norm in question.[31] That said, intent is not only an issue when the primary rule requires it, but it may also play an important role in the assessment of the content of responsibility for aid or assistance.[32] It would have been useful for the Guiding Principles to provide an additional analysis of this difficult issue. Moreover, the Guiding Principles suggest that, in all circumstances, the constructive knowledge is the applicable standard. In the author's view, this goes too far. While it is true that constructive knowledge has at times been accepted, in particular in the context of international human rights law and international humanitarian law, I have doubts as to the adoption of this standard under general international law. Comments provided by states and international organizations in the codification process of the ARSIWA and ARIO show that the required threshold is that of actual and not constructive or presumed knowledge.[33] In other words, unless the primary rule specifies that the constructive knowledge is sufficient, it would be a stretch to say that a state or an international organization must maintain a heightened duty of vigilance

[30] H. Aust, *Complicity and the Law of State Responsibility* (2011), at 235–249; M. Jackson, *Complicity in International Law* (2015), at 159–162.

[31] See Lanovoy, *supra* note 26, at 218–239.

[32] *Ibid.*, at 236–240.

[33] See, e.g., ILC, 'Comments and Observations Received from Governments', UN Doc. A/CN.4/515 and Add. 1–3, reprinted in 2(1) *ILC Yb* (2001) 33, at 52 (United Kingdom and United States); ILC, 'Responsibility of International Organizations, Comments and Observations Received from International Organizations', UN Doc. A/CN.4/637 and Add. 1, reprinted in 2(1) *ILC Yb* (2011) 133, at 155 (World Bank). See also Moynihan, 'Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility', 67 *International and Comparative Law Quarterly* (*ICLQ*) (2018) 455, at 471 (concluding that constructive knowledge is not sufficient for the responsibility for complicity to be engaged). Cf. ILC, 'Comments and Observations Received from Governments', UN Doc. A/CN.4/515 and Add. 1–3, reprinted in 2(1) *ILC Yb* (2001) 33, at 52 (Netherlands).

in all circumstances and at all times, which is a proposition that can easily be taken to the absurd, such as to say that responsibility arises even if the ultimate wrongful act is committed decades after the alleged assistance was provided.

Second, by devising a category of shared responsibility in situations of concerted action (Principle 7), the Guiding Principles seem to conflate different categories of responsibility and diminish the effectiveness of the limits on the scope of such responsibility beyond what is tenable and acceptable to international persons. In relation to the conceptual distinctions, it is difficult to see how the thesis advocated in the commentaries to Principle 7, that circumvention is properly categorized as a form of concerted action, may be justified.[34] At its minimum, concerted action requires a degree of coordination between two or more wrongdoers that agree to pursue the same goal. In contrast, circumvention, as codified in Article 61 ARIO, entails the responsibility of the member state when it uses the international organization to evade its own obligations. The international organization in this scenario is neither consenting nor even aware, at least in most instances, that it is being instrumentalized in this way. Equally problematic is the idea expressed in the commentaries to Principle 7 that the category of responsibility for concerted action presupposes that the required 'material contribution to the wrongful act is of a lower degree and is more diffuse'.[35] In a situation involving concerted action, the contribution of each participant is closer to co-perpetration or joint conduct, rather than that of aid or assistance. Further, it is difficult to reconcile this open-ended approach in respect of the material element of concerted action with Principle 11(3), which excludes the obligation of co-wrongdoers to provide reparation if the wrongdoer's 'contribution to the injury is negligible'. Would this then mean that the actor acting in concert with the principal wrongdoer would be able to avoid the obligation to provide reparation, arguing that its participation in the planning was negligible? In addition, the latter exception would be prone to subjectivity when analysing the degree or form of contribution, and thus may hamper the otherwise automatic character of the obligation to provide reparation.

Third, on several occasions, the Guiding Principles appear to impose new obligations on the responsible international person in respect of the co-responsible person. This is the case, for instance, of Principle 9(2) on cessation and non-repetition, by virtue of which '[e]ach responsible international person is under an obligation to ensure that other responsible international persons fulfil their obligations as referred to in paragraph 1'. The examples of practice given in paragraph 5 of the commentaries on this provision provide insufficient support – they are mainly driven by the field of international humanitarian law, in particular from the rather unique terms and scope of Article 1 common to the Geneva Conventions,[36] as well as the practice of the

[34] Guiding Principles, *supra* note 5, Principle 7, commentary para. 4.

[35] *Ibid.*, Principle 7, commentary para. 5.

[36] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, Art. 1; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Art. 1; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Art. 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 1.

committees set up under international human rights instruments, which operate by issuing recommendations with a view to influencing or inducing compliance by states and quite often interpret expansively the legal instruments in question. In addition, the reference to the *Eurotunnel* arbitration does not withstand scrutiny as the joint and several responsibility of the United Kingdom and France was considered on the basis of the specific primary obligations at issue and not on any such principle to be found in general international law.[37]

B *Too Little?*

In addition to the question of the relevant standard of causation discussed above, there are two other areas in which the Guiding Principles could have been more ambitious.

First, there are several Guiding Principles which simply re-state the law, without clarifying as to how the assessment would change in the context of shared responsibility as opposed to independent responsibility. For instance, Principle 15 merely restates the entitlement of an international person to take countermeasures in situations of shared responsibility. It does not seek to clarify whether only the injured state or also other than injured states could take countermeasures or rather 'other lawful measures' against any of the responsible entities.[38] Similarly, Principle 13 re-states Articles 41 ARSIWA and 42 ARIO in respect of serious breaches of a peremptory norm of international law. While Principle 13 expands the scope of what may constitute a serious breach of a peremptory norm to the possibility of cumulative conduct, which is a welcome development, the commentaries appear to ignore significant jurisprudential developments in this area. For instance, the ICJ in the *Wall* Advisory Opinion appears to have extended the legal consequences, as set out in Article 41 ARSIWA, to breaches of *erga omnes* obligations, i.e. beyond the realm of serious breaches of peremptory norms.[39] One would have expected some engagement in the commentaries as to whether such extension is warranted, in particular in cases of shared responsibility.

Second, in this author's view, a more progressive approach to the available forms of reparation in situations of shared responsibility could have been adopted. For instance, Principle 11(2) posits that '[w]hen one or more of the responsible persons is under an obligation to make restitution, each of the other responsible international persons are under an obligation to ensure that restitution is made'. Beyond the obvious fact that, in many situations, restitution is not possible or would impose a disproportionate burden, it is notable that an equivalent obligation is not provided for in respect of other forms of reparation. As the commentaries explain, where an individual is detained by state *A* and states *B* and *C* have facilitated the transport, the provision of intelligence and/or interrogation of the individual, states *B* and *C* cannot provide restitution, i.e.

[37] *Eurotunnel Arbitration (The Channel Tunnel Group Ltd and France-Manche S.A. v. United Kingdom and France)*, Partial Award, 30 January 2007, 132 *International Law Reports (ILR)* (2007) 1, paras. 187, 318 and 395(2).

[38] See ARSIWA, *supra* note 2, Art. 54.

[39] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at 200, para. 159 and at 202, para. 163 (*D*). Cf. *Ibid.*, Separate Opinion of Judge Higgins 207, at 216–217, paras. 37-37. See also D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (2017), at 42–43.

the release of the individual, but must ensure that state *A* releases the individual.[40] However, from the perspective of progressive development, the obligation of states *B* and *C* could also have been stated to apply in respect of ensuring that state *A* provides other forms of reparation. Instead, Principle 11(3), for example, provides states *B* and *C* with the possibility of arguing that their contributions to the injury suffered by the individual as a result of detention in state *A* were negligible, thereby permitting them to avoid their obligation to provide compensation. It is unclear as to why the negligible character of contribution should allow the co-wrongdoers to refrain from their duty to provide compensation, but hold them to their corresponding duties in respect of other forms of reparation. More broadly, this author struggles to see the relevance of adopting the subjective criterion of 'negligible character' of the contribution. This is a matter which should have been dealt with when devising a detailed framework of analysis for the required causal link in situations of shared responsibility, something that regrettably the Guiding Principles fail to do.

4 Conclusion

In conclusion, the Guiding Principles can be considered as a valuable restatement of some of the existing rules and principles as well as potentially having a catalysing effect on the development of the law. While they provide little clarification on some of the more complex aspects of the law of international responsibility, such as causation, they appear to embrace rather progressive, even expansionary, approaches to controversial matters such as the standard of knowledge applicable in situations of aid or assistance or the creation of a new category of responsibility for concerted action. At the same time, they also usefully reinforce the dual function of international responsibility, as a retrospective (remedial) and prospective (dissuasive) tool in the international legal order.[41] They do so, for example, by providing that a responsible international person shall ensure that its co-wrongdoers cease the internationally wrongful act and offer appropriate assurances and guarantees of non-repetition.

The Guiding Principles are not General Practitioners with solutions to all the illnesses and deficiencies of the international legal system. However, through a thoughtful and nuanced legal analysis, the Guiding Principles have brought the modern conception of international responsibility a step closer to the ideal of solidarity and towards a more robust legal framework that can be used to account for contribution to indivisible injuries and ultimately ensure that full redress is available to injured parties.

[40] Guiding Principles, *supra* note 4, Principle 11, commentary para. 3.

[41] On the functions of state responsibility, see, e.g., Pellet, 'The Definition of Responsibility in International Law', in Crawford et al., *supra* note 15, at 3, 15 (noting that the modern 'international law of responsibility . . . no longer solely plays the role of a compensatory mechanism, to which it was for a long time confined. It is now also, and perhaps principally, a mechanism having as its function the condemnation of breaches by subjects of international law of their legal obligations and the restoration of international legality, respect for international law being a matter in which the international community as a whole has an interest'); Dupuy, 'Responsabilité et légalité', in Société française pour le droit international (SFDI) (ed.), *La responsabilité dans le système international* (1991) 263.