
Liability In Solidum in the Law of International Responsibility: A Comment on Guiding Principle 7

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Abstract

The Guiding Principles on Shared Responsibility in International Law seek to address an issue hitherto unresolved in the law of international responsibility: if two or more states or organizations together cause a single harm to a victim, what are the consequences for suit and reparation? Commentators generally counsel against the use of domestic concepts such as ‘solidary liability’ or ‘joint and several liability’ in international law. This comment highlights the role of domestic analogies in the formulation of the Guiding Principles, focusing on two elements: the application of liability in solidum as the key consequence of multiple responsibility (Principle 10), and ‘concerted action’ (Principle 7) as a condition for multiple responsibility. Both of these concepts can be found in many domestic legal systems, but the Principles place differential weight on domestic analogies in the elaboration of Principles 10 and 7: Principle 10 draws useful analogies with the rationale behind liability in solidum in domestic law, while Principle 7 on concerted action does not rely on related domestic concepts. That is likely for good reason. However, responsibility based on concerted action is a novel basis for responsibility in international law, and therefore its justification is all the more important. The justification provided for Principle 7 is not fully convincing, and its scope of application is uncertain. I query whether the exploration of cognate concepts in domestic legal systems may have helped to justify the rationale for, or the scope of, responsibility based on concerted action.

1 Introduction

Where injury is caused by the wrongful conduct of two or more states or international organizations, what are the consequences for the injured party in terms of invocation

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and reparation? May an injured state sue any of the responsible parties? Must it sue all of them jointly? Can an injured state claim the whole of the damage from just one wrongdoer? Or may it only claim a portion of its damage, and if so, what portion? And if one responsible party pays compensation for the whole of the damage, does it have a right of recourse against any other wrongdoer?

While the consequences of multiple responsibility may be underdeveloped in international law,¹ domestic legal systems have developed solutions to similar issues in the law of tort or delict. Thus, in cases where a victim suffers an indivisible injury caused by two or more tortfeasors, whether acting together or independently, the law provides that the tortfeasors are liable *in solidum*, that is, they are liable in full for the damage done by all. This generates two key consequences for the injured party in terms of suit and reparation: (i) the victim may sue any tortfeasor at their election, and (ii) the victim can recover the whole amount of their damage from that tortfeasor. Consequently, a tortfeasor who has paid compensation to a victim will have a right of recourse against any other tortfeasor. This solution is replicated with striking uniformity across diverse legal traditions,² and is generally referred to as ‘solidary liability’ in civil law systems, and ‘joint and several liability’ in the common law.³

It would appear that drawing an analogy between multiple responsible states and multiple tortfeasors could provide a basis for adopting a similar rule of solidary or joint and several liability in international law. And yet, this is not usually done. On the contrary, international lawyers have historically been wary of – one might even say hostile to – drawing analogies with solidary or joint and several liability.⁴ Thus, a leading treatise, in addressing the problem of joint responsibility, states that ‘municipal analogies are unhelpful’.⁵ Others write that it is ‘necessary . . . to avoid terminological analogies with expressions used in national legal systems’.⁶ Indeed, the International Law Commission (ILC) itself, when addressing the issue of a plurality of responsible states, writes that: ‘It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions and analogies must be applied with care.’⁷

¹ H. P. Aust, *Complicity and the Law of State Responsibility* (2011), at 276.

² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Separate Opinion of Judge Simma, 6 November 2003, ICJ Reports (2003) 161, at 354, para. 66; Noyes and Smith, ‘State Responsibility and the Principle of Joint and Several Liability’, 13 *Yale Journal of International Law* (1988) 225, at 251; W. V. H. Rogers (ed.), *Unification of Tort Law: Multiple Tortfeasors* (2004), at 273; T. Weir, ‘Complex Liabilities’, in *International Encyclopaedia of Comparative Law*, vol. 11: *Torts* (1983) ch. 12, 40, at 43.

³ On the capacity for the term ‘joint and several liability’ to mislead, see Rogers, *supra* note 2, at 272; G. Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (1951), at 63 n.1.

⁴ There are some notable exceptions, particularly Noyes and Smith, *supra* note 2.

⁵ J. Crawford, *Brownlie’s Principles of Public International Law* (9th ed., 2019), at 537.

⁶ Dominicé, ‘Attribution of conduct to multiple states and the implication of a state in the act of another state’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010) 281, at 282.

⁷ International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), reprinted in 2 *International Law Commission Yearbook (ILC Yb)* (2001) 31, Art. 47, commentary para. 3 (hereinafter ‘ARSIWA’).

In this article, I seek to highlight the role of domestic analogies in the formulation of the conditions for and consequences of multiple responsibility in the Guiding Principles on Shared Responsibility in International Law (hereinafter ‘Guiding Principles’).⁸ I focus on two elements: the application of liability *in solidum* as the key consequence of multiple responsibility (Principle 10), and ‘concerted action’ (Principle 7) as a condition for multiple responsibility. Both of these concepts can be found in many domestic legal systems, but the Guiding Principles place differential weight on domestic analogies in the elaboration of Principles 10 and 7: Principle 10 draws useful analogies with the rationale behind liability *in solidum* in domestic law, while Principle 7 on concerted action does not rely on related domestic concepts. That is likely for good reason. It is easier to translate the consequences of responsibility (e.g. reparation) from domestic to international law than it is to translate the conditions for responsibility. However, responsibility based on concerted action, as formulated in Principle 7, is a novel basis for responsibility in international law, and therefore its justification is all the more important. The justification provided in the commentary to Principle 7 is not fully convincing, and the scope of application of Principle 7 is uncertain. I query whether the exploration of cognate concepts in domestic legal systems may have helped to justify the rationale for, or the scope of, responsibility based on concerted action.

2 Liability *In Solidum* as a Consequence of Multiple Responsibility

Principle 2(1) defines that shared responsibility arises where the wrongful act(s) of multiple international persons ‘contribute to an indivisible injury’. As in domestic law,⁹ the necessary criterion for a principle of liability *in solidum* to apply in the case of concurrent causes is that the injury be indivisible.

Principle 10 is the heart of the Guiding Principles, providing that ‘each international person sharing responsibility has an obligation to provide full reparation for the indivisible injury caused by all of them’¹⁰ and that ‘the injured party can claim full reparation from any of these international persons’.¹¹ This is a regime of liability *in solidum*. However, possibly conscious of the ILC’s warning that ‘analogies must be applied with care’,¹² the authors appropriately borrow the justification for joint and several liability, but not the terminology.

In domestic law, as a general proposition, the principle of liability *in solidum* is designed to achieve the policy goal of full compensation for victims, by facilitating the

⁸ Nollkaemper, d’Aspremont, Ahlborn, Boutin, Nedeski, Plakokefalos, ‘Guiding Principles on Shared Responsibility in International Law’, 31 *European Journal of International Law (EJIL)* (2020) 15 (hereinafter Guiding Principles).

⁹ Weir, *supra* note 2, at 45: ‘For the classical rule of total liability [i.e. liability *in solidum*] to be applied, it is necessary that the harm caused be indivisible.’

¹⁰ Guiding Principles, *supra* note 8, Principle 10, commentary para. 1.

¹¹ *Ibid.*, para. 2.

¹² *Ibid.*, para. 3, citing ARSIWA, *supra* note 7, Art. 47, commentary para. 3.

recovery of the full sum from one tortfeasor and relieving the victim from having to identify and sue all tortfeasors. The tortfeasor's claim against a contributory tortfeasor or other debtor (such as an insurer) is considered to be secondary to the victim's claim against the tortfeasor. If a contributory tortfeasor is insolvent, the risk of non-recovery should fall on the other tortfeasors, not on the victim. In this sense, the principle of full compensation of victims is prioritized over the principle of equality of treatment among tortfeasors.

The commentary to Principle 10 draws on these justifications in support of the application of liability *in solidum* in a case of multiple responsibility. The commentary recognizes the domestic law rationale of allowing the victim of harm 'the maximum possible chance of having his harm properly and fully compensated'.¹³ Whereas, in domestic law, the risk to full compensation is usually the insolvency of one of the co-tortfeasors, the Guiding Principles recognize that in international law, the risk to full reparation is the limited access to international courts. Thus, recourse against any wrongdoer maximizes the victim's chance of a remedy. Solidary liability in domestic law is also justified on the basis of fairness to claimants in the case of evidential difficulty. Particularly in cases of concurrent causes leading to an indivisible harm, fairness to the claimant dictates that any evidential difficulty in apportioning the harm should not be construed against the claimant, or bar her full recovery; the evidential difficulty falls on the defendants and will be a matter for contribution between the tortfeasors. Hence the proposition, relied on in the commentary, that the victim does not need to prove 'how much damage each did, when it is certain that between them they did all'.¹⁴ The application of a regime of liability *in solidum* among multiple wrongdoers in international law thereby 'contributes to securing of the remedial function of international responsibility', which is one of the primary functions of the law.¹⁵

However, in any study of multiple responsibility, determining the *consequences* of that responsibility is possibly easier than determining the *conditions* for multiple responsibility. The conduct of states can concur in myriad ways. States can encourage one another, pressure one another or assist one another. They can coordinate in pursuit of common goals, or independently contribute to a common harm. They can form coalitions, conspire or create 'joint enterprises'. Which, if any, of these forms of participation can or should result in joint and several liability, should the results of that participation cause injury to a third party? This is a question about the *conditions, or basis, for* multiple responsibility, which will trigger the *consequence* of liability *in solidum* among all wrongdoers. Is there any role here for domestic analogies, carefully applied?

¹³ Guiding Principles, *supra* note 8, Principle 10, commentary para. 4.

¹⁴ *Ibid.*

¹⁵ *Ibid.* Cf. I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (1983), at 189: 'compensation is the principal object of international claims'.

3 The Conditions for Liability *In Solidum* in Domestic Law

For the sake of demonstration, I consider the conditions for liability *in solidum* in the common law. There will be joint and several liability where there are (i) several tortfeasors causing the same damage, or (ii) joint tortfeasors.¹⁶

'Several tortfeasors' are separate or independent tortfeasors whose acts combine to produce the same (indivisible) damage. They are sometimes referred to as 'several concurrent tortfeasors'.¹⁷ The 'concurrence' is in the realm of causation.¹⁸ In elaborating on several concurrent torts, Williams identifies two kinds:

There are those . . . where each of the two causes is necessary in order to effect the consequence. And there are those where either cause would be sufficient of itself to produce the consequence, as where two persons independently shoot at another at the same time, both shots being fatal. No legal consequences follow from the distinction . . . The characteristic of such torts is the logical impossibility of apportioning the damage among the different tortfeasors.¹⁹

The *basis* for liability in the case of several concurrent tortfeasors is the fact that each tortfeasor has committed a legal wrong (e.g. negligence, trespass) which is a cause of the harm – each tortfeasor is a necessary or sufficient cause of the indivisible harm, and therefore liable for it. The *consequence* for liability in a case of several concurrent tortfeasors is that each tortfeasor can be held liable for the whole damage; liability is 'solidary' or 'joint and several'.

Turning then to who or what constitute 'joint tortfeasors', the position in English law can be broadly classified into cases of (a) vicarious liability or agency relationships, and (b) concerted action.²⁰ Within the first category fall the vicarious liability of an employer for the torts of their employee; the vicarious liability of partners in a partnership; and the liability of a principal for the torts of the agent. The employer and employee, the principal and the agent, and all the partners to a partnership, will be joint tortfeasors. The second category comprises cases where a person (the accessory) instigates another (the principal) to commit a tort, or cases where persons take 'concerted action to a common end' and in the course of executing that joint purpose commit a tort.²¹ In such cases, the principal and the accessory, and all the parties who actively furthered the conspiracy, will be joint tortfeasors.²²

As is readily apparent, the fact that all cases of joint tortfeasors result in joint and several liability (that is, the *consequence* of joint torts is joint and several liability) tends to obscure the various *bases* for the imposition of liability in cases of joint torts. The rationale for holding an employer vicariously liable for the torts of their employee is not the same as the rationale for holding all conspirators liable for furthering a common

¹⁶ M. Jones and A. Dugdale (eds), *Clerk & Lindsell on Torts* (22nd ed., 2018), section 4-02.

¹⁷ Williams, *supra* note 3, at 16; Rogers, *supra* note 2, at 277.

¹⁸ Williams, *supra* note 3, at 1.

¹⁹ *Ibid.*, at 17.

²⁰ *Ibid.*, at 6–13; C. Witting (ed.), *Halsbury's Laws of England*, vol. 97: *Tort* (2015), section 447.

²¹ Witting, *supra* note 20, section 447.

²² In a comparative study of the law relating to multiple tortfeasors in 15 jurisdictions, Rogers concludes that in all systems solidary liability may arise:

end, except at a rather abstract level of treating employment, partnerships and conspiracies all as ‘joint enterprises’.

The point is that analogies between domestic and international law are easier to apply in the case of several concurrent wrongdoers than they are for joint wrongdoers. Just as two companies may pollute a river resulting in damage to a downstream farm, so may two states pollute a river causing damage to a downstream state. But situations of ‘joint wrongs’ require an examination not of causality, but of the conditions for rendering forms of collaboration wrongful in the first place. Such questions cannot be resolved by the rules on the content (or consequences) of responsibility, as found in Part II of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) or Part III of the Articles on the Responsibility of International Organizations (ARIO).²³ Rather, they are a matter for the rules on the conditions for responsibility, as found in Part I of the ARSIWA and in Parts II and V of the ARIO, in particular those articles that concern the responsibility of a state or organization in connection with the act of another state or organization. So, the question is, who are joint wrongdoers in international law?

4 Joint or Several Wrongdoing in International Law

The issue of joint or several wrongdoers was addressed by Special Rapporteur James Crawford in his Second Report on State Responsibility. The question was whether ‘aid and assistance’ and ‘direction, control or coercion’ – the content of Chapter IV of the ARSIWA after first reading – were the only forms of ‘accessorial responsibility in international law. Crawford begins by placing these concepts within ‘the broader context of cooperation between several states in the commission of internationally wrongful conduct’,²⁴ and envisages at least nine scenarios: (a) joint conduct; (b) action via a common organ; (c) agency;²⁵ (d) independently wrongful conduct involving another state;²⁶ (e) voluntary assistance in the commission of a wrongful act; (f) incitement of wrongful conduct; (g) direction, compulsion or coercion; (h) assistance given after the

(1) from conduct making an actual, direct contribution to one harm . . . or (2) from participation with others in some concerted action, including participation by way of procurement, incitement or encouragement or (3) in circumstances where one defendant is liable for the acts of the other (loosely, ‘vicarious liability’).

Rogers identifies category (1) as what, in English common law, is termed ‘several concurrent tortfeasors’. Categories (2) and (3) are ‘joint tortfeasors’ in the English sense. See Rogers, *supra* note 2, at 277 and n. 52.

²³ ILC, Articles on the Responsibility of International Organizations with Commentaries, UN Doc. A/66/10 (2011), reprinted in 2(2) *ILC Yb* (2011) 40 (hereinafter ‘ARIO’).

²⁴ Crawford, Special Rapporteur, ‘Second Report on State Responsibility’, UN Doc. A/CN.4/498/Add.1 (1999), para. 159 (hereinafter ‘Crawford, Second Report’).

²⁵ The example given is to the *Nauru* case: *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Reports (1992) 240. See Crawford, Second Report, *supra* note 24, para. 159.

²⁶ The examples given are ECtHR, *Soering v. United Kingdom*, Appl. No. App No 14038/88, Judgment of 7 July 1989, and *Corfu Channel (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4; Crawford, Second Report, *supra* note 24, para. 159.

wrongful conduct; and finally (i) conduct of several states separately causing aspects of the same harm or injury.²⁷

Crawford assesses which of these scenarios are already adequately resolved under the general principles of responsibility (the responsibility of each state for its own conduct in breach of its own international obligations); which scenarios do not exist as a matter of international law; and which scenarios require elaboration as part of Chapter IV of the ARSIWA.

The Special Rapporteur concludes that (a) joint action, (b) action via a common organ, (c) agency, (d) independently wrongful conduct involving another state, and (i) conduct of several states separately causing aspects of the same harm or injury, can all be resolved in accordance with the general principles of responsibility, though he concedes that these situations 'may raise issues . . . as to the extent of reparation which each state is to bear'.²⁸

The extent of reparation raised by these scenarios is now, happily, addressed by the Guiding Principles. A case of joint action, or action by a common organ, are situations where the same conduct will be attributed to multiple states, and therefore all those states will be held jointly and severally liable to the injured party (Principle 3). A situation of agency is not directly addressed in the Guiding Principles, though it could similarly be treated as a situation where the conduct of the agent is attributed to all the principals on whose behalf it acts, and therefore fall within Principle 3. A situation of independent wrongful conduct involving another state, if it resulted in an indivisible harm, would fall within Principle 4 – such as Albania's liability for all of the loss suffered by the United Kingdom when Albania failed to warn British ships of mines in the Corfu Channel, even though a third state had laid the mines and was a concurrent cause of the harm. And finally, in the situation of several states separately causing aspects of the same harm, if this harm is indivisible (e.g. destruction of oil fields) rather than divisible (e.g. progressive pollution), then the Guiding Principles specify the *in solidum* liability of the wrongdoers.²⁹

Of the other scenarios canvassed by Crawford, he holds that incitement, while unlawful under certain primary rules, is not generally wrongful in international law.³⁰ Nor is giving assistance after the conduct has been committed (in common law terminology, being an 'accessory after the fact'). Thus, the remaining bases for responsibility requiring elaboration in the ARSIWA are situations of aid and assistance, and direction, control and coercion. Following considerable refinement of their scope and

²⁷ Crawford also identifies the 'special kind of "collective" conduct [that] occurs where several States cooperate in establishing and maintaining an international organization to act on their behalf or, conversely, where one of more States acts on behalf of an international organization for some purpose of the organization', but since the responsibility of or for international organizations is outside the scope of the ARSIWA, it is put to one side. *Ibid.*, para. 163.

²⁸ *Ibid.*, para. 164.

²⁹ Guiding Principles, *supra* note 8, Principle 4.

³⁰ For a contrary view, see Jackson, 'State Instigation in International Law: A General Principle Transposed', 30 *EJIL* (2019) 391.

content, including the introduction of the so-called ‘opposability’ requirement, these concepts form the basis of Chapter IV of the ARSIWA.

The Guiding Principles, like the ARSIWA and ARIO before them, similarly identify aid and assistance (Principle 6) and direction, control and coercion (Principle 8) as bases for responsibility. But the Principles also add a new basis for responsibility: Principle 7, on ‘shared responsibility in situations of concerted action’. This provides:

1. An international person shares responsibility when it knowingly acts in concert with another international person that commits an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person.
2. International persons act in concert when each of them participates in a course of conduct with a view to achieving agreed goals.
3. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act.
4. An international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person.

What is the basis for responsibility for participating in a course of conduct with a view to achieving agreed goals, as defined in Principle 7? The commentary to Principle 7 freely admits that the ‘the ARSIWA and ARIO do not include a provision on responsibility for concerted action, and international judicial pronouncements on concerted action are rare’. Nevertheless, the commentary claims that Principle 7 is not without precedent, as it:

echoes the notion of ‘common adventures’ referred to by Special Rapporteur Crawford in his Third Report in which he observed: ‘Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants.’³¹

Crawford identifies that the rationale for *in solidum* liability in such a case is ‘the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of [the participants]’.³²

This is a rather thin basis on which to formulate Principle 7. Crawford does not explain what he means by a common adventure, though the idea of ‘jointly engaging’ in a common adventure may suggest two states committing separate, though parallel, wrongful acts as part of a coordinated effort; for example, the invasion of a third state. This would satisfy the definition of ‘multiple internationally wrongful acts’ in Principle 4, which, if resulting in an indivisible harm, would justify the imposition of *in solidum* liability, in the same way that the evidential difficulty in any case of an indivisible harm caused by two or more persons is construed against the wrongdoers rather than against the victim.³³ Nothing in Crawford’s formulation

³¹ Crawford, Special Rapporteur, Third Report on State Responsibility, UN Doc. A/CN.4/507/Add.2 (2000), para. 276(c) (hereinafter ‘Crawford, Third Report’).

³² Crawford, Third Report, *supra* note 31, para. 276(c), cited in Principle 7, n. 118.

³³ That Crawford, in the case of common adventures, is considering an issue of concurrent causes and difficulties of proof of causation of harm, rather than a question of derived responsibility, is further evidenced by a footnote reference back to paragraph 35 of the Third Report, wherein Crawford is discussing the *Zafiro* and issues of concurrent causes of harm (Crawford, Third Report, *supra* note 31, para. 35).

suggests the kind of *derived* responsibility posited in Principle 7. Principle 7 holds one person (the accessory) responsible for the wrongful acts of another person (the primary wrongdoer). In this sense, Principle 7, like Principle 8 on direction and control, is a form of derived responsibility. It is also a form of responsibility that seems to have a rather low threshold, compared to other forms of joint wrongdoing. Under Principle 7, an accessory need only ‘actively participate in a course of conduct with a view to achieving agreed goals’,³⁴ and this participation is described as a less burdensome threshold than the material assistance required under Principle 6 (aid and assistance).³⁵ Participation under Principle 7 will require the ‘coordination of conduct’, whether via agreement or more informal means.³⁶ The goal to be pursued need not be itself unlawful, provided the wrongful act of the primary wrongdoer is committed in the course of the concerted action.³⁷ Thus, on this construction of Principle 7, a participant in a common plan will be held liable for the wrongs committed by others in the course of that common plan. This is a form of derived responsibility, which can be triggered, it seems, in circumstances where the participation of the accessory may have been non-material, lawful and in pursuit of a lawful goal.

The precedential value of the ‘echoes’ of a concept of concerted action in Crawford’s Third Report is, however, put in doubt by his Second Report, which is not mentioned in the commentary to Principle 7. In the Second Report, Crawford assesses whether other forms of ancillary responsibility ought to be included in Chapter IV of the ARSIWA. Crawford notes that in some national legal systems, the concepts of ‘complicity’ (aid and assistance) and ‘indirect responsibility’ (direction and control) are addressed alongside other forms of accessory responsibility such as incitement, conspiracy and attempt.³⁸ On whether international law should adopt a concept such as ‘conspiracy’, Crawford notes that ancillary responsibility in domestic systems is more a feature of criminal rather than civil law,³⁹ which militates against the adoption of such concepts in international law, where there is no distinction between delicts and crimes.⁴⁰ Moreover, on conspiracy particularly, he argues:

Where two States conspire to commit an internationally wrongful act, it is usually in the context of the subsequent joint commission of that act. At least, one of the conspiring States may well aid or assist the other, and depending on the facts, the planning might itself constitute such assistance. However, there does not seem to be any need for a general concept of ‘conspiracy’ in international law, and certainly there is no need for such a notion in Chapter IV.

Crawford’s argument is that a concept of conspiracy in international law would have no work to do, since concepts of aid and assistance, or joint conduct, will usually suffice. Incitement and attempt are also dismissed as not unlawful in general international

³⁴ Guiding Principles, *supra* note 8, Principle 7, commentary para. 7.

³⁵ *Ibid.*, para. 5.

³⁶ *Ibid.*, para. 7.

³⁷ *Ibid.*, para. 8.

³⁸ Crawford, Second Report, *supra* note 24, para. 210.

³⁹ See, e.g., Davies and Sales, ‘Intentional harm, Accessories and Conspiracies’, 134 *Law Quarterly Review* (2018) 69, at 78.

⁴⁰ Crawford, Second Report, *supra* note 24, para. 210.

law. Referring back to the Second Report's catalogue of cases involving joint or collective action by several states,⁴¹ Crawford concludes that 'the present report does not identify any further situation which needs to be dealt with' in Chapter IV.⁴²

5 Justifying the Concept of Concerted Action in Principle 7

The Principles, however, take a different position than to Crawford. While conceding that there is a degree of overlap between cases of aid and assistance, and concerted action, the commentary argues that concerted action will capture forms of participation that do not meet the material threshold of aid and assistance. The example used to illustrate this is the 2003 invasion of Iraq by a coalition of states. Treating that military campaign as 'concerted action', the commentary argues that not all the conduct of coalition states (such as decision-making or execution processes⁴³) may qualify as aid and assistance. Therefore, 'as situations of concerted action cannot always be captured by other Principles on shared responsibility, a separate principle on concerted action is warranted'.⁴⁴ But this only begs the question. Just because a concept of concerted action will capture forms of participation not otherwise wrongful, does not mean that it *should*. Expanding responsibility to more forms of collaboration cannot be a goal for its own sake, especially if it would unduly constrain states and organizations in conducting their lawful international affairs. Crawford, for his part, did not think there was any gap to be filled. Is there a justification for capturing participation in a common plan?

The commentary offers three rationales. The 'main' rationale is that 'the injured party should not be put in a position of having to prove which parts of the injury are attributable to each of the responsible international persons'. But concerns about difficulty of proof only explain why, if liable, multiple wrongdoers should be held liable on an *in solidum* basis. This is not a rationale for why concerted action in pursuit of a common end is a 'joint wrong' in the first place, any more than it is a rationale for why aid and assistance, or direction and control, incur responsibility. The justification for the *imposition* of multiple responsibility must be separate from the justification for its *consequences*.⁴⁵

The second rationale offered by the commentary does address the imposition of responsibility. The argument is that, in some cases, the wrongful act, and resulting injury, 'only come about' because the accessory acted in concert with the principal wrongdoer:

⁴¹ As summarized above, see text accompanying notes 25–28.

⁴² Crawford, Second Report, *supra* note 24, para. 211.

⁴³ Guiding Principles, *supra* note 8, Principle 7, commentary para. 7.

⁴⁴ *Ibid.*, para. 5.

⁴⁵ Just as in the common law there are justifications for *why* an employer is vicariously liable for their employee, which are separate from the justifications for the *consequence* of joint and several liability between employer and employee. For example, in English law, see *Catholic Child Welfare Society v. Various Claimants* [2012] UKSC 56, at 34–35.

By engaging in concerted wrongful action, the actors involved can produce results that they could not have brought about on their own. Principle 7 makes clear that in such situations, the international persons acting in concert would not be able to evade international responsibility.⁴⁶

The rationale here appears to be that wrongdoers can achieve together more than they could achieve on their own, thus all participants in a wrongful enterprise should bear responsibility for it. Keeping in mind that participation under Principle 7 need not reach the threshold of material assistance required for Principle 6, the idea of 'producing results' together may not be confined to an analysis of the conspirators' physical ability to carry out a wrongful act (e.g. supplying the material or intelligence necessary for an invasion) or the extent of the harm they can inflict. The knowing provision of, say, aircraft for an invasion, or munitions to destroy a bridge, would fall comfortably within Principle 6. In that sense, Principle 7, if it has any work to do, appears to be suggesting that non-material forms of assistance, such as encouragement or incitement, also suffice for responsibility. Thus, Principle 7 might be construed to cover a situation where a coalition of states give their political support or backing – perhaps though an alliance – to an invasion by state *A* into state *B*, if state *A* would not have invaded without the coalition's support. The coalition states will have participated 'in a course of conduct with a view to achieving agreed goals', and this could be enough for the coalition states to incur responsibility, on an *in solidum* basis, for the harm suffered by state *B*. Evidently, the scope of such a mode of responsibility could be quite far reaching; especially given the fact that Principle 7 extends to member states acting in concert in the framework of an international organization.⁴⁷ For example, say the UN Security Council authorizes state *A* to carry out military operations in state *B* (the agreed goal). The goal is lawful (under Chapter VII of the UN Charter). But state *A* conducts its operation contrary to rules of international humanitarian law (IHL) (a wrongful act committed in pursuit of the agreed goal). There is at least constructive knowledge that state *A* will violate IHL rules. Would the vote in favour of the military operation make each UN Security Council member an accessory to the IHL violations by state *A*, and jointly and severally liable to state *B*? Perhaps more importantly, should it? Article 61 ARIIO, which is said to be encompassed by Principle 7,⁴⁸ certainly does not go so far. Article 61 only applies where a member state, in seeking to avoid compliance with its own obligations, causes the organization to commit the wrongful act in its stead.⁴⁹ Article 61 does not create a derivative responsibility of a member state for its 'knowing participation' in some common plan with other states, within the framework of an international organization.

The commentary's final justification for derivative responsibility under Principle 7 is one of policy, that this rule would discourage knowing participation in joint

⁴⁶ Guiding Principles, *supra* note 8, Principle 7, commentary para. 2.

⁴⁷ Guiding Principles, *supra* note 8, Principle 7, commentary para. 10.

⁴⁸ *Ibid.*, paras. 4, 10.

⁴⁹ See, generally, Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization', 8 *International Organizations Law Review* (2011) 291.

enterprises which can cause harm.⁵⁰ The intention is certainly a laudable one, but any legal intervention designed to change incentive structures must get the balance right, so as to avoid overkill and unintended consequences, which may stymie legitimate efforts at cooperation and collective action between states and within organizations. To this end, there are serious questions as to the material and mental elements of concerted action responsibility. For example, does a ‘constructive knowledge’ standard set the bar too low? In light of the minimal threshold for ‘participation’, should responsibility for concerted action require actual knowledge, or even intention (either intending the wrong, or the injury)?⁵¹ And what constitutes ‘participation’? Would procurement, encouragement or incitement suffice, especially in light of the rejection of responsibility for incitement by Special Rapporteur Crawford?⁵² Would voting within an international organization suffice, given that the ILC has specified that an act by a member state done in accordance with the rules of the organization ‘does not as such engage the international responsibility of that state’ as aid and assistance or direction and control?⁵³

On this and other questions, there are likely fruitful avenues for comparison with domestic legal concepts of accessory liability and conspiracy,⁵⁴ which may help to develop the parameters of a rule on concerted action that is appropriately calibrated for application at the level of international relations. For example, one could explore why domestic legal systems impose *in solidum* liability on the participants in a common plan or conspiracy, and on what conditions. Does the plan need to be unlawful, what kind of participation suffices and what degree of knowledge is required? And, more importantly, what policy goals are served by setting the thresholds for liability high or low? An analysis of the rationales underpinning conspiracy or common plan liability in domestic law would help to determine whether such rationales similarly apply in the relations between states, or between states and international organizations. Conversely, comparison with domestic law may demonstrate such diversity of rules, or rules predicated on procedural or other structural features unique to national legal systems, which render the application of domestic analogies inappropriate.⁵⁵ Either

⁵⁰ Guiding Principles, *supra* note 8, Principle 7, commentary para. 2: ‘This Principle also creates incentives for such international persons to refrain from acting in concert when they are aware that this could result in injury to a third person.’

⁵¹ The commentary argues that ‘the considerations that justify applying a standard of constructive knowledge in relation to aid and assistance also apply with regard to concerted action’, but given the higher material threshold for Principle 6, and the fact that in a state–organization context there is no opposability requirement under Principle 7 (commentary para. 10), the comparability of the justification could be put in doubt.

⁵² Crawford, Second Report, *supra* note 24, para. 211, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, ICJ Reports (1986) 14, at 129.

⁵³ ARIQ, *supra* note 23, Arts 58(2) and 59(2).

⁵⁴ Honoré, ‘Causation and Remoteness of Damage’, in *International Encyclopaedia of Comparative Law*, vol. 11: *Torts*, *supra* note 2, ch. 7, at 78, para. 123: ‘Most legal systems have special provisions which make those who participate in joint action liable *in solidum* for the harm done by all, within the limits of the common purpose, whatever the nature and extent of the contributions of the various agents.’

⁵⁵ Compare Crawford’s examination of liability for ‘inducing breach of contract’, Second Report, *supra* note 24, paras 182–183.

way, an analysis of cognate concepts in domestic law would be useful. It will either assist in justifying the application of similar principles in international law (as it did for Principle 10), or it will demonstrate that the municipal analogy, in this case, is unhelpful, and thereby force us to seek justifications elsewhere.

6 Conclusion

The Guiding Principles' exposition of the key consequence of multiple responsibility – liability *in solidum* – is an important contribution to the law. The Principles' elaboration of conditions for multiple responsibility – the modes of participation that result in 'joint wrongs' – is perhaps less successful, but any exercise in creating new rules to constrain the behaviour of states is necessarily fraught. The authors of the Guiding Principles are to be congratulated for suggesting possibilities for development in the law, and challenging us anew to apply analogies with care.