United in Joy and Sorrow: Some Considerations on Responsibility Issues under Partnerships among International Financial Institutions

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1. INTRODUCTORY REMARKS

In the sprawling system of global governance, collaboration is widely sought to curb inefficiencies in resource allocations. That gives rise to complex and fast-changing bundles of relationships. Partnerships between international organizations are one of the best examples of this: multi-purpose and flexible, they have come to represent an ideal tool to accommodate pragmatic needs flowing from the common or parallel action of organizations.

That international law struggles to apprehend such manifestations of collaboration is palpable when one takes up the topic of responsibility. The International Law Commission tried to grapple with this problem in the articles on the responsibility of international organizations it adopted in 2011. From the outset, the acknowledgement that an international organization can incur responsibility in connection with a conduct other than its own, particularly in the cases spelt out in chapter IV of the articles, ushers in a concept of responsibility more balanced and potentially more ambitious than its equivalent in the field of State responsibility. It is more balanced because derived responsibility stands on an equal
footing with responsibility for one’s own acts, while this is a mere exception in the articles on State responsibility, which the International Law Commission had adopted in 2001. It is also more ambitious because, in trying to frame the relational networks of international organizations, the 2011 articles bring the topic of shared responsibility to the forefront.

Yet, the solutions offered by these articles have only stirred mild enthusiasm. Some international organizations have voiced doubts on whether the provisions in chapter IV will have a true grip on reality; others have conversely warned about the risk that some articles may have a chilling effect on the activities of international organizations. Doctrinal voices are also sceptical, pointing out that, notwithstanding the improvements over the 2001 articles, responsibility in multi-actor scenarios remains rather uncertain.

Indeed, a glance at the commentaries to chapter IV of the articles on the responsibility of international organizations suffices to demonstrate the close kinship with their correlative provisions in the articles on State responsibility, the only novelty being responsibility of an international organization for the circumvention of its own obligations through decisions or authorisations implemented by its members. Such a strong reliance on the 2001 articles transposes into the 2011 articles the uncertainties riddling States’ derived responsibility. Additionally, the Commission’s rules do not address the possible consequences of acts adopted in contexts other than membership. The question therefore arises how to situate relations between international organizations and their members other than through membership within a general regime of responsibility.

Here, partnerships between international organizations offer an interesting angle of analysis. The broad range of circumstances they cover permits testing

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5 Concerning article 14 (direction and control) the UN Secretariat was of the view that ‘the draft article has little practical effect for the Organization.’ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1), 20.

6 On draft article 13 (aid and assistance) the World Bank commented that the provision ‘is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients.’ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 27.


8 Articles 14–16, ARIO Commentaries, 103–7.

the link among the exercise of normative power, the implementation of pragmatic activities, and the occurrence of wrongful acts in a framework distinct from membership and yet of a certain degree of formality and of continuity over time. That seems a promising approach to clarify the conceptual underpinnings of the derived responsibility of international organizations and, more generally, the scope of their shared responsibility. The analysis will focus on partnerships set up by international financial institutions (IFIs)—which have voiced strong concerns about the potential effects of chapter IV—and it will touch upon the circumstances for engagement of responsibility, while leaving aside issues concerning implementation.

2. PARTNERSHIPS AMONG IFIs: A VECTOR FOR INSTITUTIONAL EMULATION

Partnerships among IFIs have grown out of a need for effectiveness in the pursuance of a wide range of activities and objectives. IFIs may receive logistical, material, or financial aid from each other for operational purposes, exchange information and participate in their respective fora of discussion, or establish institutional arrangements to implement a given activity and provide a framework for common goals. Flexibility and low costs of establishment have driven the growing success of partnerships in domains such as environmental protection and sustainable development.

Financing is a crucial issue in such domains and is usually pursued through ad hoc arrangements, ranging from full-fledged formal agreements, informal instruments such as Memoranda of Understanding (MOUs), to agreements

10 L. Boisson de Chazournes, ‘Les relations entre organisations régionales et organisations universelles’, 347 RdC (2010), 79–406, at 346, stating: ‘While concern for pragmatism demands flexibility to render cooperation between the UN and regional organizations more efficient, the diverse relations between organizations creates more complexity, at times obscuring their legal profiles.’ (Original in French; translation by the author.)

11 But see Article V, Section 1(e), of the Articles of Agreement of the International Development Association (439 UNTS 249—IDA being the World Bank’s lending arm to the poorest countries), providing for preferential financing to ‘a public or regional organization’.

12 See, for example, the Co-financing Agreement between the Nordic Development Fund, the African Development Bank, and the African Development Fund (1995), at <www.afdb.org>.

13 See, for example, the MOU on an Enhanced Strategic Partnership for Cooperation in the African Countries between the European Commission, the European Investment Bank, and the African Development Bank (2005), at <www.afdb.org>. See also the MOU between the European Bank for Reconstruction and Development, the African Development Bank, and the African Development Fund (2011), at <www.afdb.org>.
incorporating the standard conditions adopted by one organization. Regardless of their legal nature, these instruments combine provisions of a more contractual type, e.g. on termination or arbitration with typical administrative law mechanisms, such as monitoring and reporting on project implementation. These similarities show that partnership agreements represent an important vector of emulation and procedural harmonisation among IFIs. Emulation helps, in fact, to reduce transaction costs and, in turn, to facilitate collaboration among IFIs.

Partnerships are also the building blocks of more institutionally complex multilateral schemes. Trust funds for concessional financing are a good example. Conceived as a less burdensome alternative to the proliferation of autonomous organizations, most trust funds are set up jointly by two or more international organizations and administered by one of them, acting as trustee. IFIs have engaged in further forms of collaboration, such as the Heavily Indebted Poor Countries (HIPC) Initiative, set up by the International Monetary Fund (IMF) and the World Bank in 1996.

3. Responsibility Issues under IFIs’ Partnerships

(a) Issues of Responsibility

Partnerships formed by IFIs may seem of dubious relevance for articulating the conceptual underpinnings of a general regime of responsibility. Admittedly, the diversity one faces discourages against venturing into more than case-specific considerations, whereas the lack of practice on responsibility for partnership-related activities risks confining a reflection on the matter to a purely theoretical discussion. Yet, the tendency to reproduce certain patterns of collaboration out of institutional emulation pleads for adopting a more than case-based

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17 For example, the HIPC Trust Fund, established by joint resolution of the boards of directors of IBRD (resolution 96–9) and IDA (resolution 96–5) and adopted as an IDA trust fund, reproduced in 36 ILM (1997), 997.

18 The objectives of HIPC were reiterated through the creation of the Multilateral Debt Relief Initiative (MDRI), a G8-promoted program. See L.F. Guder, The Administration of Debt Relief by the International Financial Institutions: A Legal Reconstruction of the HIPC Initiative (Berlin, 2009).
approach towards collaboration through partnerships. In any event, the IFIs' difficulty in translating the articles on the responsibility of international organizations into their everyday operations demonstrates the need for a theoretical approach that may be capable of linking the articles to the overarching legal framework of partnerships.

To this end, the model of derived responsibility comes to mind first, but that of independent responsibility also deserves attention. Such paradigms, in fact, complement and eventually overlap one another to grasp the many modes of partnership-based collaboration. The shared responsibility of partner international organizations could arise from a single wrongful act attributable to more than one organization, from the sum of the distinct, individual wrongful acts of two or more organizations, as well as from the contribution of one international organization to the wrongful conduct of another. We thereby consider what is 'shared' to characterize the responsibility of multiple organizations for a certain injury related to a partnership. Part of the analysis here will thus assess what room is available in the Commission’s articles for the latter conception of shared responsibility.

Before doing so, however, one must reflect on the instruments establishing financial partnerships. Could they provide the direct source of the obligations, which, if breached, trigger the responsibility of partner international organizations? The answer is clearly in the affirmative if the instruments are binding in international law. However, that is rarely the case: most partnerships are created by MOUs, although the mere choice of terms does not imply the parties' lack of intent to be bound. A somewhat unorthodox option would be to qualify such MOUs as 'rules of the organisations' under article 2(b) of the articles on the responsibility of international organizations. There is room to debate whether the broad formulation of article 2(b) can accommodate such a line of reasoning, but the true problem is that, were such acts deemed to have an international legal character, it would overstretch the scope of the obligations defining the responsibility of international organizations.

Nevertheless, the MOUs constitutive of partnerships can affect responsibility for reasons other than their binding nature. First, notwithstanding the soft law character of some MOUs, certain provisions may still give rise to obligations for an international organization. The distinction between the soft law character of

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20 Article 2(b) on the responsibility of international organizations refers to any act 'adopted in accordance with those instruments [the constituent instrument, decisions and resolutions of an international organization]'.

the *instrument* and that of the *negotium* is in place,\(^{22}\) provided the MOU does not explicitly exclude any implications in terms of responsibility.\(^{23}\) Second, if conceived as part of the internal legal order of international organizations, MOUs can still entail factual effects in the international legal order. Quite importantly, they can set the stage to assess the behavior of an international organization, while the source of obligation allegedly breached resides elsewhere. More specifically, they allow grasping the mutual expectations related to the relational context of the partnership. That, in turn, provides guidance in determining issues of attribution of conduct and responsibility, or of the latter only.

**b) Independent Responsibility**

In the broad panorama of partnerships, the category of independent responsibility may prove valuable to address one of the most common forms of collaboration among IFIs, namely project co-financing. Under a legally binding framework, the conditions for engaging responsibility would much resemble those the International Court of Justice had to grapple with in the *East Timor* case.\(^{24}\) The allegedly wrongful conduct had occurred in conjunction with a joint exploitation regime of East Timor’s resources. The Court’s decision to proceed on the merits of the case implies it deemed the respondent potentially responsible for its conduct, notwithstanding the contribution of another actor to the wrongful act. This supports a conceptual division of collaborative conduct that imputes responsibility to each of the partner international organizations.\(^{25}\) The case for doing so is even stronger when co-financing rests upon a looser basis: if the shared character of collaboration is weak, nothing prevents reliance on independent responsibility.

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\(^{23}\) For example, section 9.1 of the MOU between the European Bank for Reconstruction and Development, the African Development Bank and the African Development Fund. See also article XI of the MOU between the African Development Bank, the African Development Fund and UNIDO, at <www.afdb.org>.

\(^{24}\) *East Timor (Portugal v. Australia)*, Judgment, *ICJ Reports 1995*, 90. (See also the dissenting opinion by Judge Weeramantry, at I72.)

\(^{25}\) Concerning State responsibility, the Special Rapporteur Roberto Ago also stated that, if ‘the actions constituting participation by a State in the commission of an internationally wrongful act by another State constituted a breach of an international obligation in themselves, they would on that account already engage the international responsibility of the State which performed those actions, irrespective of any consequences that might follow from the part taken in the internationally wrongful act of another State.’ (‘Seventh report on State responsibility’ (A/CN.4/307), *YILC* (1978), vol. II, Part One, 31–60, at 52–3, note 99.) See also I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford, 1983), 190.
Reasoning along these lines also makes room for dual/multiple attribution. That does not seem at odds with the conceptual underpinnings of responsibility,\textsuperscript{26} especially the assumption that control over a wrongful act can rest only upon one subject. It is uncontested that each partner organization fully controls its contribution to financing. The thorny point is rather whether one is willing to concede that the principles on attribution hold the same notwithstanding that the wrongful conduct arises from the joint, and therefore intertwined, action of its co-actors. In truth, the conceptual hurdles one may think of are related to the implementation, as opposed to the engagement, of co-authors' responsibility. If independent responsibility seems possible in the case of co-financing, the \textit{de facto} shared responsibility ensuing from dual attribution satisfies the criteria of article 48 on the responsibility of international organizations, which grounds joint responsibility upon the occurrence of a single wrongful act.

Multiple wrongful acts can arise, instead, under a further scenario that one can imagine in terms of independent responsibility for looser schemes of collaborative action. For instance, certain partnership agreements identify the implementation of the Poverty Reduction Strategy Papers (PRSP) as an area of collaboration, notably through parallel disbursements.\textsuperscript{27} If an outcome contrary to the respective obligations of partner organizations were to occur, the injured party should be able to bring a claim against partner organizations, notwithstanding that the PRSP provided an overall working framework rather than a true scheme of collaborative action. As pointed out at the outset, partner organizations could incur \textit{de facto} shared responsibility with respect to a single outcome related to a partnership-activity, but the latter situation would not qualify as joint responsibility for the purposes of the Commission’s articles.

\textbf{(c) Derived Responsibility}

A further option to frame the relationship between two or more partner organizations under the articles on the responsibility of international organizations is to attribute responsibility to an organization in connection with the wrongful acts of others. The provisions in question—namely, articles 14, 15 and 16—have not generated much debate, the assumption being widely shared that international organizations could incur responsibility without being attributed the

\textsuperscript{26} As the Commission’s commentary clarified, ‘dual or even multiple attribution of conduct cannot be excluded’ (ARIO Commentaries, 83). It has also been argued that nothing in the articles ‘prevents such contemporaneous application of the rules (on attribution) to more than one subject in international law’. (F. Messineo, ‘Multiple Attribution of Conduct’, SHARES Research Paper No. 2012–II.)

\textsuperscript{27} For example, point 2 of ‘Priority areas of cooperation’ in the MOU between the European Development Bank, the European Commission and the African Development Bank (2005), at <www.afdb.org>.
acts of other States or organizations, much in the same manner as States.\textsuperscript{28} Yet, despite an apparent consensus, derived responsibility is hardly straightforward. The circumstances under which it arises and its consequences have largely remained underdeveloped, in the shade of the dominant paradigm of independent responsibility.\textsuperscript{29}

Several issues, which are controversial in the context of State responsibility, riddle in turn the Commission’s articles on the responsibility of international organizations. The lack of a principle common to the categories of derived responsibility is one such issue. Factual control over the conduct of the wrongdoer seems crucial to direction and control (article 17) as well as coercion (article 18), but that hardly holds for aid and assistance (article 16). Whereas significance of contribution could replace control, one may reasonably object that knowing participation in the wrongful act of another should suffice to trigger responsibility.\textsuperscript{30} Regardless of one’s position on this point, the link between the conduct of the third party and wrongfulness remains vague, with the risk of placing the application of responsibility at odds with its premises.\textsuperscript{31} That the conditions of derived responsibility rest on a shaky basis also affects the implementation of joint responsibility. As noticed by some commentators,\textsuperscript{32} article 47—which requires responsibility for the same internationally wrongful act—encompasses cases of aid or assistance only if considerably overstretched; the conduct of the aiding or assisting subject is, in fact, distinct from that of the wrongdoer.

When moving to the 2011 articles, the above hurdles become even more serious due to the structural differences between States and international organizations. Let us start from the crucial issue of control. The reference to the articles on State responsibility, which enshrines a factual type of control, proves tricky when measured against the powers of international organizations. Tellingly enough, the UN Secretariat has expressed doubts that ‘a binding decision could constitute “direction and control” within the meaning of draft article 14’ and that a resolution could impose the commission of a wrongful act meeting the conditions for

\begin{thebibliography}{9}
\bibitem{28} G. Gaja, ‘Third report on the responsibility of international organizations’ (A/CN.4/553), 11.
\bibitem{29} According to Ian Brownlie, the principles of allocation of responsibility among multiple actors are ‘indistinct’. (\textit{Principles of Public International Law} (7th edn., Oxford, 2008), 457.)
\bibitem{31} Under article 18, the coercing subject could incur responsibility even in the absence of any wrongful act. (J. Fry, ‘Coercion, Causation, and the Fictional Elements of Indirect State Responsibility’, 40 \textit{Vanderbilt Journal of Transnational Law} (2007), 611–41, at 629–38.)
\end{thebibliography}
coercion. Moreover, stressing factual control may turn derived responsibility for ‘direction and control’ into direct responsibility for the acts effectively controlled by an international organization. As to aid and assistance, the risk exists of its overstretching in light of the manifold contribution organizations provide to one another, coupled with the difficulty of tailoring a test of importance of contribution when it comes to normative decisions. Finally, the lack of clarity as to the subjective elements of knowledge and fault further blurs the circumstances of derived responsibility.

It is not much of a surprise, then, that the chapter IV provisions of the 2011 articles have met with concern among IFIs, notably the World Bank and the IMF. Such concern has nonetheless considerably evolved over the eight-year study period before the Commission. At first, the IMF maintained that only ‘assistance that is earmarked for the wrongful conduct could qualify as aid and assistance’. Lending by the IMF could never prove essential nor contribute significantly to wrongful conduct because ‘a member always has an effective choice not to follow the conditions on which IMF assistance is based… and IMF financing is not targeted to particular conduct.’ Along the same lines, the IMF also pointed out that ‘a legally binding decision upon its members is not the same as direction and control’. In the latest comments submitted to the Commission, the World Bank took a somewhat milder stance. Concerning aid and assistance, the World Bank invited the Commission to recognize the negative presumption that ‘organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong’. On ‘direction and control’, it broached the operative relationship with a borrower to argue that, whether or not control is completely ceded, the World Bank ‘engages at most in the exercise of oversight. Oversight is neither “control” nor “direction” though.’

33 Responsibility of international organizations. Comments and observations received from international organizations’ (A/CN.4/637/Add.1), 20–1. On coercion, the UN Secretariat stated that ‘the probability of adoption of a binding resolution which would meet the conditions of draft article 15—namely, a resolution not only binding a State to commit an international wrongful act, but through “coercion” having the effect of force majeure—is virtually non-existent’ (at 21).
34 A. Reinisch, ‘Aid or Assistance’, 76.
35 The IMF added that the ‘fungible character of financial resources also means that IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State, for the purposes of this draft article 13.’ (Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/582), 10–11.)
36 Ibid., II.
37 Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 28.
38 Ibid.
To be sure, scattered and organization-specific as they are, the comments by international organizations are to be put in perspective. The Special Rapporteur himself has done so by emphasizing the difference between general lending to a State or another international organization and project financing with some control over the activities of the borrowing subject, the latter case being more germane to the potential responsibility flowing from IFIs’ lending policies. Still, the IFIs’ comments show what aspects are of greater relevance to their specific activities, particularly in light of the normative hurdles discussed above. The framework of partnerships seems ideal for addressing these aspects.

Let us consider the issue of aid and assistance. The IMF’s stance recalled above has more to do with the case of general lending than project financing. Yet, the idea that a contribution needs to be ‘essential or significant’ to trigger responsibility for acts to which such contribution is made finds place in the Commission’s commentaries. Whereas significance of contribution is hardly amenable to a standard criterion of assessment, partnership agreements may nonetheless offer valuable clues as to their covered domain. A good example is preferential financing: the conditions offered in such contexts are most probably determinant in implementing a project or engaging in a given activity, which would suffice to presume the test of significance is satisfied. More generally, by establishing the features of collaboration among international organizations, partnership agreements help apprehend significance of contribution in terms of a relational rather than quantitative context.

Concerning the subjective circumstances of aid and assistance, the position of the World Bank is not only compatible with the 2011 articles, but also insightful in the context of project financing through partnerships. A generic knowledge of the circumstances of financing may not seem enough to reverse the presumption against assumption of risk for a possibly wrongful act; some proof of intent is necessary to that end. When assessed in the context of partnerships, some further considerations prove relevant. For instance, co-financing agreements often foresee mechanisms of consultation and monitoring.

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40 ARIO Commentaries, 104.
42 The European Commission noted that as ‘the threshold for the application of the rule seems low (knowledge) one should add in the commentary some limiting language (intent)’. (Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 27.)
43 For example, article IV of the Co-financing Agreement between the Nordic Development Fund, the African Development Bank and the African Development Fund provides that the parties ‘shall promptly inform each other of any condition or development which, in its opinion, is likely to interfere with the implementation or the successful
duty to exchange information concerning the implementation of the co-financed project, each of them can keep abreast of the injurious developments potentially arising from the project. In such conditions, the partner organizations possess, at least in principle, enough knowledge to argue that maintaining the contractual relationship concerning the injurious project is tantamount to willingly providing aid and assistance to a wrongful act. However, that does not hold when the instrument establishing a partnership only foresees a generic exchange of information among the parties.

Besides aid and assistance, IFIs also tackled direction and control in their comments. The position of the IMF, claiming that its normative acts never entail direction and control, deprives the latter category of almost any utility and is therefore of little help in deciding whether derived responsibility arises under the articles on the responsibility of international organizations. The World Bank, instead, touched upon issues of control from a more operational perspective when it excluded that oversight, the only form of control allegedly exercised by the World Bank, could trigger derived responsibility. To be sure, the World Bank’s position finds support when one combines the commentaries on the 2001 articles with those of the 2011 articles: oversight is in principle not to be identified with either direction or control. Yet, one must also put that in context. Oversight is a term of art, which does not necessarily cover the different types of control IFIs may exercise when involved in a partnership. The example of development funds with separate legal personality and administered by an IFI is telling. The decisions of the trustee imply a degree of control over an activity formally implemented through the fund and its executing agencies. Incidentally, such a scenario finds support also in the articles on the responsibility of international organizations, hinting at the possibility of a joint exercise of direction and control.

4. Conclusion

The means through which international organizations jointly carry out their activities are rarely the subject of reflection. The reason is, in part, that an analysis of such complex collaborative settings proves hard as long as some crucial features of the general regime of responsibility remain controversial. In this connection, one may think in particular of the scope of the obligations binding on international organizations and the place of the internal rules of the organizations in relation with them. Other major issues—such as the possibility of

completion of a project or programme being co-financed hereunder and shall consult with each other regarding the appropriate remedial action to be taken by the parties.’

See also Sections 2.06 and 2.08 of the World Bank Standard Conditions for Grants.

ARIO Commentaries, 106.

Ibid., 105–6.
multiple attribution, the circumstances of derived responsibility as well as the defining criteria of joint responsibility—either have been broached at too high a level of abstraction or are still underdeveloped. Hence, a shift in the focus of attention seems necessary. To make the 2011 articles operational in this respect, one needs to identify the recurrent features of collaboration among international organizations and thus to devise gateway concepts between the articles and IFIs’ activities. We have attempted to do so by referring to a number of partnership agreements in conjunction with the main scenarios of both independent and derived responsibility. Such an approach also brings to light the close link between the mechanisms foreseen to ensure accountability under a partnership agreement and issues of responsibility under general international law. In the case of aid and assistance, the implications stemming from the monitoring procedures foreseen under financing agreements are particularly telling. Incidentally, although we did not explore this aspect, provisions of a contractual character may also help to clarify joint responsibility. To be sure, more practice is yet to be analyzed and further systematized.