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Introduction

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This volume explores the question of how the law of international responsibility, as authoritatively codified and developed by the International Law Commission (ILC), can be used to address situations where multiple actors contribute to harmful outcomes. In particular, it considers how and to what extent this law enables, facilitates, or obstructs determination and implementation of a responsibility that is shared between all states and/or international institutions that contribute to such harmful outcomes.

Questions that give rise to the volume include the following. If multiple states agree to reduce emissions of carbon dioxide with a view to abating climate change, yet they continue to emit carbon dioxide that causes climate change, and human displacement and environmental harm occur, can, or should, the responsibility for the harm be shared between the contributing states?[1] If states or international organisations fail to live up to the collective 'responsibility to protect' human populations from mass atrocities[2] – a responsibility that rests in part on obligations that are binding on a plurality

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[1] The question is not entirely hypothetical. See e.g. R. Lord, S. Goldberg, and L. Rajamani (eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011), at pp. 23–49. See generally M. G. Faure and P. A. Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 43 ASJIL 123.

[2] UN Secretary-General, 'Implementing the Responsibility to Protect: Report of the Secretary-General', UN Doc. A/63/677 (2009).

of states or organisations[3] – can we speak of a responsibility that is to be shared between the actors that failed to act?[4] If two or more states or international organisations conduct joint military operations in which some soldiers violate international humanitarian law, should responsibility be shared among these states, organisations, and individual perpetrators?[5] If states agree to cooperate, whether or not through international institutions, to conserve fish stocks beyond their exclusive economic zone but fail to realise that objective, will all of the states that collectively fail to act share in the responsibility for the failure?[6]

In this volume, we consider such questions from the perspective of positive international law. While the problem of shared responsibility clearly calls for much wider investigations, and indeed other parts of the project will approach the above questions from different angles,[7] the necessary starting point of our inquiry has to be an understanding of the law as it has been construed by the dominant actors. On this basis,

[3] D. Amnéus, *Responsibility to Protect by Military Means – Emerging Norms on Humanitarian Intervention?* (Stockholm University Press, 2008); M. Hakimi, 'State Bystander Responsibility' (2010) 21 EJIL 341, at 342–3; A. J. Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander' (2000) 37 JPR 519, at 529.

[4] This question has been considered to some extent by the International Court of Justice (ICJ). *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, at para. 379 (discussing the state's responsibility for failure to prevent genocide, one of the mass atrocities that responsibility to protect (R2P) requires states to prevent); see also J. Pattison, 'Assigning Humanitarian Intervention and the Responsibility to Protect', in J. Hoffman and P. A. Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, 2012), p. 173.

[5] A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8 HRLR 151. A similar question was raised regarding the distribution of responsibilities in the hybrid UN and African Union force in Sudan. See generally S. E. Kreps, 'The United Nations–African Union Mission in Darfur: Implications and Prospects for Success' (2007) 16 ASR 65.

[6] See e.g. United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 24 July–4 August 1995 (sixth session); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 2167 UNTS 3. Recently, the Sub-Regional Fisheries Commission asked for an Advisory Opinion from the International Tribunal for the Law of the Sea (ITLOS), with the aim of clarifying the responsibilities of multiple actors engaged in illegal fisheries: see *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Request to Render an Advisory Opinion of 28 March 2013, ITLOS Case No. 21, available at www.itlos.org.

[7] P. A. Nollkaemper and D. Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015 *forthcoming*).

the volume will primarily inquire into the law of international responsibility as formulated by the ILC. In particular, the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[8] have to be considered an authoritative formulation of international law relating to international responsibility. Courts, both international and domestic, now routinely turn to the ARSIWA when they are faced with any question of international responsibility,[9] if only for lack of an alternative, equally authoritative source. The same is not entirely true for the Articles on the Responsibility of International Organizations (ARIO),[10] which are more controversial and have not been tested in international and national courts to the same extent. However, for these latter Articles, too, it is hard to find an alternative, equally authoritative starting point for any inquiry into questions of international responsibility involving international organisations.

This volume demonstrates that while the law of international responsibility as construed by the ILC is generally highly flexible, in many respects it provides little or no guidance for solving problems of shared responsibility. In some respects, the law complicates or even impedes such solutions. As a whole, the chapters in this volume lead to the conclusion that if international law is to be helpful in addressing questions of shared responsibility, it will often be necessary to look beyond the ILC legacy. In this respect, the volume is the starting point for a further, and more fundamental, enquiry into the phenomenon of shared responsibility in international law.

This introductory chapter first summarises the processes that underlie the emergence of problems of shared responsibility, which, to some extent, are relevant in appraising the state of the law (section 1). It then explains the concept of shared responsibility (section 2) and identifies why situations in which multiple actors contribute to a harmful outcome have posed problems for international law (section 3). The chapter then sets out the framework for analysis that will be used throughout the volume to appraise the

[8] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

[9] S. Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26(3) LJIL 615. UN General Assembly, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General', UN Doc. A/68/72 (2013).

[10] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

ILC legacy from the perspective of shared responsibility (section 4). The final section will explain the organisation of the volume (section 5).

1. The rise of situations of shared responsibility

The examples of situations that may lead to shared responsibility given above are not isolated incidents. As states, international institutions, and other actors increasingly engage in cooperative action, the likelihood of harm resulting from such action multiplies. Responsibility for harm caused then need not lie with any single actor, but may be shared by all actors involved.

The increase in the number of situations that appear to call for a shared responsibility is driven by interdependence between states, underlying the passage from a society of coexistence to a society of cooperation.[11] States have become increasingly dependent on each other to protect common goods, and have felt compelled to address them collectively.[12] The underlying reasons are both objective and subjective. The former are driven by factual effects across borders, such as transboundary pollution, state-supported transborder crime, and refugee flows. In other areas it is the perception that has changed, rather than the reality. The recognition that genocide is no longer acceptable is an example.[13]

Interdependence, whether perceived or real, directly influences the occurrence of situations of shared responsibility. It informs a shift towards 'global governance', thus creating an increase in the number of situations where cooperation may not deliver what was promised, and where questions of shared responsibility may arise.[14]

This pattern of interdependence-induced shared responsibility is supported by three related trends. The first is the increasing degree to which

[11] See W. Friedmann, 'Cours général de droit international public' (1969) 127 RCADI 39, at 127; G. Abi-Saab, 'Whither the International Community?' (1998) 9 EJIL 248; P.-M. Dupuy, 'International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions' (1998) 9 EJIL 278.

[12] E.-U. Petersmann, 'International Economic Law, "Public Reason", and Multilevel Governance of Interdependent Public Goods' (2011) 14 JIEL 23.

[13] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277.

[14] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 EIA 405, at 437; C. Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', in G. Anthony (ed.), *Values in Global Administrative Law* (Oxford: Hart Publishing, 2011), p. 173.

(some) states and other actors feel morally compelled to act in relation to harm occurring elsewhere.[15] This moral stance has to some extent influenced international legal obligations to protect persons abroad, and in any case has led to an increase in situations where states and international institutions actually act abroad. An example is the notion of 'responsibility to protect' (R2P), which, because of its collective nature, raises questions concerning the distribution of obligations to act.[16]

The second supporting trend is the multiplication of actors that participate in the cooperative pursuit of public goods.[17] The fact that states now regularly defer to international organisations to 'legislate' on a wide-ranging array of topics, from cultural heritage to health and environmental law,[18] potentially leads to questions of shared responsibility between multiple organisations and/or between organisations and states. The layered nature of international organisations, which are legal persons but at the same time consist of sovereign states as members, facilitates the construction of responsibility for wrongdoing as a shared responsibility between the organisation and member states.[19] The ARIO indeed envisage that an organisation can be responsible in connection with the wrongful acts of states, for instance by adopting decisions that require states to commit acts that contravene international obligations.[20] Significantly, the Articles acknowledge that in such situations both the organisation and the state can be responsible, resulting in a situation of shared responsibility.[21]

[15] A. Linklater, *The Problem of Harm in World Politics. Theoretical Investigations* (Cambridge University Press, 2011), pp. 151, 254. This is, in a domestic context, the argument of N. Elias, *The Civilizing Process*, revised edition (Oxford: Blackwell Publishing, 2000). Of course, this does not exclude other (strategic) considerations for setting up protection regimes; see e.g. B. Cronin, *Institutions for the Common Good: International Protection Regimes in International Society* (Cambridge University Press, 2003).

[16] J. Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, 2010), pp. 9–11.

[17] See generally on the multiplicity of actors (or 'participants') in the international legal process: R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995).

[18] The World Trade Organization (WTO) illustrates this trend, by providing a formal negotiation forum for international trade, thus centralising discussions on this issue within one institution. In relation to this, see M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 914 (arguing that 'the procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law').

[19] See generally on the layered nature of international organisations C. Brölmann, *The International Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Oxford: Hart Publishing, 2007).

[20] Article 17 ARIO, n. 10. [21] Article 19 ARIO, n. 10.

The third supporting trend is the increased value attached to the accountability of contributing actors. We have seen the emergence of a culture of accountability at the international level.[22] Both in practice and in legal scholarship, more and more weight is attached to holding those who do not deliver accountable for their conduct. Many actors, including the press, civil society, and sometimes also states and international institutions, are not (always) content with putting all of the blame on just one actor, who may be the most visible wrongdoer, but extend blame to wider networks of actors who made the wrong possible. The debate on responsibility of contributing states for rendition is a case in point.[23] This development, which is part of a more general trend towards good governance and transparency,[24] has substantially increased the number of situations where questions of shared responsibility have been raised.

These developments have led to an increase in the number of situations in which it is necessary to ascertain who, among the multiplicity of actors involved in cooperation, is to answer for the failure to live up to promises and abide by agreements, and who is to provide reparation to any injured parties.

However, the mere fact that multiple actors contribute to harm does not necessarily lead to a situation in which these actors indeed share responsibility. There is safety in numbers. The very fact that states and international institutions act collectively makes it more difficult to determine who is to blame for what. The international legal order increasingly has to come to terms with a truth learned long ago in organisational theory: as the responsibility for any given instance of conduct is scattered among more actors, the discrete responsibility of every individual actor diminishes proportionately.[25]

2. The concept of shared responsibility

In this volume the concept of shared responsibility refers to situations where a multiplicity of actors contributes to a single harmful outcome,

[22] M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998); Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', n. 14, at 173.

[23] See G. Callaghan, 'Member States Told to "Accept Responsibility" for Illegal CIA Renditions', The Parliament, 11 September 2012, available at www.theparliament.com.

[24] P. Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance' (2008) 11 JIEL 779.

[25] Bovens, *The Quest for Responsibility*, n. 22, p. 46.

and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors. We emphasise that this definition is not identical to a particular form of responsibility recognised by the ARSIWA and the ARIO. Rather, the concept of shared responsibility as defined here is used as an external concept to assess the suitability of the principles codified and developed by the ILC in relation to situations of shared responsibility.

Leaving aside the obvious point that shared responsibility involves a multiplicity of actors, the above definition comprises three aspects: it is premised on contributions to a single harmful outcome (section 2.1), which engage the legal responsibility of the contributing actors (section 2.2), which is distributed between more than one of the contributing actors separately (section 2.3).

2.1 Contributions to a harmful outcome

The first defining feature of shared responsibility is that such responsibility is premised on contributions to a single harmful outcome.[26] The notion of 'contribution' will be commented upon in section 2.2; here I will address, respectively, the notion of 'harmful outcome' and the singularity of a harmful outcome.

The notion of a 'single' harmful outcome is important because it is the contribution to a single outcome that creates the basis for sharing of responsibility. If each actor contributes to a distinct harm, responsibility will lie with the individual actors for their individual contributions. In contrast, in situations where multiple actors contribute to a single harm, such harm generally will be indivisible, in the sense that the proportion of harm attributable to each contributing actor cannot be determined.

[26] The choice of the term 'harmful outcome' as a defining element of shared responsibility corresponds to the notion of outcome as a basis for responsibility in legal theory, although we do not necessarily follow the particular meanings that have been associated with outcome responsibility. See e.g. D. Miller, 'National Responsibility and Global Justice' (2008) 11 CRISPP 383; T. Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999), p. 27 (defining outcome responsibility in terms of responsibility for the good and bad outcomes of a person's conduct); see also P. Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility', in P. Cane and J. Gardner (eds.), *Relating to Responsibility* (Oxford: Hart Publishing, 2001), p. 88; B. Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Leiden: Martinus Nijhoff, 2005), p. 93.

Whether or not this is so depends largely on the test of causation, which in itself is a subject of inquiry.[27]

An outcome may be harmful in a factual sense (e.g. pollution of a watercourse, physical injury of a person, destruction of property).[28] It may also involve non-material harm, such as the violation of sovereignty of a third state.

For present purposes, whether or not an outcome is harmful is treated as a factual (and inevitably somewhat subjective) question. That is: an outcome may be harmful without necessarily being in violation of international law. In this respect the approach taken here can be distinguished from that taken by Raz, who observed that:

> one causes harm if one fails in one's duty to a person or a class of persons and that person or a member of that class suffers as a result. That is so even when one cannot be blamed for harming the person who suffered because the allocation of the loss was determined by other hands.[29]

Transposed to our topic, Raz's definition would mean that multiple actors cause harm to another person when they had a duty not to cause such harm or where international law assigns responsibility for causing such harm. In particular cases the causing of harm will indeed be wrongful, for instance because it infringes rights of states or individuals, or involves the non-realisation of collective interests of states parties to a treaty, such as genocide, climate change, or the depletion of stocks of tuna.

However, defining 'harm' in terms of wrongfulness would conflate the question of whether multiple states cause factual harm to another person, on the one hand, and the question of whether they are responsible in law for doing so. That distinction is analytically useful for studying questions of shared responsibility and will thus be maintained here.

It should be observed that a single course of conduct can lead to different levels of harm. While some levels of harm may result from the conduct of individual actors, others may result from the conduct of

[27] Chapter 2 in this volume, A. Gattini, 'Breach of International Obligations', p. 25, at pp. 28–31; Chapter 7 in this volume, P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', p. 208, at p. 222.

[28] Compare Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 31, para. 6.

[29] J. Raz, *The Morality of Freedom* (Oxford University Press, 1986), p. 416. For a definition of responsibility in terms of contribution to harm, see also J. Feinberg, 'Collective Responsibility' (1968) 65 J Phil 674.

multiple actors. An example is the situation in which state A abducts a person from the territory of state B, and hands him over to state C, in which he is tortured.[30] State A's abduction independently causes harm to the person as it infringes his individual rights. But assuming that state A had knowledge of the subsequent event, the act may also be construed as a contribution to state C's act of torture – both A and C then contribute to that single harm.

2.2 *Legal responsibility for contributions*

The fact that a particular course of conduct contributes in a factual way to harm does not in itself make the author of that conduct responsible in law. In other words, holding an actor responsible is different from assigning a *causal* responsibility to that actor.[31] For the purposes of this volume, which examines the conditions, content, and implementation of shared responsibility as a matter of international law, we obviously focus on the conditions under which someone can be held responsible (in law) rather than merely on the question of whether someone caused harm. It will appear below, though, that the concept of shared causal responsibility is relevant for assessing the nature and development of shared legal responsibility.

Shared responsibility as a matter of international law arises when contributions to a harmful outcome trigger the legal responsibility of the authors of such contributions. Causal contribution is only a necessary and not a sufficient condition for legal responsibility. Shared legal responsibility rests on causal contributions that international law recognises as triggering the legal responsibility of the actor in question.

It is useful to distinguish between three situations in which this is the case. I refer to these situations as *concurrent* responsibility, *cumulative* responsibility, and *joint* responsibility. It will appear throughout the volume that each of the three types of legal responsibility raises different normative and legal questions in the determination and implementation of shared responsibility.

First, in situations of *concurrent* shared responsibility,[32] each contribution constitutes a wrongful act that by itself causes the harmful outcome.

[30] Derived from d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 27, pp. 212.
[31] P. Pettit, 'Responsibility Incorporated' (2007) 117(1) *Ethics* 171, at 173.
[32] D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 27, pp. 211–12.

An example is the situation where two upstream states discharge large quantities of chemicals into an international watercourse, which results in downstream harm in a third state. Each of the emissions would in itself have caused significant harm. We can consider this to be a case of shared responsibility, since multiple actors cause a single harm. Yet each individual contribution in itself is sufficient to cause the harm, and the law considers each individual contribution as wrongful.

Second, in situations of *cumulative* shared responsibility, each contribution in itself would have been insufficient to cause the eventual harm, yet international law treats it as sufficient to trigger the responsibility of the author. A state that aids a torturing state contributes to that harmful outcome, yet does not itself engage in the conduct of torture. In the approach chosen by the ILC, the responsibility of the contributing actors can either be based on a separate wrongful act (such as aid or assistance), on the one hand,[33] or on attribution of responsibility, based on direction or control, coercion or 'circumvention', on the other.[34] In both cases the eventual harm is caused in cumulation with other contributions by other actors, but each individual contribution can lead to a (shared) responsibility.

Third, a single harmful outcome may constitute what the ILC has termed 'the same wrongful act'. Article 47(1) of the ARSIWA provides that: '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.' In such cases we can also use the term *joint* responsibility. Though the terms 'shared responsibility' and 'joint responsibility' are sometimes used interchangeably,[35] the latter term is narrower than the former and is best used to refer to situations where multiple actors commit a single wrongful act and one is responsible for the acts of the other(s).[36]

Whether or not all situations of cumulative responsibility as defined above are properly considered as situations of joint responsibility is a

[33] Chapter 3 in this volume, F. Messineo, 'Attribution of Conduct', p. 60.
[34] See Articles 16–18 ARSIWA, n. 8; and Articles 14–16 ARIO, n. 10. Chapter 4 in this volume, J. D. Fry, 'Attribution of Responsibility', p. 98.
[35] E.g. R. Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', in P. A. Nollkaemper and D. Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015 *forthcoming*). Also Fry, 'Attribution of Responsibility', ibid., p. 100.
[36] See J. Crawford, 'Third Report on State Responsibility', ILC *Yearbook* 2000/II(1), p. 74, para. 272; and d'Argent, 'Reparation, Cessation, Assurances and Guarantees', n. 27, p. 235.