1

Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility

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1. Introduction: identifying the starting point

Questions of distribution of shared responsibility continue to challenge international courts and other decision-makers. Examples of such questions that are discussed in the present volume are distribution of responsibility in relation to harm caused to civilians in armed conflicts;[1] climate change;[2] prosecution of pirates;[3] failure to protect social and economic rights;[4] and the global financial crisis.[5] In all these situations, the question arises who is responsible and how responsibility is to be distributed between multiple actors.

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[1] T. Dannenbaum, 'Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures', Chapter 7 in this volume, 192; M. Hakimi, 'Distributing the Responsibility to Protect', Chapter 9 in this volume, 265.

[2] C.L. Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', Chapter 12 in this volume, 341; D.H. Cole, 'The Problem of Shared Irresponsibility in International Climate Law', Chapter 10 in this volume, 290; H. Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating Responsibility', Chapter 11 in this volume, 321.

[3] E. Kontorovich, 'Pirate "Globalisation": Dividing Responsibility Among States, Companies, and Criminals', Chapter 14 in this volume, 386.

[4] M.E. Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', Chapter 13 in this volume, 366.

[5] S. Miller, 'The Global Financial Crisis and Collective Moral Responsibility', Chapter 15 in this volume, 404.

The question of distribution of responsibility is key to the understanding and application of shared responsibility in international law. In this volume, we speak of 'shared responsibility' as a matter of international law when a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed separately among more than one of the contributing actors.[6] If shared responsibility indeed implies a distribution of responsibility between multiple actors, it inevitably raises the question of the grounds on which such responsibility is to be distributed.

The term 'distribution', on a basic level, refers to the 'allocation' or 'division' of something between multiple persons or entities. In this volume, 'distribution' is meant to cover more than merely the implementation of the responsibility regime. It addresses the normative foundations for the actual choices that are made in terms of thinking of the allocation of responsibility among several wrongdoing entities.

While the term 'distribution' thus is relatively straightforward, the notion 'distribution of responsibility' has two separate, though interrelated, meanings deriving from the dual meaning of the term 'responsibility'.[7]

In the first meaning of 'responsibility', 'distribution of responsibilities' is concerned with how multiple actors determine *ex ante* who should do what in relation to a common purpose or a common interest. For instance, the question can be posed as to which states and international institutions must act in situations of mass atrocities[8] or in relation to the protection of social and economic rights.[9] In both examples, it is clear that while some obligations under international law (e.g., the obligation to cooperate) can rest similarly on all states and international institutions, when it comes to specific obligations (e.g., which states are obliged to take forceful measures to protect civilians), a division of tasks is necessary. In this use of the term, 'responsibility' is essentially shorthand for 'duty' or 'obligation' – terms that might

[6] P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 1.

[7] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 365.

[8] Hakimi, 'Distributing the Responsibility to Protect', n. 1.

[9] Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4.

or might not be used in a strictly legal meaning.[10] Such duties or obligations then need to be distributed.

In the second meaning of 'responsibility', the expression 'distribution of responsibilities' seeks to answer the question of how responsibility is divided *ex post* between multiple actors who have contributed to a particular harm. This question is, for instance, raised in relation to harmful conduct in peacekeeping operations[11] and climate change.[12] In this meaning, the term 'distribution of responsibility' thus relates to responsibility for wrongful conduct and harmful outcomes.

In this volume, we are primarily concerned with the second meaning. The difficulty of allocating responsibility between multiple parties for wrongdoing has been puzzling courts and scholars alike, and it is this difficulty that has informed the research project from which this volume emanates.[13] However, we recognise that there is an intimate connection between the two meanings – an issue to which we will return in section 5 of this chapter.

In cases where multiple states contribute to a harmful outcome, and the test of causation does not provide an answer to the question of who is responsible for what, several possibilities arise. One option is that no state is held responsible. Another suggestion is that one state is responsible for the whole damage, no matter how large its individual contribution. A third possibility is that all states involved are responsible, but only for the part that is attributed to them. A fourth option is that all states are jointly and severally responsible, and they all are responsible for the full damage, irrespective of their own specific contributions. A fifth and final option is that states rely on some other criterion (e.g., fairness) to distribute responsibility.[14]

[10] P. Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2003), 1; J.R. Lucas, *Responsibility* (Oxford University Press, 1995), 75.

[11] Dannenbaum, 'Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures', n. 1.

[12] Cole, 'The Problem of Shared Irresponsibility in International Climate Law', n. 2. See also J. Brunnée, S. Goldberg, R. Lord, and L. Rajamani, 'Overview of legal issues relevant to climate change', in R. Lord, S. Goldberg, L. Rajamani, and J. Brunnée (eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 23; M.G. Faure and P.A. Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26(A) Stan ELJ 123.

[13] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 412.

[14] For a similar distinction see A. van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis', Chapter 6 in this volume, 153, at 156.

The choice between these options is of critical importance for all actors involved, and often for the larger international community. It determines who is to act to ensure that reparation is provided and that community values are protected.

However, international law has had very little to say on the question of when and on what grounds decisions are to be made, one way or the other. The first edited volume in this series, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*,[15] reviewed the extent to which the current law of responsibility, as laid down by the International Law Commission (ILC), is or could be relevant in solving questions of shared responsibility, including the question of distribution. The book noted that although the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[16] and the Articles on the Responsibility of International Organizations (ARIO)[17] were not designed and drafted with situations of shared responsibility in mind, the Articles did not necessarily preclude determinations of shared responsibility. The Articles are quite flexible and to some extent can be adapted to new situations. In fact, one can identify examples in the case law of various international courts and tribunals that applied such principles in a shared responsibility context.[18] However, the Articles provide only limited guidance for the *distribution* of responsibility. As a whole, the chapters in that first volume led 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.[19]

This lack of guidance that international law currently provides for questions of distribution presents both practical and theoretical problems. On a practical level, this means that it is difficult for courts and tribunals to make satisfactory assessments of the forms and amounts of

[15] P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014).

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

[17] 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).

[18] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)*, Merits, ICJ Reports 1949, 4; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia*), Preliminary Objections, ICJ Reports 1992, 240.

[19] P.A. Nollkaemper and I. Plakokefalos, 'Conclusions: Beyond the ILC Legacy', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 341.

reparation to be provided by one actor, in a situation where multiple actors contributed to the harm. A good illustration is the *Bosnian Genocide* case.[20] The International Court of Justice (ICJ or Court) first found that the fact that the obligation to prevent genocide rests upon a multitude of states does not reduce the obligations of each individual state. When considering whether the obligations of Serbia to prevent genocide would be affected by the action or inaction of other states, the Court held that

> it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[21]

Yet, in considering compensation, the Court found that it had not been shown that in the specific circumstances of the case, the use of the means of influence by Serbia and Montenegro 'would have sufficed to achieve the result which the Respondent should have sought'.[22] The Court declined to order Serbia and Montenegro to pay compensation.[23] This contrast between the acceptance of Serbia's obligations irrespective of the role of other states, on the one hand, and the inability to allocate the obligation to reparation to Serbia precisely because other actors were involved, on the other, is unsatisfactory.[24] At a practical level, that holds first and foremost for victims (in this case Bosnia), which then may be unable to obtain reparation.

On a theoretical level, the question of distribution requires some normative basis that needs to ground the legal framework. This normative

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (*Bosnian Genocide*).

[21] Ibid., 182, para. 430. [22] Ibid., 234, para. 462. [23] Ibid.

[24] See also A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695, at 707–712; P. Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 EJIL 631; M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669; W.A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes' (2007) 4 ISJ 17.

basis has so far not been the object of a systematic study. Often, in the literature, the normative underpinnings are implied in the legal framework that is advocated, rather than being expressly articulated and justified, in particular in advocating particular primary obligations in relation to, for instance, genocide or climate change. The absence of express and fundamental articulations of a specific normative justification may in part be caused by the fact that such articulations would entail paradigms, concepts, and methodologies that are far removed from legal doctrine.

However, the normative basis for the attribution and distribution of responsibility generally, and shared responsibility in particular, has direct consequences on the mechanisms that are put in place and how they operate. A choice for one ground of distribution over the other, based on one's own moral and conceptual approach to responsibility and distribution, has immediate wider implications. For instance, a focus on the public order dimension of the legal framework might lead to ascribing obligations to provide reparation to different entities than in case one would emphasise the private interests at stake. In the former case, there may be an interest to assign obligations of cessation or reparation to all actors whose acts undermine particular public goods or values. In the latter case, it may be sufficient if one actor provides reparation, as long as the injured parties are thereby satisfied.

Another example of how competing normative or conceptual perspectives may lead to different appraisals in terms of distribution is a situation of genocide. The nature of genocide might call for rules of distribution of responsibility that strictly focus on the particular role of a particular state, and exclude joint and several liability, given the moral stigma of a finding in that direction. However, one might to the contrary argue for looser rules of distribution, with less focus on causation and more on ensuring adequate reparation of the harm, given the need to avoid impunity for such an act.[25]

So far, models of international and shared responsibility rarely provide a theoretical foundation for understanding the differences between these approaches, let alone explain the choices made between them. This in turn will impact the way judges or other decision-makers will approach the question of distribution.

The present volume responds to the practical and conceptual problems identified here. We explore articulations of the grounds on which actors,

[25] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 417–418.

participating in a collective endeavour, can be blamed for their respective contribution to a harmful outcome. Given the fact that international law often gives no clear direction for distribution in such cases, the volume inquires into the bases and justifications for apportionment of responsibilities that could support a critique of current international law, support choices in the application of the law, and could provide a basis for reform.

The volume offers a diversity of approaches. Indeed, the underlying idea is not to trace a path to a particular normative framework, but rather to map the landscape of possible normative frameworks that might apply to the distribution of responsibilities under international law.

There is not one approach that has been adopted in the various chapters. Rather, the volume brings together possible approaches that might in certain circumstances, but not necessarily, complement each other. All chapters agree on the basic intellectual premise that underlies the whole project: there is a need for the development of a comprehensive legal framework on shared responsibility, solidly argued on a normative basis, and grounded in the changing realities of the international legal order.[26] However, there are fundamental differences in the normative choices and methodologies of the chapters. Ultimately, policy choices have to be made, in light of the social, political, moral, and legal preferences of decision-makers. Against this background, the importance of this volume is that by shedding light on these policy considerations, it helps to make an informed choice.

In this sense, this book has both a modest and an ambitious objective. Modest, because it does not purport to intellectually and normatively defend a single approach to the distribution of shared responsibility.[27] Ambitious, because it aims at providing comprehensive tools for a better understanding of the concept of shared responsibility and the ensuing theoretical underpinnings in relation to the distribution of such responsibility among wrongdoers.

The various approaches to distribution in this volume are far from abstract and conceptual musings. Normative choices for distribution can have a concrete impact on the legal frameworks that are set up to address current challenges of international law. This is illustrated in

[26] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7.

[27] Some might even argue that as legal scholars this kind of normative positioning would be beyond the scope of our function. See J. d'Aspremont, 'The Politics of Deformalization in International Law' (2011) 3(2) GoJIL 503.

many chapters in this volume, which are contextualised in relation to particular topical areas of international law, such as piracy, climate change, or the duties of the international community to protect and safeguard human rights.

All in all, this book aims to contribute to the discussion on responsibility in three dimensions: a conceptual/theoretical dimension of explaining the possible normative foundations for the distribution of responsibility; a practical dimension of setting the conceptual discussion in the context of particular areas of international law; and, ultimately, a policy dimension in providing an informed starting point for possible development of the law.

Taking account of the need for differentiation and context specificity, we will explain in this introductory chapter our methodology in mapping different approaches (section 2); identify the components of the map: that is, fundamental concepts, choices, and approaches that have an impact on questions of distribution of responsibility (section 3); identify possible grounds for distribution as these are discussed in the contributions to the volume (section 4); and discuss what all of this may mean for the construction and development of international law on responsibility (section 5). The chapter closes with a brief roadmap of the volume (section 6).

2. Mapping conceptual approaches

As noted earlier, this volume does not aim at providing the grounding for a single normative or conceptual approach to the distribution of shared responsibilities in international law, but rather to map a range of possible bases for the distribution of responsibility.

In order to map possible conceptual understandings of the distribution of responsibility, the choice was made to cover a number of approaches that provide some insight into how to address such distribution. These can be divided into four categories: an economic analysis of law; a moral philosophy approach to responsibility; a political approach; and what can be called a pragmatic normative approach. It should be noted that there are differences and disagreements *within* these approaches. An illustration in this volume is whether collective entities can be moral agents, an issue that divides moral philosophers.[28] Equally, one can note differences

[28] See discussion of this in Erskine's chapter, T. Erskine, '"Coalitions of the Willing" and the Shared Responsibility to Protect', Chapter 8 in this volume, 227, at 229–234.

between the various chapters relying on an economic analysis of law. However, it was not possible to account for all the subtleties in the various disciplinary fields considered. This volume provides the first reasonably comprehensive normative map of the ways to approach the distribution of responsibility. Future scholarly work can build on it and seek further refinement of the various approaches.

The economic analysis of law provides tools for understanding the efficient distribution of responsibility in light of economic models such as the 'tragedy of the commons' and the 'prisoners' dilemma'. It allows a better assessment of the different ways in which responsibility can be distributed, depending on both the type of responsibility that is envisioned (individual, joint, and several) and the type of reparation that is sought (individualised, collective). This approach allows Van Aaken, for example, to explain that particular types of responsibility are more likely to be conducive to international cooperation,[29] or Kontorovich to explain why privatisation of the fight against piracy might be more efficient.[30] In another application of the economic analysis of law, Trachtman argues that a choice for either rules for the allocation of responsibility *ex ante* or for general principles for the allocation of responsibility *ex post*, affect 'net benefits of internalisation of policy externalities' in different manners.[31]

The moral philosophy approach focuses more on a moral evaluation of the conduct and the blameworthiness of the entities that engage in that conduct. The distribution of responsibility then flows from this evaluation. The decision to allocate responsibility comes as a consequence of the determination of such blameworthiness (or 'moral guilt'). This approach can therefore be called deontological in nature, and moves away from the more consequentialist focus of the economic analysis of law approach, which tends to concentrate more on the allocation of liability and reparations, and less on the actual blame of the wrongdoer. In other words, the deontological approach is more likely to provide answers for the distribution of blame, while the economic analysis of law approach is more likely to provide answers for the efficient allocation of financial obligations. This moral approach allows Kutz, in the context

[29] Van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis', n. 14, at 190–191.
[30] Kontorovich, 'Pirate "Globalisation": Dividing Responsibility Among States, Companies, and Criminals', n. 3, at 387.
[31] J.P. Trachtman, '*Ex Ante* and *Ex Post* Allocation of International Legal Responsibility', Chapter 4 in this volume, 87, at 89.

of climate change, to discuss the ways in which to distribute the burden of the reduction of carbon emissions, based on the past conduct of states.[32]

The political approach sets the legal analysis of distribution in the broader discussion of political incentives for action. This approach is important in two respects. First, it recognises that most areas of international law do not exist in a political void. Issues such as climate change or the 'Responsibility to Protect' (R2P) are debated in the context of strong political oppositions and narratives, which cannot be ignored when discussing the possible evolution of the legal regimes to implement them. Second, and more conceptually, it stems from the acknowledgement that law operates within the confines of a certain political community, and legal responsibility ultimately constitutes the basis for a broader political responsibility.[33] Lang observes that 'instead of solely tying individual agents to specific actions, this initial act of locating responsibility in specific agents can be used to compel agents to engage in forms of political action that construct new political arrangements, rather than ending in punitive or even restorative consequences'.[34]

The fourth approach is that of normative pragmatism. What underlies this approach is the acceptance of the fragmented reality of the international legal order, and the suggestion that broad normative agendas can be attained in that context. The idea is that there is not necessarily a need to comprehensively rethink the legal framework in a unitary way to achieve a certain goal, but that this goal can be achieved, at least in large part, through a collection of existing legal tools. Hakimi illustrates this approach in relation to R2P, showing that a number of mechanisms already exist to ensure that some aspects of it can become a reality.[35] In the same way, Salomon explores legal tools available in order to guarantee the protection and development of socio-economic rights.[36] This approach is, to some extent, complementary to the previous three approaches in the sense that the goal to be achieved can be identified through the economic, moral, and political evaluations already discussed. The difference of this approach is that it focuses on the connections between the normative agenda and the existing legal framework. For

[32] Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', n. 2, at 341–342.
[33] A.F. Lang, Jr., 'Shared Political Responsibility', Chapter 3 in this volume, 62.
[34] Ibid., at 65. [35] Hakimi, 'Distributing the Responsibility to Protect', n. 1.
[36] Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4.