

## Theorizing International Responsibility Law, an Introduction

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International responsibility law today is in great need of theorizing or, at least, that is the present volume's argument. This introduction sets the stage for that argument. It unfolds in four steps: first, it clarifies the reasons that led to putting this collection of essays together and explains what it hopes to achieve; second, it introduces the main theoretical challenges addressed in the volume; third, it provides some information about how the book is organized; and, finally, it sketches out the content of its successive chapters and their articulation.

### 1 THE BACKGROUND TO THE VOLUME

Ten years ago, I co-edited, with John Tasioulas, a collection of essays entitled *The Philosophy of International Law*.<sup>1</sup> By addressing central philosophical questions about international law, that collection was to contribute to a renaissance in the field and thereby to revive an ancient tradition of theoretical inquiry about international law among international lawyers. The book was a success,<sup>2</sup> to the extent, at least, that most chapters in the volume rapidly led to active discussions and multiple publications.

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<sup>1</sup> Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010).

<sup>2</sup> For other similar endeavours since then, see, e.g., Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016); Robert Kolb, *Theory of International Law* (Oxford: Hart, 2016); Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016); Samantha Besson (ed.), *International Responsibility: Essays in Law, History and Philosophy* (Zürich: Schulthess, 2017); Jean d'Aspremont (ed.), *The History and*

There is one topic addressed in the book, however, that has curiously not given rise to debate since 2010 and certainly not to any book-length publications.<sup>3</sup> That is the philosophy (or theory, as both terms are used interchangeably here) of international responsibility law, that is, the philosophy of the international law on the responsibility<sup>4</sup> of States and international organizations (IOs) in case of breach of international law.<sup>5</sup> This absence of reaction is even more incomprehensible as the two chapters on responsibility in the book – the first by James Crawford, our late and much missed colleague, and Jeremy Watkins,<sup>6</sup> and the second by Liam Murphy<sup>7</sup> – make for a

*Theory of International Law* (Northampton: Edward Elgar, 2020); David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge: Cambridge University Press, 2021).

- <sup>3</sup> For some notable exceptions, see, e.g., Samantha Besson, 'State and Individual Secondary Liability in Case of International Organizations' Responsibility: The Challenge of Fairness Unveiled' (2017) 6(1) *Journal of Legal Philosophy* 51–78; Sean Fleming, 'Moral Agents and Legal Persons: The Ethics and the Law of State Responsibility' (2017) 9(3) *International Theory* 466–489; Sean Fleming, *Leviathan on a Leash: A Theory of State Responsibility* (Princeton: Princeton University Press, 2020).
- <sup>4</sup> On the meaning of 'responsibility' in international law and how it differs from and relates to (i) (primary) 'obligations', (ii) 'liability' to some negative response for wrongdoing (including for the breach of primary obligations), and/or (iii) broader 'accountability' for one's (even non-wrongful) conduct, see André Nollkaemper, 'Responsibility', in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar, 2019), pp. 760–772. See also James Crawford and Jeremy Watkins, 'International Responsibility', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 283–298, pp. 283–284.
- <sup>5</sup> On international responsibility law understood as a form of 'liability' of States and, by extension, of IOs, that is, as a set of secondary obligations that arise from the breach of primary obligations, see *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Merits) [1928] PCIJ Ser. A No. 17; *Case of the S.S. Wimbledon (United Kingdom v. Japan)* [1923] PCIJ Ser. A No. 1; *Corfu Channel Case (United Kingdom v. Albania)* (Merits) [1949] ICJ Rep. 4; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep. 14; *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep. 174; International Law Commission (hereafter ILC), *Draft Articles on the Responsibility of International Organizations*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 66/100 (9 December 2011); ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 56/83 (12 December 2001). See also James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 3–44; Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 3–16; James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility', in Malcolm Evans (ed.), *International Law*, 5th ed. (Oxford: Oxford University Press, 2018), pp. 415–449.
- <sup>6</sup> Crawford and Watkins, fn. 4.
- <sup>7</sup> Liam Murphy, 'International Responsibility', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 299–315.

fascinating and thought-provoking read. They raise multiple philosophical questions John Tasioulas and I thought would be picked up by others, and especially by a younger generation of international law scholars.

To the extent that there is no issue more central to a legal order and the Law than responsibility,<sup>8</sup> the dearth of theorizing on international responsibility law should actually worry us about the state of international law and of its institutions, especially about the state of the State and IOs. As a matter of fact, there is hardly any topic more interesting in any given legal order than the way in which responsibility is conceived and organized. Not only is responsibility an additional source of obligations for the future,<sup>9</sup> it is also a source of legitimate authority for the institutions held responsible and, hence, a key factor in their internal organization.<sup>10</sup>

The neglect of the philosophy of international responsibility law is actually quite concerning in international law, because responsibility has been even more central to the international legal order<sup>11</sup> in practice than it has domestically. There are at least three reasons for that centrality that pertain to the normative and institutional specificities of international law.<sup>12</sup>

First of all, responsibility matters even more particularly in international law because it is still a relatively new legal order, by comparison. This explains, for instance, that the relationship between international legal *normativity* and responsibility is more direct than it is in domestic legal orders. Indeed, the mutual influence between so-called primary obligations of international law and secondary obligations arising from a breach thereof has been crucial to

<sup>8</sup> See, e.g., Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999), 'Chapter 2. Responsibility and Luck: The Moral Basis of Strict Liability', pp. 14–40; Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002); John Gardner, 'The Mark of Responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 157–171; John R. Lucas, *Responsibility* (Oxford: Oxford University Press, 1995); Joseph Raz, *From Normativity to Responsibility* (Oxford: Oxford University Press, 2011).

<sup>9</sup> See Raz, fn. 8, in particular 'Chapter 12. Being in the World', pp. 227–254; Seana V. Shiffrin, 'The Moral Neglect of Negligence', in David Sobel, Peter Vallentyne and Steven Wall (eds.), *Oxford Studies in Political Philosophy*, Volume 3 (Oxford: Oxford University Press, 2017), pp. 197–228. See on the relationship between time and responsibility, d'Aspremont, Chapter 11.

<sup>10</sup> See Samantha Besson, *Reconstructing the International Institutional Order*, translated from French, Inaugural Lectures of the Collège de France (Paris: OpenEdition Books and Editions du Collège de France, 2021), paras. 81–86.

<sup>11</sup> See, e.g., *Factory at Chorzów*, fn. 5, p. 29: 'As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.

<sup>12</sup> See Samantha Besson, 'International Responsibility: An Introduction', in Samantha Besson (ed.), *International Responsibility: Essays in Law, History and Philosophy* (Zürich: Schulthess, 2017), pp. 3–13.

the consolidation of a corpus of international law norms in the first place.<sup>13</sup> A second reason, which is related to the first, lies in *sovereign equality* and its relationship to equal responsibility.<sup>14</sup> International responsibility law provides the means to secure the mutual responsibility of equally competent States (and the peoples they stand for). It thereby contributes, by constraining and empowering them at the same time, to making those institutions not only competent or sovereign, but also equal in that sovereignty.<sup>15</sup> When one knows the role played by sovereign equality in the international legal order, this is not a minor feat of international responsibility law.

A final ground for the specific importance of responsibility in international law pertains to legal personality in the circumstances of *institutional plurality* that characterize international law.<sup>16</sup> In this context, international responsibility has been tied not only to the recognition of legal personality, as it has domestically, but also to organizing institutional standing for another legal subject (e.g., a State for its people or specific private persons, or an IO for its Member States and their peoples or specific private persons).<sup>17</sup> This is particularly important in the international institutional order, where the most relevant legal persons in terms of responsibility are institutions.<sup>18</sup>

Not all responsibility regimes under international law have been left hanging philosophically. By comparison, the philosophy of international criminal law and, hence, the theorizing of the international criminal responsibility of individuals (as opposed to the international responsibility of States or IOs), which was discussed in another pair of chapters – authored respectively by David Luban and R.A. Duff<sup>19</sup> – in the 2010 *Philosophy of International Law*

<sup>13</sup> See Pierre d'Argent, 'Les obligations internationales' (2021) 417 *Collected Courses of the Hague Academy of International Law* 9–210.

<sup>14</sup> See Pellet, fn. 5, p. 4.

<sup>15</sup> See Samantha Besson, 'La due diligence en droit international' (2020) 409 *Collected Courses of the Hague Academy of International Law* 153–398, at 202–203.

<sup>16</sup> See Besson, *Reconstructing the International Institutional Order*, fn. 10, paras. 84–86.

<sup>17</sup> See, e.g., Besson, 'The Challenge of Fairness Unveiled', fn. 3.

<sup>18</sup> No wonder the argument in many of this volume's chapters revolves around international institutional issues: see, e.g., Duff (on the international community), Harel and Kulaga (on international courts) or Fleming (on the State), Chapters 3, 4 and 10.

<sup>19</sup> R.A. Duff, 'Authority and Responsibility in International Criminal Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 589–604; David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 569–588.

book, have flourished in the last ten years.<sup>20</sup> That difference cannot be explained by reference to those regimes' comparative effectiveness in practice, for the individual criminal responsibility regime also has its enforcement issues. It should rather be pinned down to the increasing individualization of international law duties and responsibilities. The most recent and telling example thereof is the current academic efforts and practical focus being placed on an international crime and criminal responsibility of 'ecocide' for individuals<sup>21</sup> rather than on international environmental duties of States and IOs and the latter's corresponding responsibilities if those duties are breached.

True, there have been lots of interesting new publications on the law on international responsibility of States and IOs in the past few years,<sup>22</sup> including, most recently, in the wake of the celebration of the twentieth anniversary of the International Law Commission's codification or 'encoding' of that law.<sup>23</sup> It has also been the case on specific issues such as 'shared responsibility' in cases of collective and joint wrongful acts and complex causation of harm

<sup>20</sup> See, e.g., Roberto Gargarella, 'Human Rights, International Courts and Deliberative Democracy', in Nicola Palmer, Phil Clark and Danielle Granville (eds.), *Critical Perspectives in Transitional Justice* (Antwerp: Intersentia, 2012), pp. 101–118; Massimo Renzo, 'Crimes against Humanity and the Limits of International Criminal Law' (2012) 31(4) *Law and Philosophy* 443–476; Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Brussels: Torkel Opsahl Academic EPublisher, 2018); Alain Zysset, 'Global Constitutionalism and the International Criminal Court: A Relational View' (2020) 1 *Glasgow Centre for International Law and Security Working Paper Series*; Robert Cryer and Albert Nell, 'The Philosophy of International Criminal Law', in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, 2nd ed. (Cheltenham: Edward Elgar, 2020), pp. 200–239.

<sup>21</sup> See, e.g., Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text*, June 2021. Available at: <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf>, last accessed 14 April 2022.

<sup>22</sup> See, e.g., Robert Kolb, *The International Law of State Responsibility: An Introduction* (Cheltenham: Edward Elgar, 2017); Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020).

<sup>23</sup> See, e.g., Federica Paddeu and Christian J. Tams (eds.), *Symposium 'The ILC Articles at 20'* (2021) *EJIL: Talk!* Available at: [www.ejiltalk.org/the-ilc-articles-at-20-introduction-to-the-symposium/](http://www.ejiltalk.org/the-ilc-articles-at-20-introduction-to-the-symposium/); Patrícia Galvão Teles and Pierre Bodeau-Livinec (eds.), *The Articles on Responsibility of States for Internationally Wrongful Acts: A Commentary* (Oxford: Oxford University Press, forthcoming). On 'codifying' and 'encoding', see also Federica Paddeu and Christian J. Tams, 'Dithering, Trickling Down, and Encoding: Concluding Thoughts on the "ILC Articles at 20" Symposium' (2021) *EJIL: Talk!* Available at: [www.ejiltalk.org/dithering-trickling-down-and-encoding-concluding-thoughts-on-the-ilc-articles-at-20-symposium/](http://www.ejiltalk.org/dithering-trickling-down-and-encoding-concluding-thoughts-on-the-ilc-articles-at-20-symposium/), last accessed 14 April 2022.

by multiple States and/or IOs<sup>24</sup> or, more recently, ‘multilateral responsibility’ in areas of common concern.<sup>25</sup> However, there has been no or very little in-depth engagement with the philosophy of responsibility in those publications.

At the same time, there is a revival in discussions of collective (and especially institutional) responsibility among moral and political theorists, including on the responsibility of States and other public institutions.<sup>26</sup> None of those new philosophical publications, however, broach the *legal* aspects thereof (except regarding the responsibility of private collective persons under domestic criminal or corporate law),<sup>27</sup> not to mention international responsibility law, which is usually simply ignored.<sup>28</sup>

<sup>24</sup> See, e.g., Samantha Besson, ‘La pluralité d’États responsables: vers une solidarité internationale?’ (2007) 17(1) *Swiss Review of International and European Law* 13–38; André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34(2) *Michigan Journal of International Law* 359–438; André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014); Helmut P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Oxford: Hart, 2016).

<sup>25</sup> See, e.g., Martins Paparinskis, ‘The Once and Future Law of State Responsibility’ (2020) 114(4) *American Journal of International Law* 618–626; Santiago Villalpando, ‘Protecting Community Interests: Solidarity Measures within the State Responsibility Regime?’ (2021) *EJIL: Talk!* Available at: [www.ejiltalk.org/protecting-community-interests-solidarity-measures-within-the-state-responsibility-regime/](http://www.ejiltalk.org/protecting-community-interests-solidarity-measures-within-the-state-responsibility-regime/), last accessed 14 April 2022.

<sup>26</sup> See, e.g., Saba Bazargan-Forward and Deborah Tollefsen (eds.), *The Routledge Handbook of Collective Responsibility* (New York: Routledge, 2020), and especially Stephanie Collins’ chapter, ‘Collective Responsibility and International Relations’, pp. 331–346; Marion Smiley, ‘Collective Responsibility’, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2017). Available at: <https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility/>, last accessed 14 April 2022; Anna Stilz, ‘Collective Responsibility and the State’ (2011) 19(2) *Journal of Political Philosophy* 190–208; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011); Philip Pettit, ‘Responsibility Incorporated’ (2007) 117(2) *Ethics* 171–201.

<sup>27</sup> Worse, many of the recent philosophical discussions of so-called corporate responsibility usually conflate the responsibility of public and private collective persons, including that of States and business corporations. They do not question the first and original analogy in legal history between the State’s corporation and private ones (see Alain Supiot, ‘État, entreprise et démocratie’, in Pierre Musso (ed.), *L’entreprise contre l’État?* (Paris: Editions Manucius, 2017), pp. 13–31), and thereby unreflectively endorse its contemporary reversal that consists in constructing State responsibility on the model of corporate (business) responsibility (see Besson, *Reconstructing the International Institutional Order*, fn. 10, paras. 60–62). For an example of such a conflation, see Samuel Mansell, John Ferguson, David Gindis and Avia Pasternak, ‘Rethinking Corporate Agency in Business, Philosophy, and Law’ (2019) 154(4) *Journal of Business Ethics* 893–899.

<sup>28</sup> For an exception, see Fleming, *Leviathan on a Leash*, fn. 3. Of course, mastering both sides of the scholarship is by no means easy, and gathering the present volume’s contributors in the first

As a matter of fact, a philosophical reflexion about international responsibility law has become even more urgent today than it was ten years ago. Indeed, the general law<sup>29</sup> of international State and IO responsibility is in flux again.<sup>30</sup> Many had, curiously, thought that the ILC's 2001 and 2011 codifications would settle the practice for a while, but their universal and general (customary) authority is increasingly contested.<sup>31</sup> In addition, years of active and passive contribution to global warming and nearly two years of global pandemic, to cite only those, have sadly put the current regime of international responsibility law to the test.<sup>32</sup> Some argue, therefore, that the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter ARSIWA) and Draft Articles on the Responsibility of International Organizations (hereafter ARIO)<sup>33</sup> may just have been one stage in the development of international responsibility law and have already proposed new, or at least complementary, sets of principles and articles.<sup>34</sup>

There are at least three dimensions in what one may refer to as the contemporary 'crisis' in the practice of international (State and IO) responsibility law that match other, broader crises in contemporary international law.

place and then ensuring sufficient mutual learning and dialogue between them have actually proven more difficult than expected.

<sup>29</sup> It should be clear by now, indeed, that the regime of 'international responsibility law' cannot be reduced to the 2001 and 2011 ILC codifications thereof. There was such customary international law before those codifications and that law is still more encompassing today.

<sup>30</sup> On the nature and place of international responsibility law in the international legal order and how one may understand 'change' in that context, see Nollkaemper, Chapter 2.

<sup>31</sup> See Federica Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2018) 21(1) *Max Planck Yearbook of United Nations Law* 83–123; Fernando Lusa Bordin, 'Still Going Strong: Twenty Years of the Articles on State Responsibility's "Paradoxical" Relationship between Form and Authority' (2021) *EJIL: Talk!* Available at: [www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibility-paradoxical-relationship-between-form-and-authority/](http://www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibility-paradoxical-relationship-between-form-and-authority/), last accessed 14 April 2022; Katja Creutz, 'The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal' (2021) *EJIL: Talk!* Available at: [www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/](http://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/), last accessed 14 April 2022.

<sup>32</sup> See, e.g., Paparinskis, fn. 25; Christian Tomuschat, 'Global Warming and State Responsibility', in Holger Hestermeyer, Nele Matz-Lück, Anja Seibert-Fohr and Silja Vöneky (eds.), *Law of the Sea in Dialogue* (Heidelberg: Springer, 2011), pp. 3–29. On climate change and international responsibility theory, see Murphy, Chapter 7.

<sup>33</sup> See fn. 5.

<sup>34</sup> See e.g. André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15–72. See also the discussion thereof by B. S. Chimni, Lorenzo Gasbarri, Vladyslav Lanovoy, Odette Murray and Federica Paddeu, 'Afterword: The Guiding Principles on Shared Responsibility in International Law and Its Critics' (2020) 31(4) *European Journal of International Law* 1211–1275.

First, binding international legal obligations (that may be breached and give rise to responsibility) no longer matter as much anymore by comparison to other types of ‘norms’ (crisis of the *normativity* of international law). The distinct normative consequences of the breach of those other norms by comparison to those of international responsibility have an impact on the latter.<sup>35</sup> Second, States and IOs are just two of the many institutions one may want to hold responsible along an institutional spectrum that has become much more diversified (crisis of the *institutions* of international law). The latter have indeed become increasingly private or at least straddle the public/private distinction, thereby diluting the relevance of public institutions therein or at any rate their specificities and those of their responsibility.<sup>36</sup> Finally, and it is related, legal responsibility for wrongful acts is only one of many ‘liability’ mechanisms available in practice (crisis of the *modes of accountability* in international law). It is moreover probably not the most efficient one for institutions such as IOs in particular. It is therefore increasingly replaced by other, broader and vaguer mechanisms of so-called accountability in international relations.<sup>37</sup>

Those three ‘crises’ should not only fuel the legal reform of international responsibility law, but also concomitantly, and one may argue even in priority, stir a philosophical ‘critique’ thereof. It is this conviction that brought me to conceive the present collection of essays and to organize the conference during which the various essays were discussed. This volume should therefore be read as a new attempt at bringing philosophers of responsibility law in dialogue with international responsibility law specialists.

## 2 THE AIMS OF THE VOLUME

The time has come to say a little more about the specific dimensions of the dialogue the present volume hopes to launch between philosophers of responsibility law and international responsibility lawyers and about the topics they are addressing.

<sup>35</sup> See, e.g., Nollkaemper, ‘Responsibility’, fn. 4.

<sup>36</sup> See, e.g., Besson, *Reconstructing the International Institutional Order*, fn. 10; Samantha Besson, *The Public-Private Relation and International Law* (Leiden: Brill, forthcoming).

<sup>37</sup> On international ‘responsibility’ and ‘liability’ *stricto sensu*, see d’Argent, Chapter 9. On ‘responsibility’ and ‘accountability’ of IOs, see Kristen E. Boon and Frédéric Mégret, ‘New Approaches to the Accountability of International Organizations’ (2019) 16(1) *International Organizations Law Review* 1–10. See also, on ‘non-compliance’ mechanisms in international environmental law, Ginevra Le Moli, ‘State Responsibility and the Global Environmental Crisis’ (2021) *EJIL: Talk!* Available at: [www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/](http://www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/), last accessed 14 April 2022; Murphy, Chapter 7.



This collection of essays' starting point is that many of the current challenges facing international responsibility law in practice – some of which have been mentioned previously – are of an institutional nature.<sup>38</sup> More precisely, they may be said to stem from weaknesses in the original conceptualization of the responsibility of public institutions such as States and IOs in international law and of what makes their responsibility specific.<sup>39</sup> Those institutions do not merely amount to *collective persons* as opposed to individuals – and this is a first and very important difference – but they are also *public institutions* as opposed to private collective persons or even to private institutions.

It suffices here to mention three of these conceptual or institutional shortcomings to understand their repercussions on the contemporary practice of States' and IOs' international responsibility law.

First of all, one could start by pointing at the private law analogies (particularly through the sixteenth and seventeenth centuries' reception of the categories of Roman private law into international law<sup>40</sup> and, later on, through the analogies with various domestic legal regimes pertaining to torts or delicts) in the origins of the international responsibility regime of public institutions such as States first and then IOs.<sup>41</sup> Those *private law analogies* still pervade the current regime of international State and IO responsibility. Secondly, one could also mention, as a consequence, the identification of those collective public institutions with private (mostly individual/natural or, more rarely, collective/legal) persons when it comes to organizing the practicalities of their responsibility (especially attribution) under international law. This *individualization* of States and IOs has led to a skewed understanding of the further

<sup>38</sup> See Besson, *Reconstructing the International Institutional Order*, fn. 10, paras. 84–86.

<sup>39</sup> This is not to say, of course, that the international law on the responsibility of individuals and of other institutions, especially private ones, is not relevant philosophically – as I explained before, it is the topic that has mostly been addressed by legal philosophers –, but the present collection focuses on the philosophy of the international responsibility of States and IOs. Note, however, that contributors have been invited to think broadly and to include other public institutions such as cities or regions in their arguments, for instance, but also to reflect on the public/private divide and its consequences in terms of international responsibility law more generally.

<sup>40</sup> On the reception of private Roman law categories in modern and contemporary international responsibility law, see Mantovani, Chapter 1. See also, more generally, Olivier Descamps, 'Histoire du droit de la responsabilité dans le monde occidental', in Alain Supiot and Mireille Delmas-Marty (eds.), *Prendre la responsabilité au sérieux* (Paris: Presses Universitaires de France, 2015), pp. 39–54; Besson, 'Introduction', fn. 12.

<sup>41</sup> See Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Clark, NJ: The Lawbook Exchange, 2013 (London: Longmans, Green and Co., 1927)); Besson, 'La due diligence en droit international', fn. 15, paras. 46–48.

relationships between institutions, especially public ones, and their members, as between States within IOs, and of their consequences for the individual and/or collective responsibility of either of them.<sup>42</sup> Finally, and conversely, while intentional *fault* or *negligence* is very present in private tort law, its role is usually evaded in international responsibility law, mainly for reasons that have to do with the private analogy and the individualization of State and IO responsibility.<sup>43</sup> This leaves an important part of international responsibility without a clear justification, however, even more so as the current regime does not always entail an additional requirement of harm for international responsibility to arise.

Curiously, international lawyers' reactions to those three conceptual and institutional challenges have generally not been informed by discussions among theorists or philosophers of the law of responsibility (in domestic private, public or criminal law). This is regrettable, as the three distinctions mentioned— between public and private types of responsibility, between individual and collective responsibility and between fault-based and purely causal responsibility – have been addressed by the latter.<sup>44</sup> Nor do international responsibility lawyers usually resort to comparative domestic (public, private or criminal) law in this area. They often confine themselves to discussing solutions within international law. Yet, not only are the international law solutions very limited, but they also have their roots in (justified or not) analogies with one or the other domestic (and mainly Western<sup>45</sup>) traditions of origin of the drafters or interpreters of the international responsibility law regime.

Conversely, however, responsibility law theorists (tort or delict law theorists, but also (the fewer) theorists of the responsibility of public institutions) have paid very little attention to the international responsibility of States and IOs, and therefore to international law relating thereto. There is a remarkable difference in this respect with the field of criminal responsibility law theory, where both domestic and international law aspects of the criminal responsibility (of individuals) have been addressed together by criminal legal theorists,

<sup>42</sup> See Besson, 'The Challenge of Fairness Unveiled', fn. 3.

<sup>43</sup> See, e.g., Oliver Diggelmann, 'Fault in the Law of State Responsibility: Pragmatism *ad Infinitum*?' (2006) 49 *German Yearbook of International Law* 293–305; Giuseppe Palmisano, 'Fault', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2007). See also Duff, Chapter 3.

<sup>44</sup> See Duff, Chapter 3, for references.

<sup>45</sup> On this question, see Delmas-Marty, Chapter 16.