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The Practice of Shared Responsibility: A Framework for Analysis

ANDRÉ NOLLKAEMPER AND ILIAS PLAKOKEFALOS

This volume explores how, in selected issue-areas, states and international organisations have addressed situations where multiple actors have contributed to harmful outcomes. In particular, it considers whether and how and to what extent regimes set up in relation to these issue-areas facilitate the determination and implementation of a responsibility that is shared between all states and/or international institutions that contribute to such harmful outcomes.

The answer to the question of whether or not in any particular issue-area responsibility is or is not shared is partly found in the general international law of international responsibility, as formulated by the International Law Commission (ILC) in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)¹ and the Articles on the Responsibility of International Organizations

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¹ Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

(ARIO).² Earlier work has shown that this body of law has much to offer for resolving questions of shared responsibility.³ On that basis, we can presume that the principles would by and large be relevant to a wide range of issue-areas.

However, it is also clear that in many respects the ILC texts provide little or no guidance for solving problems of shared responsibility and that, in some respects, the law complicates or even impedes such solutions.⁴ Indeed, it is hardly to be expected that a set of principles of such generality as the ARSIWA and the ARIO can provide meaningful answers to questions that arise in a wide variety of issue-areas, characterised by different interests and dominated by different actors.

The present volume is premised on the recognition that there are significant differences in the law and practice of shared responsibility between different issue-areas and their corresponding regimes.⁵ Whether or not, and to what extent, situations of shared responsibility arise differs significantly between, for instance, peacekeeping operations, nature conservation, and anti-piracy operations. In each of such areas, relevant actors have chosen issue-specific solutions that differ in terms of the actors that they govern, the specific obligations to prevent harm, the principles that allow for apportioning of responsibility of multiple actors, as well as the processes that are available for implementing principles of shared responsibility.

Against this background, this volume seeks to provide a better understanding of the actual practice of shared responsibility within different issue-areas. Questions that we consider include the following: what are the main lines of differentiation; how can such differences be explained; what differences do we see in how the general law of responsibility is received, interpreted, and implemented within the context of such specific regimes; and in what areas do we see commonalities between approaches to shared responsibility?

² 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).

³ P.A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014).

⁴ P.A. Nollkaemper and I. Plakokefalos, 'Conclusions: Beyond the ILC Legacy', *ibid.*, 341, 348.

⁵ This is articulated in greater detail in the conceptual framework of the SHARES project. See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *MIJIL* 359.

In order to allow comparisons across the chapters in this volume, all the authors have employed an analytical template of themes to be addressed in each chapter, to the extent applicable. This analytical template was developed in an iterative process, and profited from input from the authors. The template that the authors were asked to follow also serves as a common thread among chapters regarding their structure. However, the template has not served as a straitjacket. Depending on the nature of each issue-area, this structure may present variations in order better to accommodate the questions raised within the particular issue-area.

In this introductory chapter, we will first describe the concept of shared responsibility as used in this volume (section 1). The chapter will then set out the threefold framework of analysis in sections 2 to 4. The final section will explain the selection of chapters and the organisation of the volume (section 5).

1 The Concept of Shared Responsibility

In this volume, we use the concept of shared responsibility to refer to situations where a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors.

Apart from the obvious aspect that shared responsibility involves a multiplicity of actors, three aspects of this definition require brief explanation. First, shared responsibility is premised on contributions to a single harmful outcome.⁶ If each actor contributes to a distinct harm, responsibility will lie with the individual actors for their individual contributions to such different harms. It is the fact that multiple actors contribute to a single, undivided harm that provides the basis of and justification for sharing of responsibility. Harm is undivided when the proportion of harm attributable to each contributing actor cannot be

⁶ 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. See e.g. D. Miller, 'National Responsibility and Global Justice' (2008) 11 *CRISP* 383; T. Honoré, *Responsibility and Fault* (Oxford: Hart, 1999), at 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, 2001), 81, 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), 93.

determined. Whether or not this is so depends largely on the test of causation, which in itself is a subject of inquiry.⁷ This means that exploring the practice of shared responsibility is not just a matter of identifying what principles are applied in relation to a given harm, but also one of exploring whether a particular harm is actually undivided and properly subject to principles of shared responsibility.

The second defining feature of shared responsibility is that the responsibility of two or more actors for their contribution to a particular outcome is distributed between them separately, rather than resting on them collectively.⁸ If the responsibility were to rest on a collectivity, it would no longer be shared, but would instead be a responsibility of the collectivity as such.⁹ Somewhat counterintuitively, because the term may suggest otherwise, shared responsibility is by definition thus a responsibility that rests on individual actors for their contribution to a particular harm.

Third, however, shared responsibility is not simply the aggregation of two or more individual responsibilities. In many situations of shared responsibility identified in this volume, two or more actors stand in some relationship to each other, and their conduct or omission mutually influence the (scope of) responsibility of the other. An important application of the concept of shared responsibility is to situations where responsibility is based on multiple actors contributing to each other's acts and thereby to the eventual outcome.

2 Factual Scenarios

In identifying regime-specific approaches to shared responsibility, the chapters in this volume proceed along three levels of analysis.

First, all chapters provide information on the way and extent to which questions of shared responsibility may arise in a particular issue-area ('factual scenarios'). To what extent do we indeed see in various areas situations where multiple actors contribute to undivided harms, and to what extent have these actually been construed in terms of shared responsibility? In cases where there is little or no actual practice of situations

⁷ A. Gattini, 'Breach of International Obligations', in P.A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), 25; P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', *ibid.*, 208.

⁸ L. May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1996), 112.

⁹ *Ibid.*, at 116.

where questions of shared responsibility have arisen, the authors have construed hypothetical scenarios that may present themselves.

While the book as a whole, and the project of which it is part, are premised on the idea that there is an increasing number of situations where questions of shared responsibility arise, ultimately this is a presumption that requires support (or, alternatively, is one that can be contested in whole or in part). The chapters in this volume thus allow us to assess the extent to which shared responsibility is indeed a problem that calls for responses, and, if so, what the main features of that problem are in various issue-areas.

3 Components of the Shared Responsibility Regime

At the second level of analysis, the chapters map the three main components of shared responsibility regimes: primary rules developed in these regimes that are relevant to sharing of responsibility; the 'secondary' principles of responsibility; and the processes that can be applied for the implementation of responsibility. This threefold distinction provides the structure for most chapters.

The chapters first discuss the applicable primary rules relating to the conduct by which multiple actors can contribute to harmful outcomes. We use the term 'primary rules' in the way that the ILC uses the concept: they refer to substantive or procedural obligations of states and international organisations.¹⁰ The mapping and analysis of primary rules is relevant for two purposes. On the one hand, such obligations are, when breached, one of the constitutive elements of shared responsibility. In order to understand when there can be shared responsibility, it is first necessary to be clear as to the relevant rules which, when breached, may result in a situation of shared responsibility; and then what these rules provide, and upon whom they are binding (here an important question is whether all actors that contribute to a harmful outcome are bound by similar obligations). On the other hand, primary rules can be considered as 'antidotes' to situations of shared responsibility. When multiple actors contribute to harmful outcomes, and such harm is deemed undesirable, the common approach is not to have resort to

¹⁰ See generally E. David, 'Primary and Secondary Rules', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 27; U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System' (2009) 78 *Nordic JIL* 53.

principles of responsibility, but rather to articulate new 'primary' rules that aim to prevent such harm in the future.

The fact that the ILC restricted itself to secondary rules is not a compelling reason to leave aside consideration of primary rules. It appears that the ILC adopted the dichotomy between primary and secondary rules for essentially pragmatic reasons (mainly linked to the generality of secondary rules).¹¹ Understandable as that may have been, the fact is that resolution of particular questions of shared responsibility will frequently require primary and secondary rules to be considered together. The contributions to this volume thus support the argument for a holistic and integrated approach, which includes a consideration of the content of obligations irrespective of any primary/secondary categorisation.¹²

The chapters next discuss the relevance and application of secondary rules of responsibility to the situations of shared responsibility that may arise in a particular issue-area. The starting point for this discussion is formed by the ARSIWA and the ARIO. The chapters identify whether any of the principles contained in these documents are relevant at all for the specific questions of shared responsibility that have arisen or that may arise and/or whether they have been interpreted and applied in a particular way that connects to the specific features of the regime in question. But, above all, the chapters explore whether specific rules have been developed and applied that, as *lex specialis*, supplement or displace the general rules.

Both the ARSIWA and the ARIO expressly allow for the application of a *lex specialis* that may supplement and deviate from the general law of responsibility. While it is unlikely that *lex specialis* will cover the full breadth of what is contained in the ARSIWA and the ARIO, especially in relation to attribution and compensation, relevant practices have emerged that make reliance on the general law less fruitful. Examples that are reviewed in this volume are questions of shared responsibility that arise in relation to *non-refoulement*,¹³ NATO operations,¹⁴ and space law.¹⁵

¹¹ J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *AJIL* 874, 877.

¹² Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 5, at 411–12.

¹³ Chapter 19 in this volume, at 481. ¹⁴ Chapter 25 in this volume, 639.

¹⁵ Chapter 18 in this volume, 453.

The chapters then discuss the processes through which shared responsibility may be determined and implemented. This may include procedures in international courts and tribunals,¹⁶ accountability processes (such as non-compliance procedures in multilateral environmental agreements), procedures before national courts, as well as a range of less formal procedures. It appears to be extremely rare that in relation to one particular harmful outcome, multiple parties are brought together before a specific court or tribunal. However, even when claims are made against individual contributing actors, the question will arise whether and how a certain procedure is able to take into account that these particular contributions are part of a wider set of contributions. This is relevant to questions of jurisdiction (whether a court can adjudicate a claim against one wrongdoer at all when other wrongdoers are not part of the proceedings), but also to questions of evidence, especially when claims against different wrongdoing actors are brought in different courts.¹⁷

4 Correlations and Possible Explanations of Diversity

The chapters identify three sources of variation, each of which may be both a manifestation and a cause of differentiation: the differences in the type of actors; the different relations between actors; and the differences in the degree to which particular regimes protect public or private interests.

First, the type of actors that are part of the multiplicity of actors that contribute to a harmful outcome differs significantly between different contexts. From the perspective of international law, there is an obvious distinction between, on the one hand, situations where these actors are international legal persons whose responsibility can be engaged and, on the other, situations where non-state actors without international legal personality contribute to harm. In principle, the contributions by the latter type of actors will not engage (shared) responsibility. Given our focus on the role of the law of international responsibility in addressing shared responsibility, it is logical that in this volume we focus mainly on states and international organisations.

¹⁶ See the contributions in the collection of papers in ‘Themed Section: Procedural Aspects of Shared Responsibility in International Adjudication’ (2013) 4(2) *JIDS* 277–405.

¹⁷ See generally P.A. Nollkaemper, ‘Concerted Adjudication in Cases of Shared Responsibility’ (2014) 46(3) *NYUJILP* 809.

However, situations of shared responsibility often bring into play the responsibility of individuals and other private actors, the analysis of which is essential to comprehensively understand the issue – even though they may sometimes fly below the radar of international law. In many examples of shared responsibility, such as climate change and atrocities committed during armed conflicts, the role of non-state actors is critical. Individuals can cause part of a proscribed outcome to which states or other actors also contribute, and their responsibility can be understood as part of a larger picture. The role of non-state actors, and the degree to which their contribution can be appraised in legal terms, differs strongly between issue-areas. In the context of the genocide in Srebrenica, there is merit in seeing the responsibility of Serbia, the United Nations, the Netherlands and possibly other states, General Mladić, and other individual perpetrators in their mutual relationship – and each actor in that relationship can be appraised in legal terms.¹⁸ That is much less obvious in relation to, for instance, the role of non-state actors in climate change or the transboundary movement of hazardous waste.

However, excluding the role of actors other than states and international organisations from consideration only because their legal responsibility cannot be engaged would provide only a partial understanding of shared responsibility. Contributions by actors whose international responsibility cannot be engaged can in a factual sense be relevant for determining formal international responsibility, for instance, by providing concurrent causes of harm. But even where they cannot be relevant in this way, their factual role, and the normative questions that they raise, cannot be neglected. Regime-specific approaches have been developed in particular areas of international law that in a more informal way can incorporate non-state actors in a scheme for shared responsibility. The chapters in this volume take a broad view and explore the role of various types of actors from the perspective of shared responsibility.

Second, shared responsibility regimes can be expected to vary depending on the type of situations in which multiple actors contribute to harmful outcomes. Two main categories can be identified, which are illustrated at various places throughout this volume. In the first category, shared responsibility can arise out of joint or concerted action. Examples that are reviewed

¹⁸ See generally on the interplay between responsibility of individuals and states P.A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615; P.S. Rao, 'International Crimes and State Responsibility', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden: Martinus Nijhoff, 2005), 63.

in this volume are 'coalitions of the willing',¹⁹ peacekeeping operations,²⁰ and cross-border police operations.²¹ Such forms of shared responsibility could also be termed 'cooperative responsibility'.²² In the second category, shared responsibility may arise where there is no concerted action, but rather each actor's individual conduct contributes cumulatively to the harmful outcomes of conduct of other actors. Examples are cumulative pollution caused by two or more riparian states of an international watercourse²³ and climate change caused by emissions in several states.²⁴ Situations of shared responsibility in either of these categories will raise different questions. Typically, in cases of cooperative responsibility the questions of aid and assistance or of effective control will feature prominently. These issues are unlikely to be of importance in cases of cumulative responsibility, where the more pressing questions relate to differentiation of obligations and the adoption of quantitative criteria in order to address each actor's responsibility.

Third, regimes for particular issue-areas will be influenced by differentiation between public and private aspects of international responsibility. The common understanding is that the rules on the international responsibility of states and international organisations form a single, unitary system.²⁵ However, we submit that it is possible and indeed useful to identify distinct private and public law dimensions of international responsibility. On the one hand, international responsibility always has been, and continues to be, characterised by strong private law dimensions.²⁶ On the other hand, the modern international law of responsibility has a distinct public law dimension. The law of responsibility as construed by the ILC is of an objective nature, in the sense that responsibility can arise regardless of damage to any particular state or organisation.²⁷

¹⁹ Chapter 27 in this volume, 701. ²⁰ Chapter 23 in this volume, 585.

²¹ Chapter 8 in this volume, 184.

²² Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 5, at 368–9.

²³ Chapter 34 in this volume, 905. ²⁴ Chapter 38 in this volume, 1009.

²⁵ J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in M. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003), 443, 451.

²⁶ H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co., 1927; repr. 2002), 81; T.E. Holland, *Studies in International Law* (Oxford: Clarendon Press, 1898), 152.

²⁷ A. Pellet, 'Remarques sur une révolution inachevée: Le projet d'articles de la CDI sur la responsabilité des Etats' (1996) 42 *AFDI* 7, at 101; Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', n. 6, at 94 (noting that it would introduce a 'review of legality through the institutions of international responsibility').

Moreover, and more relevant for present purposes, several regimes allow for determination of non-performance of obligations by multiple parties in a way that is more akin to administrative law procedures than to private law.

The issue-areas covered in this volume differ markedly in the degree to which they have more of a private or a public law dimension. An example of the former is the regime for outer space.²⁸ Examples of the latter are the regimes for international crimes²⁹ and for the protection of global commons.³⁰ This has direct consequences for the relevance of particular approaches to shared responsibility. For instance, while joint and several responsibility may be relevant to the outer space regime, it appears to be much less appropriate for climate change.

5 Structure of the Volume

In addition to this introduction and the conclusions, the volume consists of thirty-nine chapters divided into nine thematic clusters: statehood; international criminal law and cooperation; international law of the sea; international space law; international refugee law; international military operations; international economic law; international environmental law; and energy. The choice of the clusters reflects the areas where issues of shared responsibility have actually arisen (such as peacekeeping operations) or may arise in the future (for example, the protection of the environment in Antarctica). The use of clusters is only a means to organise the material. The boundaries between these clusters are not rigid, and several chapters relate to more than one cluster. However, it may be possible to identify trends and patterns that are common to some clusters and not to others. We return to this in the conclusions.

The volume does not include a separate human rights cluster. As many chapters in other clusters (notably in those on criminal law and cooperation and refugee law, but also in the clusters on law of the sea and military operations) deal with human rights issues, there is no need for a separate cluster.

While the number of chapters is large, we do recognise that several issue-areas are not represented, even though it may well be

²⁸ Chapter 18 in this volume, n. 15. ²⁹ Chapter 10 in this volume, 236.

³⁰ Chapter 16 in this volume, 399.

that questions of shared responsibility do arise. Notable examples are financial law and global health law. In this respect, the present study is not an exhaustive examination of the topic, and further research into such areas, which may profit from the conclusions that we draw from the present volume, might well yield further insights.

