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### Conclusions

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## Conclusions

ANDRÉ NOLLKAEMPER AND ILIAS PLAKOKEFALOS

The chapters in this volume display significant diversity. Problems such as climate change, unsustainable fisheries, and failure to protect civilians in military operations and extraordinary renditions vary both in terms of the degree to which they give rise to situations of shared responsibility and in the legal solutions that have been chosen to address such problems. The differences suggest that regimes for sharing responsibility are highly contingent. They have been construed by different actors with different interests and have responded to different needs at different times.

In view of this diversity, this volume induces modesty for claims that it would be possible or useful to formulate a 'one size fits all' solution to problems of shared responsibility. The inclination of many international lawyers who are faced with questions of shared responsibility may be to resort to the texts drafted by the International Law Commission (ILC). While many chapters demonstrate that the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>1</sup> and the Articles on

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

the Responsibility of International Organizations (ARIO)<sup>2</sup> are relevant, and while the ILC principles often help to clarify a legal situation in cases of shared responsibility, the volume as a whole also suggests that these texts often are not the first, and certainly not the final, port of call for relevant actors. Rather, issue-specific solutions have been sought.

In this concluding chapter we will identify, on the basis of the preceding chapters, the main convergences and variations in the practice of shared responsibility. For this purpose, we will use the framework for analysis that we articulated in the introductory chapter.<sup>3</sup> We will thus evaluate the practice of shared responsibility on three levels. First, we will assess variations in the degree to which problems of shared responsibility present themselves across issue-areas (section 1). Second, we will identify the diversity in the three main components of shared responsibility regimes: primary rules, secondary rules, and processes for implementation (section 2). Third, we will identify three factors that to some extent correlate with variations in shared responsibility and that could be considered as possible explanations for such variations: the diversity of actors that contribute to harmful consequences, the nature of the relationship between such actors, and the degree to which regimes for shared responsibility cater to private or public interests (section 3). In section 4, we will offer some final reflections on the practice of shared responsibility.

## 1 Diversity of the Problem of Shared Responsibility

This volume demonstrates that questions of shared responsibility have arisen in virtually any situation where multiple actors engage in activities that may cause harm – ranging from armed conflict, refugee protection, and climate change, to *refoulement*, economic development of international river basins, fisheries, cross-border police cooperation, and so on. Shared responsibility is not an extraordinary problem, but it is inherent to the fact that states and other actors interact in multifarious ways.

A few more specific comments can be made on the diversity of situations leading to shared responsibility problems. First, when we cluster problems of shared responsibility in terms of established sub-disciplines

<sup>2</sup> 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).

<sup>3</sup> Nollkaemper and Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', Chapter 1 in this volume, at 4–10.

(or 'fields') of international law, we can identify substantial differences in the degree to which shared responsibility is a problem. Some regimes are largely dominated and driven by the fact that harm results from the acts of many, rather than individual actors. Examples are land-based marine pollution,<sup>4</sup> exhaustion of fish stocks,<sup>5</sup> and *refoulement* of asylum seekers.<sup>6</sup> This affects regulatory approaches. The corresponding regimes are invariably tailored towards preventing shared responsibility. In contrast, other 'fields' of international law respond mainly to harm caused by individual actors. For instance, international investment law<sup>7</sup> and international trade law<sup>8</sup> are not driven by the aim to prevent shared responsibility: it is, for example, noteworthy that there has never been a case involving co-respondents, nor a case of a single measure attributed to two World Trade Organization (WTO) members.<sup>9</sup>

Second, problems of shared responsibility arise predominantly in those areas where actors engage in concerted action. Examples are peacekeeping operations,<sup>10</sup> coalitions of the willing,<sup>11</sup> joint anti-piracy operations,<sup>12</sup> regional fisheries organisations,<sup>13</sup> search and rescue,<sup>14</sup> joint development agreements,<sup>15</sup> joint investigation teams,<sup>16</sup> and so on. In some cases, the concerted action makes problems of shared responsibility self-propelling: concerted action responds to the fact that multiple actors contribute to harmful outcomes (such as land-based marine pollution and fisheries), whereupon that very concerted nature of the action may result in harmful outcomes (for example, by failures to agree on, or to implement, required measures). In such cases, cooperation is both a solution and a further cause of problems of shared responsibility.

Third, much of the concerted interactions between states and other actors that result in harmful outcomes can be conceptualised through the lens of complicity: that is, as situations where one or more actors in some

<sup>4</sup> Y. Tanaka, 'Land-Based Marine Pollution', Chapter 12 in this volume, 294.

<sup>5</sup> Y. Takei, 'Fisheries', Chapter 14 in this volume, 350.

<sup>6</sup> M. Den Heijer, 'Refoulement', Chapter 19 in this volume, 481.

<sup>7</sup> S. Wittich, 'International Investment Law', Chapter 32 in this volume, 822.

<sup>8</sup> J. Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', Chapter 33 in this volume, 849.

<sup>9</sup> *Ibid.*, at 871.

<sup>10</sup> R. Murphy and S. Wills, 'United Nations Peacekeeping Operations', Chapter 23 in this volume, 585; A. Abass, 'African Union Operations', Chapter 24 in this volume, 613.

<sup>11</sup> M. Tondini, 'Coalitions of the Willing', Chapter 27 in this volume, 701.

<sup>12</sup> E. Papastavridis, 'Piracy', Chapter 13 in this volume, 316. <sup>13</sup> Takei, 'Fisheries', n. 5.

<sup>14</sup> S. Trevisanut, 'Search and Rescue Operations at Sea', Chapter 17 in this volume, 426.

<sup>15</sup> C. Redgwell, 'Energy', Chapter 40 in this volume, 1071.

<sup>16</sup> S. Hufnagel, 'Cross-Border Law Enforcement', Chapter 8 in this volume, 184.

way assist another actor in committing a wrongful act. Not all of this practice may lead to findings of responsibility for aid and assistance in terms of Article 16 of the ARSIWA – in fact, such findings are rare due to the fact that the thresholds for complicity as wrongfulness have been pitched at a high level.<sup>17</sup> However, conceptually we see many examples of such situations, including arms proliferation,<sup>18</sup> extraordinary rendition,<sup>19</sup> failure to protect civilians in peacekeeping operations<sup>20</sup> or coalitions of the willing,<sup>21</sup> human rights violations in anti-piracy operations<sup>22</sup> or by private military contractors,<sup>23</sup> transboundary movement of hazardous waste,<sup>24</sup> and so on. Such situations where one or more actors contribute to a wrongful act of another actor are perhaps the paradigmatic type of practice that leads to shared responsibility.

Fourth, while situations where multiple actors contribute to harmful outcomes are pervasive, many of the legal problems of shared responsibility remain hypothetical. Only in relatively few situations have there been actual determinations, or acknowledgements, of *ex post facto* shared responsibility. This is in part related to the lack of procedures by which such determinations could be made (see further, section 3), but it also indicates that invoking responsibility is not at all a dominant response of states and international institutions to situations where harm is caused. Responsibility is only one of many responses to situations where multiple actors contribute to wrongdoing. The far more common approach is to focus on *ex ante* regulation (see section 2.1).

## 2 Components of Shared Responsibility Regimes

Problems of shared responsibility have given rise to a wide variety of legal responses. Such diversity of these responses can be identified for each of the three main building blocks of shared responsibility regimes: primary rules (2.1), secondary rules (2.2), and processes for implementation (2.3).

<sup>17</sup> H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011), at 192–268 (chap. 5).

<sup>18</sup> D. Joyner, ‘Arms Control’, Chapter 30 in this volume, 781.

<sup>19</sup> H. Duffy, ‘Detention and Interrogation Abroad: The “Extraordinary Rendition” Programme’, Chapter 5 in this volume, 89.

<sup>20</sup> Murphy and Wills, ‘United Nations Peacekeeping Operations’, n. 10.

<sup>21</sup> Tondini, ‘Coalitions of the Willing’, n. 11. <sup>22</sup> Papastavridis, ‘Piracy’, n. 12.

<sup>23</sup> C. Lehnardt, ‘Private Military Contractors’, Chapter 29 in this volume, 761.

<sup>24</sup> K. Kummer Peiry, ‘Transboundary Movement of Hazardous Waste and Chemicals’, Chapter 35 in this volume, 936.

## 2.1 Primary Rules

Much of the divergence between regimes for shared responsibility does not concern rules on *ex post facto* responsibility as such, but rather the obligations pertaining to conduct that contributes to harmful outcomes. While such obligations generally are not considered to be part of the law of responsibility, and in part fulfil quite a different function than principles of responsibility, the contents and scope of obligations are often highly relevant for the allocation of responsibility.

From the wide variety of obligations analysed in the preceding chapters, we can infer seven further propositions. First, in a number of situations primary obligations are not attuned to the cumulative effects of conduct of multiple actors. Individual contributions may, in combination with contributions of others, result in serious harmful effects, yet not be wrongful. This is a problem with which regimes for, for instance, fisheries,<sup>25</sup> climate change,<sup>26</sup> land-based marine pollution,<sup>27</sup> and drug control,<sup>28</sup> try to cope. Because of the large number of individual contributions, it may not be possible to hold anyone responsible for breach of an obligation in situations where actual harmful outcomes occur. Rules on responsibility, including the obligation to terminate a wrong and to provide reparation, will not ‘fit’ with the eventual harm. Addressing these harms requires the further development and coordination of primary rules.

Second, in many areas where multiple actors contribute to harm, they have in general terms accepted an *ex ante* shared responsibility (and thus have accepted obligations) to address such problems. In some of the chapters, alternative labels are given to such a shared responsibility – for instance, the common heritage of mankind,<sup>29</sup> a community of interests in relation to international watercourses,<sup>30</sup> or the idea of public trusteeship<sup>31</sup> – but such terms can be seen as embodying the same idea of a recognition that multiple actors that contribute to harm should accept their responsibility to take appropriate action. In fact, such

<sup>25</sup> Takei, ‘Fisheries’, n. 5.   <sup>26</sup> J. Peel, ‘Climate Change’, Chapter 38 in this volume, 1009.

<sup>27</sup> Tanaka, ‘Land-Based Marine Pollution’, n. 4.

<sup>28</sup> P. Gallahue, ‘International Drug Control’, Chapter 7 in this volume, 162.

<sup>29</sup> I. Plakokefalos, ‘Environmental Protection of the Deep Seabed’, Chapter 15 in this volume, 380, 385; Trevisanut, ‘Search and Rescue Operations at Sea’, n. 14 at 434.

<sup>30</sup> O. McIntyre, ‘Transboundary Water Resources’, Chapter 34 in this volume, 905, 910–14 (referring to the community of interests’ approach with regard to the management of shared water resources which would support the idea of shared responsibility).

<sup>31</sup> P.H. Sand, ‘Transboundary Air Pollution’, Chapter 36 in this volume, 962, 983–5.

a general acceptance of responsibility to address problems appears to be much more common than an acceptance of shared responsibility for wrongdoing. We should add that the general acceptance of a responsibility to act (as in the responsibility to prevent) may, but often does not, translate into specific obligations.

Third, and directly connected to the previous point, while international lawyers examining problems of responsibility tend to look at the breach of primary obligations as one of the conditions of responsibility, in many of the chapters we see primary obligations as responses to situations where multiple actors contribute to harmful outcomes, rather than just as conditions for responsibility. The primary rules seek to prevent the harmful outcomes resulting from the conduct of multiple actors. This, for instance, is the case for pollution of international watercourses,<sup>32</sup> land-based marine pollution,<sup>33</sup> rules of engagement for military operations,<sup>34</sup> and so on. In such situations, primary rules serve as an alternative for secondary rules.

Whether such obligations may underlie specific claims of responsibility for wrongdoing depends on their content. A common response to situations of harm arising from conduct of multiple actors is to establish obligations of cooperation, but these may not be of a nature that they might actually trigger *ex post facto* responsibility. For example, in relation to fisheries, obligations of cooperation require joint performance by multiple states, but it may not be clear that in case of non-performance shared responsibility could arise for multiple states.<sup>35</sup> Similar examples of obligations to cooperate can be taken from human trafficking,<sup>36</sup> international crimes,<sup>37</sup> or Antarctica.<sup>38</sup>

Fourth, the ability of primary rules to address, and be relevant to, situations where multiple actors cause harm often depends on the jurisdictional scope of such rules. Extending the jurisdictional reach of obligations may imply that multiple actors who contribute to harm are in fact subjected to international obligations. But whether the obligations indeed have a sufficiently wide jurisdictional reach is often controversial.

<sup>32</sup> H. Ringbom, 'Ship-Source Marine Pollution', Chapter 11 in this volume, 265.

<sup>33</sup> Tanaka, 'Land-Based Marine Pollution', n. 4.

<sup>34</sup> M. Zwanenburg, 'North Atlantic Treaty Organization-Led Operations', Chapter 25 in this volume, 639.

<sup>35</sup> Takei, 'Fisheries', n. 5, at 359.

<sup>36</sup> A.T. Gallagher, 'Human Rights and Human Trafficking', Chapter 22 in this volume, 556.

<sup>37</sup> G. Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes', Chapter 10 in this volume, 236.

<sup>38</sup> K. Bastmeijer, 'Antarctica', Chapter 16 in this volume, 399.

This is exemplified in the chapters relating to refugee law,<sup>39</sup> extraordinary rendition,<sup>40</sup> private military contractors,<sup>41</sup> and multinational corporations.<sup>42</sup>

Fifth, in quite a few situations shared responsibility of multiple actors will not be based on obligations that are identical for each of the relevant actors. Shared responsibility is not limited to situations where states have identical obligations. For instance, in relation to *refoulement*, a possible shared responsibility between the refouling state, on the one hand, and the state to which a person will be refouled, on the other, will be based on separate obligations for the two states involved. The situation is comparable in relation to extradition,<sup>43</sup> extraordinary rendition,<sup>44</sup> anti-piracy operations,<sup>45</sup> and human trafficking.<sup>46</sup> Further differences exist when one actor is bound to a treaty provision and another actor only to a corresponding, but not necessarily identical, rule of customary law (for example, because it is an international organisation), an issue that is relevant, for instance, in relation to the North Atlantic Treaty Organization.<sup>47</sup> Such differences in the source and contents of obligations may be relevant to the allocation and content of responsibility, in that the actors concerned will not necessarily be responsible for the same wrong.

In some areas, international law expressly allocates or distributes different obligations, or different roles, to different actors. This, for instance, is the case in relation to vessel-source pollution (with respective roles for the flag state and the coastal state),<sup>48</sup> transboundary movement of hazardous waste (with respective roles for states of origin, states of transit, and states of destination),<sup>49</sup> search and rescue,<sup>50</sup> and human trafficking.<sup>51</sup> In the context of nuclear proliferation, the 1968 Nuclear

<sup>39</sup> E.g. N. Frenzen, 'Extraterritorial Refugee Protection', Chapter 20 in this volume, 506, 512, 515 (referring to UNCAT General Comment No. 2, providing for the possibility of two or more states sharing 'effective control' over persons; therefore, sharing responsibility).

<sup>40</sup> Duffy, 'Detention and Interrogation Abroad', n. 19.

<sup>41</sup> Lehnardt, 'Private Military Contractors', n. 23.

<sup>42</sup> O. Amao, 'Multinational Corporations', Chapter 31 in this volume, 799.

<sup>43</sup> A. Constantinides, 'Extradition', Chapter 6 in this volume, 128.

<sup>44</sup> Duffy, 'Detention and Interrogation Abroad', n. 19. <sup>45</sup> Papastavridis, 'Piracy', n. 12.

<sup>46</sup> Gallagher, 'Human Rights and Human Trafficking', n. 36.

<sup>47</sup> Zwanenburg, 'North Atlantic Treaty Organization-Led Operations', n. 34.

<sup>48</sup> Ringbom, 'Ship-Source Marine Pollution', n. 32.

<sup>49</sup> Kummer Peiry, 'Transboundary Movement of Hazardous Waste and Chemicals', n. 24.

<sup>50</sup> Trevisanut, 'Search and Rescue Operations at Sea', n. 14.

<sup>51</sup> Gallagher, 'Human Rights and Human Trafficking', n. 36.

Non-Proliferation Treaty creates a two-tiered classification of states parties.<sup>52</sup> In some cases, such distinctions in roles are based on substantive criteria, notably capability, for instance, in relation to climate change (common but differentiated responsibility)<sup>53</sup> and humanitarian law.<sup>54</sup>

Such differentiations in principle need not stand in the way of the possibility of shared responsibility. However, they may have consequences for the content of responsibility (most significantly, the obligation to provide reparation). All of this points to the fact that an analysis of shared responsibility, and the consequences thereof, will be largely determined by the specific obligations imposed on the actors.

Sixth, the interconnected nature of the multiple actors that contribute to harm is often reflected in obligations that make obligations of one actor contingent on a wrong, or a risk of a wrong, committed by another actor. These types of obligations can be seen as specific forms of the principle of complicity contained in Article 16 of the ARSIWA, which can be considered as a primary norm.<sup>55</sup> One example is the European Union (EU) guidelines for arms exports, which include a checklist on the prevalent human rights standards.<sup>56</sup> Others are Article 3 of the Convention against Torture (CAT), Article 33(1) of the Refugee Convention, and, more generally, human rights obligations to require states to take measures to prevent that their relation to other actors (whether states or private actors) results in harm.<sup>57</sup> Further examples of situations where the required conduct of one state is in part based on conduct of other actors include protection of migratory species<sup>58</sup> and transboundary movement of hazardous waste.<sup>59</sup> In such cases conduct of

<sup>52</sup> Joyner, 'Arms Control', n. 18, at 783–5; 1968 Treaty on the Non-Proliferation of Nuclear Weapons (729 UNTS 161) (Nuclear Non-Proliferation Treaty).

<sup>53</sup> Peel, 'Climate Change', n. 26, at 1024, 1033.

<sup>54</sup> See also J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention* (Geneva: ICRC, 1958), at 16 (stating that states 'should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally').

<sup>55</sup> G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58(1) *ICLQ* 1, at 5–6.

<sup>56</sup> European Union Code of Conduct on Arms Exports, Brussels, 5 June 1998, Council of the European Union, Doc. No. 8675/2/98 Rev.2.

<sup>57</sup> Den Heijer, 'Refoulement', n. 6; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85) (Convention against Torture or CAT); 1951 Convention relating to the Status of Refugees (189 UNTS 137) (Refugee Convention).

<sup>58</sup> A. Trouwborst, 'Nature Conservation', Chapter 37 in this volume, 987.

<sup>59</sup> The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1673 UNTS 57) (Basel Convention), in Article 4(2), sets out primary obligations and rights governing states of import, export, and transit, making it

one actor may trigger obligations of another actor. The obligations can then be said to be relational.<sup>60</sup>

Seventh, and lastly, in a substantial number of regimes regulation of conduct of multiple actors that can result in harmful outcomes proceeds by informal rules which do not impose legal obligations on such actors. Transborder police cooperation is one example of many: arrangements among policing institutions are largely informal.<sup>61</sup> Other examples can be found in relation to land-based marine pollution<sup>62</sup> and anti-drugs policy.<sup>63</sup> When states do not act in conformity with such rules and contribute to harmful outcomes, this in itself will not result in shared responsibility (in the sense of responsibility for wrongful acts). Rather, in many cases the corresponding responses, too, are of an informal nature.<sup>64</sup>

## 2.2 Secondary Rules

In relation to secondary rules (that only come into play where the primary rules actually allow for a determination of shared responsibility), a similar diversity can be identified. We infer five propositions from the chapters in this volume.

First, while the ARSIWA and the ARIO are rarely conclusive, many chapters conclude that these texts apply to the facts at hand, and indeed can be helpful. If only because of the relative lack of specific rules in many regimes, the ILC rules are the natural default position. Situations such as land-based marine pollution, transboundary watercourses, and coalitions of the willing can be accommodated by the rules on attribution.<sup>65</sup> This also holds for joint conduct or conduct of common organs, for instance, in relation to international administration of territories<sup>66</sup> and

well placed for addressing shared responsibility. Also, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (2244 UNTS 337) aims to protect the environment against the ill-effects of hazardous chemicals through information exchange: see Kummer Peiry, 'Transboundary Movement of Hazardous Waste and Chemicals', n. 24, at 941–4.

<sup>60</sup> See generally L. May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1996), 76.

<sup>61</sup> Hufnagel, 'Cross-Border Law Enforcement', n. 16, at 186.

<sup>62</sup> Tanaka, 'Land-Based Marine Pollution', n. 4.

<sup>63</sup> Gallahue, 'International Drug Control', n. 28.

<sup>64</sup> See e.g. Hufnagel, 'Cross-Border Law Enforcement', n. 16, at 210–11.

<sup>65</sup> E.g. Tondini, 'Coalitions of the Willing', n. 11.

<sup>66</sup> Saul notes that the reference to the Joint Administering Authority in the 1947 Trusteeship Agreement for the Territory of Nauru (10 UNTS 3) provided an indication that it was the intention of the three states to create a common organ of the three states, with each state

fisheries.<sup>67</sup> Such practices are subject to the principle that wrongful conduct of a common organ engages the responsibility of each of the participating states. This is a situation that was given scant attention in the ILC Commentary, but in principle the ILC rules do apply in such situations.

Second, the chapters confirm that the ARSIWA and the ARIO do not lay down the respective rules in great detail and do not provide much guidance for addressing the specific problems at hand in specific regimes.<sup>68</sup> It was observed in relation to several issues that the general nature of the Articles may cause uncertainty as to their exact application.<sup>69</sup> Examples are questions of allocation of responsibility and reparation in relation to transboundary air pollution and climate change (such as joint and several liability versus apportionment between contributors).<sup>70</sup>

Third, several chapters suggest that the possibility to apply the ILC norms may be limited by high thresholds. This holds, for instance, for the test of effective control as a basis of attribution; several chapters relating to military operations conclude that this test is difficult to apply successfully in practice.<sup>71</sup> Also, the threshold for complicity appears to render shared responsibility in many situations theoretical.<sup>72</sup> For instance, in some cases, such as that of extraordinary rendition, the ILC rule on aid and assistance might be stricter than similar provisions in specialised regimes (such as the CAT).<sup>73</sup>

Fourth, the relevance of the ILC rules is significantly reduced by the fact that they do not apply to the wide variety of actors other than states and international institutions that can be involved in situations of shared responsibility. For instance, the rules on attribution have proved to be of little help in cases where the harmful conduct is also performed by

equally obligated. M. Saul, 'Internationally Administered Territories', Chapter 2 in this volume, 15, 17–19.

<sup>67</sup> Takei, 'Fisheries', n. 5.

<sup>68</sup> P.A. Nollkaemper and I. Plakocefalos, 'Conclusions: Beyond the ILC Legacy', in P.A. Nollkaemper and I. Plakocefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), 341, at 348.

<sup>69</sup> *Ibid.*, at 352. <sup>70</sup> E.g. Sand, 'Transboundary Air Pollution', n. 31.

<sup>71</sup> Zwanenburg, 'North Atlantic Treaty Organization-Led Operations', n. 34; F. Naert, 'European Union Common Security and Defence Policy Operations', Chapter 26 in this volume, 669.

<sup>72</sup> Aust, *Complicity and the Law of State Responsibility*, n. 17, chap. 5, pp. 192–268.

<sup>73</sup> Duffy, 'Detention and Interrogation Abroad', n. 19, at 112–14.

non-state actors.<sup>74</sup> Even though this may be seen mainly as a problem of the primary rules in question, it also has an effect on the application of the ARSIWA in a factual scenario. This, for instance, is relevant in the chapters on federal states,<sup>75</sup> private military contractors,<sup>76</sup> and the activities of multinational enterprises.<sup>77</sup> We will return to this aspect below in section 3.1.

Fifth, in some areas actors have sought to overcome the limitations of the ILC rules by agreeing between themselves on specific rules that govern their respective responsibilities.<sup>78</sup> Examples identified in this volume include rules of engagement in anti-piracy operations as a distinct regime regarding attribution of conduct;<sup>79</sup> the attribution rules articulated by the European Court of Human Rights (ECtHR), for instance, in relation to acquiescence as a special rule of attribution in the extraordinary rendition cases;<sup>80</sup> the provisions of the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal;<sup>81</sup> Article 232 of the United Nations (UN) Convention on the Law of the Sea (providing for liability for conduct that is not necessarily unlawful);<sup>82</sup> the allocation of costs in situations of joint actions against marine pollution under the 2002 Malta Protocol;<sup>83</sup> the 1962 lease agreement between the Soviet Union and Finland concerning the Saimaa Canal (assigning sole responsibility to Finland for any damage to third countries that would arise from the use of the canal and work done to maintain or improve it);<sup>84</sup> liability regimes for oil pollution and other forms of environmental damage;<sup>85</sup> and the outer space regime.<sup>86</sup>

<sup>74</sup> E.g. Amao, 'Multinational Corporations', n. 42; Peel, 'Climate Change', n. 26.

<sup>75</sup> G.I. Hernández, 'Federal States', Chapter 3 in this volume, 40.

<sup>76</sup> Lehnardt, 'Private Military Contractors', n. 23.

<sup>77</sup> Amao, 'Multinational Corporations', n. 42.

<sup>78</sup> Saul, 'Internationally Administered Territories', n. 66; see also M.J. Strauss, 'Territorial Leases', Chapter 4 in this volume, 65.

<sup>79</sup> Papastavridis, 'Piracy', n. 12. <sup>80</sup> Duffy, 'Detention and Interrogation Abroad', n. 19.

<sup>81</sup> Kummer Peiry, 'Transboundary Movement of Hazardous Waste and Chemicals', n. 24, at 941–3; Basel Convention, n. 59.

<sup>82</sup> Ringbom, 'Ship-Source Marine Pollution', n. 32, at 280–1.

<sup>83</sup> *Ibid.*, at 274, 290; 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, available at [www.unep.org](http://www.unep.org) (Malta Protocol).

<sup>84</sup> Strauss, 'Territorial Leases', n. 78, at 71; 1962 Agreement concerning the Lease to the Republic of Finland of the Soviet Part of the Saimaa Canal and Maly Vysotsky Island (Soviet Union–Finland) (479 UNTS 122).

<sup>85</sup> Redgwell, 'Energy', n. 15; I. Plakokefalos, 'Liability for Transboundary Harm', Chapter 39 in this volume, 1051.

<sup>86</sup> P. Mendes de Leon and H. van Traa, 'Space Law', Chapter 18 in this volume, at 453.

It should be added that several chapters indicate that whether or not a *lex specialis* exists may be controversial. A notable example is the question of whether attribution in relation to UN peacekeeping deviates from the ILC Articles.<sup>87</sup> Another example is the responsibility of the EU as an external actor.<sup>88</sup>

### 2.3 Processes

The third component of regimes for shared responsibility that displays a considerable diversity concerns the processes for determination of shared responsibility. Even though processes are not part of the law of state responsibility, they must be taken into account in order to fully assess the practice of shared responsibility. Without proper procedures, rules on shared responsibility often remain hypothetical.<sup>89</sup>

On the basis of the combined material, a few propositions can be advanced. First, the number of judicial determinations of actual shared responsibility is confined to a few issue-areas.<sup>90</sup> Even in relatively clear-cut situations where multiple states contributed to a harmful outcome by committing wrongful acts, it is very rare that an international institution determines that multiple states share responsibility, even though in some cases, including the *Nauru* case<sup>91</sup> and the *Nuhanović* case,<sup>92</sup> courts have actually suggested that the case in question could be one involving shared responsibility. The number is larger if we consider cases where states acted independently, for instance, in those such as *M.S.S. v. Belgium and Greece*<sup>93</sup> and *Ilaşcu v. Moldova and Russia*.<sup>94</sup>

<sup>87</sup> Murphy and Wills, 'United Nations Peacekeeping Operations', n. 10.

<sup>88</sup> Naert, 'European Union Common Security and Defence Policy Operations', n. 71.

<sup>89</sup> The findings in this volume have to be read in conjunction with the collection of papers in the 'Themed Section: Procedural Aspects of Shared Responsibility in International Adjudication' (2013) 4(2) *JIDS* 277–405, in which we reviewed to what extent procedures for international adjudication in the International Court of Justice, the ECtHR, the WTO dispute settlement system, International Tribunal for the Law of the Sea, and arbitration were suited for application in situations of shared responsibility.

<sup>90</sup> See e.g. Plakocefalos, 'Environmental Protection of the Deep Seabed', n. 29; Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes', n. 37.

<sup>91</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240 (*Nauru*).

<sup>92</sup> *The Netherlands v. Hasan Nuhanović*, ECLI:NL:HR:2013:BZ9225 (6 September 2013).

<sup>93</sup> *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR, 21 January 2011); see Den Heijer, 'Refoulement', n. 6, at 497, 503–4.

<sup>94</sup> *Ilaşcu and others v. Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004); see E. Milano, 'Occupation', Chapter 28 in this volume, 733, 747, 754, 756.

Second, one reason that explains the limited role of judicial determinations of shared responsibility is the fact that some actors are not subject to the jurisdiction of the court in question.<sup>95</sup> For example, this was relevant in relation to the *Marine I* case where the Committee against Torture was unable to assess questions of shared responsibility between Mauritania and Spain as Mauritania had not accepted the competence of the Committee, despite a ‘strong potential’ for shared responsibility.<sup>96</sup> Likewise, in *Hirsi v. Italy*, the ECtHR refused to consider the shared responsibility of Italy and Libya due to Libya being a non-contracting state.<sup>97</sup> This problem also arose in situations where part of the harmful outcome was due to the conduct of international organisations. An example is the potential responsibility of the UN in relation to the international administration of Bosnia,<sup>98</sup> or of regional fisheries institutions.<sup>99</sup>

Third, in those rare cases where shared responsibility claims have been brought before international courts, the procedural rules of such courts are not always attuned to the specific problems of shared responsibility. However, it should also be observed that the often-cited problem of the *Monetary Gold* rule hardly ever proves to be a barrier – as is evidenced from the *Nauru* case<sup>100</sup> and WTO cases.<sup>101</sup>

Fourth, by and large the relevant actors have demonstrated a clear preference for alternative mechanisms to address breach of or non-compliance with the primary obligation. The practice of the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal is one of many examples. While the rules of the Convention are quite straightforward in most cases and could very well

<sup>95</sup> Naert, ‘European Union Common Security and Defence Policy Operations’, n. 71; Zwanenburg, ‘North Atlantic Treaty Organization-led Operations’, n. 34; Amao, ‘Multinational Corporations’, n. 42.

<sup>96</sup> *J.H.A., on behalf of P.K. et al. v. Spain*, Communication No. 323/2007, UNCAT, UN Doc. CAT/C/41/D/323/2007 (2008) (*Marine I* case); see Frenzen, ‘Extraterritorial Refugee Protection’, n. 39, 514–17.

<sup>97</sup> *Hirsi Jamaa and others v. Italy*, App. No. 27765/09 (ECtHR, 23 February 2012); see Frenzen, ‘Extraterritorial Refugee Protection’, at 517–20.

<sup>98</sup> Saul, ‘Internationally Administered Territories’, n. 66. <sup>99</sup> Takei, ‘Fisheries’, n. 5.

<sup>100</sup> *Nauru*, n. 91. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, ICJ Reports 1954, 19 (*Monetary Gold*).

<sup>101</sup> The problem of the indispensable party does not arise in the WTO as a complaining member may cite a third WTO member as co-respondent/respondent in a new proceeding: see Flett, ‘The World Trade Organization and the European Union and its Member States in the WTO’, n. 8, at 868.

bring about the responsibility of the states that might breach them, the states parties to the Convention have preferred to rely on non-compliance procedures as well as mediation and conciliation.<sup>102</sup> Comparable situations can be identified in relation to air pollution,<sup>103</sup> international watercourses,<sup>104</sup> and non-proliferation.<sup>105</sup> The non-compliance procedures that are established in relation to such issues serve the purpose of inducing compliance with the treaty provisions rather than determining responsibility for breach. The same is true for procedures within regional fisheries management organisations that serve the purpose of resolving technical disputes regarding fishing quotas and the like.<sup>106</sup>

### 3 Correlations and Tentative Explanations of Diversity

The materials provided by the contributions to this volume do not allow us to make a comprehensive statement as to the causes of the convergences and divergences between issue-areas. It seems obvious that the contents of any particular responsibility regime reflect constellations of interests that are different for each regime, but a proper analysis of such interests would require a different type of information than can be inferred from the chapters. However, on the basis of the review of practice surveyed in this volume, a number of correlations can be identified that help us to understand why some antidotes are useful in one situation, but not in another. We identify three such factors: the nature of the actors that contribute to a particular harmful outcome (3.1), the relationship between such actors (3.2), and the public–private nature of the interests involved (3.3).

<sup>102</sup> Kummer Peiry, ‘Transboundary Movement of Hazardous Waste and Chemicals’, n. 24, at 960; Basel Convention, n. 59.

<sup>103</sup> Sand, ‘Transboundary Air Pollution’, n. 31.

<sup>104</sup> For instance, under Article 33(2) of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses ((1997) 36 ILM 700) (UN Watercourses Convention), states may ‘make use, as appropriate, of any joint watercourse institutions that may have been established by them’: see McIntyre, ‘Transboundary Water Resources’, n. 30, at 933.

<sup>105</sup> Joyner, ‘Arms Control’, n. 18, at 787 (referring to the role of the UN Security Council and the International Atomic Energy Agency in relation to monitoring and verifying state compliance with international legal obligations).

<sup>106</sup> Takei, ‘Fisheries’, n. 5, at 376–7 (noting that two recent constituent instruments of regional fisheries management organisations (RFMOs) put in place mechanisms aimed at examining the legality of conservation and management measures and objection procedures).

### 3.1 Actors

The variety of actors helps to explain the variety in regimes for shared responsibility. While in some cases (e.g. extradition) the only relevant actors are states, in other instances, non-state actors play a critical role in bringing about the harmful outcome. Antidotes to problems of multi-actor harm can be explained in part by understanding which contributing actors can, and which cannot, be captured by primary or secondary rules. Such differences matter in terms of responses, for example, by channeling more expansive (due diligence) obligations to states.<sup>107</sup> Joyner notes that while most cases of proliferation occur between an individual state recipient and private party exporters within another state, the fact that private actors are not involved in the regime leads to more demanding obligations on states.<sup>108</sup> Other examples can be taken from land-based marine pollution,<sup>109</sup> fisheries,<sup>110</sup> private companies in relation to rendition,<sup>111</sup> public and private energy actors,<sup>112</sup> private military contractors,<sup>113</sup> and multinational corporations.<sup>114</sup> In cases where states are the addressees of the international obligations despite not always being capable of controlling the conduct of the private entities in question, the need arises to address such entities in other, mostly more informal, ways.<sup>115</sup> This means that the law of responsibility as it applies to states and international organisations is only one facet of a much broader, and much more informal, network of arrangements that seeks to take care of a variety of actors. It may not be improper to capture such arrangements with the label of responsibility, but it is quite far removed from the inter-state body of law drafted by the ILC.

<sup>107</sup> See e.g. Duffy, 'Detention and Interrogation Abroad', n. 19; Amao, 'Multinational Corporations', n. 42.

<sup>108</sup> Joyner, 'Arms Control', n. 18, at 782–3.

<sup>109</sup> Tanaka, 'Land-Based Marine Pollution', n. 4.

<sup>110</sup> Takei, 'Fisheries', n. 5, at 364–5 (noting that RFMOs may become involved in shared responsibility scenarios between an RFMO and a state other than its members, a RFMO and one or more of its members, and between various RFMOs).

<sup>111</sup> Duffy, 'Detention and Interrogation Abroad', n. 19. With regard to private actors in relation to migrant management, see Gammeltoft-Hansen, 'Private Actor Involvement in Migrant Management', Chapter 21 in this volume, 527.

<sup>112</sup> Redgwell, 'Energy', n. 15. <sup>113</sup> Lehnardt, 'Private Military Contractors', n. 23.

<sup>114</sup> Amao, 'Multinational Corporations', n. 42.

<sup>115</sup> J. d'Aspremont, P.A. Nollkaemper, I. Plakokefalos, and C. Ryngaert, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 *NILR* 49, at 60–4.

### 3.2 *Relations between Actors*

In the introductory chapter we identify two main types of situations in which questions of shared responsibility can arise: concurrent responsibility and cooperative responsibility. The former situation is characterised by the fact that actors engage, independently from each other, in conduct that results in harmful outcomes. The latter category comprises situations where actors engage in concerted action that has harmful effects. The regimes reviewed in this chapter demonstrate that both categories encompass a sizable number of cases. Those involving concurrent responsibility exist in the issue-areas of transboundary watercourses,<sup>116</sup> air pollution,<sup>117</sup> land-based marine pollution,<sup>118</sup> climate change,<sup>119</sup> migratory species,<sup>120</sup> and fisheries.<sup>121</sup> Examples of concerted action include coalitions of the willing,<sup>122</sup> joint occupation,<sup>123</sup> and police cooperation.<sup>124</sup>

There is a significant category in the middle where states have set up institutions to regulate a particular area, and this has not proven to be very effective. It can be said that the ongoing harm is caused individually and concurrently. Yet it can also be said that where the institutions fail to act, this is a negative form of concerted action. An example is fisheries, where we see a mixture of joint/concerted action and individual action (for example, where conservation and management measures adopted by a regional fisheries management agreement become ineffective due to disregard for the fishing activities of non-cooperating non-members).<sup>125</sup> Another example involves the International Criminal Court, which engages in some form of cooperation with member states, but where responsibility does not really flow from concerted action.<sup>126</sup> A further example is the international administration of Bosnia, where the operation of the Office of the High Representative was 'not completely independent of other international legal persons that also have human rights obligations'.<sup>127</sup>

<sup>116</sup> McIntyre, 'Transboundary Water Resources', n. 30.

<sup>117</sup> Sand, 'Transboundary Air Pollution', n. 31.

<sup>118</sup> Tanaka, 'Land-Based Marine Pollution', n. 4. <sup>119</sup> Peel, 'Climate Change', n. 26.

<sup>120</sup> Trouwborst, 'Nature Conservation', n. 58. <sup>121</sup> Takei, 'Fisheries', n. 5.

<sup>122</sup> Tondini, 'Coalitions of the Willing', n. 11. <sup>123</sup> Milano, 'Occupation', n. 94.

<sup>124</sup> Hufnagel, 'Cross-Border Law Enforcement', Chapter 8 in this volume, n. 16.

<sup>125</sup> Takei, 'Fisheries', n. 5, at 354.

<sup>126</sup> G. Sluiter, 'International Criminal Tribunals and their Relation to States', Chapter 9 in this volume, 212.

<sup>127</sup> See UN Doc. S/RES/1031 (15 December 1995), para. 32; Saul, 'Internationally Administered Territories', n. 66, at 25.

Different constellations of relations between actors matter in terms of regulations. They lead to different presumptions. For instance, presumptions of consent and knowledge may be more justified in situations of concerted action. Also, it is in situations of concerted action that states tend to negotiate a *lex specialis* that is relevant to the allocation of responsibility, for example, in the sphere of military operations.

### 3.3 *The Private/Public Distinction*

The degree to which the interests involved in a particular issue-area are more of a private or public nature appears to be a significant explanatory factor for differences in terms of regulation. Issue-areas that have a nature closer to private law regimes usually appear to be more victim-oriented and to have more mechanisms that lead to litigation<sup>128</sup> and aim at the reparation of the person or persons that have suffered damage from the internationally wrongful act. Issue-areas that are permeated by a public law nature usually seek to protect a collective good or interest (such as the environment). Therefore, litigation is not always perceived as the preferred outcome and the corresponding rules of responsibility that relate to litigation (such as reparation) have not developed.

At one extreme we can place regimes that respond to situations where harm is or may be caused to individual persons. An example is the space law regime. The regulatory manifestation is a liability regime that seeks to address such harm. It employs tools such as absolute state liability or joint and several liability, which indicate that it is a victim-oriented regime seeking to ensure reparation.<sup>129</sup> The civil liability regimes for oil pollution and the uses of nuclear energy also seek to ensure reparation for the victim of damage, albeit in a slightly different way than the space law regime: instead of adopting state liability they opt for the liability of the operator.<sup>130</sup>

It is not only liability regimes that showcase the private dimension of shared responsibility. Refugee law, for example, is also directed at offering protection to a specific class of persons that falls under the regime's framework.<sup>131</sup> Similarly, the matrix of international obligations that

<sup>128</sup> While international criminal law is an issue-area where litigation is a day-to-day phenomenon, it possesses a decidedly public law nature. What is meant by litigation here is not the functioning of a court in general but rather the access to a dispute settlement mechanism where the injured party can seek reparation.

<sup>129</sup> P. Mendes de Leon and H. Van Traa, 'Space Law', Chapter 18 in this volume, 453.

<sup>130</sup> E.g. Ringbom, 'Ship-Source Marine Pollution', n. 32.

<sup>131</sup> Frenzen, 'Extraterritorial Refugee Protection', n. 39.

regulate extraordinary rendition is also geared towards safeguarding the rights of individuals.<sup>132</sup> Overall, we can conclude that in issue-areas such as those mentioned above, which have a nature closer to private law, the rules of responsibility have adapted or have been supplemented (in the case of liability regimes) so as to protect the interests of the persons that suffer damage.

At the other extreme, most regimes that protect public interests have not developed special rules regarding responsibility, and there are no supplementary rules either. Here the specific rules of responsibility play much less of a role. For example, there is not really a role for a principle of joint and several liability that characterises the space law regime. Nor is there a role for civil liability when the issue is the curbing of CO<sub>2</sub> emissions; what is required is that states adhere to the obligations they have assumed under the United Nations Framework Convention on Climate Change and the Kyoto Protocol<sup>133</sup> to reduce their emissions. Of course, this does not mean that there is no role for responsibility rules altogether. The rules of responsibility do apply in these regimes and they may fulfil multiple functions. The rules on countermeasures, for example, might prove to be very useful<sup>134</sup> when a state needs to induce compliance with an international obligation. The rules of responsibility may also have a deterrent effect. Although the public law nature of some regimes has not triggered the adaptation of the ARSIWA or the development of more rules on responsibility, the ARSIWA can nonetheless still prove useful under certain circumstances, especially since the ARSIWA themselves also have a public law aspect seen in the possibility of a state other than the injured state to invoke the responsibility of a wrongdoing state, and in the dissociation of responsibility from damage.

We can therefore conclude that the private or public nature dimension of the regimes in fact plays a rather significant role in the application and development of rules pertaining to shared responsibility.

<sup>132</sup> Duffy, 'Detention and Interrogation Abroad', n. 19.

<sup>133</sup> 1992 United Nations Framework Convention on Climate Change (1771 UNTS 107); 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (2303 UNTS 148) (Kyoto Protocol).

<sup>134</sup> Flett, 'The World Trade Organization and the European Union and its Member States in the WTO', n. 8, at 865–7.

#### 4 Outlook

This volume presents and appraises the relevance and application of shared responsibility across a wide range of issue-areas in international law. It has been shown that the diversity among these issue-areas is matched by a diversity of the degree of relevance of shared responsibility. Primary rules and the way they are crafted in each issue-area are often the decisive factor of inclusion or exclusion of shared responsibility considerations. The secondary rules of shared responsibility have proven to be rather flexible overall. Nonetheless, there are issue-areas where they have been tweaked so as to better address issues of shared responsibility. A broad array of procedures of implementation is also present depending on the appropriateness and availability of dispute avoidance and dispute settlement procedures. Finally, the nature of the actors that might cause a harmful outcome, the relationship among those actors (as it is reflected in the primary rules as well), and the public or private nature of the regime in question are also decisive factors in the development and application of shared responsibility.

The sheer variety of issue-areas calls for a variety of responses to problems of shared responsibility when they arise. What this volume offers is the first step towards better identifying those problems and fine-tuning solutions for them in the future. There is ample room for further research. The key question is under what conditions solutions articulated for one area may be used in others.