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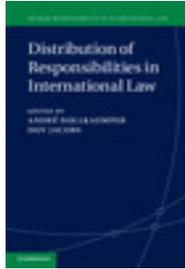
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# Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility

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## 1. Introduction: identifying the starting point

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

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

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

<sup>3</sup> E. Kontorovich, 'Pirate "Globalisation": Dividing Responsibility Among States, Companies, and Criminals', Chapter 14 in this volume, 386.

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

<sup>5</sup> S. Miller, 'The Global Financial Crisis and Collective Moral Responsibility', Chapter 15 in this volume, 404.

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

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

While the term ‘distribution’ thus is relatively straightforward, the notion ‘distribution of responsibility’ has two separate, though inter-related, meanings deriving from the dual meaning of the term ‘responsibility’.<sup>7</sup>

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

<sup>6</sup> P.A. Nollkaemper, ‘Introduction’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 1.

<sup>7</sup> P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MIJIL* 359, 365.

<sup>8</sup> Hakimi, ‘Distributing the Responsibility to Protect’, n. 1.

<sup>9</sup> Salomon, ‘How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World’, n. 4.

or might not be used in a strictly legal meaning.<sup>10</sup> Such duties or obligations then need to be distributed.

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

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

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

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

<sup>11</sup> Dannenbaum, ‘Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures’, n. 1.

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

<sup>13</sup> Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, n. 7, at 412.

<sup>14</sup> For a similar distinction see A. van Aaken, ‘Shared Responsibility in International Law: A Political Economy Analysis’, Chapter 6 in this volume, 153, at 156.

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

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

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

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

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

<sup>17</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>18</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Reports 1949, 4; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240.

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

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

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

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

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

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

<sup>21</sup> *Ibid.*, 182, para. 430. <sup>22</sup> *Ibid.*, 234, para. 462. <sup>23</sup> *Ibid.*

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

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

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

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

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

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

<sup>25</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 417–418.

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

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

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

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

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

<sup>26</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7.

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

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

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

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

## 2. Mapping conceptual approaches

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

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

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

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

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

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

<sup>29</sup> Van Aaken, ‘Shared Responsibility in International Law: A Political Economy Analysis’, n. 14, at 190–191.

<sup>30</sup> Kontorovich, ‘Pirate “Globalisation”: Dividing Responsibility Among States, Companies, and Criminals’, n. 3, at 387.

<sup>31</sup> J.P. Trachtman, ‘*Ex Ante* and *Ex Post* Allocation of International Legal Responsibility’, Chapter 4 in this volume, 87, at 89.

of climate change, to discuss the ways in which to distribute the burden of the reduction of carbon emissions, based on the past conduct of states.<sup>32</sup>

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

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

<sup>32</sup> Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', n. 2, at 341–342.

<sup>33</sup> A.F. Lang, Jr., 'Shared Political Responsibility', Chapter 3 in this volume, 62.

<sup>34</sup> *Ibid.*, at 65. <sup>35</sup> Hakimi, 'Distributing the Responsibility to Protect', n. 1.

<sup>36</sup> Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4.

instance, Dannenbaum explains that he does not ‘articulate and defend a moral account from the ground up, untethered to extant law’, but instead aims to build on ‘the existing normative substructure of some of the better-elaborated areas of state responsibility under international law’.<sup>37</sup> This has the advantage of grounding the legal discussions in pre-established rules, but also has the possible disadvantage of being affected by any limitations of these rules.<sup>38</sup>

These four approaches, while possibly leading to different results, are not necessarily incompatible and could even be complementary. Indeed, it is for example perfectly possible to conceive of a normative framework that focuses on victims from a deontological/moral perspective, but then resorts to an economic analysis of law in order to determine the most efficient model for claiming reparations. In the same way, a focus on the moral blame of the perpetrators does not necessarily exclude a resort to economic models or political strategies to identify the distribution of responsibility in order to ensure compliance. It all depends at what stage of the reasoning the different normative frameworks are introduced. In other words, it is not an ‘either/or’ situation, where policymakers would need to adopt a moral philosophy approach, for example, rather than one based on an economic analysis of the law.

This diversity and possible combination of normative preferences is made possible by two interlinked considerations. First, each model, taken in isolation, might not provide concrete solutions for every scenario. For example, the political context of responsibility will not directly help to determine the concrete moral preferences of the political community in question, and nor will a consequentialist/economic analysis of responsibility remove the need to discuss the prioritisation of acceptable consequences within a given social context. Second, this diversity is an unavoidable consequence of the complex and fragmented reality of possible societal objectives of responsibility. Indeed, reflections on responsibility cannot be made in isolation from social realities and existing preferences, which must be accommodated in the discussions. This is of course true in many areas of law. For example, criminal law is generally a combination of deontological considerations (with a focus on intention and blame) and consequentialist aspects (merely thinking

<sup>37</sup> Dannenbaum, ‘Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures’, n. 1, at 193.

<sup>38</sup> Salomon, ‘How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World’, n. 4.

of committing a crime will not carry any criminal responsibility in the absence of any preparatory acts). In international law, comparable combinations often will apply.

With these methodological clarifications in mind, it rapidly emerges that there are a number of cross-cutting themes that inform questions of distribution, and that in varying degrees will be relevant to each of the four methodological approaches.

### 3. Gathering the tools for exploring the map

The chapters, taken as a whole, point to a number of fundamental preliminary questions and choices that influence the distribution of responsibility. Based on existing literature and the contributions to this volume, we identify three such questions, which concern: the structure of collective action (3.1); the objectives of international responsibility (3.2); and the nature of international responsibility (3.3).

#### 3.1 *The structure of collective action*

How responsibility is distributed between multiple actors depends in large part on how one conceives the nature and structure of collective action. The notion of ‘collective action’ is key to shared responsibility; after all, we have defined shared responsibility as a responsibility that is not incurred by the collective, but is distributed among individual ‘members’ of the collective.<sup>39</sup> If the responsibility were to rest on a collectivity, it would no longer be shared, but instead be a responsibility of the collectivity as such.<sup>40</sup> Within the category of shared responsibility, therefore, questions will arise concerning the nature of the relationship between the actors within the collective, and how that affects distribution of responsibility between them.

In situations of collective action, a key question is what type of individual contribution to the eventual harm can serve as a basis for allocation of responsibility. It can be argued that the mere membership of

<sup>39</sup> Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, n. 7, at 368. See also L. May, *Sharing Responsibility* (University of Chicago Press, 1996).

<sup>40</sup> May, *ibid.*, 116. A major reason why in the present state of international relations exclusive collective responsibility in cases of cooperative action is not an attractive option is that the organisational structures remain too weak and the power of states too strong.

a collective may be sufficient to trigger distribution of responsibility to all. Lang recalls how Hannah Arendt argued ‘that simply by living in the current world, one in which we are automatically bound up in a community, we can never avoid responsibility for the actions of our states’.<sup>41</sup> However, all contributors to this volume seem to reject this extreme approach, and seek to identify particular structures and relations in collective action that may serve to identify some, but not all, actors as subjects of responsibility.

The relationship between members of a collective can be construed in different ways. One approach is to disaggregate the collectivity in individual ‘members’, and to see shared responsibility simply as the aggregation of two or more individual responsibilities. Several authors in this volume adopt this perspective. For instance, Hakimi argues that ‘R2P should not posit an all-encompassing duty that falls, at once, on the entire international community. It should instead posit a bundle of more discrete duties, and responsibility for each of these duties should attach to specific outside states at a time’.<sup>42</sup> Pierik notes that the obvious starting point for questions of distribution is an analysis of personal responsibility: ‘the conditions under which an individual human being is held responsible for the outcome of a specific choice, behaviour, or act’.<sup>43</sup> Given that collectivities, short of firmly established institutions, are not moral agents,<sup>44</sup> it follows that responsibility is to be distributed to individual components of collectivities.

Placing the emphasis on individual agents is justified by two considerations. One is that it counters the problem of unattributed obligations, which are likely to remain ineffective precisely because it is not clear who needs to perform an obligation.<sup>45</sup> For Hakimi, the important point is that duties for the benefit of foreign populations ‘are legally operative . . . only when responsibility can be pinned on particular states at a time’.<sup>46</sup> Erskine observes that ‘mistakenly assuming that moral responsibilities can be borne by . . . bodies that do not qualify [as moral agents in world

<sup>41</sup> Lang, ‘Shared Political Responsibility’, n. 33, at 72.

<sup>42</sup> Hakimi, ‘Distributing the Responsibility to Protect’, n. 1, at 266.

<sup>43</sup> Pierik, ‘Shared Responsibility in International Law: A Normative-Philosophical Analysis’, Chapter 2 in this volume, 36, at 39. See also Erskine, ‘“Coalitions of the Willing” and the Shared Responsibility to Protect’, n. 28.

<sup>44</sup> Erskine, *ibid.*, at 228, 229–234.

<sup>45</sup> V. Held, ‘Can a Random Collection of Individuals be Morally Responsible’ (1970) 67(14) JP 471.

<sup>46</sup> Hakimi, ‘Distributing the Responsibility to Protect’, n. 1, at 267.

politics] ... has detrimental consequences. Such missteps hamper attempts to consider, coordinate, and execute remedial action effectively and robustly'.<sup>47</sup> The second justification for focusing on individual actors is based on a moral perspective. It follows the idea that responsibility can only be attributed to agents that can be capable of moral agency and be blamed for their action. Moreover, this is premised on the idea that moral agents can only be responsible for their own specific acts and omissions, not those of someone else.<sup>48</sup>

This disaggregation of responsibility to individual actors is particularly important in situations where there is no concerted action, but rather what we call *cumulative responsibility*.<sup>49</sup> In such cases, we recognise the need for the injured party to be able to claim against several entities. More particularly, in those instances, in the absence of any link between the actions of these entities, there is no need to delve deeper into the nature of the collective action that led to the damage. Examples are cumulative pollution caused by two or more riparian states of an international watercourse, or climate change caused by emissions from several states.

However, shared responsibility cannot always simply be seen as the aggregation of two or more individual responsibilities. Indeed, a defining feature of many situations where issues of shared responsibility arise is that two or more actors stand in some relationship to each other, and the conduct or omission of one influences the conduct or omission of the other(s).<sup>50</sup> This will especially be the case in situations of concerted action. We refer to such instances as *cooperative responsibility*.<sup>51</sup> This covers examples such as coalition warfare, joint patrols to protect borders against immigration, or responsibility that may result from one state aiding another state in committing a wrongful act.

Whereas in the first situation responsibility can more easily be traced to individually operating states, with their conduct being able to be assessed in isolation, in the second situation the structure of the collective action can, and arguably should, influence the distribution of responsibility.

<sup>47</sup> Erskine, 'Coalitions of the Willing' and the Shared Responsibility to Protect', n. 28, at 230.

<sup>48</sup> Ibid., at 229–234; Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', n. 43, at 39–42.

<sup>49</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 368–369.

<sup>50</sup> May, *Sharing Responsibility*, n. 39, at 36–38.

<sup>51</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 368–369.

As Pettit argues, the agency of a collective is actually more than the sum of its members' agency.<sup>52</sup> The collective and the mutual relations within it affect the position of its members. In such cases, disaggregating collective action into individual responsibility is not satisfactory if it ignores the relationship between the various agents.

This volume takes this discussion one step further. A number of chapters provide valuable insights into the structure of collective action and decision-making that is fundamental for assessing the distribution of responsibility of various entities. For instance, Miller presents a relational account of collective moral responsibility as joint responsibility.<sup>53</sup> In his terms, two or more individuals perform a joint action 'if each of them intentionally performs an individual action (or omission), but does so with the (true) belief that in so doing they will jointly realise an end which each of them has'.<sup>54</sup> While collective responsibility is ascribed to individual human beings for their contributory action, 'each is individually responsible for that outcome, *jointly with the others*'.<sup>55</sup>

A comparable point is made by Erskine, who, when analysing 'coalitions of the willing', considers that while the coalition cannot be a moral agent as such, it is important to take into account the relationship between its members in order to determine the scope of individual responsibilities.<sup>56</sup> As a result, she considers that when agents come together to form an ad hoc group, 'the enhanced capacities with which individual agents can be imbued as part of an informal association (existing or potential) lead to *magnified individual responsibilities*'.<sup>57</sup> Thus the structure of the collective directly influences the possibilities and types of distribution between the members of the collective.

However, it may be helpful to differentiate between various forms that the relationship between members of a collective can take. As the international legal order becomes increasingly structured by international

<sup>52</sup> P. Pettit, 'Responsibility Incorporated' (2007) 1 *Ethics* 117.

<sup>53</sup> Miller, 'The Global Financial Crisis and Collective Moral Responsibility', n. 5, at 407–408. See also S. Miller, 'Collective Moral Responsibility: An Individualist Account' (2006) 30 *MSP* 176; S. Miller, 'Joint Action' (1992) 21(3) *PP* 275; and S. Miller, 'Intentions, Ends and Joint Action' (1995) 24(1) *PP* 51.

<sup>54</sup> Miller, 'The Global Financial Crisis and Collective Moral Responsibility', *ibid.*, at 408.

<sup>55</sup> *Ibid.*, at 408 (emphasis in original). See further M.J. Zimmerman, 'Sharing Responsibility' (1985) 22(2) *APQ* 115; S. Miller, 'Collective Responsibility' (2001) 15(1) *PAQ* 65; S. Collins, 'Collectives' Duties and Collectivization Duties' (2013) 91(2) *AJP* 231.

<sup>56</sup> Erskine, "'Coalitions of the Willing' and the Shared Responsibility to Protect', n. 28, at 250–253.

<sup>57</sup> *Ibid.*, at 256 (emphasis in original).

organisations and collective decisions, it is important that conceptual tools be devised to appreciate the corresponding increasingly complex nature of collective endeavours at that level. As explored in this volume, these can vary on a scale from ad hoc ventures to more institutionalised situations. In relation to the first type, Dannenbaum focuses on structures ('joint public enterprises') that are larger than individual states, yet fall short of a collectivity that can be the subject of collective responsibility.<sup>58</sup> For more institutionalised action, Miller emphasises the importance of predetermined rules and mechanisms.<sup>59</sup>

While each of these perspectives differs in terms of the weight they attach to the structure of the collective, and the assessment of the implications for distribution of responsibility, they have in common that the unit of analysis in determinations of responsibility in such cases is not just the individual members of the group, but the relations between members. This provides a critical background that points out the significance and complexity of distribution in situations of concerted action.

### 3.2 *The objectives of international responsibility*

The objectives of responsibility constitute a second tool to explore the map. The basic idea here is that the objectives that one assigns to, or expects from, a system of responsibility will have implications for the choice, and evaluation, of a particular model of distribution. The question of distribution when seen from the perspective of a victim looks different than when seen from the perspective of a perpetrator, or from the interest of cooperation.

A first major division can be drawn between a deontological approach (responsibility based on a duty and the moral blame of the perpetrator) and a consequentialist approach (responsibility based on the assessment of possible outcomes of the violation of the duty).

The deontological approach focuses on the moral agency of the individual agents. As noted by Pierik, this approach 'situates individual responsibility in personal agency and argues that responsibility can only be attributed to agents. Agency refers to the capacity to act deliberately and intentionally'.<sup>60</sup>

<sup>58</sup> Dannenbaum, 'Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures', n. 1.

<sup>59</sup> Miller, 'The Global Financial Crisis and Collective Moral Responsibility', n. 5.

<sup>60</sup> Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', n. 43, at 41.

This approach entails several methodological steps that are relevant to distribution of responsibility. First, as discussed previously, it is necessary to identify relevant agents that might be the bearers of duties. Second, once moral agents have been identified, it is still necessary to identify criteria for the distribution of responsibility between several entities that might be responsible for the harm.<sup>61</sup>

The deontological approach impacts on the question of distribution of responsibility in a number of ways. In particular, it is an invitation to consider the retributive dimension of responsibility in relation to particular wrongdoers. However, one can wonder whether international law is well equipped for this, given the traditional absence of fault in discussions on the secondary rules of international law.<sup>62</sup> While it would seem that the ‘objective responsibility’ approach in international law today, which focuses on the existence of a breach of an international legal obligation *per se*, is compatible with the deontological approach, the irrelevance of fault (in the absence of specific rules to that effect in particular treaties) in the determination of international responsibility could be seen to be at odds with this approach.

Another impact is that a deontological approach leaves open the possibility that no one entity or state is to be blamed for a particular harm. This is seen by some as a major drawback<sup>63</sup> and justifies taking a consequentialist approach, whereby the existence of a harm to be repaired is the starting point, rather than the identification of a morally culpable agent.

Adoption of a consequentialist approach leads to an altogether different set of consequences in terms of distribution. The contributions to this volume identify three main goals that can be construed in consequentialist terms.<sup>64</sup> Each of these, and also the choice between them, has distinct consequences for distribution.

A first objective is to compensate the injured parties. This aim is backward looking, in the sense that it focuses on harm that has already

<sup>61</sup> These possible criteria are discussed in more detail in section 4.

<sup>62</sup> Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, n. 7, at 409, 411. See also E. David, ‘Primary and Secondary Rules’, in J. Crawford, et al. (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 27.

<sup>63</sup> Erskine, ‘“Coalitions of the Willing” and the Shared Responsibility to Protect’, n. 28, at 243–244.

<sup>64</sup> Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, Chapter 5 in this volume, 120, at 121. See for similar distinctions Van Aaken, ‘Shared Responsibility in International Law: A Political Economy Analysis’, n. 14, at 158–161.

occurred. In terms of distribution, two points can be noted. On the one hand, a responsibility regime that aims to secure this function in effects shifts, as Kornhauser notes, the harm ‘from the “victim” to one or more legally responsible agents’.<sup>65</sup> On the other hand, for instance, from a victim’s perspective, joint and several responsibility may be most favourable, since a victim ‘just needs to identify one violator and can pick the one which, first, can be brought before a court, and second, has deep pockets’.<sup>66</sup>

A second aim is to deter states from engaging in harmful actions in the future.<sup>67</sup> This aim is forward looking. If international law is to contribute to this aim, it has to create proper incentives for states.<sup>68</sup> This aim, too, has distinct implications for distribution. For instance, it could be argued that, from this angle, responsibility should be allocated to those actors that matter in terms of power, control, and capacity.<sup>69</sup> Distribution schemes that leave some actors that contribute to harm unaddressed may not be efficient, as these actors may otherwise not have an incentive to take proper care.<sup>70</sup>

A third aim is to secure international cooperation. This is not commonly seen as an independent objective of responsibility, and never seems to have been an aim for the ILC. However, as Van Aaken notes, different forms of responsibility are ‘a crucial variable for understanding why cooperation arises (or not), since it impacts upon the propensity to cooperate in the first place’.<sup>71</sup> For instance, a distribution of responsibility based on independent responsibility ‘would inhibit the propensity of cooperation in the first place, since the pay-off of cooperation would be potentially diminished to a great extent’.<sup>72</sup>

The relationship between objectives of responsibility, on the one hand, and distribution of responsibility, on the other, is made more complex since actors may pursue multiple aims that may conflict with each other. For instance, Kornhauser observes the tension between the social aims of deterrence and compensation: ‘The deterrence objective requires that

<sup>65</sup> Kornhauser, *ibid.*, at 121.

<sup>66</sup> Van Aaken, ‘Shared Responsibility in International Law: A Political Economy Analysis’, n. 14, at 186.

<sup>67</sup> Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, n. 64, at 121–122.

<sup>68</sup> *Ibid.* <sup>69</sup> See section 4.4 entitled ‘The role of power’.

<sup>70</sup> Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, n. 64, at 130–132.

<sup>71</sup> Van Aaken, ‘Shared Responsibility in International Law: A Political Economy Analysis’, n. 14, at 154.

<sup>72</sup> *Ibid.*, at 186.

the agent be able to avoid financial responsibility by taking socially desirable actions but, when the agent escapes financial liability, that liability must fall on the victim or be socialised through an insurance scheme.<sup>73</sup> The way such potential tensions are mitigated or resolved has direct implications for distribution of responsibility.

### 3.3 *The nature of international responsibility*

A third exploration tool of the map is the nature of international responsibility. This is obviously closely linked to the question of the objectives of responsibility, as previously discussed. However, the question of the nature of international responsibility is situated on a meta-level and requires us to reflect on the role of responsibility in relation to the nature of the international legal order.

On this point, the distinction that we drew in previous work between its public order dimension and private dimension is of key relevance to questions of distribution.<sup>74</sup> The private dimension of international responsibility is exemplified in the bilateral structure of many obligations, as well as the bilateral structure of international dispute settlement, which focuses primarily on the interaction between the alleged wrongdoing state and the injured state.<sup>75</sup> However, certain dimensions of international law, such as the development of peremptory norms or the preference for objective responsibility in the ARSIWA, point to a more public dimension. Emphasising one dimension of responsibility over another may have direct implications for questions of distribution.

However, we also argued that it would be too simple to frame international responsibility in either a public or a private, or even in one single *sui generis* paradigm. The unitary approach to international responsibility cannot capture the various aspects of what it means to invoke the responsibility of multiple agents for particular harms, and we proposed a more differentiated approach to shared responsibility.<sup>76</sup>

In this volume, most chapters bring to the fore the public dimension of international responsibility. For example, Dannenbaum focuses on public enterprises; Erskine focuses on coalitions of the willing; and Shue and Kutz on climate change. They highlight, in relation to areas that are

<sup>73</sup> Kornhauser, 'Incentives, Compensation, and Irreparable Harm', n. 64, at 127.

<sup>74</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 398–407.

<sup>75</sup> *Ibid.*, at 432. <sup>76</sup> *Ibid.*, at 415.

generally deemed to be public goods (e.g., prevention of mass atrocities, human rights, and climate change), the need to better accommodate the legal framework with the nature of international obligations. For example, climate change responsibility requires more than a traditional tort-like evaluation of causation, but brings in global historical and moral evaluations.<sup>77</sup> This also shows the limits of traditional models of responsibility, such as the idea of transboundary harm.<sup>78</sup>

This emphasis on the public order dimension of international obligations has implications for distribution of responsibility, should harm occur. It calls attention to the relevant agents who would be responsible for ensuring respect for community values at the international level. This public dimension of certain duties in relation to, for example, the prevention of mass atrocities or the protection of common goods has an uneasy relationship to the absence of a centralised international authority tasked with ensuring their respect. In that regard, the current framework of both particular sets of primary obligations (e.g., the obligation to prevent genocide or the obligation to protect social, economic, and cultural rights) and of international responsibility provides inadequate answers to the question of the exact bearers of collective duties.<sup>79</sup> This significantly complicates the question of distribution of responsibility.<sup>80</sup>

In addition to the suggestion that the United Nations might play this role,<sup>81</sup> various chapters propose solutions. In that respect, the varying nature of obligations, and of related responsibility, is reflected in different proposals: efficient cooperation (Kontorovich);<sup>82</sup> pragmatism (Hakimi

<sup>77</sup> Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', n. 2, at 342.

<sup>78</sup> Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating Responsibility', n. 2.

<sup>79</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 426–427.

<sup>80</sup> A similar unsatisfactory situation exists in relation to the question of who may invoke the responsibility of others in that respect, as the distinction between injured states and non-injured states as embodied in the ARSIWA (Articles 42 and 48 ARSIWA, n. 16). For a critical discussion see also 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: Nijhoff, 2005); Nollkaemper and Jacobs, *ibid.* at 418–420.

<sup>81</sup> Nollkaemper and Jacobs, *ibid.* at 427.

<sup>82</sup> Kontorovich, 'Pirate "Globalisation": Dividing Responsibility Among States, Companies, and Criminals', n. 3.

and Salomon);<sup>83</sup> political cooperation (Cole);<sup>84</sup> or heightened rules of conduct and responsibility (Erskine, Dannenbaum, and to a certain extent, Kutz).<sup>85</sup> All these solutions accept the current structure of the international legal order and suggest ways to address collective aims within it.

The authors can be placed on a sliding scale of adaptation to the public order dimension of international responsibility. At one end of the scale is the breaking down of the common value into somewhat more manageable obligations that can rest on easily identifiable agents. This is the approach adopted by Hakimi and Salomon in relation to R2P and social and economic rights.<sup>86</sup> At the other end of the scale is the idea that certain obligations should rest on a broader category of agents. For example, Miller suggests various levels, both domestic and international, on which regulatory obligations could reside in relation to the financial crisis.<sup>87</sup> Along the same lines, Erskine argues that ultimately all states might have some duty to coalesce to achieve certain outcomes, even if they do not succeed.<sup>88</sup>

#### 4. Criteria for distribution

In a study on distribution of responsibility, the key question is on the basis of what criteria is distribution eventually to be grounded. We have already indicated several grounds, in as much as these were related to the objectives attributed to responsibility or the construction of the nature of responsibility. It is nonetheless useful to expressly identify, briefly, the most important grounds because these, from various methodological angles, will be discussed in this volume.

<sup>83</sup> Hakimi, 'Distributing the Responsibility to Protect', n. 1; Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4.

<sup>84</sup> Cole, 'The Problem of Shared Irresponsibility in International Climate Law', n. 2.

<sup>85</sup> Erskine, "'Coalitions of the Willing' and the Shared Responsibility to Protect', n. 28; Dannenbaum, 'Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures', n. 1; Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', n. 2.

<sup>86</sup> Hakimi, 'Distributing the Responsibility to Protect', n. 1; Salomon, 'How to Keep Promises: Making Sense of the Duty among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4.

<sup>87</sup> Miller, 'The Global Financial Crisis and Collective Moral Responsibility', n. 5.

<sup>88</sup> Erskine, "'Coalitions of the Willing' and the Shared Responsibility to Protect', n. 28.

We emphasise that the contents and nature of such grounds for distribution will be highly context-specific. Grounds that may be relevant in one context may be much less helpful in a different setting. For example, it may be useful to distinguish between causal responsibility, legal responsibility, and financial responsibility for harm.<sup>89</sup> Which of those forms of responsibility matters, and is actually to be distributed, will depend on the context. It also may be useful to distinguish between types of harm that arise in particular issue-areas. Questions of distribution present themselves in quite different forms in situations of divisible harm compared to situations of indivisible harm. In cases of indivisible harm, the question is whether responsibility can really be divided among several tortfeasors. A further distinction can be made between reparable and irreparable harm. For instance, in cases of irreparable harm, the cost for victims cannot be transferred to other actors.<sup>90</sup>

In the subsections that follow, we will move on from such issue-specific factors and identify a number of general grounds that may be relevant for distribution of responsibility and that will be explored in this volume: obligations (4.1); causation (4.2); contributions (4.3); power (4.4); and fairness (4.5).

#### 4.1 *Obligations*

The distribution of responsibility largely depends on the contents of primary obligations. Not all contributions made by members of a collective are legally equally relevant; it all depends on what contributions are proscribed by international law. For example, the question of distribution of responsibility in relation to climate change relies strongly on the question of what international law actually does, or does not, proscribe.

An important example of such obligations and their relevance to questions of distribution, identified in several chapters, are obligations to prevent a particular harm. Obligations to prevent, for instance, exist in relation to mass atrocities. In such cases, the contents and nature of such an obligation may be relevant for identifying which states are obliged to prevent, and possibly also for the distribution of responsibility between

<sup>89</sup> Kornhauser, 'Incentives, Compensation, and Irreparable Harm', n. 64, at 121.

<sup>90</sup> *Ibid.*, at 122.

territorial states and third states.<sup>91</sup> In this respect there is an important relation between questions of jurisdiction and responsibility.<sup>92</sup> In this volume, this connection is particularly explored by Salomon and Hakimi.<sup>93</sup>

In addition to the contents of international obligations, a further relevant factor may be the nature of the relationship (or roles) between actors in a more factual sense, which may inform the application of obligations in a particular case. For instance, in the *Bosnian Genocide* case the ICJ found in the particular relationship between Serbia and Bosnia a ground to attribute responsibility to Serbia<sup>94</sup> which, in all likelihood, it would have not attributed to other states.

However, this volume does not limit itself to exploring obligations under existing international law. For instance, Erskine argues that in assessing the shared responsibility of members of the international community to safeguard a particular population, special responsibilities arguably come into play in arriving at an efficient and just distribution of moral burdens.<sup>95</sup> Such a construction of ‘special responsibilities’ may not immediately inform a distribution as a matter of law, but may inform the negotiation of particular solutions and possibly the development of international law.

#### 4.2 Causation

An obvious factor that is relevant to the distribution of responsibility is the concept of causation. If multiple actors contribute to a harmful outcome, the first question is whether it can be determined who contributed what to the harm. This would allow for a form of proportional (or several) responsibility.<sup>96</sup> Relying on causation is not only instrumental

<sup>91</sup> Hakimi, ‘Distributing the Responsibility to Protect’, n. 1; Dannenbaum, ‘Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures’, n. 1.

<sup>92</sup> M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011), 51.

<sup>93</sup> Hakimi, ‘Distributing the Responsibility to Protect’, n. 1; Salomon, ‘How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World’, n. 4.

<sup>94</sup> *Bosnian Genocide*, n. 20.

<sup>95</sup> Erskine, ‘“Coalitions of the Willing” and the Shared Responsibility to Protect’, n. 28, at 258.

<sup>96</sup> Van Aaken, ‘Shared Responsibility in International Law: A Political Economy Analysis’, n. 14, at 156; Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, n. 64, at 124–139.

in order to achieve a distribution of responsibility, but also rests on moral grounds. As noted by Pierik, ‘we can only reasonably be held responsible for the outcome(s) of our actions and decisions’.<sup>97</sup>

However, causation is not the tool that will fix all questions of distribution. For one thing, the contents of the standard of causation remain unsettled.<sup>98</sup> Courts that opt for one particular approach to causation are invariably subject to critique for choosing that over another method. The approach of the ICJ to causation in the *Bosnian Genocide* case is an example.<sup>99</sup>

Moreover, standards of causation are hardly neutral. Establishing causation is not a purely factual operation. There is a clear normative choice involved in selecting those causes which might entail legal responsibility. This is precisely why, as explained by Kornhauser, the distinction between causal responsibility and legal responsibility is critical.<sup>100</sup> Causal responsibility does not necessarily entail legal responsibility.<sup>101</sup>

There is a more practical limitation to relying on causation as an easy fix to questions of distribution. In many cases, there will be a problem of over-determination.<sup>102</sup> Specifically in the context of collective action, causation may be of limited use, since collective action might create problems in determining the causal link between conduct and consequences of the conduct. This in turn may lead to dilution of responsibility.

This is especially true if structural causes are taken into account. Salomon observes that ‘[i]f we take the case of biofuels: global food prices would not have skyrocketed but for the European Union and United States (US) policies on production.’<sup>103</sup> Likewise, Lang notes that while at one level one can think of corporations as subjects of liability for global

<sup>97</sup> Pierik, ‘Shared Responsibility in International Law: A Normative-Philosophical Analysis’, n. 43, at 39.

<sup>98</sup> Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’, n. 24, at 708.

<sup>99</sup> *Ibid.*

<sup>100</sup> Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, n. 64, at 121.

<sup>101</sup> Pierik, ‘Shared Responsibility in International Law: A Normative-Philosophical Analysis’, n. 43, at 39–40.

<sup>102</sup> J. Schaffer, ‘Overdetermining Causes’ (2003) 114 PS 23; J.G. Stewart, ‘Overdetermined Atrocities’ (2012) NYU Public Law & Legal Theory Research Paper Series, Working Paper No. 12–53, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2152670](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152670) (accessed on 1 December 2014).

<sup>103</sup> M.E. Salomon, ‘Deprivation, Causation and the Law of International Cooperation’, in M. Langford, et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2012), 259, 263–272.

harms, such as climate change, states that create corporations without proper regulation should also be considered as being responsible.<sup>104</sup> Several conditions can thus be identified that are relevant, yet are in themselves insufficient to generate an outcome. Choices thus have to be made on the basis of other criteria. Pierik observes in this context that it will be necessary to 'limit our analysis to those links in the causal chain of events that can be linked to actions and/or decisions that are relevant in any moral or legal sense'.<sup>105</sup>

There are two possible solutions to the difficulty of solving questions of distribution through causation. The first one is to remove any discussion of individual causation altogether, for instance through the application of a version of joint responsibility.<sup>106</sup> If the collective action has led to the damage, then each individual entity becomes individually responsible for the full outcome, irrespective of his or her actual contribution to the harm. The second one is a middle ground whereby the *principle* of responsibility would be determined by participation in the collective endeavour, while the *quantum* of responsibility would be conditional on the actual conduct of the entity. For example, in a North Atlantic Treaty Organization operation decided by the organisation, every state is in principle responsible for the conduct of the organisation, but a state that merely voted for the military action might face less responsibility than a state that actually conducted the operations on the ground. This latter solution, while in theory providing a more subtle approach to the distribution of responsibilities within organisational structures, will raise some practical difficulties.

### 4.3 Contributions

A third category of factors relevant to distribution of responsibility concerns the nature of contributions to a harmful outcome. This is obviously directly related to causation, but the focus here is more on the nature of contributions to harm. Various chapters point to this criterion as a key element in allocating responsibility. For instance, Shue

<sup>104</sup> Lang, 'Shared Political Responsibility', n. 33, at 75.

<sup>105</sup> Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', n. 43, at 40.

<sup>106</sup> Kornhauser, 'Incentives, Compensation, and Irreparable Harm', n. 64, at 132–138; Van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis', n. 14, at 168–170; Pierik, *ibid.*, at 50–52.

points to current emissions per capita of the residents of states as a criterion for distributing responsibility in relation to climate change.<sup>107</sup>

A few dimensions are given special consideration in the chapters in this volume. One consists of so-called structural contributions. For example, Lang observes that while at one level one can think of corporations as subjects of liability for global harms, such as climate change, 'at a deeper level, it is the legal and political order that creates corporations that should also be responsible for the harms they commit. In other words, if states create corporations without regulatory frameworks or limits on their profit making, then the state should be considered somehow responsible'.<sup>108</sup>

In a number of chapters, a separate role is played by historical contributions. Salomon suggests that contemporary obligations could 'be assigned on the basis of historical responsibility for past exploitation'.<sup>109</sup> Likewise, Shue notes that an important factor is a state's percentage of the cumulative carbon emissions to this point.<sup>110</sup> Kutz makes a similar claim, grounding discussions on responsibility on past conduct and history.<sup>111</sup> For him, it is irrelevant whether this past conduct was, at the time, blameworthy or faultless. He considers that '[i]nsofar as this history [whether in relation to slavery or GHG emissions] is ours, so are the traces of responsibility. To be a citizen of a state is to come in a family lineage . . . to be bearer of responsibility for that lineage. We must face the future in the shadow of the collective past.'<sup>112</sup> In other words, he rejects the idea of 'bygones are bygones' as a natural conclusion for past conduct that might have contributed to harm.

This approach has a strong socio-historical grounding in the sense that, as in other examples given previously, it allows for a better understanding of the structural conditions for the occurrence of harm. However, a number of difficulties remain. From a philosophical perspective, it

<sup>107</sup> Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating Responsibility', n. 2, at 330.

<sup>108</sup> Lang, 'Shared Political Responsibility', n. 33, at 75. See also the example, quoted in section 4.2, that Salomon gives of the US and EU policies on production and their effect on global food prices; Salomon, 'Deprivation, Causation and the Law of International Cooperation', n. 103, at 259, 263–272.

<sup>109</sup> Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4, at 375.

<sup>110</sup> Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating Responsibility', n. 2, at 333.

<sup>111</sup> Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', n. 2, at 341–342.

<sup>112</sup> *Ibid.*, at 355.

does not really account for the retroactive attribution of moral culpability. Moreover, the relationship between this claim to a historical moral lineage and its implementation in a legal framework could possibly be problematic, in light of the current principles of international responsibility (such as the existence of an international obligation). More generally, it raises the question of the functions of law, and its possible limits as an adequate social tool in addressing past wrongs.<sup>113</sup>

#### 4.4 *The role of power*

A fourth consideration is the role of power. Eagleton famously claimed that ‘power breeds responsibility’.<sup>114</sup> The phrase is frequently quoted with apparent approval in international legal scholarship.<sup>115</sup> The notion is also framed in other terms but with the same underlying idea, for instance in the argument that responsibility originates in control.<sup>116</sup> There is also a strand of literature that transforms the idea into a normative proposition, for instance to the effect that responsibility should reflect power (or capacity, which is a distinct, but related, concept).<sup>117</sup>

Assigning responsibility to states or other actors on the basis of power makes sense. Power refers to the ability of a state to influence or control other actors, and thereby get another actor to do what it wants, if necessary even against its will.<sup>118</sup> In this sense power is essentially a

<sup>113</sup> For a discussion of this question in the context of the Armenian Genocide, see D. Jacobs ‘Jumping Hurdles Backwards: The Armenian Genocide and the International Criminal Court’ (2014) 14 ICLR 274.

<sup>114</sup> C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), 206. This section is partly based on P.A. Nollkaemper, ‘Power and Responsibility’, SHARES Research Paper 42(2014), ACIL 2014–22, available at [www.sharesproject.nl](http://www.sharesproject.nl).

<sup>115</sup> E.g. E. Paasivirta, ‘Responsibility of a Member State of an International Organization: Where Will It End?’ (2010) 7 IOLR 49, 51; C. Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the “Copy-Paste Approach” –’ (2012) 9 IOLR 53, 63; L. Clarke, ‘Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships’ (2012) 12 Chic JIL 55, 65.

<sup>116</sup> C. Eagleton, ‘International Organization and the Law of Responsibility’ (1950) 76 RCADI 319, at 385–386; W. Friedman, ‘The Growth of State Control over the Individual and Its Effect upon the Rules of International State Responsibility’ (1938) 19 BYIL 118, 149.

<sup>117</sup> J. Pattison, ‘*Jus Post Bellum* and the Responsibility to Rebuild’ (2013) 1 BJPS 20, 22–23; D. Miller, ‘Distributing Responsibilities’ (2001) 9(4) JPP 453.

<sup>118</sup> M. Weber, *Economy and Society* (University of California Press, 1978), 53. See also M.S. McDougal, ‘Law and Power’ (1952) 46 AJIL 102, 107–108; C. Taylor, ‘Foucault on freedom and truth’ (1984) 12 PT 152, 158 (the notion of power or domination ‘requires

relational phenomenon.<sup>119</sup> In the context of responsibility, a state can exercise power in relation to another entity by making it engage in a particular wrongful act. If so, it can be said that it then should be this state that should bear responsibility for the harm, rather than (only) the author of an act. Tracing responsibility to the actor that wields power is also justified on the basis of remedial considerations. If harm is to be prevented, those wielding the power in relation to harmful conduct should be addressed, rather than those that execute commands. Only the former actors can terminate the wrong or ensure that it is not repeated.<sup>120</sup>

The proposition that power breeds responsibility is particularly relevant in situations of shared responsibility. It suggests that power should be a relevant, perhaps even decisive, consideration in allocating responsibility in situations where multiple actors contribute to harm. Conversely, it could be said that if an actor is dominated by another actor, to the extent that its individual space for decision-making or its capacity to act is limited, the basis for assigning responsibility to that actor falls away.<sup>121</sup>

The role of power seems particularly relevant for questions of distribution in two respects. On the one hand, power underlies the very structure of the rules on responsibility that are used to distribute responsibility. Lang argues that ‘power relations . . . exist between individuals that allow some to blame others and, in so doing, reinforce or create anew those roles. Individual persons become blameworthy or praiseworthy because of the roles we create for them’.<sup>122</sup>

some notion of constraint imposed on someone’). Of course, power can be conceptualised in different ways. See e.g., A. Ballesteros, S. Nakhooda, J. Werksman, and K. Hurlburt, ‘Power, responsibility, and accountability: Rethinking the legitimacy of institutions for climate finance’ (2010) 1 *Climate Law* 261, 265 (referring to power as the capacity to determine outcomes).

<sup>119</sup> D.A. Lake, ‘Authority, Coercion and Power in International Relations’, in M. Finnemore and J. Goldstein (eds.), *Back to Basics: State Power in a Contemporary World* (Oxford University Press, 2013); D.A. Baldwin, ‘Power and International Relations’, in W. Carlsnaes, T. Risse, and B.A. Simmons (eds.), *Handbook of International Relations*, 2nd edn (London: Sage, 2013), 273, at 285–286; S. Strange, ‘International Economics and International Relations: A Case of Mutual Neglect’ (1970) 46(2) *IA* 304.

<sup>120</sup> Miller, ‘Distributing Responsibilities’, n. 117; P.J. Kuijper and E. Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart Publishing, 2013), 35.

<sup>121</sup> Pierik, ‘Shared Responsibility in International Law: A Normative-Philosophical Analysis’, n. 43, at 39–42.

<sup>122</sup> Lang, ‘Shared Political Responsibility’, n. 33, at 68.

Several authors in the present volume explore the role of power, or capacity, as a specific ground for distribution of responsibilities. For instance, Salomon observes that '[o]bligations of international cooperation could be determined on the basis of the relative power it wields in international affairs manifested as influence over the direction of international trade, investment, taxation, finance, environmental policy, and development cooperation.'<sup>123</sup>

The concept of power has a number of more specific connotations and manifestations that can serve as grounds for distribution of responsibility. One of these is power as control. Dannenbaum observes that '[e]nterprise wrongs ought to be attributed to the participant states or organisations that hold the levers of control most relevant to preventing the type of wrongdoing in question.'<sup>124</sup>

Another manifestation is capacity. This is particularly relevant from a consequentialist perspective, when the question becomes who is best placed to remedy a particular harmful situation. In this context, Miller calls this 'assigning remedial responsibility according to capacity': 'if we want bad situations put right, we should give the responsibility to those who are best placed to do the remedying'.<sup>125</sup>

'Capacity offers both a specific and a general requirement: specific in that it is one of the bases that points to the requisite international duty-bearers, and general in that it is a prerequisite to discharging any obligation.'<sup>126</sup> As to the former, the Committee on Economic, Social and Cultural Rights (CESCR) has emphasised that particular obligations of international assistance and cooperation are incumbent on those states in 'a position to assist', and thus would indicate that capacity is a basis for assigning obligations.<sup>127</sup>

To what extent capacity serves as a ground in positive international law is controversial. In the *Bosnian Genocide* case, the ICJ referred to

<sup>123</sup> Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4, at 373.

<sup>124</sup> Dannenbaum, 'Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures', n. 1, at 192–193.

<sup>125</sup> Miller, 'Distributing Responsibilities', n. 117, at 460–461, also cited in Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', n. 43, at 49.

<sup>126</sup> Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', n. 4, at 376.

<sup>127</sup> CESCR, General Comment No. 3, 'The Nature of States Parties' Obligations' (Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3), (5th Sess., 1990), UN Doc. E/1991/23 (1991), Annex III, para. 14.

the criterion as a basis for Serbia's responsibility vis-à-vis Bosnia.<sup>128</sup> However, as pointed out by Hakimi, the judgment is not very clear and, moreover, 'grounding responsibility primarily in each state's positive capacity would be misguided. States that are especially capable would repeatedly carry a disproportionate R2P burden, even if their involvement in the situation would lack legitimacy, even if other states are also highly capable (but less so), and even if those other states actually contributed to the problem'.<sup>129</sup>

This last point highlights the biggest limitation to the power-breeds-responsibility-approach: it does not necessarily square well with the idea of moral blame that underlies the deontological approach to responsibility, by sidestepping a discussion of a particular agent's moral autonomy in favour of a factual determination of who could have prevented the harm. In a sense, this approach operates as a subtle translation from a private law dimension of responsibility (who has contributed to the harm) to a more public law dimension of responsibility (who has the power/authority to ensure respect for international legal obligations, i.e., for the maintenance of public order).

#### 4.5 *Fairness*

It is often remarked that questions of distribution are ultimately based on some sense of fairness.<sup>130</sup> This appears in a number of chapters of the volume. For example, in relation to climate change, Shue notes that 'since the cumulative carbon budget is a measure of a good held in common, namely the diminishing capacity to emit carbon without contributing to an intolerably great rise in temperature, the distribution of that increasingly scarce good among states and individuals is inherently a question of fairness, or as lawyers like to say, equity'.<sup>131</sup>

<sup>128</sup> *Bosnian Genocide*, n. 20, at 221, para. 430.

<sup>129</sup> Hakimi, 'Distributing the Responsibility to Protect', n. 1, at 281.

<sup>130</sup> L. Ringuis, A. Torvanger, and A. Underdal, 'Burden Sharing and Fairness Principles in International Climate Policy' (2002) 2 IEA 1; F.L. Tóth (ed.), *Fair Weather: Equity Concerns in Climate Change* (London: Earthscan, 2012); M. Prost and A. Torres Camprubi, 'Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice' (2012) 25(2) LJIL 379.

<sup>131</sup> Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating Responsibility', n. 2, at 332. Other authors who refer to fairness as a basis for distribution include Dannenbaum, 'Public Power and Preventative Responsibility: Attributing the Wrongs of International Joint Ventures', n. 1, at 217, 222; and Kutz, 'Shared Responsibility for Climate Change: From Guilt to Taxes', n. 2, at 357, 362, 364.

This introduction of fairness can play a role on several levels, both *ex ante* in relation to primary rules and *ex post* in relation to secondary rules. Indeed, fairness can underlie the creation of particular obligations, as well as justify the particular distribution of responsibility should harm occur.

However, it would seem that claims to ‘fairness’ as a criterion for distribution have two different types of limitations. On one level, it can be considered that fairness as a concept is an empty shell that will be filled according to the normative preferences of the policy-makers. In this sense, it might not be a criterion for distribution *strictu sensu* and the conclusion of a normative discussion on responsibility, but rather the starting point of the discussion and the underlying reasons why a particular approach is adopted. Put simply, while they might not always use the term explicitly, it is likely that the authors who rely on any of the previously discussed criteria for distribution think it is fair to do so.

On another level, if there is an ambition to identify a substantial notion of fairness as an actual ground for distribution in a particular case, another problem arises: the possible absence of a shared sense of fairness that might be universally applied. As noted by Kutz in this volume, ‘the logic of responsibility presupposes a context of exchange, both social and economic. Doubtless we can have duties of beneficence towards those about whom all we know is that they suffer, but responsibility is a subset of justice, and justice requires relationships. A truly global conception of responsibility requires a global conception of justice’.<sup>132</sup>

## 5. Transition to positive law

Even though this volume discusses the various normative bases mostly from an extra-legal perspective, they are fundamental in understanding and legitimising the future content, development, and application of the international law of responsibility. It can be recalled that while the law of international responsibility as construed by the ILC is generally highly flexible, in many respects it provides little guidance for solving problems of shared responsibility.<sup>133</sup> In that respect, the grounds of distribution articulated in this volume are relevant for providing further guidance for normative development.

<sup>132</sup> Kutz, *ibid.*, at 350–351.

<sup>133</sup> Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, n. 7, at 363.

In connecting the extra-legal perspectives to the construction and development of international law pertaining to distribution, two questions can be distinguished: when such connections should be made, and by whom.

### 5.1 *The moment of distribution*

A key question for connecting the contributions to the volume to international law concerns the moment at which legal decisions on distribution of responsibility are made. A threefold distinction is helpful in this context.<sup>134</sup>

First, choices for a particular distribution can be made *ex ante*, by incorporating a particular distribution in the contents of rights and obligations or, as they are commonly called in international law, ‘primary rules’. While discussions on responsibility often focus on *ex post facto* rules, as Kornhauser observes, such arrangements are only one means of achieving the aims of compensation and deterrence: ‘*Ex ante* regulation through licensing, taxing of inputs, command and control regulations, product standards, and markets in tradable permits, to name a few, are *ex ante* tools that regulate or deter actions that impose risks’.<sup>135</sup> This holds for international law no less than for domestic law.

Indeed, it would seem that particular approaches to distribution can often more easily connect to primary rules, rather than to principles of responsibility. For instance, while the models developed by Kontorovich operate largely within existing law relating to piracy, they also allow him to critique existing law and offer suggestions for reform.<sup>136</sup>

Second, choices can be included in rules on responsibility which are laid down before harm occurs. These are still *ex ante* rules, since they are laid down beforehand, even though they deal with allocation of responsibility once it has occurred. In essence, this is what the ARSIWA and the ARIO accomplish.

In this sense, the articulation of principles of distribution can underlie and induce development of the law of responsibility as developed by the

<sup>134</sup> Comparable distinctions are made in Trachtman, ‘*Ex Ante* and *Ex Post* Allocation of International Legal Responsibility’, n. 31; Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, n. 64; and Cole, ‘The Problem of Shared Irresponsibility in International Climate Law’, n. 2.

<sup>135</sup> Kornhauser, *ibid.*, at 121.

<sup>136</sup> Kontorovich, ‘Pirate “Globalisation”: Dividing Responsibility Among States, Companies, and Criminals’, n. 3.

ILC, or within specific regimes. Although the prospects for an overhaul of the general law of international responsibility are limited, it cannot be excluded that particular principles, for instance pertaining to reparation in cases of shared responsibility, will be further developed in (judicial) practice, and that for that purpose extra-legal considerations will be of influence. More relevant is the possibility that in particular regimes, for instance relating to environmental protection or military operations, responsibility rules are designed that supplement the ILC Articles.

Third, a distributional arrangement can be determined after harm is caused. This also may be required when the grounds for determination of responsibility (as laid down *ex ante*) are flexible and/or provide limited guidance. The parties themselves, or third-party decision-makers, then need to make decisions on distribution after the harm has occurred.

The choice between the models depends on a variety of considerations. One set of considerations is the objectives and nature of responsibility. For instance, the first model may provide more guarantees that states will actually perform their obligations, a point made by Hakimi in relation to the Responsibility to Protect, and Salomon in relation to socio-economic rights.<sup>137</sup> Likewise, several contributions from a law and economics perspective emphasise that there will be differences between the three ‘moments of distribution’ in terms of the incentives they provide.<sup>138</sup>

Another consideration is whether particular legal relations are embedded in a strong institutional setting. As observed by Kornhauser, primary rules ‘typically require a strong institutional basis for their successful creation and implementation’.<sup>139</sup> Likewise, *ex post* arrangement will depend even more strongly on institutional arrangements for adjudication or dispute settlement.

It should be observed, however, that there can be a close interaction between the three stages. The models are not exclusive and can fulfil comparable purposes. For instance, similar results may be achieved by *ex*

<sup>137</sup> Hakimi, ‘Distributing the Responsibility to Protect’, n. 1; Salomon, ‘How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World’, n. 4.

<sup>138</sup> Trachtman, ‘*Ex Ante* and *Ex Post* Allocation of International Legal Responsibility’, n. 31.

<sup>139</sup> Kornhauser, *ibid.*, at 122.

*ante* due diligence standards and by *ex post facto* responsibility rules.<sup>140</sup> Moreover, we can think of the models as a cycle in which one influences the other. Following Arendt, Lang points out that responsibility ‘is not simply a legalistic move toward punishment, but is a political move toward alternative forms of action that might generate new structures and institutions’.<sup>141</sup> Thus, through primary rules, new forms of distribution can be established.

## 5.2 *The distributing actors*

Thought must also be given to the actors that would carry out any possible reform or evolution of the legal framework on the distribution of shared responsibility in international law.

On a general level, as noted previously, the principles of distribution can inform decision-makers in concrete cases. They underlie policy choices that have to be made in light of the social, political, moral, and legal preferences of the policy-makers and decision-makers.

How relevant such considerations are may obviously differ between different situations, depending on one’s assessment of the proper roles of actors. For instance, while there is not much doubt that as the primary legislators of the international legal order, states are free to consider a wide range of policy interests, the question is whether it is for courts and tribunals to make decisions on distributions based on criteria such as power or fairness, when these are not articulated in the law itself. The response to that question will depend on one’s position on the scope of the judicial function, and cannot be addressed here.<sup>142</sup>

The evolution of the law of international responsibility therefore depends on a combination of factors and a meeting of minds between

<sup>140</sup> Ibid., at 120–122; Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, n. 7, at 408.

<sup>141</sup> Lang, ‘Shared Political Responsibility’, n. 33, at 75; H. Arendt, ‘Collective Responsibility’, in H. Arendt, *Responsibility and Judgment* (edited and with an introduction by J. Kohn) (New York: Schocken Books, 2003), 147.

<sup>142</sup> In relation to the role of judges, it should also be noted that principles of distribution can be relevant as a means of interpretation. For instance, Shue observes that: ‘The interpretation of international law should rest on a policy adopted toward acceptable risks of damage, especially severe damage to the defenceless’. Shue, ‘Transboundary Damage in Climate Change: Criteria for Allocating Responsibility’, n. 2, at 322–323.

those who reflect on the law in an academic and theoretical setting and those who are called upon to amend and implement it.

## 6. Structure of the volume

As indicated in section 2, this volume contains a wide variety of different approaches on the question of distribution of responsibilities. However, the volume is not organised on the basis of these different methodological approaches. This is due to the fact that some chapters reflect a mix of approaches. Moreover, various chapters relate to specific substantive issues (such as climate change) and the contrast of particular approaches on similar substantive issues can enhance our understanding of their respective merit.

As a result, the volume is roughly set out in two parts. The first part (Chapters 1–7) consists of more general discussions of questions of distribution, from a variety of angles. The second part (Chapters 8–15) consists of chapters that are more in the nature of applications of methodological approaches to particular subject areas. However, as noted, the division is not strict, and some of the latter set of chapters contain articulations of principles of distribution that are of more general relevance, just as some of the former set of chapters can inform the discussion on particular areas.

In combination, these chapters provide a broad spectrum of discussions that, together with this introduction, enhances our knowledge of the different approaches to distribution of responsibilities in situations of shared responsibility. In this sense, this volume continues to drive forward the intellectual ambition of the whole project as laid down in the initial conceptual framework: to bring together seemingly fragmented discourses from various disciplines through which an intellectual cross-fertilisation could lead to a better understanding of the dynamics of shared responsibility in international law.<sup>143</sup>

<sup>143</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 438.