UvA-DARE (Digital Academic Repository)

Do nation states share a responsibility to secure the necessary conditions for a dignified existence?

Pierik, R.

DOI

[10.5771/9783845299297-71](https://doi.org/10.5771/9783845299297-71)

Publication date

2019

Document Version

Final published version

Published in

The Human Right to a Dignified Existence in an International Context

License

Article 25fa Dutch Copyright Act

[Link to publication](#)

Citation for published version (APA):

Pierik, R. (2019). Do nation states share a responsibility to secure the necessary conditions for a dignified existence? In L. Gunnarsson, U. Mürbe, & N. Weiß (Eds.), *The Human Right to a Dignified Existence in an International Context: Legal and Philosophical Perspectives* (pp. 71-93). (Schriften des MenschenRechtsZentrums der Universität Potsdam; Vol. 46). Nomos. <https://doi.org/10.5771/9783845299297-71>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)

Do nation states share a responsibility to secure the necessary conditions for a dignified existence?

Roland Pierik

This chapter analyses the question whether nation states have a shared responsibility in international law to secure the necessary conditions for a dignified existence of all human beings. Even though the concept of responsibility is well established in international law, it is primarily discussed in the context of independent state responsibility. But the question is whether international law can also make sense of the concept of *shared responsibility* of multiple states for their contribution to a single harmful outcome. This idea of shared responsibility has become increasingly important in our era of globalisation and increased collaboration between states. Current international law has a hard time keeping up with this reality, since it strongly holds on to the fiction of exclusive attribution of responsibility to one single state, which is ‘the historical fruit of a primitive and horizontal conception of the international legal order’ (Nollkaemper & Jacobs, 2013, p. 436). In reality, states increasingly engage in cooperative action, while the prevailing system of international responsibility suffers from a lack of clarity as to whether and when responsibility can in fact be shared, or what consequences would arise from sharing responsibility. The first part of the chapter (sect. 1-3) answers the question how we can understand the concept of shared responsibility in international law. My argument quite explicitly taps into the deontological literature in legal and political philosophy on the relation between agency and responsibility.¹

The second part (sect. 4-6) investigates whether multiple states can have a shared responsibility in international law for securing the necessary conditions for people to have their human right to live a dignified life ensured. Can we hold affluent societies responsible when they have set up a global structure of interstate cooperation that violates human rights of the global poor? As such, the chapter investigates whether the more philosophical arguments on the human right to a dignified existence as developed in this book can be translated into the legal realm.

¹ For recent philosophical work on collective responsibility see: (Erskine, 2003; Isaacs, 2011; List & Pettit, 2011; Miller, 2007; Pettit, 2007).

1. Understanding 'responsibility' – causality and agency²

This first part presents a general normative-philosophical and legal conceptualization of responsibility. Under what conditions can an actor reasonably be held responsible for a specific harmful outcome? The most obvious starting point 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. This concept is one of the cornerstones in law and legal philosophy. Within domestic law the attribution of individual responsibility for an act is essential in ascribing guilt (criminal law) or liability (the law of tort). Within liberal political philosophy, individual responsibility guides the central distinction between outcomes resulting from choices and outcomes generated by unchosen endowments.

The fact *that* persons can be held responsible is widely acknowledged in legal and political philosophy, as much as it is acknowledged that not *every* person can be held responsible for *every* outcome. This generates three questions: what is so special about persons that they can be held responsible for a certain outcome, unlike for example non-human animals? Secondly, what are the conditions under which persons should be relieved of this responsibility? Finally, for what outcomes can persons be held responsible?

A first intuition links responsibility to causality: we can only reasonably be held responsible for the outcome(s) of our actions and decisions, and not for outcomes outside our control. And indeed, causality plays a central role in discussions on responsibility, but we should not presuppose a one-to-one relationship between the two (Miller, 2001, p. 453). The reason is that the notion of causality is not well geared to the problem at hand. Causal responsibility is being invoked when we want to provide a factual description of *why* something occurred: for example, a forest fire. There will be many conditions that have causally contributed to the fire: me clumsily lighting a match; the poor quality of the match which caused it to break during the action of striking it; the extreme dryness of the forest due to a drought; the recent cutback in government expenditures on emergency services that prevented the fire brigade from arriving in time; and so on and so forth. Given this large set of necessary but insufficient conditions for the outcome, it is impossible to single out one of them as the decisive cause of the fire. After all, each of these conditions alone would be insufficient to generate the outcome – for example, my clumsiness would have

2 Section 1-3 of this chapter builds upon (Pierik, 2008, 2015).

been harmless if the forest was sodden after a downpour. Moreover, our analysis in terms of causal factors does not distinguish between those causes that are within and those outside human control.

For our discussion of responsibility, we should 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. Thus, my clumsy behaviour should be taken into consideration; however, the extreme dryness of the forest is to be neglected, since a forest cannot reasonably be held responsible or liable in any meaningful sense. So outcome responsibility assumes a causal component – the actor must be connected to the outcome in one way or another. On the other hand, causal responsibility does not automatically lead to outcome responsibility. Consider a market setting in which my restaurant has lost its clientele because you opened a restaurant across the street and your food is superior to mine. Although there is a causal relation between your action and my bankruptcy, your behaviour is not unjustified – competition on the basis of quality of products is perfectly legitimate in a market economy. Therefore there is no reasonable argument as to why you should be criminally prosecuted or should pay reparations (Miller, 2001, p. 458). This implies that our analysis of outcome responsibility should distinguish between behaviour that is appropriate, inappropriate, or forbidden in a specific situation. Thus, the case in which your skill as a cook pushed me out of the market is different from the case in which your connections to the mafia caused my bankruptcy.

This brings us to the second element: under what conditions should actors be held responsible for a certain outcome, and when should they be relieved of this responsibility?

In this second step I tap into the deontological tradition that situates individual responsibility in personal agency and argues that responsibility can only be attributed to ‘agents.’³ Agency refers to the capacity to act de-

3 This analysis of collective responsibility in terms of outcome responsibility, embedded in ideas of causal connection and agency, fits neatly into a deontological ethics. However, we can also encounter a more consequentialist justification for collective responsibility (Pierik, 2015, pp. 56-58). It focuses less on the perpetrators – i.e. who was responsible for bringing about this bad situation – but primarily on the best way to help the victims. Miller (2001, pp. 460-461) 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.” In this chapter I will ignore this strand of thought and only focus on deontological defences.

liberately and intentionally and is usually contrasted with natural forces, which are causes that involve merely deterministic processes.

The question, then, is: to what does the term 'acting intentionally' refer?

The discussion of agency is a philosophical minefield, in which one has to navigate the narrow path between free will and determinism. It is not necessary for this discussion to provide a comprehensive philosophic account of what agency consists of. I will confine myself to a description of personal agency in terms of three central conditions. Firstly, when a person is faced with a choice, he or she should have an understanding of the situation in which he or she finds him or herself, the courses of action available, and their possible consequences. Secondly, he or she should be able to deliberate over these issues and choose the most preferred course of action. Third and finally, agency implies the ability *to act* upon deliberation; he or she should be able to act in such a way that the most preferred course of action is performed. These conditions can help us in our conceptualisation of agency that can be employed in our discussion of shared responsibility in the next sections.

Responsibility stems from agency because responsibility presupposes the capacity of an actor to act intentionally. Agents cannot escape responsibility when they failed to anticipate the results of their actions through negligence or ignorance. Temporary drunkenness or inborn clumsiness do not relieve an agent from responsibility, since a responsible agent should be able to foresee the possible outcomes of his or her temporary or permanent incapacity. Moreover, agency does not presuppose extensive deliberation over each and every decision; many choices can be made without much thought and consideration. Agency implies only the *ability* to deliberate if the situation so demands. Finally, agency does not presuppose full knowledge of all possible courses of action and all their possible (side) effects. We hold people responsible for the consequences of their actions that a reasonable person would have foreseen, whether or not these consequences were intended, and whether or not they were actually foreseen by the person in question (Miller, 2007, p. 116). Imagine someone throwing a hand grenade into an open window, causing the death of a child (Held, 1991, pp. 90-91). Although he or she might not have been able to foresee this particular outcome, he or she still can be held responsible for it. After all, he or she could have been aware of the possible risks involved in this action. On the other hand, if he or she flips on a light switch that turns out to be booby-trapped – of which he or she could have no knowledge – thereby causing the death of a child, then he or she cannot reasonably be held responsible.

In conclusion: personal responsibility presupposes two things: first, a certain causal connection between the person and the outcome; and second, the capacity for intentional action on the side of the person. At the end of the day, attributing personal responsibility is not a mechanical process but a normative activity, taking 'normal powers of agents' as the norm in judging whether a particular agent should have been able to foresee the outcomes of his or her action. This is why we generally ascribe responsibility to persons above the age of reason, but not to young children and non-human animals, because they are not able to foresee and understand the consequences of their actions.

2. Collective responsibility

This section translates arguments about the responsibility of a *natural person* to arguments about the responsibility of a *legal person* consisting of a collective of natural persons. The preceding section presented personal responsibility, typically defended as stemming from individual agency. If we have a widely accepted idea of individual responsibility, why do we also need to conceptualise the responsibility of collectives of people? At the end of the day, collective outcomes are the aggregated result of individual actions of the members of the collective. Joining a collective does not change agents acting intentionally into mechanically operating zombies. So one could ask how collectives can have responsibilities that do not boil down, without residue, into responsibilities of individuals that constitute that collective. One important reason to include collective responsibility in our normative repertoire is to analyse cases where the application of individual responsibility does not suffice. Consider the following examples.

Example I:

On 6 March 1987 a ferry, the Herald of Free Enterprise, capsized when it left the Zeebrugge harbour with its bow doors still open, killing nearly two hundred people. Not a single staff member of Townsend Thoresen, the company that operated the ferry, was penalised in court because it was impossible to identify individual persons who were seriously enough at fault. At the same time an official inquiry concluded that 'all concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate

*was infected with the disease of sloppiness.*⁴ Eric Colvin concluded that ‘ultimately (...) it was the primary requirement of finding an individual who was liable that stood in the way of attaching any significance to the organizational sloppiness that had been found by the official inquiry’ (Colvin, 1995, p. 18). Given the fact that the cause of the disaster was primarily located within the organisational structure of the company, rather than individual acts of employees, it seems more plausible to hold the company, as a collective, responsible for the negative outcome.

Example II:

*Imagine seven non-acquainted passengers sitting in a subway car.*⁵ The second smallest person stands up, pushes the smallest to the floor, and starts beating and strangling him. If the remaining five passengers do nothing, the attacker will certainly seriously wound the victim. Although none of the passengers acting alone can stop the attacker, it is extremely plausible that jointly they can save the victim with no serious injury to themselves. Moreover, the group is small enough so that collective action will not result in confusion. Do the remaining five passengers have a joint responsibility for the outcome if they do not interfere?

The difference between these two examples indicates two things. Firstly, we should distinguish between two forms of collective responsibility: ‘corporate responsibility’ and ‘shared responsibility’.

The first example illustrates *corporate responsibility* that befalls the collective *as a* collective, without descending directly to the actors that make up the collective. The collective is considered to be a self-standing actor, organised through a clear set of internal regulations, functioning as a separate legal entity, and holding private funds separated from the funds of its members. The more these processes of deliberation, decision-making, and action-taking have become institutionalised routines within the collective, the easier it is to mimic the performance of a single unified agent. This makes the concept of corporate responsibility comprehensible: institutionalised routines and procedures within a collective mimic decision-making processes in the case of individual agents.

The subway car example illustrates *shared responsibility* of two or more actors for their contribution to a particular outcome that descends to the members separately, rather than resting on them as a collective. It applies

4 The *Sheen Report* as discussed in Colvin (1995, p. 16); See also Pettit (2007, p. 171).

5 Example taken from Held (1991, pp. 94-96).

in cases where the actors collaborate in one specific domain, but remain distinct and distinguishable actors in most other domains. In such *ad hoc* situations, with no time for explicit deliberation, shared responsibility for negative outcomes descends to individual members under two conditions: first, where it is obvious to ‘normal persons’ *that* collective action is required in this situation; and second, where it is obvious *what* collective action is required.

The second distinction between the examples is that they refer to two different kinds of responsibilities: the responsibility for the negative outcome of one’s own actions, and the responsibility for failing to prevent others from doing harm. Ascribing responsibility proceeds in two steps: first, under what conditions can an actor be held responsible for certain outcomes; and second, what are the consequences that follow from this responsibility? Although both Townsend Thoresen and the five non-aggressive subway passengers can be held responsible for the specific outcome, the consequences of that responsibility will be quite different in both cases. After all, operating the vessel was the primary business for Townsend Thoresen, and the dire outcome was the direct result of the poor and faulty way this task was organised. As such the corporation’s behaviour was clearly inappropriate, given its responsibility towards the passengers on board. The corporation should therefore bear the full consequences of the outcome, both in terms of reparations and criminal repercussions.

In the subway example, the five passengers did not choose to get involved in the fight; they were forced by the situation in which they found themselves, initiated by the action of the aggressive seventh passenger. They are only indirectly responsible for the outcome: they did not act wrongly, but merely failed to intervene in another’s wrong actions.

They can only be prosecuted criminally for their failure to intervene, not for the outcome as a whole. In a criminal case, this implies that the consequences in terms of punishment should be less severe.

This distinction can be understood in terms of agency, as discussed earlier. Only the attacker deliberately intended the specific negative outcome and should have the primary responsibility for it. The other passengers neither initiated nor intended the fight. Helping the victim was the appropriate thing to do, but given the fact that they did not choose to get involved, and therefore were forced into the situation, their responsibility for the outcome is limited (Scheffler, 2004). In other words, the specific context in which a particular responsibility originates determines the consequences stemming from this responsibility: the criminal consequences for the five subway car passengers – had they not intervened – should be far less severe than the consequences for the attacker.

Assigning collective responsibility implies that a collective of persons is held jointly responsible for a certain outcome. The advantage of such an approach is that the victims are relieved of the duty to investigate how the responsibility is distributed within the collective. At the same time, the concept of shared responsibility may set liberal alarm bells ringing because it 'goes against an intuition that it is only what a person does herself that can make her responsible for harmful outcomes' (Miller, 2007, p. 120). Under what conditions should individual responsibility for an outcome be replaced by collective responsibility? Determining whether responsibility should be ascribed to individuals or collectives implies steering a delicate middle course whereby two types of mistakes need to be avoided. I conceptualise them as follows.

- **Type-1 mistakes** are made by persistently sticking to individual responsibility and denying the normative relevance of collective responsibility. This prevents us from ascribing remedial responsibility to a collective of perpetrators when it is impossible to determine how each participant contributed to the final outcome, leaving the victims uncompensated. Type-1 mistakes undermine a fair distribution of burdens and benefits between the perpetrators and the victims of acts. The inability of the British courts to hold Townsend Thoresen legally responsible for the negative outcome in the ferry disaster is an example of a type-1 mistake.
- **Type-2 mistakes** occur by too readily embracing the notion of collective responsibility by too loosely including innocent bystanders as members of the responsible collective, or by too easily making group membership sufficient for responsibility for acts performed by some, even if the other members clearly demonstrated their opposition to these acts. Non-perpetrators are wrongfully included in the shared responsibility *and* the duty to pay an equal share of the expenses. In short, type-2 mistakes undermine a fair distribution of burdens and benefits between different members of the collective.

In section 1, I argued that personal agency is generally considered to be a prerequisite for personal responsibility. A collective can, in a similar way, be held responsible when it can be considered to be an agent, that is, when participants in their cooperation 'mimic the performance of a single unified agent' (Pettit, 2007, p. 179). Personal agency presupposes an understanding of one's situation, the ability to deliberate over possible courses of action and their consequences, and the ability to act in such a way that the most preferred course of action is carried out. How can the conditions for personal agency be translated into conditions for collective agency? Firstly,

collectives must have the ability to make decisions as if they were a single agent *and* the ability to take action in a concerted fashion. Secondly, the responsibility should properly be attributed to the relevant agent, either to the collective as a whole – corporate responsibility – or to a set of actors that constitute the collective – shared responsibility.

Let me employ these rules to discuss whether the collectives as described in the two examples above could be held collectively responsible. Concerning the example of the *Herald of Free Enterprise*, Townsend Thoresen should have been ascribed corporate responsibility to compensate for the negative outcomes of the ferry disaster, because the corporation can be considered to be an agent. After all, corporations can be organised so that they ‘operate through their members in such a way that they simulate the performance of individual agents’ (Pettit, 2007, p.172). Corporations usually have institutionalised decision-making procedures that enable collective deliberation and concerted action. It is very possible to achieve a well-defined and agreed-upon division of labour within the collective, in which employees do their part and can assume that others will do theirs (Pettit, 2007, p. 179). Moreover, firms usually have procedures for deciding which goals are desirable, how these goals should be achieved, what means should be used, and how these goals and means must be revised in light of new circumstances. A well-run corporation complies with the conditions of collective agency and responsibility: it functions as a unified actor, and holds private funds, separated from the funds of its members. Since the responsibility does not descend to the separate actors that make up the collective, the demand that it should be clear as to who is included and who is excluded is not as relevant as in the case of shared responsibility.

Concerning the second example, it is justifiable to ascribe responsibility to the five subway car passengers for the negative outcome if they failed to help the victim under two conditions: first, where it is obvious to ‘normal persons’ *that* collective action is required in this situation; and second, where it is obvious to ‘normal persons’ *what* collective action is required in order to prevent the negative outcome. We expect them to cooperate to prevent an outcome – that is, to act as a collective agent – when collective action is necessary and possible, and we hold them responsible if they fail to do so (Held, 1991, p. 95). Although they entered the subway car as strangers, the situation in which they found themselves forced them to become an *ad hoc* collective and to cooperate in such a way as to prevent the unwanted outcome. Held’s example is set up in such a way that collectives can be held responsible if they refuse to cooperate to prevent certain outcomes. This shared responsibility of the random collection of subway passengers is established in terms of shared agency. We can only ascribe shared

responsibility when the collective is able to function as a unified actor, and when the participants can participate in some way in collective processes of deliberation and decision-making. In the case of corporate responsibility, such processes are comprehensive, extensive, and institutionalised. In other situations, these processes are swift, *ad hoc*, and implicit, for example when a group of subway passengers collectively subdues an attacker. This implies that even in the case of loose or temporary collectives, or in one-time-only events, shared responsibility can be ascribed if we can reasonably assume that the collective was able to collaborate in such a way that its members acted as a unified agent, even if only for a short period of time. On the other hand, if the circumstances were such that it was impossible for the members to coordinate their activities in such a way as to act as an agent – because the task was too complex; because there was too little time; or because the conditions were too hectic – ascribing shared responsibility is unwarranted because it would imply making a type-2 mistake. They cannot be held collectively responsible if it was impossible for ‘normal persons’ to act collectively in such a way that the outcome could have been prevented. They can only be held jointly responsible if they had the possibility to act as a collective agent to help the victim, but refused to do so.

In cases of sustainable and long-term cooperation between actors, shared responsibility can and should descend to individual actors when first, it is clear who is included in, and excluded from, the collective; second, when those included can participate in the collective decision-making in one way or another; and third, when those who disagree with the shared goals have an exit option. The members of the collective do not have to discuss or agree on everything, but they should at least agree upon the procedures of deliberation, and each member should be able to voice their disagreement.⁶ This guarantees that all members of the collective can influence the collective outcome if they feel the need to do so, and thus can share responsibility for it.

In conclusion: in this section I have developed a philosophical argument for determining outcome responsibility, and determining under what conditions an actor – an individual person or a collective of persons – can be held responsible for certain outcomes. I concluded that outcome responsibility presupposes a certain causal relation between the action of the person and is couched in agency: collective responsibility can be ascribed

⁶ This situation seems to be analogous to a case of personal agency in which someone is responsible for the outcome of a decision, although he or she was not fully convinced that it was the right decision.

when the members of a collective are in a situation in which they can deliberate, decide, and act as a unified agent. Collective responsibility can befall the collective as a whole – corporate responsibility – or it can descend to the members separately – shared responsibility.

3. Responsibility: from philosophy to international law

The normative-philosophical arguments discussed above primarily address issues of *moral* responsibility, which do not necessarily dovetail with legal responsibility, the latter being the subject of discussions of joint responsibility in domestic or international law. The currency of moral responsibility is blame or praise; the currency of legal responsibility is liability or guilt.

Legal responsibility flows from a legal system, and legal systems ‘recognize, create, vary and enforce obligations’ (Green, 2012). Within liberal-democratic states, one would expect a substantial overlap between prevailing moral convictions on outcome responsibility and the way these convictions are enshrined in law. Indeed, such normative-philosophical arguments are usually employed to inform, defend, or criticise actual legislation. As such, within domestic law, the philosophical debate defending moral responsibility can be considered to be a stepping-stone for legal arguments defending legal responsibility. How can the arguments of moral responsibility be translated into the context of a well-organised legal order – for example within a liberal-democratic state?

The legal ascription of (shared) responsibility proceeds in two steps: first, under what conditions can an actor be held legally responsible for certain outcomes? Second, what are the legal consequences that follow from this responsibility?

In domestic law, responses by the competent authority typically fall into two categories, a distinction that coincides with the separation between private and public law. The outcome may be material or non-material damage to third parties, which generates tort law cases in private law courts. Alternatively, the outcome might be the result of acts that undermine the legal order itself: cases that are handled through public (criminal) law. We can reconstruct the process of ascribing shared responsibility in domestic legal orders in a number of steps.

First, the competent authority should determine whether it is possible to unpack the cooperative action by the actors into independent actions, which would enable the authority to analyse the case in terms of independent responsibility. After all, individual responsibility seems to be the more straightforward option conceptually, and collective responsibility is

merely a second-best option, only to be employed when it is impossible to ascribe independent responsibility.

Second, if the cooperative action cannot be unpacked into independent actions, the competent authority should determine whether the collective could be considered to be a collective *agent*, which is a necessary prerequisite for holding the collective as such responsible for the outcome. In situations in which such collective agency can be established, the competent authority should determine whether it is a case of corporate responsibility or shared responsibility.

Third, an important consequence of ascribing collective – either corporate or shared – responsibility is that the claimant is relieved of the duty to investigate how the responsibility is distributed within the collective; the collective *as such* will be confronted with the legal consequences. Furthermore, by making it a collective responsibility, within a private law case, the burden of proof concerning this distribution of liability within the collective has moved from the victim to the perpetrators. Within a criminal law case, it enables the prosecutor to prosecute a collective, and even to ascribe shared responsibility in cases where the collective is not a legal entity.

Fourth, in the case of corporate responsibility, the legal consequences rest on the collective as such. In the example of the *Herald of Free Enterprise*, Townsend Thoresen was a legal entity with its own funds from which damages after a tort action could be paid. Concerning criminal prosecution, it is highly conceivable that persons in certain offices within the collective – those who were directly involved in this departure from Zeebrugge, those responsible for the security procedures within the company, or the highest ranking officials – could also be prosecuted personally.

Fifth, in the case of shared responsibility, the legal consequences descend to the individual members, and this can happen in several ways. Dominant in domestic tort law is the model of *joint and several* liability: the victim can recover the full amount of reparations from one of the responsible actors, who can in turn demand compensation from the other responsible actor(s) that may have contributed to the damage (Nollkaemper & Jacobs, 2013, p. 422). Another model requires that the perpetrators have a shared responsibility to pay damages. Given the shared nature of the responsibility, the default position is that all bear an equal share of that responsibility, thus disregarding the possible differences between each individual's contribution to the net outcome. Judges (or perpetrators amongst themselves) might make more finely-tuned allocations of responsibility, depending on what is known about the responsibilities, capacities, or activities of each member. Consider the example of a raging mob rampaging through a neighbourhood. If the members are held jointly responsible for the out-

come, some could be identified as ringleaders, and therefore be considered to be more liable than others (Miller, 2007, pp. 116-117). In the case of the subway car incident, a healthy young person could be held more responsible for the outcome than an elderly person with a walker. Distributing responsibility over the various participants cannot be done mechanically; it is a normative choice, based on the (inherently inconclusive) information available. Indeed, such an allocation of the burden over the various perpetrators can never be a perfect reflection of their individual contribution to the collective outcome. After all, the reason why shared responsibility was invoked was precisely because the plurality of contributions and their interrelationships implies that it is very difficult, if not impossible, to disentangle the individual contributions to the outcome.

The arguments presented above not only support ascribing collective responsibility to actors for the negative outcomes of their own decisions and actions, but also for their failure to intervene in another's wrong actions, when the situation so demands and when they are able to do so. However, such a duty to assist persons in danger is more generally acknowledged in civil law countries – see, for example, Article 450 of the Dutch Penal Code – than in common law countries. This also illustrates that even though this chapter has demonstrated that there are good arguments for assigning shared responsibility, this does not always translate into legal obligations.

This enables us to make the last step: from domestic to international law. Let me sum up the argument so far. I have provided a reconstruction of discussions of agency and personal responsibility, explained under which circumstances these arguments can also apply to collective actors, and described how collective responsibility can be employed in domestic law. The question, now, is how the argument can be translated into yet another context: collaborating states in international law. States and international organisations increasingly engage in cooperative action, while the prevailing system of international responsibility suffers from a lack of clarity as to whether and when responsibility can in fact be shared, or what consequences would arise from sharing responsibility (Nollkaemper & Jacobs, 2013, p. 363). There is an increasing need for more detailed and nuanced rules governing the allocation of responsibility among states. Such a regime to regulate shared responsibility of states and/or international organisations could serve the interests of injured parties, who otherwise may have difficulty identifying the responsible entities and the scope of their responsibility – as discussed in section 3.1 in terms of type-1 mistakes. On the other hand, such a regulatory scheme might serve the interests of states by providing some predictability as to how their responsibility may be dis-

tributed among various states and attributed to them – as discussed in terms of type-2 mistakes (Nollkaemper & Jacobs, 2013, p. 391).

Characteristic of philosophical discussions of collective responsibility is that they focus on collectives of natural persons and argue that a plausible story can be told whereby these collectives can, under specific conditions, be responsibility-bearing agents, over and above their individual members. The discussion of collective responsibility in international law moves one step further away from the individual person: it asks under what conditions collectives of collectives – cooperating states – can be held jointly responsible for certain outcomes. However, adding another ‘degree of separation’ between the natural persons and the collective does not seem to preclude the possibility of ascribing shared responsibility to cooperating states in the international legal order.

After all, the agency of the collective is not derived directly from the agency of their constitutive persons. Instead, an analogy argument is employed: collectives are supposed to be responsibility-bearing agents in as much as they operate in such a way that they simulate the performance of individual agents (Pettit, 2007, p. 172).

4. *Human Dignity, Human Rights and Positive Law*

This chapter links the analysis of shared responsibility of states in international law to the central topic of this book – the right to a dignified existence. I start this second part of the chapter by formulating how I understand this *right to a dignified existence*. Discussions of human dignity, human rights, and positive law are strongly interconnected; at the same time, as concepts they are quite distinct. Dignity is a central concept in ethical theory but an odd man out in positive law. The term usually looms large in preambles of human rights conventions and national constitutions (Hughes, 2011). For example, the opening clause of the preamble of the *Universal Declaration of Human Rights* (UDHR) proclaims the recognition of “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” But the term is scarcely to be found in the legally binding articles of conventions or constitutions themselves. That is: human rights refer to basic needs-fulfilment, the threshold level necessary for persons to – in Amartya Sen’s terms – achieve a life worth living, or a decent existence. However, it seems to be assumed that once threshold of basic needs-fulfilment is guaranteed by government, the preconditions persons to be able to live a dignified life are fulfilled.

How should we understand the interrelation of human dignity, human rights and positive law?

Jürgen Habermas presents the insightful metaphor of human rights as a Janus face which is turned to morality and to law simultaneously. Human rights can, on the one hand, grasp the moral ideal of the dignified life; on the other hand, human rights are formulated in a legal parlance providing a lead to legal implementation:

“Notwithstanding their exclusively moral content, [human rights] have the form of enforceable subjective rights that grant specific liberties and claims. They are designed to be spelled out in concrete terms through democratic legislation, to be specified from case to case in adjudication, and to be enforced in cases of violation. Thus, human rights circumscribe precisely that part (and only that part) of morality which can be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights.” (Habermas, 2010, p. 470)

Habermas thus separates the moral concept of dignity from the legal translation thereof into human rights, which subsequently form the basis of legislation, adjudication and law enforcement. Human rights thus can be seen as a filter allowing the normative content of human dignity to seep through into law, while preventing the explicitly terminology of dignity to seep through into the legal realm.

Cécile Laborde (2015) provides another way of understanding the interrelation between – and separation of human dignity, human rights, and positive law. Even though dignity is the essential underlying value emphasizing the importance of human rights, it is hard to employ the term in legal parlance. In the context of her own work on the freedom of religion, she proposes a *disaggregation strategy*. Analogizing her approach, we should unpack the concept of dignity, and disaggregate its different features and connected them to the relevant liberal values and the linked fundamental rights (Laborde, 2017). Thus, different parts of law should capture different dimensions of the normative idea of human dignity. This implies that the idea of human dignity, albeit predominantly moral, can be disaggregated into a set of human rights that protect the access to the basic needs that have to be realized to a certain threshold in order to be able to live a dignified (or autonomous) life. One might discuss which basic needs have to be met, but a rather uncontroversial list includes food, shelter and basic healthcare.

Both Habermas’s and Laborde’s models provide an insight in how the moral idea of human dignity and the legally enforceable positive rights are

simultaneously separated and connected. The two are interrelated in a *reflective equilibrium*: the set of disaggregated rights as a whole should cover as good as possible the necessary preconditions that must be met to enable persons to live a dignified life. Argued the other way around, the inclusion of each and every human right in the disaggregated set must be justified because it satisfies an indispensable and uncontroversial physical or biological need of persons.

So, the question is which set of basic needs ought to be guaranteed in order for persons to live a dignified life. Following Lukas Meyer's presentation at the conference, we can define basic needs as follows: P has a basic need for O *if and only if* P not having access to O harms P and this harm occurs necessarily – that is, independent of the individual and her religious or cultural convictions, but simply because of nature's way. Food, access to clean water, shelter, and basic healthcare come to mind as minimal threshold means to achieving higher order aims: autonomy, rationality or dignity. We can employ art. 25 of the UDHR as an authoritative formulation of the minimal set of basic needs that ought to be guaranteed: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services..."

Let us take stock: from the argument above we can conclude that human beings are able to live a dignified life if and only if at least their adequate standard of living as formulated in art. 25 of the UDHR is secured. However, even if we endorse this most minimal conceptualization of basic needs, achieving the threshold is unattainable for millions of people in the world. In a recent paper, Thomas Pogge (2011, p. 21) summarizes the depressing statistics:

"About half of all human beings live in severe poverty and about a quarter live in extreme or life-threatening poverty. They appear in statistics such as the following: 925 million people are chronically undernourished, 884 million lack access to improved drinking water, 2.5 billion lack access to improved sanitation, and almost 2 billion lack regular access to essential medicines. Over 1 billion lack adequate shelter ... About one third of all human deaths, 18 million each year, are due to poverty-related causes"

These persons lack access to the basic conditions, necessary to live a dignified life. This brings us to the central question in this chapter: do affluent Western states share a responsibility to secure that the human right as formulated in art. 25 of the UDHR are secured for all human beings? Within (international) legal discourse, the term 'responsibility' has a very specific

meaning, since it is used to refer to *ex post* responsibility for contributions to injury. So formulating the question more precisely: can we conclude that affluent governments have a responsibility for the dire situation of the global poor?

5. Do states share a responsibility for people to live a dignified life?

Have affluent states failed in their responsibility in international law for securing the necessary conditions for people to live a dignified life? This question is answered in the affirmative by Thomas Pogge, who argues that affluent states (and their citizens) have a duty to protect the human right as formulated in art. 25 of the UDHR, and that they are failing to do so (Pogge, 2011).⁷ Phrasing the discussion of global poverty in terms of human rights and their non-fulfillment implies making at least two claims (2011, p. 4). First, that it is of great importance that all human beings should have secure access to this object; and second that these important interests justify some significant duties on the part of other human agents or collections thereof. After all, formulating an unfortunate situation in terms of a non-fulfillment of human rights – instead of a natural disaster or *an act of God* – implies that human conduct has created this unfortunate situation and is able to alter it. Moreover, this phrasing of the problem implies that other human beings have a *responsibility* to ensure that this non-fulfillment ends. An unfulfilled human right manifests a human rights violation “only if there are one or more human agents who are bringing about the un-fulfillment of the human right in question even while they could and should have known that their conduct would have this result (2011, p. 9).

Pogge argues that the societies of the world interact in one single global institutional order that unfairly favors affluent societies and severely deprives the globally worst-off of their basic necessities. He describes the significance of the global institutional order in two claims: (1) states are interconnected through a global network of market trade and diplomacy and (2) this global institutional order is shaped by the better-off, and imposed on the worse-off:

⁷ In fact, Pogge makes two claims: not only that governments of affluent states harm the poor, but also that the citizens of these “countries share a collective responsibility for what their government does in their name.” (Pogge, 2011, p. 2) I agree with the first claim, I am not convinced by the second, as I argue in (Pierik, 2013).

“Our new global economic order is so harsh on the global poor, then, because it is shaped in negotiations where our representatives ruthlessly exploit their vastly superior bargaining power and expertise, as well as any weakness, ignorance, or corruptibility they may find in their counterpart negotiators, to shape each agreement for our greatest benefit.” (Pogge, 2011, p. 19)

He does not argue that this global institutional order is inherently unjust, but rather that the current version thereof is designed in an unjust way, since governments of affluent states have pushed their self-interest to the extreme and managed to arrange global institutions in such a way that their societies benefit more than other societies.

The global institutional order affects the position of the globally worst-off in a direct and an indirect way.

An example of a direct effect is the current WTO treaty. The treaty permits the affluent countries to protect their markets against cheap imports, e.g. agricultural products, textiles, steel, and so on, through quotas, tariffs, anti-dumping duties in ways that poor countries are not permitted, or cannot afford, to match (Pogge, 2004, p. 12).

Such protectionist measures reduce the opportunities of developing countries by hampering their exports to the affluent countries. Moreover, subsidizing domestic producers enables affluent societies to sell their products below the market price, pushing more efficient poor-country producers from the world markets:

“This particular aspect of the existing WTO treaty system may thus have a rather large impact on the incidence of severe poverty in the developing countries, understanding “impact” here in a counterfactually comparative way: If the WTO treaty system did not allow the protectionist measures in question, there would be a great deal less poverty in the world today.” (Follesdal & Pogge, 2005, p. 7)

Pogge’s complaint is not that the WTO treaty opens markets too much, but that it opens our markets not enough. Affluent societies reap the benefits of international trade but refuse to accept the burdens thereof.

Examples of the indirect effect of the global institutional order on global poverty are the international borrowing-privileges and resource-privileges. Any group that exercises effective power within a country is internationally recognized as the legitimate government of this country’s power, regardless of how they came to power. This gives them the privileges to borrow in the country’s name (international borrowing privileges) and sell the country’s natural resources (international resource privileges).

These advantages give potential oppressors a strong incentive to try to take power by force. Therefore, these institutions foster oppressive and corrupt governments in developing countries. In this way:

“Transforming the traditional realm of international relations, one central component of globalization has been the creation of an increasingly dense and influential global system of rules along with a proliferating set of new international, supranational, and multinational actors. These transnational rules and actors reach deep into the domestic life of (especially the poorer) national societies by shaping and regulating not only the ever-growing share of interactions that traverse national borders, but increasingly also purely domestic interactions.” (Pogge 2011, p. 19)

Rules and institutions of the global institutional order affect the global poor indirectly by affecting the national institutional orders under which they live, encouraging non-democratic oppressive regimes, and reducing the prospects of the worst-off in those societies (Pogge, 2001, pp. 18-19; 2002, pp. 146-176). He thus concludes that “there exists a supranational institutional regime that foreseeably produces massive and reasonably avoidable human rights deficits. By collaboratively imposing this severely unjust institutional scheme, we are violating the human rights of the world’s poor.” (Pogge 2011, p. 20)

6. A conceptual problem or a problem of implementation?

We can return now to the two distinct steps of ascribing responsibility as described in section 3: first, under what conditions can an actor or set of actors be held legally responsible for certain outcomes? And second, what are the legal consequences that follow from this responsibility? Concerning the first question: It is clear that the actors involved – affluent states – are formal organisations that can be considered agents and that they can be collectively held responsible for their role in the global basic structure in failing to secure the necessary conditions for the global poor to live a dignified life. Concerning the second step: since the actions of the affluent states affect the global poor through a closely knit global basic structure, it is impossible to unpack the cooperative action by the actors into independent actions, disabling us to hold states responsible as separate actors. In addition, since the states cooperate but remain distinct actors, their collective responsibility in international law is a *shared responsibility*. It will be very hard, if not impossible to correctly disentangle their responsibilities

because their collective agency is different from their combined individual responsibility. Pettit (2007) shows that the agency of a collective is actually more than the sum of its members' agency. As a result of negotiations and deliberative processes between the representatives of the parties establishing the common actions in the global basic structure, the attitudes of collective agents cannot be a majoritarian or non-majoritarian function of the corresponding attitudes of the participating states. The collective attitudes and decisions are thus unique by being the attitudes and decisions of the collective – the powerful affluent states and the weaker parties in the negotiation. This collective agency 'may be surprising, but it is not mysterious' (Pettit, 2007, p. 184) While group attitudes are not functions of the corresponding attitudes of individual members, they are produced by those members, and they derive all their matter and energy from what they supply.

So, it might be possible to hold affluent states responsible for the fact that the global poor are unable to live a dignified life because they are deprived of a secure access to the basic conditions of the standard of living as formulated in art. 25 of the UDHR. But it will be very hard to conceptually translate this shared responsibility into concrete claims that can be made against specific states. Moreover, besides this conceptual problem there are also quite a number of problems of implementation.

A first problem of implementation is that within well-ordered nation states, law and enforcement systems ensure that there are legal consequences for those who are caught violating the law, both individual and collective actors. Within a well-functioning state there is a clear distinction and hierarchical relation between on the one hand lawmakers and law enforcers – the state – and on the other subjects of law – citizens and non-state actors. Regulating shared responsibility domestically boils down to regulating the interactions between citizens and non-state actors within a state. Regulating joint responsibility in international law would, however, involve states to infringe on their own sovereignty and to undermine their independence from one another. However, states notoriously resist principles of responsibility that might make them responsible for acts of other states on the basis of a loose involvement with those other states. Enforcing the public law function, and ensuring the integrity of the international legal order, seems to be very difficult in the current situation. The decentralised 'patchwork' nature of the international legal order, the lack of courts with compulsory jurisdiction, and the inherently consensual nature of most international dispute settlement mechanisms undermine an effective enforcement mechanism for joint responsibility in international law. States could be considered *morally* responsible, but there might not be an

agent – whether supranational or not – to hold them *legally* responsible with the additional legal consequences.

This might lead to the conclusion that the reluctance of states to transfer power to supranational institutions and courts, and the lack of truly cosmopolitan legal institutions, might be a more significant obstacle to a firm legal establishment of shared responsibility in international law than difficulties in understanding the concept of shared responsibility in the international legal order.⁸

A second problem of implementation is that of the legal basis. Art. 25 of the UDHR, emphasising the right for every human being to a standard of living adequate for the health and well-being of himself and of his family is only part of a human rights *declaration*, and *not* of a treaty or a formal convention that legally binds nation states. The best alternative actually binding human right to an adequate standard of living is formulated in Art. 11.1 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR):

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

This is a legally binding Covenant but emphasizing the essential importance of free consent of states in international co-operation phrased in a language that makes clear that states are not eager to commit to self-binding conventions in this field.

7. Conclusion

This chapter discussed whether affluent states share a responsibility to protect a dignified existence of all human beings. I translated the more ethical concept of a dignified life in the legal terms of a life in which at least the basic needs have been met and, consequently into the standard of living as formulated in art. 25 of the UDHR. I concluded that affluent states can be collectively held responsible for failing to secure the necessary conditions

8 On cosmopolitan legal institutions and their limits see Pierik and Werner (2010).

for the global poor to live a dignified life. But I also concluded that, due to conceptual problems and problems of implementation, it will be very hard to translate this shared moral responsibility into concrete legal claims that can be made against specific states.

Bibliography

- Colvin, E. (1995). Corporate Personality and Criminal Liability. *Criminal Law Forum*, 6, 1-44.
- Erskine, T. (2003). Making Sense of 'Responsibility' in International Relations: Key Questions and Concepts. In T. Erskine (ed), *Can Institutions Have Responsibilities* (pp. 1-17). New York and Basingstoke: Palgrave Macmillan.
- Follesdal, A., & Pogge, T. (2005). Introduction. In A. Follesdal & T. Pogge (eds), *Real World Justice. Grounds, Principles, Human Rights, and Social Institutions*. Dordrecht: Springer.
- Green, L. (2012). Legal Obligation and Authority. In E. N. Zalta (ed), *Stanford Encyclopedia of Philosophy*.
- Habermas, J. (2010). The Concept of Human Dignity and the Realistic Utopia of Human Rights. *Metaphilosophy*, 41(4), 464-480.
- Held, V. (1991). Can a Random Collection of Individuals be Morally Responsible? In L. May & S. Hoffman (eds), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (pp. 89-100). Savage: Rowman & Littlefield.
- Hughes, G. (2011). The Concept of Dignity in the Universal Declaration of Human Rights. *Journal of Religious Ethics*, 39(1), 1-24. doi:doi:10.1111/j.1467-9795.2010.00463.x
- Isaacs, T. (2011). *Moral Responsibility in Collective Contexts*. Oxford: Oxford University Press.
- Laborde, C. (2015). Religion in the Law: The Disaggregation Approach. *Law and Philosophy*, 34(6), 581-600.
- Laborde, C. (2017). *Liberalism's Religion*. Cambridge: Harvard University Press.
- List, C., & Pettit, P. (2011). *Group Agency. The Possibility, Design, and Status of Corporate Agents*. Oxford: Oxford University Press.
- Miller, D. (2001). Distributing Responsibilities. *The Journal of Political Philosophy*, 9(4), 453-471.
- Miller, D. (2007). *National Responsibility and Global Justice*. Oxford: Oxford University Press.
- Nollkaemper, A., & Jacobs, D. (2013). Shared Responsibility in International Law: A Conceptual Framework. *Michigan Journal of International Law*, 34.
- Nollkaemper, A., & Jacobs, D. (2015). *Distribution of Responsibilities in International Law*. Cambridge: Cambridge University Press.
- Pettit, P. (2007). Responsibility Incorporated. *Ethics*, 117(1), 171-201.

- Pierik, R. (2008). Collective responsibility and national responsibility. *Critical Review of International Social and Political Philosophy*, 11(4), 465-483.
- Pierik, R. (2013). Do We Have a Negative Duty Towards the Global Poor? In J.-C. Merle (ed), *Spheres of Global Justice. Fair Distribution. Global Economic, Social and Intergenerational Justice* (pp. 595-610). Dordrecht: Springer.
- Pierik, R. (2015). Shared Responsibility in International Law: A Normative-Philosophical Analysis. In A. Nollkaemper & D. Jacobs (eds), *Distribution of Responsibilities in International Law*. Cambridge: Cambridge University Press.
- Pierik, R., & Werner, W. (2010). Cosmopolitanism In Context: an Introduction. In R. Pierik & W. Werner (eds), *Cosmopolitanism In Context: Perspectives From International Law & Political Theory* (pp. 1-15). Cambridge: Cambridge University Press.
- Pogge, T. (2001). Priorities of Global Justice. In T. Pogge (ed), *Global Justice*. Oxford: Blackwell.
- Pogge, T. (2002). *World Poverty and Human Rights*. Oxford: Polity Press.
- Pogge, T. (2004, 25 March 2004). *Severe Poverty as Human Rights Violation*. Columbia University, Department of Philosophy.
- Pogge, T. (2011). Are We Violating the Human Rights of the World's Poor? *Yale Human Rights & Development Law Journal*, 14(2), 1-33.
- Scheffler, S. (2004). Doing and allowing. *Ethics*, 114(2), 215-239.