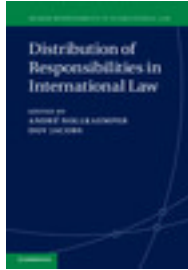


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Shared Responsibility in International Law

A Normative-Philosophical Analysis

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1. Introduction

This chapter analyses normative issues concerning shared responsibility among multiple actors, that is, states and/or international organisations, which have contributed to harmful outcomes that international law seeks to prevent. More precisely, the term ‘responsibility’ is used to refer to *ex post* responsibility for contributions to injury. The concept of independent state responsibility is well established in international law, especially in the Articles on Responsibility of States for Intentionally Wrongful Acts (ARSIWA)¹ of the International Law Commission (ILC). The question is whether international law can also make sense of the concept of *shared responsibility* of multiple actors for their contribution to a single harmful outcome.

In their seminal overview article, Nollkaemper and Jacobs conclude that current international law has a hard time keeping up with the prevailing reality of increased collaboration between states, since

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¹ Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2), Article 1 (ARSIWA) provides that ‘[e]very internationally wrongful act of a State entails the international responsibility of that State’, while Article 2 states that ‘[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission’ is attributable to the state and constitutes a breach of an obligation of the state. These basic principles underlie all of the ARSIWA’s subsequent principles.

international law is ‘the historical fruit of a primitive and horizontal conception of the international legal order’² that holds on to the fiction of exclusive attribution of responsibility to one single state. At the same time, however, they discern several trends in the development of the international legal order in recent decades that have led to an emerging complexity of legal relationships among various actors and a growing complexity of the interests promoted and protected by the law.³ These trends can be recognised in the emergence of pressing issues in international law.⁴ Imagine the case of two or more states contributing under the aegis of *Frontex* to joint missions to control the external borders of the European Union (EU).⁵ If they are violating the rights of an asylum seeker, how should the responsibility for the outcome be distributed among the several partners? Or, consider two or more states acting collaboratively in the framework of United Nations (UN) peacekeeping. How should responsibility be attributed among the several actors when they are involved in an unintended wrongful act, for example when innocent citizens are killed by an air strike?

Two decades ago, Noyes and Smith argued that a mature system of international law should be able to comprehend the responsibility of multiple state actors for a single event.⁶ However, since shared responsibility remains a relatively unknown and novel concept in international law, its discussion explores uncharted territories and novel normative questions. Nollkaemper and Jacobs have entered these uncharted territories and have provided a conceptual framework from *within* the parameters as set by positive law, using building blocks from other fields of law for their reconstruction – including concepts like ‘joint and several responsibility’ from private law and ‘joint criminal enterprise’ from international criminal law.

This chapter steps outside the legal (tool) box and provides a philosophical analysis of ‘responsibility’ – the normative concept that has the central stage in these discussions. Under what conditions can an actor reasonably be held responsible for a specific harmful outcome? And what

² P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MJIL* 359, at 436.

³ *Ibid.*, at 436. ⁴ *Ibid.*, at 372.

⁵ *Frontex* is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. For more information see www.frontex.europa.eu (last accessed on 5 June 2014).

⁶ J.E. Noyes and B.D. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 *YJIL* 225.

consequences should this responsibility have in terms of reparations or repercussions? As such, the chapter taps into the more deontological literature in legal and political philosophy on the relation between agency and responsibility.⁷ I will, in the first instance, focus on philosophical discussions, and whether or not these arguments are (or can be) adopted in domestic or international law. I do not presuppose (or pretend) that a full-blown legal defence of shared responsibility in international law can be logically deduced from such a normative-philosophical argument. I do assume, however, that such a philosophical treatise could help to put our normative intuitions into line and get our priorities right and, as such, might provide some essential normative nuts and bolts for a more conceptually grounded legal analysis of collective responsibility in international law.

This chapter is organised as follows: Section 2 contains a normative-philosophical discussion of the concept of personal responsibility, in terms of causality and agency. Section 3 translates the concept of personal responsibility into collective responsibility, and argues that a collective can be held responsible when its members, through their cooperation, can mimic the performance of a single unified agent. In addition, the general concept of ‘collective responsibility’ will be subdivided into two more specific conceptions: ‘corporate responsibility’, in which the responsibility befalls the collective as a whole, and ‘shared responsibility’, in which the responsibility descends to the members separately. Section 4 translates the insights of the normative-theoretical discussion to analyse the issue of distributing shared responsibility in the legal context. Section 5 employs the arguments developed in the earlier sections to analyse some issues that are central to the current discussion of shared responsibility in international law. Section 6 concludes.

2. Personal responsibility: causality and agency

What is the most fruitful way to conceptualise responsibility? Under what conditions can an actor reasonably be held responsible for a

⁷ For recent philosophical work on collective responsibility see: T. Isaacs, *Moral Responsibility in Collective Contexts* (Oxford University Press, 2011); C. List and P. Pettit, *Group Agency. The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011); P. Pettit, ‘Responsibility Incorporated’ (2007) 117 *Ethics* 171; D. Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007), chapter 3; T. Erskine, ‘Making Sense of “Responsibility” in International Relations: Key Questions and Concepts’, in T. Erskine (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (New York and Basingstoke: Palgrave Macmillan, 2003), 1.

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.⁸ 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.⁹

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, which will be answered in sections 2.1 to 2.3. Firstly, 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?

2.1 Responsibility and causality

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.¹⁰ 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

⁸ Sections 2 and 3 of this chapter build upon on R. Pierik, 'Collective Responsibility and National Responsibility' (2008) 11(4) CRISPP 465.

⁹ The question of where to draw the line between choice and circumstance has dominated the luck-egalitarian debate over the last decade. See for some key publications R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), at 285–303; and G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, MA: Harvard University Press, 2000). For an overview of the debate, see M. Matravers, 'Responsibility, Luck, and the "Equality of What" Debate' (2002) 50(3) PS 558.

¹⁰ D. Miller, 'Distributing Responsibilities' (2001) 9(4) JPP 453; L.A. Kornhauser, 'Incentives, Compensation, and Irreparable Harm', Chapter 5 of this volume, 120.

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 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.¹¹ 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.

2.2 *Responsibility and agency*

What are the conditions under which actors should be held responsible for a certain outcome, and under what conditions should they be relieved

¹¹ Ibid., Miller, at 458.

of this responsibility? In this section I tap into the deontological tradition that situates individual responsibility in personal agency and argues that responsibility can only be attributed to agents.¹² Agency refers to the capacity to act deliberately 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 a 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.¹³ 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. In terms of Toni Erskine: 'Since moral agents possess the sophisticated deliberative capacities necessary to allow them to respond to specific types of reasoning, and to understand their actions and the probable outcomes of their actions, we ... render them vulnerable to the ascription of duties and the apportioning of moral praise and blame in the context of specific actions in a way that non-moral agents are not similarly vulnerable.'¹⁴

¹² In section 3.3 I relate this deontological way of arguing to the more consequential argument about outcome responsibility.

¹³ This description builds upon M. Dan-Cohen, 'Conceptions of Choice and Conceptions of Autonomy' (1992) 102 *Ethics* 221, at 222; Erskine, 'Making Sense of "Responsibility" in International Relations: Key Questions and Concepts', n. 7, at 6–7, 21; V. Held, 'Can a Random Collection of Individuals Be Morally Responsible?', in L. May and S. Hoffman (eds.), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage: Rowman & Littlefield, 1991), 89, at 90; Pettit, 'Responsibility Incorporated', n. 7, at 174–175).

¹⁴ *Ibid.*, Erskine, at 6.

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.¹⁵ Imagine someone throwing a hand grenade into an open window, causing the death of a child.¹⁶ 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.

2.3 *Individual agency and personal responsibility: a 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.

¹⁵ Miller, *National Responsibility and Global Justice*, n. 7, at 116.

¹⁶ This example is taken from Held, ‘Can a Random Collection of Individuals Be Morally Responsible?’, n. 13, at 90–91.

3. Collective responsibility

3.1 From personal to collective responsibility

The preceding section presented a description of the way in which personal responsibility is 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.’¹⁷ 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.’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.

¹⁷ The *Sheen Report* as discussed in E. Colvin, ‘Corporate Personality and Criminal Liability’ (1995) 6(1) CLF 1, at 16. See also Pettit, ‘Responsibility Incorporated’, n. 7, at 171.

¹⁸ *Ibid.*, Colvin, at 18.

Example II: Imagine seven non-acquainted passengers sitting in a subway car.¹⁹ 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 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

¹⁹ Example taken from Held, ‘Can a Random Collection of Individuals Be Morally Responsible?’, n. 13, at 94–96.

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.²⁰ 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,

²⁰ The most sophisticated defense of this distinction can be found in S. Scheffler, 'Doing and Allowing' (2004) 114(2) *Ethics* 215.

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'.²¹ 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.

3.2 *Ascribing collective responsibility through the agency model*

Previously, I argued that personal agency is generally considered to be a prerequisite for personal responsibility. In a similar way, many authors assume that a collective can only be held responsible when it can be considered to be an agent, when participants in their cooperation 'mimic the performance of a single unified agent'.²² 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

²¹ Miller, *National Responsibility and Global Justice*, n. 7, at 120.

²² Pettit, 'Responsibility Incorporated', n. 7, at 179.

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 earlier 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'.²³ 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.²⁴ 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

²³ Ibid., at 172.

²⁴ Ibid., at 179.

collective agent – when collective action is necessary and possible, and we hold them responsible if they fail to do so.²⁵ 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

²⁵ Held, 'Can a Random Collection of Individuals Be Morally Responsible?', n. 13, at 95.

to voice their disagreement.²⁶ 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.

3.3 *Deontological and consequentialist defences of collective responsibility*

My analysis of collective responsibility in terms of outcome responsibility, embedded in ideas of causal connection and agency, fits neatly into a deontological ethics that primarily focuses on the question of under what conditions a perpetrator can be considered an agent and, as such, be held responsible for the consequences of his or her actions and decisions. However, we can also encounter a second, more consequentialist justification for collective responsibility. It focuses less on the perpetrators – that is, who was responsible for bringing about this bad situation. Instead, this approach primarily focuses on the victims.

The argument is something like this: we need to help these victims, even though we cannot pinpoint precisely who exactly is causally responsible for their predicament, or because those who are responsible are unable or unwilling to pick up the tab. 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.’²⁷ In (international) law the deontological and consequentialist justifications for collective responsibility are often used interchangeably. However, given that the normative arguments in these approaches are quite distinct, these defences should be separated conceptually. In section 5.2 I will return to this distinction between deontological and consequentialist defences of outcome responsibility in international law.

3.4 *Collective responsibility and agency: a conclusion*

In the preceding sections, 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

²⁶ 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.

²⁷ Miller, ‘Distributing Responsibilities’, n. 10, at 460–461.

held responsible for certain outcomes. I concluded that outcome responsibility presupposes a certain causal relation between the person and the outcome that is couched in agency: collective responsibility can be ascribed 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.

4. From philosophical to legal arguments

The normative-philosophical arguments discussed primarily address issues of *moral* responsibility, which do not necessarily coincide 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’.²⁸ 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 neatly 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

²⁸ L. Green, ‘Legal Obligation and Authority’, in E.N. Zalta (ed.), SEP (Winter 2012 edition), at 1 (available at <http://plato.stanford.edu/>, last accessed on 5 June 2014).

(criminal) law.²⁹ 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.³⁰ 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

²⁹ Although the distinction between public and private law is not undisputed in law and legal theory, the attribution of responsibility in domestic law more or less follows this dichotomy.

³⁰ As was the case in the *Herald of Free Enterprise* example. Nollkaemper and Jacobs describe two examples of this phenomenon in international law: The *Saddam Hussein* case and *Behrami* case before the European Court of Human Rights; Nollkaemper and Jacobs, 'Shared Responsibility', n. 2, at 391.

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.³¹ 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 outcome, some could be identified as ringleaders, and therefore be considered to be more liable than others.³² 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.

These arguments 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

³¹ Ibid., at 422.

³² Miller, *National Responsibility and Global Justice*, n. 7, at 116–117.

though this chapter has demonstrated that there are good arguments for assigning shared responsibility, this does not always translate into legal obligations.

5. Collective responsibility in 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 actors 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.³³ 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 distributed among various states and attributed to them – as discussed in terms of type-2 mistakes.³⁴

International law, therefore, is in need of a conception of collective responsibility.³⁵ One of the aims is to avoid the practice of blame shifting – or buck-passing – between the various actors involved. Widely discussed is the question of whether the Dutch government or the UN should be held responsible for the eviction of Muslims from the UN compound in Srebrenica in June 1995.³⁶ What can philosophical discussions, immersed in counter-factuals and thought experiments,

³³ Nollkaemper and Jacobs, 'Shared Responsibility', n. 2, at 363. For a recent treatise on collective responsibility in international criminal law see T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011).

³⁴ Nollkaemper and Jacobs, 'Shared Responsibility', n. 2, at 428. ³⁵ *Ibid.*, at 425.

³⁶ P.A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutch-bat in Srebrenica' (2011) 9(5) JICJ 1143.

teach us about such cases of collective responsibility in international law? In this chapter I will not even attempt to come up with a full discussion of the issue. I will restrict myself to an approach in which I analyse specific elements in the current discussion of shared responsibility in international law from the normative perspective presented previously.

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.³⁷ 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.³⁸

The discussion focuses on harmful outcomes as a result of collective actions that violate international law. How should such *ex post* responsibility for contributions to injury be attributed to the various parties?

5.1 *The variety of actors involved in shared international responsibility*

It is clear that the actors primarily involved – states and international organisations – are formal organisations that can be considered agents in the sense of the discussion in sections 2 and 3. The questions are whether the collective of actors involved in the specific action can be held responsible for an unwanted outcome, and how that responsibility should

³⁷ This term refers to the term ‘collectivity of collectivities’ as coined by Amitai Etzioni in A. Etzioni, *The Active Society: A Theory of Societal and Political Processes* (New York: Free Press, 1968), 107; Toni Erskine describes the UN in similar terms of a collectivity of collectivities in T. Erskine, ‘Assigning Responsibilities to Institutional Moral Agents: The Case of States and “Quasi-States”’, in T. Erskine (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (New York and Basingstoke: Palgrave Macmillan, 2003), 19, at 39, note 20.

³⁸ Pettit, ‘Responsibility Incorporated’, n. 7, at 172.

be distributed among them. Firstly, we need to determine whether it is possible to unpack the cooperative action by the actors into independent actions, in which case the actors can be held responsible as separate actors. If this is not possible, it should be determined 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 the event of collective agency, we should determine whether it is a case of corporate responsibility or shared responsibility. In some situations, collective responsibility in international law is shared responsibility, when states cooperate but remain distinct actors. In other cases they form independent international organisations with their own corporate responsibility.

The question of the distribution of responsibility among these actors is slightly more difficult to answer than in the interpersonal examples discussed earlier. The possible variety of parties involved in such collective action is much wider, and their possible interconnections can be far more complicated. One complicating issue is that in some cases the individual natural persons – officials who were directly involved in the wrongful act – should primarily be held responsible for a specific outcome. Imagine a humanitarian intervention in which several states cooperated under the aegis of the UN. During the operation one soldier, for no legitimate reason, broke specific rules of conduct that were *ipso facto* clear and straightforward. In that case, responsibility primarily rests on this specific person, regardless of how the rules of cooperation between the cooperating actors have been arranged formally. In the event that responsibility does not rest on the individual, two kinds of actors can be considered as candidates for being held responsible for the legal consequences: the state for which the official works, or the UN – the common organ under whose supervision the official was working.

Moreover, in the international arena, states can cooperate in various ways. They can cooperate bilaterally or through international or supranational organisations. Moreover, the form of cooperation through international or supranational organisations can take various sub-forms. Take, for example, *Frontex*. Most Schengen countries are also members of the EU; however, some EU countries are not party to the Schengen Treaty, while other non-EU countries participate in the Schengen cooperation.³⁹ If various countries with different statuses

³⁹ The Schengen *acquis* – Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen Agreement), Schengen,

collaborate within *Frontex*, it might be quite difficult to unpack the myriad of interrelations and to distribute responsibility correctly. In other cases it might not be clear whether the ‘collective of collectives’ should be held responsible. First, should only the EU be held corporately responsible; second, should the various states participating in the EU be held jointly responsible; or third, should the various states participating in the EU *and* the EU *as such* be held jointly responsible?

When two or more states, through cooperative action, whether or not in a common organ, are involved in a wrongful act, it will be impossible to correctly disentangle their responsibilities because their collective agency is different from their combined individual responsibility. Pettit 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 organ, 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. This collective agency ‘may be surprising, but it is not mysterious’.⁴⁰ 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.

5.2 *Consequentialist defences and outcome responsibility*

In section 3, I distinguished deontological defences of shared responsibility, which focus primarily on the perpetrators, from consequentialist ones, which focus mainly on the victims. Interestingly enough, towards the end of their article, Nollkaemper and Jacobs spell out possible foundations for shared responsibility – consent and control and the intrinsic nature of the obligation.⁴¹ These seem to dovetail very neatly with the deontological, agency-oriented model of collective responsibility as presented in this chapter.

In addition, it might be illuminating to analyse consequentialist defences of shared responsibility in terms of the arguments as developed

14 June 1985, in force 15 June 1985, *Official Journal of the European Communities* L 239, Vol. 43, 22 September 2000, at 0013–0018.

⁴⁰ Pettit, ‘Responsibility Incorporated’, n. 7, at 184.

⁴¹ Nollkaemper and Jacobs, ‘Shared Responsibility’, n. 2, at 428.

in this chapter, especially since deontological and consequentialist arguments are often used interchangeably in discussions in (international) law. Consequentialist defences argue for remedial responsibility according to capacity. In specific dire situations, those actors who are best placed to do the remedying are supposed to take action. A good example is provided by humanitarian interventions: the use of military force against a state with the aim of ending human rights violations being perpetrated by the state against which it is directed.

What if arguments of capacity lead certain states to participate in a well-organised humanitarian intervention abroad, and during this intervention something goes awry; for example, one of their planes mistakenly hits civilians? To what extent do such outcome-responsibility arguments have weight when participating states take up a supererogatory duty? And are these arguments similar to those employed in the example of *Frontex*, where the participating states merely organise a central domestic task jointly?

Here we need to return to the two distinct steps of ascribing responsibility: 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?

It seems to me that the answer to the latter should be different in a *Frontex* case than in one of humanitarian intervention. After all, the activities of *Frontex* are 'business as usual' for European states: protecting their borders collectively (for reasons of efficiency and effectiveness) rather than as individual states. However, states participating in a humanitarian intervention take up the moral responsibility to help in a specific dire situation to which they are not causally connected. They undertake the task of protecting human rights although they were not involved in the actions that violated the human rights. Such actors find themselves in a situation that is similar to that of the five subway car passengers discussed earlier.

There is a clear normative distinction between a dire outcome as a consequence of conducting one's core business in a careless way and, on the other hand, a dire outcome resulting from failing to interfere appropriately in a situation in which one finds oneself, without being involved in generating the situation.

Thus, harmful outcomes resulting from incidents that arise during humanitarian interventions should have less severe legal consequences than harmful outcomes resulting from incidents that arise during *Frontex* operations. The more supererogatory a duty is, the fewer

legal consequences should follow from this responsibility in case something goes awry.

This does not imply, however, that, the supererogatory character of an action implies that the actors are fully relieved from outcome responsibility. Even in the case of a humanitarian intervention, actors can be held responsible for certain outcomes of their actions, for example when the intervening parties in the humanitarian intervention mistakenly hit civilians and kill them. The fact that an actor takes up a supererogatory duty should not imply that it should not be held up to certain standards of professional behaviour, befitting the assignment. In the same way that we ascribed shared responsibility to the five subway car passengers for not intervening properly, even though they found themselves involuntarily involved in the fight, parties taking up a supererogatory duty in international law should never be able to escape evaluation of their actions through immunity claims.

In conclusion: yes, even while performing supererogatory duties, an actor or set of actors can be held legally responsible for certain outcomes; however, the legal consequences that follow from this responsibility should be less severe the more supererogatory is the duty.

5.3 *The distinction between private law and public law approaches*

Characteristic of philosophical discussions on shared responsibility is that they ignore the distinction between private law and public law responses, which is central – maybe even typical – for domestic legal analysis: an actor is either held responsible for damages in a tort action, or is criminally prosecuted. Interestingly enough, within international law this distinction is, again, less prevalent. Many scholars of international law (want to) see international law as a unitary system, to which domestic notions of private or public law cannot easily be transposed. Pellet argues that international responsibility is neither public nor private, but ‘simply international’.⁴² Seen from one perspective, there is much truth in this claim. The domestic distinction between private and public law is more a contingent outcome of a historical development in domestic law than an inherent legal necessity.⁴³ Thus, there is no evident

⁴² A. Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’ (1999) 10 EJIL 425, at 433–434.

⁴³ D. Kennedy, ‘The Stages of the Decline of the Public/Private Distinction’ (1982) 130 Penn LR 1349; C.M. Chinkin, ‘A Critique of the Public/Private Dimension’ (1999) 10 EJIL 387.

reason why, while developing instruments of joint responsibility in international law, theorists should follow this distinction. However, given the equally contingent patchwork of courts in international law – a constellation in which the private-public distinction can still be recognised – it might be prudent to develop a pluralist approach of joint responsibility in international law.⁴⁴ Indeed, international law did not emerge *ex nihilo*, separated from the domestic legal traditions of the states that compose the international legal order. It might be true that the distinction within domestic law between private-law and public-law ways of dealing with individual and shared responsibility may be the contingent outcome of a certain historical development. Still, there is some logic in the separation between, on the one hand, compensation for material or non-material damage to third parties, and on the other hand, punishment for acts that undermine the legal order itself.

5.4 *A conceptual problem or a problem of implementation?*

Within well-ordered nation states, law and enforcement systems ensure that there are legal consequences for those who are caught violating the law, both private and public. In this context there is a clear distinction and hierarchical relation between lawmakers and law enforcers (the state) and 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 regulating and limiting their own sovereignty, their independence from one another. States resist principles of responsibility that allow them to be 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 supra-national or not – to hold them *legally* responsible with the additional legal consequences.

⁴⁴ Nollkaemper and Jacobs, ‘Shared Responsibility’, n. 2, at 415.

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.⁴⁵ This conclusion is supported by the fact that the European Court of Human Rights, indeed one of the few courts that does have jurisdiction over the participating states, has ruled in several multi-defendant cases.⁴⁶

6. Conclusions

Current international law, being the historical fruit of a horizontal conception of the international legal order, is as yet incapable of correctly grasping and ascribing the responsibility of multiple state actors for a single event. This chapter has aimed to contribute to our understanding of shared responsibility in international law. It has explicitly stepped away from the way shared responsibility is conceptualised in conventional international law, and has analysed the issue from a normative-philosophical perspective. I developed the basic idea of responsibility through a discussion of personal agency and personal responsibility, and argued that shared responsibility can be ascribed when a collective can operate through its members in such a way that they simulate the performance of individual agents. I concluded that, from this perspective, it is very possible to understand the general concept of shared responsibility in international law through an analogy argument: collectives are supposed to be responsibility-bearing agents to the extent that they operate in such a way as to simulate the performance of individual agents. In that sense, the concept of shared responsibility in international law seems to be more readily acceptable in normative-philosophical debates than in conventional international law.

At the same time, I argued that it is usually very difficult to correctly allocate the shared responsibility to the involved actors. The reason why joint responsibility is usually invoked is precisely that the plurality of contributions of the involved actors and their interrelationships make

⁴⁵ On cosmopolitan legal institutions see R. Pierik and W. Werner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge University Press, 2010).

⁴⁶ Nollkaemper and Jacobs, 'Shared Responsibility', n. 2, at 387.

it very difficult, if not impossible, to disentangle the individual contributions to the outcome. In international law these questions become even more complicated. Sometimes individual natural persons – officials who were directly involved in the wrongful act – should be held responsible for a specific outcome. In other cases it is a shared responsibility. However, in the international arena, states can cooperate in various ways: bilaterally, or through international or supranational organisations.

But the fact that such an allocation of responsibility can never be determined exactly should not deter philosophers and legal scholars from trying to determine this allocation as far as possible. A philosophical conceptualisation of responsibility and shared responsibility as presented here can be helpful in developing the much-needed regulations to govern the allocation of shared responsibility in international law. It may serve both the interests of injured parties, who otherwise may have difficulty identifying the responsible entities and the scope of their responsibility, *and* the interests of states, by providing some predictability as to how their responsibility might be distributed among various states and attributed to them.