SHARED RESPONSIBILITY IN INTERNATIONAL LAW: A CONCEPTUAL FRAMEWORK

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INTRODUCTION

In this Article we explore the phenomenon of shared international responsibility among multiple actors that contribute to harmful outcomes that
international law seeks to prevent. We examine the foundations and manifestations of shared responsibility, explain why international law has had difficulty in grasping its complexity, and set forth a conceptual framework that allows us to better understand and study the phenomenon. Such a framework provides a basis for further development of principles of international law that correspond to the needs of an era characterized by joint and coordinated, rather than independent, action.

Questions of shared responsibility are critical to many pressing issues in international law. Consider the following examples. If states do not meet obligations to reduce emissions to prevent climate change, and human displacement and environmental harm occurs, the question will arise which states are responsible. If states or international organizations, in particular the United Nations, fail to live up to the collective "responsibility to protect" (R2P) human populations from mass atrocities—a responsibility that rests in part on obligations that are binding on a plurality of states or organizations—the question will arise who is responsible for the failure to act. If two or more states or international organizations conduct joint military operations in which some soldiers violate international humanitarian law, the question of how to distribute responsibility among these states, organizations, and individual perpetrators arises. If states agree to cooperate,
whether or not through international institutions, to conserve fish stocks beyond their Exclusive Economic Zone but fail to realize that objective, the distribution of responsibility among the wrongdoing states will have to be determined.\textsuperscript{7} If two states under the aegis of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) contribute to joint missions to control the external borders of the European Union (EU) and the rights of asylum seekers are violated, the question will arise which if any of the state or organizational actors involved are responsible and how that responsibility should be distributed among them.\textsuperscript{8} As a final example, if two or more states agree to allocate tasks for hosting refugees and one of them does not live up to its obligations, the question may arise whether only that latter state, or both states, or perhaps also the U.N. High Commissioner for Refugees if it has been given a role, are responsible.\textsuperscript{9}

A study of shared responsibility in international law is therefore timely. As states, international institutions, and other actors increasingly engage in cooperative action, the likelihood of harm or other outcomes proscribed by international law multiplies. Injured parties may then be faced with a plurality of wrongdoing actors.

The examples multiply rapidly once we recognize the variety of actors that can contribute to outcomes that, from the perspective of international law, are undesirable. In this Article we focus mainly on states and, to a lesser extent, international organizations.\textsuperscript{10} However, in the above examples of


\textsuperscript{\textsuperscript{10. We acknowledge that the multilayered nature of international organizations may pose additional challenges for the law of international responsibility to which the general rules of state responsibility are not mutatis mutandis applicable. See generally Christiane Ahlborn, The Rules of International Organizations and the Law of International Responsibility (Amsterdam Ctr. for Int’l Law, SHARES Research Paper No. 2011-03, 2011), available at http://www.sharesproject.nl/wp-content/uploads/2012/04/SHARES-RP-02-final.pdf (discussing the multilayered nature of international organizations and the additional challenges they}}
climate change and atrocities committed during armed conflicts, the role of nonstate actors is critical. These situations often bring into play the question of individual or other private-actor responsibility, an issue integral to a clear understanding of shared responsibility even though it may sometimes fly below the radar of international law.

The apparent increase of situations of shared responsibility raises fundamental questions for positive law and legal doctrine. The principles of international law on the basis of which responsibility among multiple actors is currently allocated are, in the words of Brownlie, "indistinct" and do not provide clear guidance. There is still much truth to Noyes and Smith's 1988 observation that "[t]he law of multiple state responsibility is undeveloped. The scholarly literature is surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility. Judicial or arbitral decisions addressing a state's assertions that other states share responsibility are essentially unknown." While the latter statement is not entirely correct in light of recent judicial developments, it remains true that as a result of jurisdictional limitations and underdeveloped principles of shared responsibility, the contribution of the case law is limited. In legal scholarship, we find useful contributions that may help us identify the conceptual tools and perspectives for reaching satisfactory solutions in situations where two or more states or other actors are collectively involved in an act or omission causing injury to third parties. However, a comprehensive conceptual framework within which to better understand the phenomenon of shared responsibility still requires formulation.

As the variety and frequency of cooperative endeavors between states and other actors increase, there is a need for new perspectives that allow us to understand how the international legal order could and does address shared responsibility. Such new perspectives might eventually help relevant actors to develop international principles and processes that are suited to address such situations. Improving the law applicable to shared responsibility may serve the interests of injured parties, who may otherwise experience difficulty in identifying the responsible entities and the scope of their responsibility, as well as the interests of states more generally by providing some predictability as to how their own responsibility might be engaged.

In attempting to formulate such new perspectives, we must cover a vast terrain, including the design, content, and role of primary rules that define the respective obligations of states and other actors in cases of collective

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13. See infra Part V.C.1.
action. We also must address the content and implementation of secondary obligations: how can principles of responsibility for wrongdoing themselves address shared responsibility? We furthermore cannot neglect international courts and tribunals, where claims of shared responsibility may eventually arise but where the procedural law, at least in some cases, is ill suited to deal with claims that transcend a bilateralist framework. We moreover must consider the wide variety of practices by which actors can be held accountable for their involvement in collective wrongdoing but which cannot be qualified in terms of formal international responsibility and which will not be treated as such by international courts. Examples include supervisory institutional arrangements set up under multilateral environmental agreements. Effectively addressing issues of shared responsibility requires that these problems be considered in relation to one another, rather than in isolation. And finally, each of these dimensions of shared responsibility raises fundamental normative questions regarding the criteria that should govern the apportionment of responsibility among multiple actors. Such criteria might include justice, equity, effectiveness, and power; for instance, it may be argued that those actors best placed to remedy a wrong effectively should incur more responsibility than others. Indeed, the current regime and its dynamics, potential, and limitations cannot be understood without considering the particular normative interests it serves.

In this Article, we identify the principles of international law that are applicable to cases of shared responsibility as well as gaps in the international legal framework and provide the building blocks for a new perspective that may be better able to grasp the legal complexities arising out of such situations. Our main argument is as follows: Current international law is largely based on the notion of independent international responsibility (mainly of states and international organizations). This notion does not always provide the conceptual or normative tools for allocating responsibility between a plurality of actors in situations where contributions to harmful outcomes cannot be attributed based on individual causation of each actor. Such tools cannot properly be developed unless we abandon the fiction that international responsibility is a unitary system in which a limited set of principles can address all questions of shared responsibility, irrespective of the nature of the actors, the interests at issue, and the nature of the conduct in question. In short, we advance a model for a more differentiated approach to international responsibility that can better address questions of shared responsibility.

Our methodology is dialectical, adopting both a holistic and pluralist approach to international responsibility. It is holistic in the sense that we suggest that we need not necessarily abide by the dichotomy between primary and secondary rules that often structures debates on international responsibility. Analyses of situations of shared responsibility must take into account both the content and nature of an obligation and the principles of responsibility that apply to its violation. However, we also adopt a pluralist approach, as we argue that in particular cases one needs to
distinguish between public and private dimensions of international responsibility and that differentiated approaches better reflect the varied nature of obligations and the diversity of objectives of international responsibility.

We first identify and define the core concepts that allow us to assess the law pertaining to shared responsibility and to conceptualize the relevant practice (Part I). We then identify the fundamental changes in the international legal order that explain the emergence of situations of shared responsibility and that need to be taken into account in framing the relevant legal principles and procedures (Part II). Subsequently, we discuss the potentials and limits of the current framework of international responsibility in dealing with situations of shared responsibility (Part III). Part IV then contextualizes the need to develop principles of shared responsibility by revisiting the foundations of the law of state responsibility and to construe them in a manner that is better adapted to the needs of addressing shared responsibility. Part V discusses the principles and processes of shared responsibility in light of these reconstructed foundations.

I. A SEMANTIC TOOLBOX OF SHARED RESPONSIBILITY

The examples given in the Introduction illustrate that questions of shared responsibility may arise in a wide variety of scenarios and involve a number of different modalities. In literature and practice we do not find a consistent or well-established use of concepts and terms to capture that variety. Indeed, the term shared responsibility that we explore in this Article has hardly been used in legal literature at all. It is therefore necessary to provide a preliminary typology that transcends the diversity of possible situations and allows us to identify the possible situations of shared responsibility. In this Part we therefore propose a semantic toolbox of terms and concepts that form a common point of reference for constructive dialogue on questions of shared responsibility.

A. Responsibility

We use the term responsibility to refer to ex post facto responsibility for contributions to injury. Our main interest is in situations where collaboration between two or more actors leads to harmful outcomes, for instance by infringing the rights of third parties, and in the related question of how to apportion responsibility among these actors.

The term "responsibility" has frequently been used to refer to obligations that ex ante structure the conduct of the relevant actors. Examples include Principle 21 of the 1972 Stockholm Declaration, which refers to the responsibility of all states to prevent transboundary environmental harm.14

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and the use of the term responsibility in the phrase “responsibility to protect.” It also appears that the Obama administration has used the term “shared responsibility” primarily in this ex ante sense. Ex ante and ex post shared responsibility can be closely related. When two or more actors have a shared responsibility in the former sense and do not do what is required, shared responsibility in the latter sense may follow. For example, when all riparian states to an international watercourse have a shared responsibility (in the sense of an obligation resting on each of them) to protect the ecosystem of the watercourse, and they all engage in acts that destroy the ecosystem, they may all be responsible for the consequences. However, for semantic clarity and to prevent confusion as to the focus of this Article, we will resist as much as possible using the word “responsibility” to describe ex ante obligations.

With the term responsibility we thus refer to international responsibility for wrongful acts in the meaning of the Articles on State Responsibility (ASR) and the Articles on the Responsibility of International Organizations (ARIO), both developed by the International Law Commission (ILC).

B. Shared Responsibility

We define the term shared responsibility (as distinct from responsibility as such) by four main features. First, the concept of shared responsibility refers to the responsibility of multiple actors. These actors obviously include states and international organizations, but may also include other actors such as multinational corporations and individuals.


15. Concerning the semantics of the term “responsibility to protect” (formed by a bundle of primary obligations), see Sandra Szurek, Responsabilité de Protéger: Nature de l'Obligation et Responsabilité Internationale, in SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, COLLOQUE DE NANTERRE: LA RESPONSABILITÉ DE PROTÉGER 91, 100 (2008); see also Sigrun I. Skogly, Global Responsibility for Human Rights, 29 OXFORD J. INT'L L. 827, 836 (2009) (arguing that the notion of shared responsibility should consist of both a preventative and a reactive dimension).


Second, the term refers to the responsibility of multiple actors for their contribution to a single harmful outcome. Such an outcome may take a variety of forms, including material or nonmaterial damage to third parties. As we will further explain below, on this point we distance ourselves from the concept used by the ILC, which opted for a more narrow approach.\textsuperscript{19}

The choice of the term \textit{harmful outcome} as a defining element of shared responsibility finds support in the notion of outcome as a basis for responsibility in legal theory.\textsuperscript{20} Different conceptualizations of shared responsibility may be considered, for instance, by defining it in terms of a contribution to a single injury.\textsuperscript{21} However, this would force us to expand beyond the commonly considered notion of injury as a constitutive element of a particular wrongful act vis-à-vis particular parties. That is, in international law the concept of injury is typically used as an element of a particular wrongful act: state $A$ acts wrongfully toward state $B$ if it causes injury, whether legal or material, to that latter state. This usage is not easily combined with a concept of injury that captures acts by multiple actors contributing to outcomes that affect many states or the international community as a whole—that would encompass public-order dimensions of international responsibility.\textsuperscript{22} As to the use of "harm" in our concept of outcomes: while it is true that responsibility can arise irrespective of physical harm caused,\textsuperscript{23} we suggest a broad use of the term "harm," encompassing all situations in which actors violate their obligations toward others. We thus opt for a definition referring to a contribution to harmful outcomes that the law seeks to prevent, irrespective of the question whether such an outcome causes injury to a particular actor. This will allow us, later in this Article, to conceptualize shared responsibility in both its private law and public law dimensions.

Third, the term shared responsibility \textit{strictu sensu} refers to situations where the contributions of each individual cannot be attributed to them based on causation. If individual causal contributions could be determined, the allocation of responsibility could fully be based on principles of individual responsibility, rather than shared responsibility. In this sense, shared responsibility is an antidote for situations where causation does not provide

\textsuperscript{19} See ARIO, supra note 18, art. 48; ASR, supra note 17, § 76, art. 47.


\textsuperscript{21} Brigitte Stern, A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 93, 93 (Maurizio Ragazzi ed., 2005).

\textsuperscript{22} See, e.g., ASR, supra note 17, ¶ 77, art. 31, cmt. 5.

\textsuperscript{23} See id.; see also id. ¶ 77, art. 31, cmt. 6.
an adequate basis for responsibility.\textsuperscript{24} It is precisely for such situations that existing international law has not always offered sufficient solutions.

The fourth defining feature of shared responsibility in this broad sense is that the responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively.\textsuperscript{25} If the responsibility rested on a collectivity, it would no longer be shared, but rather would be the responsibility of the collectivity as such.\textsuperscript{26} For instance, the responsibility of the EU for its Frontex policies is not a shared responsibility, while the responsibility of the EU member states that are involved in a Frontex action, possibly in combination with the responsibility of Frontex itself, is shared.

However, shared responsibility does not only consist of the aggregation of two or more individual responsibilities. In most of the examples given in the introduction to this Article, the relevant actors stood in some relationship to each other, for instance because they agreed to cooperate to pursue particular aims. Indeed, perhaps the most relevant application of the concept is to situations where responsibility is based on multiple actors contributing to each other's acts and thereby to the eventual outcome.\textsuperscript{27} This notion of shared responsibility bears some similarity to what others have referred to as "complex responsibility," but that term fails to capture the element of sharing that is fundamental to our inquiry.\textsuperscript{28}

To refer to situations of shared responsibility, we also use the term \textit{joint responsibility}. We emphasize that, at this stage, the term "joint" is meant to be descriptive and should not be seen as entailing specific legal consequences in terms of substance or procedure, as would the expression "joint and several responsibility," as discussed in Part V.A.

\section*{C. Cooperative and Cumulative Shared Responsibility}

Instances of shared responsibility can be divided into two groups. Our main interest is in shared responsibility that arises out of joint or concerted action. We refer to such instances of shared responsibility as \textit{cooperative responsibility}. This covers such examples as coalition warfare, joint border patrols, or one state aiding another in committing a wrongful act.

Occurrences of shared responsibility also can arise when there is no concerted action. For these cases, we adopt the phrase \textit{cumulative responsibility}. In such cases, we recognize the need for the injured party or parties to be able to make claims against several entities, despite the fact that these entities acted independently from each other. Examples of such scenarios

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} On shared responsibility as a concept applying in situations where causation alone is insufficient, see \textsc{Larry May}, \textit{Sharing Responsibility} 37–38 (1996).
\item \textsuperscript{25} \textit{Id.} at 112.
\item \textsuperscript{26} \textit{Id.} at 106–07 (distinguishing between collective and shared responsibility).
\item \textsuperscript{27} \textit{See id.} at 36–38.
\item \textsuperscript{28} \textit{See Andrew Linklater}, \textit{The Problem of Harm in World Politics: Theoretical Investigations} 101 (2011).
\end{itemize}
\end{footnotesize}