Collection dirigée par SAMANTHA BESSON et NICOLAS LEVRAT

FONDEMENTS DU DROIT INTERNATIONAL

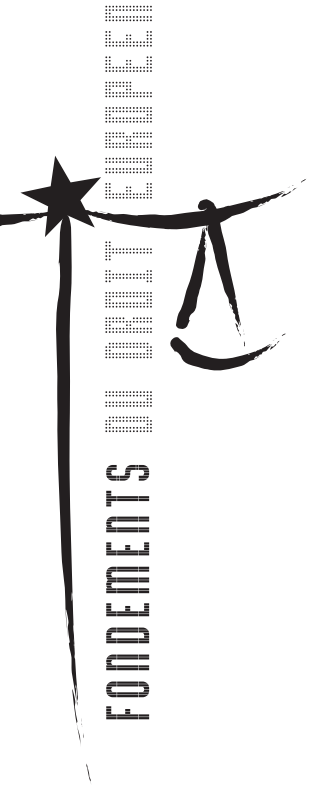
International Responsibility

Essays in Law, History and Philosophy

Edited by
Samantha Besson

With the assistance of
Matthieu Loup

Schulthess
ÉDITIONS ROMANDES



Volume 10

Collection dirigée par Samantha Besson et Nicolas Levrat

Collection dirigée par Samantha Besson et Nicolas Levrat

International Responsibility

Essays in Law, History and Philosophy

Edited by
Samantha Besson

With the assistance of
Matthieu Loup

LGDJ
lextenso éditions

Schulthess
ÉDITIONS ROMANDES
§ 2017

Création de la couverture : © Valérie Salvo

ISBN 978-3-7255-8598-4

www.schulthess.com

Diffusion en France : Lextenso Éditions, 70, rue du Gouverneur Général Éboué,
92131 Issy-les-Moulineaux Cedex
www.lextenso-editions.com

Diffusion et distribution en Belgique et au Luxembourg : Patrimoine SPRL, Avenue Milcamps 119,
B-1030 Bruxelles ; téléphone et télécopieur : +32 (0)2 736 68 47 ; courriel : patrimoine@telenet.be

Information bibliographique de la Deutsche Nationalbibliothek : La Deutsche Nationalbibliothek a répertorié cette publication dans la Deutsche Nationalbibliografie ; les données bibliographiques détaillées peuvent être consultées sur Internet à l'adresse http://dnb.d-nb.de.

Contents

Contents ..... **V**

Table of contents ..... **VII**

List of contributors ..... **XIII**

Foreword **1**
SAMANTHA BESSON

International Responsibility: An Introduction **3**
SAMANTHA BESSON

PART I: HISTORY AND RESPONSIBILITY **15**

The "Historikerstreit" 30 Years Later – From a Responsible Way to Remember to a Dogmatic Standardization of Facing the Past **17**
CÉCILE BLASER

Nineteenth-Century *Interventions d'Humanité* and the Question of Responsibility: A Very Short Historical Overview **33**
DAVIDE RODOGNO

PART II: CAUSATION AND RESPONSIBILITY **51**

Responsibility without Causation? The Public International Law Experiment **53**
DÁVID M. PUSZTAI

Responsibility for International Monetary Stability in the Post-Crisis Era **77**
LUCIA SATRAGNO

PART III: PRIMARY AND SECONDARY RESPONSIBILITIES 95

State Responsibility Aspects of a Common Concern Based Approach to Collective Action 97
ZAKER AHMAD

Theorizing the Retrospectiveness of International Responsibility: A Historical Inquiry into *Restitutio in Integrum* 117
EDOARDO STOPPIONI

The Content of State Responsibility under the European Convention on Human Rights – Some Reflections on the Court's Approach to General International Law on State Responsibility 139
MATTHIEU LOUP

PART IV: NON-STATE ACTORS AND RESPONSIBILITY 159

The Importance and Difficulties of Establishing and Clarifying the International Legal Personality and Responsibility of Non-State Armed Groups 161
HELEEN M. HIEMSTRA

Targeted Killings and the Punishment of Enemy Leaders 179
FRANCESCO ROMANI

PART V: INTERNATIONAL ORGANIZATIONS AND RESPONSIBILITY 197

Immunities and Responsibilities of International Organizations: Two Sides of the Same Coin or Two Separate Coins? 199
AURÉLIE GALETTO

Challenging the Presumption of "Non-Responsibility" of Member States of International Organizations 221
ODETTE MURRAY

International Responsibility: An Introduction

SAMANTHA BESSON

Responsibility is a pivotal concept in law.[1] Some argue that there can be no law without responsibility.[2] However central the concept of responsibility is to legality, and maybe because it is that inescapable, it remains fraught with conceptual and normative difficulties.

This is even more true of international responsibility.[3] A first reason for this is that international law is still a relatively new legal order, and the relationship between international legality and *normativity*, on the one hand, and responsibility, on the other, has been crucial to its consolidation. A second reason is *sovereign equality*,[4] and how international responsibility law has provided the means for securing mutual accountability between equal States, as a result. A final ground for the specific importance of responsibility in international law pertains to legal *personality* (from the Latin *persona* or mask[5]) and especially the plurality of international legal subjects, and how responsibility, or lack thereof, has been tied to the ability to stand for another legal subject (e.g. a State acting and being held responsible for its people or an international organization for its member States[6]), and how responsibility is

---

1 See e.g. Tony HONORÉ, "Responsibility and Luck", in *Responsibility and Fault*, Oxford, Hart Publishing, 1999, p. 14-40; John GARDNER, "The Mark of Responsibility", *Oxford Journal of Legal Studies*, no. 2, vol. 23, 2003, p. 157-171; John R. LUCAS, *Responsibility*, Oxford, OUP, 1995.

2 See e.g. Permanent Court of International Justice, 13 September 1928, *The Factory at Chorzów*, Series A, No. 17, p. 47, par. 73: "As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."

3 See e.g. Andre NOLLKAEMPER, "Responsibility", in Jean D'ASPREMONT, Sahib SINGH, eds, *Fundamental Concepts for International Law: Constructing Intelligibility in International Legal Studies*, Cheltenham, Edward Elgar Publishing, 2017, forthcoming, available on SSRN: <https://ssrn.com/abstract=2914250> [accessed 2 March 2017]. See also James CRAWFORD, *State Responsibility – The General Part*, Cambridge, CUP, 2013, p. 3-44; Alain PELLET, "The Definition of Responsibility in International Law", in James CRAWFORD, Simon OLLESON, Alain PELLET, eds, *The Law of International Responsibility*, Oxford, OUP, 2010, p. 3-16; James CRAWFORD, Simon OLLESON, "The Nature and Forms of International Responsibility", in Malcolm EVANS, ed., *International Law*, 3rd edn, Oxford, OUP, 2010, p. 441-471.

4 See PELLET, "The Definition of Responsibility", *op. cit.* n 3, p. 4.

5 See Alain SUPIOT, "Introduction", in Alain SUPIOT, Mireille DELMAS-MARTY, eds, *Prendre la responsabilité au sérieux*, Paris, Presses Universitaires de France, 2015, p. 9-35.

6 On secondary liabilities of individuals for their States' responsibility and of States (and individuals) for their international organizations' responsibility, see Samantha BESSON,

increasingly becoming plural and potentially shared by many legal subjects at the same time.[7]

Of course, responsibility is a highly slippery notion in moral and political philosophy in general.[8] In short, it refers to the confrontation of a person or group of persons with the effects of their action or that of others.

Herbert L.A. HART captured the polysemic nature of responsibility in (domestic) law in this famous passage:

> "As captain of the ship, X was *responsible* for the safety of his passengers and crew. But on his last voyage he got drunk every night and was *responsible* for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was *responsible* for his actions. Throughout the voyage, he behaved quite *irresponsibly*, and various incidents in his career showed that he was not a *responsible* person. He always maintained that the exceptional winter storms were *responsible* for the loss of the ship, but in the legal proceedings brought against him he was found criminally *responsible* for his negligent conduct, and in separate civil proceedings he was held legally *responsible* for the loss of life and property. He is still alive and he is morally *responsible* for the deaths of many women and children."[9]

Those are just some of the different meanings responsibility may have in domestic law. Various domains or regimes of domestic law, such as civil or criminal law, have given rise to a few others. In international law, some of those meanings have receded to the background, while new ones have come to the fore.

"Individual and State Liability for an International Organization's Responsibility – The Challenge of Fairness Unveiled", *Journal of Legal Philosophy*, Special issue on Global justice and international law, 2017, forthcoming.

7 See e.g. Samantha BESSON, "Shared Responsibilities under the ECHR – Concurrent Jurisdictions, Duties and Responsibilities", in Julia MOTOC, Anne VAN AAKEN, eds, *The ECHR and General International Law*, Oxford, OUP, 2017, in press; Samantha BESSON, "La pluralité d'Etats responsables: un état des lieux", *Revue suisse de droit international et de droit européen*, no. 1, 2007, p. 13-38.

8 See David MILLER, *National Responsibility and Global Justice*, Oxford, OUP, 2007, p. 82; Samuel SCHEFFLER, "Individual Responsibility in a Global Age", in *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, New York, OUP, 2001, p. 32-48.

9 Herbert L.A. HART, *Punishment and Responsibility*, Oxford, Clarendon Press, 1968, p. 211.

Based on NOLLKAEMPER's taxonomy,[10] albeit with some revisions, one may mention at least four relevant meanings of responsibility in current international law: responsibility as a primary duty to act or not; responsibility as a non-allocated obligation to act or not (e.g. responsibility to protect);[11] responsibility as accountability or "answerability" for one's conduct (whether wrong or not); and responsibility as liability, i.e. as a set of secondary obligations that arise from the violation of primary duties (wrongdoing). The latter is the most common meaning of responsibility used by international lawyers. It is the one that was consolidated in the early case law of the Permanent Court of International Justice[12] and the International Court of Justice,[13] and the one at stake in the International Law Commission's two codifications of the law on the international responsibility of States and international organizations.[14] Importantly, however, the lines between that fourth meaning and the others are fluid, as exemplified by the strong ties that subsist between primary duties and secondary duties arising from international responsibility law or by the fast-developing accountability mechanisms in international law.

Interestingly, responsibility became a central institution in Western and European legal orders quite late in history. This is also the case in international law, of course,

[10] See NOLLKAEMPER, "Responsibility", *op. cit.* n 3. See also James CRAWFORD, Jeremy WATKINS, "International Responsibility", in Samantha BESSON, John TASIOULAS, eds, *The Philosophy of International Law*, Oxford, OUP, 2010, p. 283-298.

[11] How do responsibilities differ from duties? Broadly speaking, responsibilities are abstract moral requirements whose extent and reasonable distribution among potential bearers are still indeterminate and subject to judgment. Nor are responsibilities directed; they have no right-holder as a result. A difficulty is that duties amount to responsibilities, albeit to concrete and perfect ones whose material extent and personal allocation are fully specified and that are directed to an individual right-holder. The reverse is not true, however: not all responsibilities amount to duties.

[12] Permanent Court of International Justice, *The Factory at Chorzów*, *supra* n 2; Permanent Court of International Justice, 17 August 1923, *S.S. "Wimbledon"*, Series A, No. 1, p. 15.

[13] ICJ, 9 April 1949, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland/Albania)*, judgment, I.C.J. Reports 1949, p. 4; ICJ, 27 June 1986, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)*, judgment, I.C.J. Reports 1986, p. 14; ICJ, 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174. See also Christian J. TAMS, "Law-making in Complex Processes: the World Court and the Modern Law of State Responsibility", in Christine CHINKIN, Freya BAETENS, eds, *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, Cambridge, CUP, 2015, p. 287-306.

[14] Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10, *Yearbook of the International Law Commission*, vol. II, part 2, 2001, p. 30-143; Draft Articles on the Responsibility of International Organizations with Commentaries, UN Doc. A/66/10, *Report of the International Law Commission on its Sixty-Third Session*, p. 50-180.

where it only dates back to the 19th Century. But so did it in domestic law, at least in the way we understand it today.[15]

Of course, early traces of responsibility could be found in Roman law, but what *responsio* (from the Latin *re-spondere*) amounted to was a guarantee for a debt in justice, and what *responsalis* corresponded to was a guarantee in the law of engagement. Responsibility *qua* liability, and as we know it in contemporary (Western, and European in particular) domestic law, is a modern institution that grew out of the Natural Law school, and especially emerged from the work of seventeenth and eighteenth Century Natural Law scholars like GROTIUS and PUFENDORFF and then WOLFF and VATTEL who happened to be both international and domestic scholars at the same time. The first systematic accounts date back to 1850 thanks to HEFFTER, followed by the work of TRIEPEL and ANZILOTTI in 1898 and 1906, and finally AGO in his 1939 Hague Lectures. What was decisive in this development in the late 19th Century resulted from a combination of factors, and in particular: the development of international institutions, and especially of international dispute settlement mechanisms and of arbitral adjudication; the succession of wars, and issuing of reparation awards; and the development of foreign investment and of diplomatic protection in this context.

Today, the law of international responsibility is in ebullition again. Some argue that the ILC 2001 and 2011 codifications may just have been one stage in the development of international responsibility law. NOLLKAEMPER in particular refers to three grounds for change in international responsibility law that match broader developments in contemporary international law: "the notion of binding obligations often may not matter so much in view of a wide proliferation of other types of norms [what one may coin changes in international law *normativity*]; States and international organizations are just two actors in a much more diverse spectrum [what one may coin changes in international law *subjects*]; and responsibility for wrongdoing is only one of many accountability mechanisms, let alone the most efficient one [what one may coin changes in international law modes of *accountability*]."[16]

[15] See Jean-Noël ROBERT, "Traduire la responsabilité", in Alain SUPIOT, Mireille DELMAS-MARTY, eds, *Prendre la responsabilité au sérieux*, Paris, Presses Universitaires de France, 2015, p. 101-116; Olivier DESCAMPS, "Histoire du droit de la responsabilité dans le monde occidental", in Alain SUPIOT, Mireille DELMAS-MARTY, eds, *Prendre la responsabilité au sérieux*, Paris, Presses Universitaires de France, 2015, p. 39-53.

[16] See e.g. NOLLKAEMPER, "Responsibility", *op. cit.* n 3.

One should add that international responsibility law's original "fissures", to quote D'ASPREMONT,[17] have themselves also contributed to sharpening this crisis and may be said to lie at the core of contemporary difficulties. One may mention at least two of the consequences of those birth defects for international responsibility law.

First of all, international responsibility has never been conceived around *fault*, as confirmed by the circumvention of the issue of intent or negligence in the ILC codifications. This had made it difficult to develop a regime of causal liability that was tellingly referred to as "liability for injurious consequences arising out of acts not prohibited by international law"[18] where the absence of fault, that is not required in mainstream international responsibility law anyway, had to be replaced by the absence of a breach. This has been confirmed again in recent debates pertaining to due diligence (that is usually conceived as a primary duty instead). Secondly, *harm* and hence a prejudice to repair are largely absent from the structure of international responsibility in the ILC codifications. This has had a detrimental impact on the conceptualization of causation in international law and, accordingly, of reparations. It has also given rise to hurdles in attribution, and explains why the attribution of the responsibility of other subjects had to become part of the ordinary operation of assigning responsibility rather than a distinct form of responsibility.[19]

Besides those two specific structural shortcomings in contemporary international responsibility law, one may also consider that its predominant private or civil nature needs to be revised to develop a public responsibility regime for States and international organizations. This would be in line with the development of the status of the individual in international law and, more generally, of the verticalization and politicization of international relations. The largely horizontal, State or IO to State or IO, regime of responsibility fails to provide sufficient means for State or IO responsibility to individuals.[20] Of course, such regimes have developed separately, especially in international human rights law, but they are usually considered either as special regimes or as specifications of a general regime of international

---

17 Jean D'ASPREMONT, "The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility", *International Organizations Law Review*, no. 1, vol. 9, 2012, p. 15-28.

18 See the ILC Draft Articles on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, UN Doc. A/51/10, *Yearbook of the International Law Commission*, vol. II, part 2, 1996, p. 100-132.

19 See e.g. Samantha BESSON, "La responsabilité solidaire des organisations internationales et des Etats – Une institution négligée", in Alain SUPIOT, ed., *La responsabilité solidaire*, Paris, Publications du Collège de France, 2017, in press.

20 See BESSON, "La responsabilité solidaire des organisations internationales et des Etats", *op. cit.* n 19; BESSON, "Individual and State Liability for an International Organization's Responsibility", *op. cit.* n 6.

responsibility law.[21] There are elements of such a public and objective regime of responsibility in the procedural mechanisms available under the ILC Articles, but they have not been put to much use so far. Another related concern is the difficulty under current international responsibility to hold more than one State or IO responsible at the same time. The reasons for this are well-known, but need to be re-considered in light of the institutionalization of international relations, including of international adjudication, on the one hand, and of the growing recognition of the importance of individual justice under international law, on the other. The latter requires more solidarity in international responsibility.[22]

In view of all those difficulties, it is clear why the time has come to re-examine the foundations of international responsibility. This is best done not only among lawyers, but also with the help of scholars in the two other disciplines represented in this volume, i.e. historians and philosophers. International responsibility has indeed played a crucial role in those two disciplines' scholarship or practice, alone or by reference to the law. However, it is also because the historical and philosophical underpinnings of international responsibility law themselves are currently the most vulnerable ones that this call should be taken seriously. Some of those questions, but many others too are broached by the authors in this volume.

***

It is useful at the outset of this collection to provide a brief overview of the contributions it is comprised of. In each case, a short abstract of the contribution is provided.

Following the structure adopted at the colloquium itself, the present volume is organized around five sections that correspond to five clusters of topics: history and responsibility, causation and responsibility, primary and secondary responsibilities, non-State actors and responsibility, and international organizations and responsibility. Needless to say that many other structuring lines could have been chosen and that the different chapters in this volume actually contribute to many of those issues at the same time and irrespective of the sections they are in.

The first topic addressed in the book is *History and Responsibility*. It contains two contributions.

[21] See BESSON, "Shared Responsibilities under the ECHR", *op. cit.* n 7; Samantha BESSON, "L'extra-territorialité des droits de l'homme internationaux: juridictions concurrentes, obligations conjointes et responsabilités partagées", in Pierre D'ARGENT, ed., *Droit des frontières internationales. Actes des Journées franco-allemandes SFDI-DGIR 2014*, Paris, Pedone, 2016, p. 245-259.

[22] See BESSON, "La responsabilité solidaire des organisations internationales et des Etats", *op. cit.* n 19; BESSON, "La pluralité d'Etats responsables: un état des lieux", *op. cit.* n 7.

In her chapter **The "Historikerstreit" 30 Years Later – From a Responsible Way to Remember to a Dogmatic Standardization of Facing the Past**, Cécile BLASER argues that the *Historikerstreit*, a heated debate between 1986 and 1988 among several prominent West-German intellectuals on the question of the comparability of the Nazi past, not only laid ground for a "comparative ease" of commemorating the German past, but even led to a standardization of memory in policy-oriented peacebuilding. To make this argument, her contribution is organized around two sections: a first part about the historians' quarrel itself, its main arguments and achievements, and a second part which explains how the *Historikerstreit* contributed, as an important part of the process that gave rise to the "facing the past" framework, to developing a trend to standardize memorialization. The author argues that there cannot be a one-size-fits-all solution for how to face atrocious pasts. In order to find a responsible way to deal with past atrocities, each post-conflict society must examine and deal with its own crimes in their uniqueness. Without wanting to propose a standardized solution for a critique of standardization, the author pleads for new historians' debates in post-conflict societies – in whatever form they may appear – to find a tailor-made solution for how to deal with the past and how to take responsibility for it.

In his contribution **Nineteenth-Century *Interventions d'Humanité* and the Question of Responsibility: A Very Short Historical Overview**, Prof. Davide RODOGNO touches upon the case of humanitarian interventions, or *interventions d'humanité* that took place throughout the nineteenth century. The author examines the issue of responsibility from the point of view of the intervening States in an analysis which is partial, non-exhaustive and leaves unaddressed the issue of the ways in which the beneficiaries of these interventions interpreted such responsibility as well as the ways in which the target State of the intervention attempted to reject the allegedly responsible intervention of foreign States within its national and imperial frontiers. This short overview takes the perspective of the European powers and the articulation of a specific idea of responsibility that revolved around legal, moral and political motivation. The author argues that a contextualized analysis might eventually enhance a dialogue with scholars interested in the history and historiography of human rights and their most flagrant violations as well as with scholars working on the controversial principle of the responsibility to protect.

The second topic addressed in the book is *Causation and Responsibility*. It contains two contributions.

In his chapter **Responsibility without Causation? The Public International Law Experiment**, Dávid M. PUSZTAI argues that the decision of the International Law Commission to exclude causation from the constitutive pillars of international responsibility did not hold ground in practice. The author submits that there are several possible doctrinal explanations for this, ranging from arguments about a

fragmented law of international responsibility to an allegedly emerging new test of complicity-based attribution. He then draws on the works of legal philosophers engaged with action theory to argue that the law of international responsibility lacks a developed theory of action. Most of the conceptual problems surrounding causation and its relationship with attribution stem from a missing theoretical foundation for the concept of the "internationally wrongful act" itself. The author proposes a "causal theory of action" to address this deficiency.

In her chapter **Responsibility for International Monetary Stability in the Post-Crisis Era**, Lucia SATRAGNO considers that the stability of the international monetary system depends both on domestic and international policies. There are clear mandates that attribute responsibility for the promotion and maintenance of monetary stability at the domestic and regional level to the central banks (as States agencies) and for the promotion of monetary stability at the international level to the International Monetary Fund (the central international monetary institution). These overlapping dominions dealing with monetary stability are not static and interact and also influence each other. The Global Financial Crisis of 2007-2009 highlighted this interaction by evidencing the existing trade-off among domestic policies and global monetary stability. Consequently, this contribution aims to explore the role of law and institutions in safeguarding international monetary stability with a special focus on the allocation of duties and responsibilities at the different levels of governance. In doing so the author argues that the emerging principle of Common Concern of Humankind can be a valuable and original methodological approach to analyse the existing trade-off in the field of international monetary law.

The third topic addressed in the book is *Primary and Secondary Responsibilities*. It contains three contributions.

In his chapter **State Responsibility Aspects of a Common Concern Based Approach to Collective Action**, Zaker AHMAD argues that we know currently of no international legal norms that could be used to resolve problems of supply of global public goods (i.e. collective action problems). In this context, he examines the call for greater acceptance of the principle of Common Concern of Humankind to resolve collective action problems. The author demonstrates the concept's growing legal influence over time by looking at its evolution, meaning and normative implications. Yet, he argues, common concern cannot be categorized as a general principle or a customary norm of international law. It entails the primary duty of all States to engage in effective global cooperation and to take measures domestically. Common concern would also suggest that the secondary obligations of States would extend beyond the limits suggested by the articles on State responsibility, calling for a responsibility to take non-forcible measures against the non-performers of primary duties.

In his chapter **Theorizing the Retrospectiveness of International Responsibility: A Historical Inquiry into *Restitutio in Integrum***, Edoardo STOPPIONI aims at reconceptualising the remedy of *restitutio in integrum* using legal history and theory. He invites us on a journey through the historical origins and the evolution of the narratives on restitution in international law and deconstructs the major problems raised by this legal instrument: its polysemic use, its relationship with the primary obligation and cessation. He argues that *restitutio in integrum* is an attribution of the international jurisdictional function that aims at eradicating the internationally wrongful act. Its role of re-establishing the *status quo ante* reflects the need to repair the legal injury that the violation causes in the international order. Therefore, restitution is strictly linked to the primary obligation and shares the very philosophical underpinning of international responsibility, which is *in primis* the protection of international legality.

In his chapter **The Content of State Responsibility under the European Convention on Human Rights – Some Reflections on the Court's Approach to General International Law on State Responsibility**, Matthieu LOUP compares the content of State responsibility under the European Convention on Human Rights and under the ILC Articles on Responsibility of States for Internationally Wrongful Acts. Pointing at their differences and similarities, he aims at assessing the ways in which the European Court of Human Rights developed its understanding of the content of State responsibility in relation with general international responsibility law. The author argues that the Court limited itself in most instances to specifying the content of the general provisions of the Articles. Real derogations are limited to very specific elements, such as the invocation of domestic law to bar full reparation at the domestic level. This assessment provides useful perspectives for the Court at a time when its authority is challenged, offering a basis in international responsibility law on which to ground progressive developments of the Court's approach to reparation and prevention of future breaches of the Convention.

The fourth topic addressed in the book is *Non-State Actors and Responsibility*. It contains two contributions.

In her chapter **The Importance and Difficulties of Establishing and Clarifying the International Legal Personality and Responsibility of Non-State Armed Groups**, Heleen M. HIEMSTRA argues that, because the great majority of contemporary armed conflicts are of a non-international nature, the role and impact of non-State armed groups have greatly increased in significance. Yet, the legal position and direct international responsibility of such groups are far from crystallized and States remain reluctant to clarify this under international law. If assumed that non-State armed groups, as parties to non-international armed conflicts, are bound by international humanitarian law applicable in such conflicts, the implications of possible violation of such rules remain unclear. The author's

contribution outlines why the current approaches to deal with the responsibility of non-State armed groups are unsatisfactory. Both the responsibility of States for certain conduct of non-State armed groups, as well as individual criminal responsibility of the groups' members do not sufficiently address the responsibility gap that exists for non-State armed groups. While highlighting some of the challenges involved therein, the author advocates a move towards the direct responsibility of non-State armed groups themselves at the international level.

In his chapter **Targeted Killings and the Punishment of Enemy Leaders**, Francesco ROMANI, considers that the elimination of enemy leaders through operations of targeted killing has become a strategic priority of belligerents. Struggling to place this evanescent feature of contemporary warfare within the traditional framework of the laws of armed conflict, international legal scholarship has however overlooked some of its most important innovations and distinguishing features. In his contribution, the author aims at filling this conceptual *lacuna* by highlighting how the notion of individual criminal responsibility is progressively transforming and replacing the traditional grounds for targeting enemy leaders. The first part of the chapter demonstrates how the Israeli practice has relied on considerations based on the individual responsibility of enemy leaders to significantly expand the concept of direct participation in hostilities. In the second part, centred on recent US practice, the author shows how similar considerations have transformed the continuity and imminence of a threat from a justification of the use of force *vis-à-vis* States into a basis for targeting individuals. Building on these considerations, he then assesses the meaning of individual responsibility in the context of targeted killings, and investigates the tensions and dangers created by the use of criminal law concepts as a ground for targeting. Finally, he turns to interpreting the importance of individual criminal responsibility in the field of targeted killing as an inescapable, albeit upsetting, consequence of the processes that have placed the individual at the centre of international law.

The fifth topic addressed in the book is *International Organizations and Responsibility*. It contains two contributions.

In her chapter **Immunities and Responsibilities of International Organizations: Two Sides of the Same Coin or Two Separate Coins?**, Aurélie GALETTO argues that when courts and authors separate immunities and responsibility (and introduce that the latter has no effect on the former), they only mean that immunities, as procedural bars, have no effect on the legality of the behaviour of the wrongdoer. Her contribution aims at specifying this reasoning and defending the position that immunities should be understood as an inability of a given court or tribunal to examine certain causes, but not generally as an inability of the wrongdoer to answer for its actions, taking into account that the answer can take many forms. Immunity could amount to a procedural obstacle to judicial liability, but should not have for

consequence the unaccountability of the subject as soon as a breach of an international obligation exists. By examining the case law, the author demonstrates that, in some cases, especially when no judicial *forum* exists and when the immunity is absolute, immunities have the *de facto* effect of leaving the three types of normative consequences of responsibility up to the wrongdoer (and, in particular, an international organization), letting it choose to respond or not without having to clearly justify its choices and answers for its actions. The author concludes that it should be established that immunities should not work as a veil that "isolates" a subject of law from the consequences of its actions.

In her chapter **Challenging the Presumption of "Non-Responsibility" of Member States of International Organizations**, Odette MURRAY traces the genealogy of the position espoused in the 2011 Articles on Responsibility of International Organizations that member States of an international organization are not responsible for the wrongful acts, or the liabilities, of the organization. An analysis of the preparatory work of the two leading codification efforts on member State responsibility – the 1995 Resolution of the *Institut de Droit International* and the International Law Commission's own 2011 Articles – exposes some deep divisions among the members of those respective institutions, with "non-responsibility" provisions being adopted over the objection of a minority of members. The author argues that case law on the topic is more equivocal than usually presented. Ultimately, the author considers that a preference for the non-responsibility of member States is based on policy. She challenges the balance which the Commission's work has struck between the competing policy considerations, arguing that it has put too much store in the autonomy and independent functioning of the organization, to the detriment of the protection of innocent third parties and the fundamental obligation of reparation for injuries.