Theorizing International Responsibility Law, an Introduction

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International responsibility law today is in great need of theorizing or, at least, that is the present volume's argument. This introduction sets the stage for that argument. It unfolds in four steps: first, it clarifies the reasons that led to putting this collection of essays together and explains what it hopes to achieve; second, it introduces the main theoretical challenges addressed in the volume; third, it provides some information about how the book is organized; and, finally, it sketches out the content of its successive chapters and their articulation.

1 THE BACKGROUND TO THE VOLUME

Ten years ago, I co-edited, with John Tasioulas, a collection of essays entitled *The Philosophy of International Law*.[1] By addressing central philosophical questions about international law, that collection was to contribute to a renaissance in the field and thereby to revive an ancient tradition of theoretical inquiry about international law among international lawyers. The book was a success,[2] to the extent, at least, that most chapters in the volume rapidly led to active discussions and multiple publications.

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1 Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010).

2 For other similar endeavours since then, see, e.g., Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016); Robert Kolb, *Theory of International Law* (Oxford: Hart, 2016); Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016); Samantha Besson (ed.), *International Responsibility: Essays in Law, History and Philosophy* (Zürich: Schulthess, 2017); Jean d'Aspremont (ed.), *The History and*

There is one topic addressed in the book, however, that has curiously not given rise to debate since 2010 and certainly not to any book-length publications.[3] That is the philosophy (or theory, as both terms are used interchangeably here) of international responsibility law, that is, the philosophy of the international law on the responsibility[4] of States and international organizations (IOs) in case of breach of international law.[5] This absence of reaction is even more incomprehensible as the two chapters on responsibility in the book – the first by James Crawford, our late and much missed colleague, and Jeremy Watkins,[6] and the second by Liam Murphy[7] – make for a

Theory of International Law (Northampton: Edward Elgar, 2020); David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge: Cambridge University Press, 2021).

3 For some notable exceptions, see, e.g., Samantha Besson, 'State and Individual Secondary Liability in Case of International Organizations' Responsibility: The Challenge of Fairness Unveiled' (2017) 6(1) *Journal of Legal Philosophy* 51–78; Sean Fleming, 'Moral Agents and Legal Persons: The Ethics and the Law of State Responsibility' (2017) 9(3) *International Theory* 466–489; Sean Fleming, *Leviathan on a Leash: A Theory of State Responsibility* (Princeton: Princeton University Press, 2020).

4 On the meaning of 'responsibility' in international law and how it differs from and relates to (i) (primary) 'obligations', (ii) 'liability' to some negative response for wrongdoing (including for the breach of primary obligations), and/or (iii) broader 'accountability' for one's (even non-wrongful) conduct, see André Nollkaemper, 'Responsibility', in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar, 2019), pp. 760–772. See also James Crawford and Jeremy Watkins, 'International Responsibility', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 283–298, pp. 283–284.

5 On international responsibility law understood as a form of 'liability' of States and, by extension, of IOs, that is, as a set of secondary obligations that arise from the breach of primary obligations, see *Case Concerning the Factory at Chorzów (Germany* v. *Poland)* (Merits) [1928] PCIJ Ser. A No. 17; *Case of the S.S. Wimbledon (United Kingdom* v. *Japan)* [1923] PCIJ Ser. A No. 1; *Corfu Channel Case (United Kingdom* v. *Albania)* (Merits) [1949] ICJ Rep. 4; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits) [1986] ICJ Rep. 14; *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep. 174; International Law Commission (hereafter ILC), *Draft Articles on the Responsibility of International Organizations*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 66/100 (9 December 2011); ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 56/83 (12 December 2001). See also James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 3–44; Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 3–16; James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility', in Malcolm Evans (ed.), *International Law*, 5th ed. (Oxford: Oxford University Press, 2018), pp. 415–449.

6 Crawford and Watkins, fn. 4.

7 Liam Murphy, 'International Responsibility', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 299–315.

fascinating and thought-provoking read. They raise multiple philosophical questions John Tasioulas and I thought would be picked up by others, and especially by a younger generation of international law scholars.

To the extent that there is no issue more central to a legal order and the Law than responsibility,[8] the dearth of theorizing on international responsibility law should actually worry us about the state of international law and of its institutions, especially about the state of the State and IOs. As a matter of fact, there is hardly any topic more interesting in any given legal order than the way in which responsibility is conceived and organized. Not only is responsibility an additional source of obligations for the future,[9] it is also a source of legitimate authority for the institutions held responsible and, hence, a key factor in their internal organization.[10]

The neglect of the philosophy of international responsibility law is actually quite concerning in international law, because responsibility has been even more central to the international legal order[11] in practice than it has domestically. There are at least three reasons for that centrality that pertain to the normative and institutional specificities of international law.[12]

First of all, responsibility matters even more particularly in international law because it is still a relatively new legal order, by comparison. This explains, for instance, that the relationship between international legal *normativity* and responsibility is more direct than it is in domestic legal orders. Indeed, the mutual influence between so-called primary obligations of international law and secondary obligations arising from a breach thereof has been crucial to

8 See, e.g., Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999), 'Chapter 2. Responsibility and Luck: The Moral Basis of Strict Liability', pp. 14–40; Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002); John Gardner, 'The Mark of Responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 157–171; John R. Lucas, *Responsibility* (Oxford: Oxford University Press, 1995); Joseph Raz, *From Normativity to Responsibility* (Oxford: Oxford University Press, 2011).

9 See Raz, fn. 8, in particular 'Chapter 12. Being in the World', pp. 227–254; Seana V. Shiffrin, 'The Moral Neglect of Negligence', in David Sobel, Peter Vallentyne and Steven Wall (eds.), *Oxford Studies in Political Philosophy*, Volume 3 (Oxford: Oxford University Press, 2017), pp. 197–228. See on the relationship between time and responsibility, d'Aspremont, Chapter 11.

10 See Samantha Besson, *Reconstructing the International Institutional Order*, translated from French, Inaugural Lectures of the Collège de France (Paris: OpenEdition Books and Editions du Collège de France, 2021), paras. 81–86.

11 See, e.g., *Factory at Chorzów*, fn. 5, p. 29: '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'.

12 See Samantha Besson, 'International Responsibility: An Introduction', in Samantha Besson (ed.), *International Responsibility: Essays in Law, History and Philosophy* (Zürich: Schulthess, 2017), pp. 3–13.

the consolidation of a corpus of international law norms in the first place.[13] A second reason, which is related to the first, lies in *sovereign equality* and its relationship to equal responsibility.[14] International responsibility law provides the means to secure the mutual responsibility of equally competent States (and the peoples they stand for). It thereby contributes, by constraining and empowering them at the same time, to making those institutions not only competent or sovereign, but also equal in that sovereignty.[15] When one knows the role played by sovereign equality in the international legal order, this is not a minor feat of international responsibility law.

A final ground for the specific importance of responsibility in international law pertains to legal personality in the circumstances of *institutional plurality* that characterize international law.[16] In this context, international responsibility has been tied not only to the recognition of legal personality, as it has domestically, but also to organizing institutional standing for another legal subject (e.g., a State for its people or specific private persons, or an IO for its Member States and their peoples or specific private persons).[17] This is particularly important in the international institutional order, where the most relevant legal persons in terms of responsibility are institutions.[18]

Not all responsibility regimes under international law have been left hanging philosophically. By comparison, the philosophy of international criminal law and, hence, the theorizing of the international criminal responsibility of individuals (as opposed to the international responsibility of States or IOs), which was discussed in another pair of chapters – authored respectively by David Luban and R.A. Duff[19] – in the 2010 *Philosophy of International Law*

[13] See Pierre d'Argent, 'Les obligations internationales' (2021) 417 *Collected Courses of the Hague Academy of International Law* 9–210.

[14] See Pellet, fn. 5, p. 4.

[15] See Samantha Besson, 'La due diligence en droit international' (2020) 409 *Collected Courses of the Hague Academy of International Law* 153–398, at 202–203.

[16] See Besson, *Reconstructing the International Institutional Order*, fn. 10, paras. 84–86.

[17] See, e.g., Besson, 'The Challenge of Fairness Unveiled', fn. 3.

[18] No wonder the argument in many of this volume's chapters revolves around international institutional issues: see, e.g., Duff (on the international community), Harel and Kulaga (on international courts) or Fleming (on the State), Chapters 3, 4 and 10.

[19] R.A. Duff, 'Authority and Responsibility in International Criminal Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 589–604; David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 569–588.

book, have flourished in the last ten years.[20] That difference cannot be explained by reference to those regimes' comparative effectiveness in practice, for the individual criminal responsibility regime also has its enforcement issues. It should rather be pinned down to the increasing individualization of international law duties and responsibilities. The most recent and telling example thereof is the current academic efforts and practical focus being placed on an international crime and criminal responsibility of 'ecocide' for individuals[21] rather than on international environmental duties of States and IOs and the latter's corresponding responsibilities if those duties are breached.

True, there have been lots of interesting new publications on the law on international responsibility of States and IOs in the past few years,[22] including, most recently, in the wake of the celebration of the twentieth anniversary of the International Law Commission's codification or 'encoding' of that law.[23] It has also been the case on specific issues such as 'shared responsibility' in cases of collective and joint wrongful acts and complex causation of harm

[20] See, e.g., Roberto Gargarella, 'Human Rights, International Courts and Deliberative Democracy', in Nicola Palmer, Phil Clark and Danielle Granville (eds.), *Critical Perspectives in Transitional Justice* (Antwerp: Intersentia, 2012), pp. 101–118; Massimo Renzo, 'Crimes against Humanity and the Limits of International Criminal Law' (2012) 31(4) *Law and Philosophy* 443–476; Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Brussels: Torkel Opsahl Academic EPublisher, 2018); Alain Zysset, 'Global Constitutionalism and the International Criminal Court: A Relational View' (2020) 1 *Glasgow Centre for International Law and Security Working Paper Series*; Robert Cryer and Albert Nell, 'The Philosophy of International Criminal Law', in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, 2nd ed. (Cheltenham: Edward Elgar, 2020), pp. 200–239.

[21] See, e.g., Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text*, June 2021. Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf, last accessed 14 April 2022.

[22] See, e.g., Robert Kolb, *The International Law of State Responsibility: An Introduction* (Cheltenham: Edward Elgar, 2017); Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020).

[23] See, e.g., Federica Paddeu and Christian J. Tams (eds.), *Symposium 'The ILC Articles at 20'* (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/the-ilc-articles-at-20-introduction-to-the-symposium/; Patrícia Galvão Teles and Pierre Bodeau-Livinec (eds.), *The Articles on Responsibility of States for Internationally Wrongful Acts: A Commentary* (Oxford: Oxford University Press, forthcoming). On 'codifying' and 'encoding', see also Federica Paddeu and Christian J. Tams, 'Dithering, Trickling Down, and Encoding: Concluding Thoughts on the "ILC Articles at 20" Symposium' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/dithering-trickling-down-and-encoding-concluding-thoughts-on-the-ilc-articles-at-20-symposium/, last accessed 14 April 2022.

by multiple States and/or IOs[24] or, more recently, 'multilateral responsibility' in areas of common concern.[25] However, there has been no or very little in-depth engagement with the philosophy of responsibility in those publications.

At the same time, there is a revival in discussions of collective (and especially institutional) responsibility among moral and political theorists, including on the responsibility of States and other public institutions.[26] None of those new philosophical publications, however, broach the *legal* aspects thereof (except regarding the responsibility of private collective persons under domestic criminal or corporate law),[27] not to mention international responsibility law, which is usually simply ignored.[28]

[24] See, e.g., Samantha Besson, 'La pluralité d'États responsables: vers une solidarité internationale?' (2007) 17(1) *Swiss Review of International and European Law* 13–38; André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) *Michigan Journal of International Law* 359–438; André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014); Helmut P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Oxford: Hart, 2016).

[25] See, e.g., Martins Paparinskis, 'The Once and Future Law of State Responsibility' (2020) 114(4) *American Journal of International Law* 618–626; Santiago Villalpando, 'Protecting Community Interests: Solidarity Measures within the State Responsibility Regime?' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/protecting-community-interests-solidarity-measures-within-the-state-responsibility-regime/, last accessed 14 April 2022.

[26] See, e.g., Saba Bazargan-Forward and Deborah Tollefsen (eds.), *The Routledge Handbook of Collective Responsibility* (New York: Routledge, 2020), and especially Stephanie Collins' chapter, 'Collective Responsibility and International Relations', pp. 331–346; Marion Smiley, 'Collective Responsibility', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2017). Available at: https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility/, last accessed 14 April 2022; Anna Stilz, 'Collective Responsibility and the State' (2011) 19(2) *Journal of Political Philosophy* 190–208; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011); Philip Pettit, 'Responsibility Incorporated' (2007) 117(2) *Ethics* 171–201.

[27] Worse, many of the recent philosophical discussions of so-called corporate responsibility usually conflate the responsibility of public and private collective persons, including that of States and business corporations. They do not question the first and original analogy in legal history between the State's corporation and private ones (see Alain Supiot, 'État, entreprise et démocratie', in Pierre Musso (ed.), *L'entreprise contre l'État?* (Paris: Editions Manucius, 2017), pp. 13–31), and thereby unreflectively endorse its contemporary reversal that consists in constructing State responsibility on the model of corporate (business) responsibility (see Besson, *Reconstructing the International Institutional Order*, fn. 10, paras. 60–62). For an example of such a conflation, see Samuel Mansell, John Ferguson, David Gindis and Avia Pasternak, 'Rethinking Corporate Agency in Business, Philosophy, and Law' (2019) 154(4) *Journal of Business Ethics* 893–899.

[28] For an exception, see Fleming, *Leviathan on a Leash*, fn. 3. Of course, mastering both sides of the scholarship is by no means easy, and gathering the present volume's contributors in the first place and then ensuring sufficient mutual learning and dialogue between them have actually proven more difficult than expected.

As a matter of fact, a philosophical reflexion about international responsibility law has become even more urgent today than it was ten years ago. Indeed, the general law[29] of international State and IO responsibility is in flux again.[30] Many had, curiously, thought that the ILC's 2001 and 2011 codifications would settle the practice for a while, but their universal and general (customary) authority is increasingly contested.[31] In addition, years of active and passive contribution to global warming and nearly two years of global pandemic, to cite only those, have sadly put the current regime of international responsibility law to the test.[32] Some argue, therefore, that the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter ARSIWA) and Draft Articles on the Responsibility of International Organizations (hereafter ARIO)[33] may just have been one stage in the development of international responsibility law and have already proposed new, or at least complementary, sets of principles and articles.[34]

There are at least three dimensions in what one may refer to as the contemporary 'crisis' in the practice of international (State and IO) responsibility law that match other, broader crises in contemporary international law.

[29] It should be clear by now, indeed, that the regime of 'international responsibility law' cannot be reduced to the 2001 and 2011 *ILC* codifications thereof. There was such customary international law before those codifications and that law is still more encompassing today.

[30] On the nature and place of international responsibility law in the international legal order and how one may understand 'change' in that context, see Nollkaemper, Chapter 2.

[31] See Federica Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2018) 21(1) *Max Planck Yearbook of United Nations Law* 83–123; Fernando Lusa Bordin, 'Still Going Strong: Twenty Years of the Articles on State Responsibility's "Paradoxical" Relationship between Form and Authority' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibilitys-paradoxical-relationship-between-form-and-authority/, last accessed 14 April 2022; Katja Creutz, 'The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/, last accessed 14 April 2022.

[32] See, e.g., Paparinskis, fn. 25; Christian Tomuschat, 'Global Warming and State Responsibility', in Holger Hestermeyer, Nele Matz-Lück, Anja Seibert-Fohr and Silja Vöneky (eds.), *Law of the Sea in Dialogue* (Heidelberg: Springer, 2011), pp. 3–29. On climate change and international responsibility theory, see Murphy, Chapter 7.

[33] See fn. 5.

[34] See e.g. André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15–72. See also the discussion thereof by B. S. Chimni, Lorenzo Gasbarri, Vladyslav Lanovoy, Odette Murray and Federica Paddeu, 'Afterword: The Guiding Principles on Shared Responsibility in International Law and Its Critics' (2020) 31(4) *European Journal of International Law* 1211–1275.

First, binding international legal obligations (that may be breached and give rise to responsibility) no longer matter as much anymore by comparison to other types of 'norms' (crisis of the *normativity* of international law). The distinct normative consequences of the breach of those other norms by comparison to those of international responsibility have an impact on the latter.[35] Second, States and IOs are just two of the many institutions one may want to hold responsible along an institutional spectrum that has become much more diversified (crisis of the *institutions* of international law). The latter have indeed become increasingly private or at least straddle the public/private distinction, thereby diluting the relevance of public institutions therein or at any rate their specificities and those of their responsibility.[36] Finally, and it is related, legal responsibility for wrongful acts is only one of many 'liability' mechanisms available in practice (crisis of the *modes of accountability* in international law). It is moreover probably not the most efficient one for institutions such as IOs in particular. It is therefore increasingly replaced by other, broader and vaguer mechanisms of so-called accountability in international relations.[37]

Those three 'crises' should not only fuel the legal reform of international responsibility law, but also concomitantly, and one may argue even in priority, stir a philosophical 'critique' thereof. It is this conviction that brought me to conceive the present collection of essays and to organize the conference during which the various essays were discussed. This volume should therefore be read as a new attempt at bringing philosophers of responsibility law in dialogue with international responsibility law specialists.

2 THE AIMS OF THE VOLUME

The time has come to say a little more about the specific dimensions of the dialogue the present volume hopes to launch between philosophers of responsibility law and international responsibility lawyers and about the topics they are addressing.

[35] See, e.g., Nollkaemper, 'Responsibility', fn. 4.

[36] See, e.g., Besson, *Reconstructing the International Institutional Order*, fn. 10; Samantha Besson, *The Public-Private Relation and International Law* (Leiden: Brill, forthcoming).

[37] On international 'responsibility' and 'liability' *stricto sensu*, see d'Argent, Chapter 9. On 'responsibility' and 'accountability' of IOs, see Kristen E. Boon and Frédéric Mégret, 'New Approaches to the Accountability of International Organizations' (2019) 16(1) *International Organizations Law Review* 1–10. See also, on 'non-compliance' mechanisms in international environmental law, Ginevra Le Moli, 'State Responsibility and the Global Environmental Crisis' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/, last accessed 14 April 2022; Murphy, Chapter 7.

This collection of essays' starting point is that many of the current challenges facing international responsibility law in practice – some of which have been mentioned previously – are of an institutional nature.[38] More precisely, they may be said to stem from weaknesses in the original conceptualization of the responsibility of public institutions such as States and IOs in international law and of what makes their responsibility specific.[39] Those institutions do not merely amount to *collective persons* as opposed to individuals – and this is a first and very important difference – but they are also *public institutions* as opposed to private collective persons or even to private institutions.

It suffices here to mention three of these conceptual or institutional shortcomings to understand their repercussions on the contemporary practice of States' and IOs' international responsibility law.

First of all, one could start by pointing at the private law analogies (particularly through the sixteenth and seventeenth centuries' reception of the categories of Roman private law into international law[40] and, later on, through the analogies with various domestic legal regimes pertaining to torts or delicts) in the origins of the international responsibility regime of public institutions such as States first and then IOs.[41] Those *private law analogies* still pervade the current regime of international State and IO responsibility. Secondly, one could also mention, as a consequence, the identification of those collective public institutions with private (mostly individual/natural or, more rarely, collective/legal) persons when it comes to organizing the practicalities of their responsibility (especially attribution) under international law. This *individualization* of States and IOs has led to a skewed understanding of the further

[38] See Besson, *Reconstructing the International Institutional Order*, fn. 10, paras. 84–86.

[39] This is not to say, of course, that the international law on the responsibility of individuals and of other institutions, especially private ones, is not relevant philosophically – as I explained before, it is the topic that has mostly been addressed by legal philosophers –, but the present collection focuses on the philosophy of the international responsibility of States and IOs. Note, however, that contributors have been invited to think broadly and to include other public institutions such as cities or regions in their arguments, for instance, but also to reflect on the public/private divide and its consequences in terms of international responsibility law more generally.

[40] On the reception of private Roman law categories in modern and contemporary international responsibility law, see Mantovani, Chapter 1. See also, more generally, Olivier Descamps, 'Histoire du droit de la responsabilité dans le monde occidental', in Alain Supiot and Mireille Delmas-Marty (eds.), *Prendre la responsabilité au sérieux* (Paris: Presses Universitaires de France, 2015), pp. 39–54; Besson, 'Introduction', fn. 12.

[41] See Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Clark, NJ: The Lawbook Exchange, 2013 (London: Longmans, Green and Co., 1927)); Besson, 'La *due diligence* en droit international', fn. 15, paras. 46–48.

relationships between institutions, especially public ones, and their members, as between States within IOs, and of their consequences for the individual and/or collective responsibility of either of them.[42] Finally, and conversely, while intentional *fault* or *negligence* is very present in private tort law, its role is usually evaded in international responsibility law, mainly for reasons that have to do with the private analogy and the individualization of State and IO responsibility.[43] This leaves an important part of international responsibility without a clear justification, however, even more so as the current regime does not always entail an additional requirement of harm for international responsibility to arise.

Curiously, international lawyers' reactions to those three conceptual and institutional challenges have generally not been informed by discussions among theorists or philosophers of the law of responsibility (in domestic private, public or criminal law). This is regrettable, as the three distinctions mentioned– between public and private types of responsibility, between individual and collective responsibility and between fault-based and purely causal responsibility – have been addressed by the latter.[44] Nor do international responsibility lawyers usually resort to comparative domestic (public, private or criminal) law in this area. They often confine themselves to discussing solutions within international law. Yet, not only are the international law solutions very limited, but they also have their roots in (justified or not) analogies with one or the other domestic (and mainly Western[45]) traditions of origin of the drafters or interpreters of the international responsibility law regime.

Conversely, however, responsibility law theorists (tort or delict law theorists, but also (the fewer) theorists of the responsibility of public institutions) have paid very little attention to the international responsibility of States and IOs, and therefore to international law relating thereto. There is a remarkable difference in this respect with the field of criminal responsibility law theory, where both domestic and international law aspects of the criminal responsibility (of individuals) have been addressed together by criminal legal theorists,

[42] See Besson, 'The Challenge of Fairness Unveiled', fn. 3.

[43] See, e.g., Oliver Diggelmann, 'Fault in the Law of State Responsibility: Pragmatism *ad Infinitum*?' (2006) 49 *German Yearbook of International Law* 293–305; Giuseppe Palmisano, 'Fault', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2007). See also Duff, Chapter 3.

[44] See Duff, Chapter 3, for references.

[45] On this question, see Delmas-Marty, Chapter 16.

some present in this volume.[46] Most tort law theorists assume that it is possible to develop a theory of responsibility generalizing from the specific responsibility regime for private persons (natural or legal) in their domestic legal order. Sometimes, they simply propose a domestic theory of responsibility (e.g., of Anglo-American, French or German tort law).[47] They only very rarely resort to comparative (domestic) responsibility law, let alone to comparative international responsibility law, in order to devise their (most of the time allegedly universal) theories of responsibility.

In reaction to this state of affairs, this volume is the first one to open a dialogue, and hopefully a fruitful one, between international lawyers and philosophers of the law of responsibility. In doing so, it aims at laying the groundwork for a new field of research in the theory or philosophy of international responsibility law, bridging the growing scholarly gap between the philosophy of responsibility law and international responsibility law.

As with all first forays in a given field, however, not all aspects of the theory of international responsibility law could be addressed, and some will have to wait for future publications. I have chosen to invite the different contributors to explore the three issues identified here: the distinctions between public and private responsibility, between individual and collective responsibility and between fault-based responsibility and purely causal responsibility. Those three questions are, as I explained, the ones debated so far by the few theorists involved in the philosophy of international responsibility law discussion.[48] They are also those over which the practice itself stumbles, as I will briefly explain now.

With respect to the first issue and challenge in the theory of international responsibility law, it suffices to mention some of the difficulties raised by the various private law analogies in international State and IO responsibility law.

It is difficult, for instance, to apply the various private law 'defences' enclosed in the ARSIWA and ARIO, such as 'necessity', to public institutions like States and IOs.[49] Another difficulty pertains to the conception and

[46] See, e.g., Duff, fn. 19; François Tanguay-Renaud and James Stribopoulos (eds.), *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012); and many authors in Bergsmo and Buis, fn. 20.

[47] See, e.g., John Gardner, *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019); Stephen R. Perry, 'The Moral Foundations of Tort Law' (1992) 77(2) *Iowa Law Review* 449–497; Shiffrin, fn. 9.

[48] On the second issue and part of the book, see, e.g., the exchange between Crawford and Watkins, fn. 4, and Murphy, fn. 7; Besson, 'The Challenge of Fairness Unveiled', fn. 3.

[49] See Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge: Cambridge University Press, 2018).

apportionment of 'reparations', and especially monetary compensations, owed by public institutions that stand for the individual members of the relevant political communities[50] (not all of them being democratic, at that, nor duly represented by their public institutions[51]). Not to mention the key role still played by 'injury' in international responsibility law and the distinction between injured States and the others (referred to negatively and reductively as 'non-injured' States) in a system of international responsibility in principle exclusively grounded in the breach of law.[52] One may even consider that the private law analogies in the attribution of conduct central to contemporary international responsibility law have accelerated the privatization of so-called public 'functions' and, therefore, of the so-called 'agents' of States (but also of IOs)[53] and even, conversely, the 'publicization' of private institutions and of their responsibility.[54] In turn, this has made it even more difficult to distinguish between the acts or omissions of private agents and those of official organs for the purposes of attribution to the State or, even more importantly, to an IO.[55]

With respect to the second issue and challenge in the law of international responsibility, that is, the identification of collective public institutions such as States and IOs with private individual persons, it obliterates not only the collective dimension of their responsibility, but also their institutional dimension.

The individualization of international responsibility has, for instance, made it very difficult to deal with the consequences of the representative nature of the responsible institutions for their individual members' responsibility and for

[50] On this question, see Crawford and Watkins, fn. 4; Murphy, fn. 7; Besson, 'The Challenge of Faimess Unveiled', fn. 3; Martins Paparinskis, 'A Case against Crippling Compensation in International Law of State Responsibility' (2020) 83(6) *Modern Law Review* 1246–1286. See also Murphy, Steel and Nollkaemper, Chapters 7, 8 and 2. More generally in political philosophy, see also Holly Lawford-Smith, *Not in Their Name: Are Citizens Culpable for Their States' Actions?* (Oxford: Oxford University Press, 2019); Avia Pasternak, *Responsible Citizens, Irresponsible States: Should Citizens Pay for Their States' Wrongdoings?* (Oxford: Oxford University Press, 2021).

[51] See Murphy and Mallat, Chapters 7 and 13.

[52] See also Steel and d'Argent, Chapters 8 and 9.

[53] For this critique, see also Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound* 307–311. See for a defence, however, see Fleming, Chapter 10.

[54] See, e.g., Alex Mills, 'State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/state-responsibility-and-privatisation-accommodating-private-conduct-in-a-public-framework/, last accessed 14 April 2022.

[55] For the consequences on the invocation of due diligence and the responsibility for negligence, see Besson, 'La *due diligence* en droit international', fn. 15, para. 73.

the collective responsibility of the individual members of the corresponding political communities those institutions institute.[56] This has proven even more frustrating with IOs and the relationship of their responsibility to that of their Member States[57] and, eventually, to that of some of the individual citizens of those States, that are merely stated to be concurrent (e.g., Articles 57 and 58 ARSIWA). Not to mention the fact that the shared responsibilities of public institutions such as States and IOs, whose relationships are ones of institutional dependence and political cooperation, may not simply be equated to those between independent private persons.[58]

Finally, the third issue and challenge in the law of international responsibility is the place of fault (whether intentional or negligent).

While fault is very present in private tort law, with variations across traditions of course, its role is usually evaded in international responsibility law precisely because it is difficult, under the private law analogy, to construe what could be either the intentional fault or the negligence of a collective entity and especially of a public institution such as the State or an IO. In turn, it explains why, in spite of some remaining references to an institutional state of mind such as knowledge in the ARSIWA and ARIO (e.g., Articles 11, 16, 17 or 18 ARSIWA), the international responsibility of States and IOs is mostly conceived, oddly enough, as based on an 'objective' violation of international law (the wrongful act being a breach of international law) independently of any 'subjective' element. One may wonder, however, whether the private (law) analogy and, more specifically, individual analogies are the only way to understand the fault of collective entities and especially of public institutions. One may indeed imagine a form of international responsibility and of international wrong arising without any kind of fault or, on the contrary, with a kind of fault adapted to the organizational and especially political circumstances of public institutions.[59]

Mostly absent from ARSIWA and ARIO and relegated to the realm of a standard of conduct potentially qualifying the obligations breached, no

[56] See Besson, 'The Challenge of Faimess Unveiled', fn. 3; Besson, 'La *due diligence* en droit international', fn. 15; Besson, *Reconstructing the International Institutional Order*, fn. 10, para. 78. See also Murphy and Duff, Chapters 7 and 3.

[57] See Palchetti, Chapter 6.

[58] See Samantha Besson, 'La responsabilité solidaire des États et/ou des organisations internationales: une institution négligée', in Alain Supiot (ed.), *Face à l'irresponsabilité: la dynamique de la solidarité?* (Paris: Éditions du Collège de France, 2018), pp. 121–159; Besson, 'The Challenge of Faimess Unveiled', fn. 3; Besson, 'La *due diligence* en droit international', fn. 15, paras. 389–390.

[59] See Duff, Chapter 3.

wonder that the place of fault has been haunting the practice of international responsibility law to this date. This has not only been the case with respect to the special obligations breached, as it should be, to the extent that their content may foresee a certain intent or diligence for the obligation to be complied with or, on the contrary, to be breached. There are also traces of fault within general international responsibility reasoning, as exemplified in cases of international negligence that amount to more than cases of breach of obligations of diligence[60] and independently from what is foreseen by those special obligations.

One finds a confirmation thereof in the recent discussions around forms of 'aggravated' responsibility and the special obligations it gives rise to[61] (whose aggravation is usually grounded in some kind of fault) or around the conditions for 'complicity' as a ground of attribution of responsibility (whose relationship to intent to aid or assist, or at least to negligence in doing so, is heavily discussed).[62] Not to mention, of course, the growing reference to the responsibility for negligence by IOs and the breach of the kind of due diligence one may expect from such international institutions as an alternative to their responsibility for a breach of the international obligations they most often do not yet incur and to the ways of grounding it.[63]

Conversely, the lack of clarity about the role of fault in international responsibility law has also made it difficult to develop an international equivalent to strict (or purely causal) responsibility in domestic law. This is regrettable at a time where such a regime is much needed, especially in international environmental law.[64] Indeed, and to the extent that mainstream international responsibility does not require fault to arise and is grounded only in a breach of international law, the 'liability for injurious consequences

[60] See, e.g., Besson, 'La *due diligence* en droit international', fn. 15, at 281 and 289–294.

[61] See, e.g., Jorge E. Viñuales, 'La responsabilité aggravée en droit international', *Collected Courses of the Hague Academy of International Law* (forthcoming, 2022).

[62] See, e.g., Aust, fn. 24; Lanovoy, fn. 24; Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case', in Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (London: Routledge, 2012), pp. 315–334.

[63] See Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28(4) *European Journal of International Law* 1133–1161; Besson, 'La *due diligence* en droit international', fn. 15, at 227–232. See also Klabbers, Chapter 5.

[64] See, e.g., Alexandre Kiss and Dinah L. Shelton, 'Strict Liability in International Environmental Law', in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden: Brill, 2007), pp. 1131–1151. See also Dupuy, Conclusion.

arising out of acts not prohibited by international law', as it is usually called, is often construed (unsuccessfully and even wrongly, as argued in some of the chapters[65]) as a responsibility in the absence of breach of international law. This has not only led to a conceptual dead-end, but also made it difficult to understand the role played, for instance, by duties to prevent environmental harm in that context, thereby depriving some of those duties from having any teeth at a time when we need them the most.[66]

Of course, those three issues overlap. This becomes particularly clear in the course of certain chapters and especially in the later chapters of the volume, which position themselves on the concerns addressed in the first and second parts such as the relevance of the 'publicity' of States and IOs for their responsibility and the question of the relationship between individual and collective duties and responsibilities.[67] Some of those issues are also woven back together at the end of the volume. This is done to some extent in the final part dedicated to a comparison of the domestic or regional responsibility law of public institutions.

3 THE STRUCTURE AND METHOD OF THE VOLUME

Now that the background to the volume and the three dimensions of the dialogue between international lawyers and philosophers of law it hopes to stir have been clarified, let me say a few words about the organization of the book itself.

In order to address the three controversial issues identified in the theory of international responsibility law, the volume is organized around them. To do so, it encompasses three main parts: Part I: International Responsibility of Public Institutions: Public and/or Private?; Part II: International Responsibility of Public Institutions: Collective and/or Individual?; and Part III: International Responsibility of Public Institutions: Fault-based or Not?. In each part, two international lawyers specializing in international responsibility law and two philosophers of responsibility law have been asked to address what they take to be the most pressing questions in the theory of international responsibility law.[68]

[65] See d'Argent, Chapter 9.

[66] See Besson, 'La *due diligence* en droit international', fn. 15, at 286–289.

[67] See especially Steel and Fleming, Chapters 8 and 10.

[68] Please note that, due to one of the contributors' late withdrawal, Part III is only comprised of three chapters.

The discussion in these three parts of the book is supplemented by Part IV, consisting of a 'World Tour' of the legal concept of public responsibility, that is, of public institutions (be they States or sub-national, international or supranational public institutions such as cities, regions, etc.), in different legal cultures and regions of the world. In each of the four regional reports or chapters, a specialist has been asked to address the three questions of the book from a domestic and then regional perspective, including with respect to the reception within domestic law of the international responsibility law regime.[69] At the end of the World Tour, a commentator has been invited to provide a comparative perspective based on those different reports and to make a few prospective proposals for international responsibility law.

The aim in that closing part of the volume is to open a discussion around different conceptions of public responsibility – including in the absence of a public/private distinction or in case of a different take on that distinction in a given legal culture[70] – and launch a comparison between them. In turn, the idea is to develop a better and less parochial (and especially less Western and, arguably, less Roman) interpretation of the concept of responsibility of public institutions under international responsibility law on that comparative basis: one that is more receptive to the variations between different cultural conceptions and one that could be considered more universal as a result.[71] In turn, developing such a comparison between different legal conceptions of public responsibility and the possible construction of a 'common law' of international responsibility on that basis could thicken customary international responsibility law and maybe pave the way towards a truly universal international treaty on international public responsibility in the future.[72]

[69] Part IV is comprised of four regional reports or chapters (Africa, Asia, Middle East and Europe) exemplified through one or more domestic jurisdictions every time (Mali, Burkina Faso, Cameroon, Morocco, etc. for Africa; China for Asia; Lebanon for the Middle East; and a comparative study of Poland, Czechia, Hungary and Slovakia for Central Europe).

[70] See, e.g., Constant, Chapter 12, on China, and Mallat, Chapter 13, on the Middle East.

[71] On the tension between uniformization and relativity and the role of comparative international law therein, see Samantha Besson, 'Comparative Law and Human Rights', in Mathias Reimann and Reinhard Zimmermann (eds.), *Oxford Handbook of Comparative Law*, 2nd ed. (Oxford: Oxford University Press, 2019), pp. 1222–1249; Samantha Besson, 'L'autorité légitime du droit international comparé: quelques réflexions autour du monde et du droit des gens de Vico', in Samantha Besson and Samuel Jubé (eds.), *Concerter les civilisations: Mélanges en l'honneur d'Alain Supiot* (Paris: Seuil, 2020), pp. 49–60; Samantha Besson, 'Du droit de civilisation européen au droit international des civilisations: instituer un monde des régions' (2021) 31(3) *Swiss Review of International and European Law* 373–400.

[72] On the advantages and disadvantages of such a treaty and especially the universality question in that debate, see Paddeu, 'To Convene or Not to Convene?', fn. 31.

In terms of method, and as I explained at the beginning of my introduction, the present volume's aim is to launch a dialogue between international lawyers and legal philosophers working on international responsibility law. It therefore revolves around the *law* of international responsibility, and not only the idea thereof, and on international responsibility law understood broadly, and not only on the ARSIWA and ARIO. The ultimate goal of the project is to feed States', IOs' and (domestic, regional and international) courts' interpretations of that law and thereby prepare the ground for a critique and potential reform of the existing legal practice (including where it is very scarce, as in the field of IOs responsibility law). This should be eased by the fact that some of the volume's contributors are also practitioners in the field. They have brought that experience into their respective argument and also, hopefully, into the whole book following the contributors' discussions at the conference.

Having said that, some of the lawyers among the book's contributors are more philosophically oriented than others, the latter being originally less familiar with the existing literature on the philosophy of responsibility law. Similarly, some of the philosophers in the book already had a pre-existing background in international (at least States' and IOs') responsibility law, while others had to work themselves through the material before starting to think about it. Those differences between contributors actually constitute a quality and strength of the volume. They may indeed be beneficial to the debate in the field, by drawing more international lawyers and legal (and political) philosophers into thinking about those issues than has been the case so far (probably out of fear of its many legal intricacies and technicalities).

4 THE CONTENTS OF THE VOLUME

The book is divided in four parts: Part I: International Responsibility of Public Institutions: Public and/or Private?; Part II: International Responsibility of Public Institutions: Collective and/or Individual?; Part III: International Responsibility of Public Institutions: Fault-based or Not?; and Part IV: Responsibility of Public Institutions: A World Tour.

Part I is comprised of four chapters and pertains to the question of the public versus private nature of the international responsibility of public institutions. Following a chapter by Dario Mantovani on the legal history of the term 'responsibility' and on the private law origins of the international law term, the other three chapters approach the public/private question in international responsibility differently. Focusing on change in the international law of responsibility, André Nollkaemper refers to the public or private nature of the institutions held responsible and to its impact on their responsibility

regime. While R.A. Duff focuses on the public (*qua* criminal) versus private law distinction, Alon Harel and Julian Kulaga broach the public question as pertaining to the absence of a global State and hence of a global and common adjudication mechanism in international responsibility law.

In Chapter 1, 'From "Respondere" to "Responsibility": A Roman Lawyer's Gloss on the International Law of State Responsibility', Dario Mantovani proposes a brief lexical history of the English term 'responsibility', starting from the Latin 'respondere', through French and Anglo-Norman, up to the emergence of the abstract noun in modern languages. Seen from a purely semantic diachronic perspective, 'responsibility', as a legal term, expresses the idea that one may be called upon to answer for one's act (or inaction), but does not itself denote the prerequisites of liability nor hints at the source or nature of any duty to do so. It looks at what is to be done in the future, not to the imputation of a duty by reference to what has gone before. If the meaning that history brings to light is quite neutral – and pivots around the ordinary, basic meaning of the verb 'respondere': 'to say something in answer to a question' – 'responsibility' appears nonetheless to be most appropriate to signify the distinctive feature of contemporary international law, namely that States 'have to answer' for their actions.

André Nollkaemper's Chapter 2, 'Change in the Law of International Responsibility' starts by observing that the law of responsibility has been subject to massive change over the past centuries. While in key areas such change is well-established in the form of customary law or general principles, for particular transformations the process of change is more difficult to pin down. Major examples are the transition from a private to a public law model and from independent to shared responsibility. Here the depth and scope of change and its support in practice remains uncertain. The chapter explores the process of change in the law of international responsibility against this background. It develops the argument that the normal rules for determination of change in international law, reflected in the sources of international law, are not always helpful for determining change in the law of responsibility. To understand such change, it is helpful to distinguish change in secondary rules from change in primary rules (substantive rights and obligations) and tertiary rules (procedures and institutional rules for implementing responsibility). Change in the law of responsibility is to some extent driven by prior changes in primary rules, but the chapter also argues that secondary rules have a logic and justification that is to some extent independent from primary rules.

In Chapter 3, 'State Responsibility: An Outsider's View', R.A. Duff starts from a familiar question: is State responsibility in international law usefully understood on the model of domestic private law or on that of domestic criminal law, or neither? Section 3.2 discusses the attractions and limits of the model of private law. Section 3.3 turns to 'international crimes' (as defined by the ILC's 1996 Draft Articles on State Responsibility), or 'serious breach[es] of an obligation arising under a peremptory norm of general international law' (as defined by the ILC's 2001 ARSIWA) and discusses the ways in which the provisions for such wrongs seem analogous or disanalogous to domestic criminal law. Section 3.4 takes up the suggestion that a distinction between 'private' and 'public' law is conceptually and practically preferable to that between 'international crimes' and 'international delicts': is this the best way to capture a category of international wrongs that merit a distinctive response? Section 3.5 asks whether State responsibility thus understood can usefully be seen as a species of 'criminal' responsibility and whether it offers domestic theorists a fruitful way of 'deconstructing' criminal law.

Alon Harel and Julian Kulaga, in Chapter 4, 'Responsibility of States for Wrongdoing: Who is to Decide?', address the following questions: can States determine unilaterally what counts as a wrongful behaviour in the absence of public international adjudicative institutions? Can meaningful responsibility for wrongful acts exist in the absence of a public adjudicative entity? What happens in the case of a conflict between a unilateral (private) judgment of a State accused of having committed a wrong and the decision of a (public) international adjudicative institution? Whose decision should prevail? The authors resort to non-instrumentalist considerations to argue that the conviction that one system (internationalist) is superior to the other (Statist) or *vice versa* is unsatisfactory. They advocate for a system that is founded on conflicting judgments concerning responsibility – judgments that are made both by international adjudicative institutions (publicly) and by the States themselves (privately), what they refer to as the 'discordant parity hypothesis'. The chapter's case for the overriding power of international adjudicative institutions is based on the importance of the State's publicly recognized duties. The case for the overriding power of judgments made by States stems from its promise to facilitate active engagement of States with their obligations. Both claims are compelling. The chapter therefore embraces a system that recognizes the normative force of both (and the inevitable resulting conflicts).

The second part of the book pertains to the collective versus individual nature of the international responsibility of public institutions and is composed of four chapters. While Jan Klabbers and Paolo Palchetti address the individual versus collective responsibility question in the context of the responsibility of IOs and their Member States, Liam Murphy focuses on State responsibility and the relationship between individual and State

responsibility in the context of climate change. Sandy Steel also broaches the latter relationship, albeit from the perspective of the justifications of individual liability in the context of State remedial duties.

In Chapter 5, 'Responsibility as Opportunism: The Responsibility of International Organizations', Jan Klabbers discusses the responsibility of IOs under international law. With the help of two case studies (the proposed relocation of a refugee camp involving the United Nations High Commissioner for Refugees and a water project involving, amongst others, the World Bank), the chapter discusses three central elements of international responsibility: obligation, attribution and causation. The chapter concludes that, often enough, allegations concerning the responsibility of international organizations owe much to opportunism. Since the current legal regime is not very helpful, responsibility claims flow like water: they flow wherever they can, relatively independent from obligation, attribution and causation.

In Chapter 6, 'Responsibility of Members of an International Organization: Collective and/or Individual?', Paolo Palchetti argues that, when considering ways for preventing Member States from hiding behind the institutional veil of the organization, two distinct approaches can be identified. A first approach focuses on the position of the Member State as a subject endowed with its own distinct personality and holder of its own rights and obligations. According to this approach, when the State acts as a member within or on behalf of the organization, it continues to be bound by its obligations and may be held individually responsible for their breach. The other approach focuses on the position of the State *qua* member of the organization. It relies on the institutional link binding together the organization and its members to affirm that, under certain circumstances, all members should be called upon to bear the consequences of the wrongful acts of the organization in a collective way. While in legal literature much of the debate on the risk of abuse of the organization's institutional veil tends to focus on the question of collective responsibility of members, the chapter argues that in practice it is through different forms of individual responsibility that the organization's institutional veil has been pierced or circumvented.

In Chapter 7, 'International Responsibility for Global Environmental Harm: Collective and Individual', Liam Murphy argues that there are important doctrinal and institutional obstacles in the way of proper treatment of collective legal responsibility of several States for global environmental harm, but no serious theoretical obstacles. Difficult theoretical issues do, however, arise at the level of justification. The chapter investigates how legal and moral responsibility of individuals, States and collectives of both all fit together as a normative matter, using global environmental harm as its case study. It is

argued that shared moral responsibility – the responsibility an individual has when acting together with others – is a very important moral phenomenon. By contrast, we have no need for the idea of a collective (such as a State) itself being morally responsible. Ideally, the shared *ex ante* moral responsibilities of individuals to reduce greenhouse gas emissions together would be discharged by domestic law under the guidance of international law. Where non-complying States face sanctions, the burden of those sanctions will be imposed on individuals who are not responsible for their State's failure. Yet citizens have political obligations to improve their States, including in the matter of compliance with international law. If the sanctions can be seen as doing citizens' work for them, the burdens imposed do not seem objectionable, Murphy argues.

In Chapter 8, 'Justifying Liability for State Remedial Duties', Sandy Steel examines a central moral problem arising in connection with the law on State responsibility: the problem of justifying the liability of ordinary State subjects for the material fulfilment of the remedial duties arising from their State's wrongs. After isolating the problem and explaining its relationship to the question of whether States are moral agents, it critically examines a range of different justifications for subject liability, with a focus on theoretical justifications that have received less extensive attention in the literature. It considers: (1) causal contribution, (2) benefitting, (3) duties of aid, (4) part-constitution, (5) authorisation, (6) fictive authorisation, (7) moral vicarious liability, (8) duties to support valuable institutions, and (9) lesser evil. The overall conclusion is that, even when State subjects are not morally responsible for the wrong which triggered a remedial duty, there are not infrequently moral liability justifications for State subjects bearing the costs of remedial duties. In practice, however, the only possible justification for the imposition of subject liability will lie on lesser evil grounds.

Part III pertains to the place of fault in the international responsibility regime of public institutions. It is comprised of three chapters. They approach the question of fault from seemingly different, albeit complementary, directions. Each of them, in their own way, reflects on how international responsibility (including remedial duties arising from it) relates, or ought to relate, to a past wrong and what kind of wrong that should be. They even reply to one another on certain points, like Sean Fleming and Jean d'Aspremont on the two-way temporal linearity of causation in international responsibility law.

In Chapter 9, 'Responsibility or Liability: Is it Really that Simple?', Pierre d'Argent recalls the distinction between responsibility and liability as it emerged in the work of the ILC and its inherent difficulties, before turning to its relevance in relation to the interplay between the obligation to prevent

harm and the prohibition to cause harm, the question of cessation and the procedural treatment at the International Court of Justice of the issues of injury, causality and reparation owed. The chapter questions the received wisdom according to which 'responsibility' and 'liability' would be two different legal genres and argues that the dichotomy between them is porous.

Sean Fleming, in Chapter 10, 'Causation, Fault and Function in the Rules of Attribution', raises the question of whether attribution of wrongful acts to the State is based on 'objective' causal chains or 'subjective' mental states. The chapter argues that attribution of conduct to the State is not primarily causal or fault-based. First, it shows that several of the Articles on the Responsibility of States for Internationally Wrongful Acts cannot be understood in terms of causation or fault. Second, it argues that causal and fault-based theories of attribution are either circular or incomplete. Instead, the chapter claims, the logic of attribution is primarily *functional*. The rules of attribution converge around the central principle that an act of State is an act performed in the service of a State function, such as defence or detention. Functional attribution is best understood as 'intersubjective': it is determined not by objective causal chains or by subjective mental states, but by shared ideas about the functions of the State and what it means to perform them. The functional character of the rules of attribution allows them to adapt to economic and technological changes, such as the growth of corporations and the development of autonomous weapons.

In Chapter 11, 'Time Travel in the Law of International Responsibility', Jean d'Aspremont examines the temporality around which international law is articulated, with an emphasis on the doctrine of international responsibility. The chapter specifically elaborates on how the doctrine of international responsibility suspends international law's one-directional temporality and provides discursive devices that allow one to travel back and forth between the past of wrongfulness and the present of responsibility. Such two-directional temporality, the chapter argues, is at the service of the narrative function of international responsibility in that such two-way time travel allows a re-representation of the real produced by legal claims made under the doctrine of international responsibility. The chapter ends with concluding remarks on the distinction between the imaginary and the real.

Part IV consists in a World Tour of the concept of public responsibility. It is comprised of four regional reports or chapters (each region being assessed first from the vantage point of a main domestic jurisdiction and then branching out to others in the region) and one comparative and prospective commentary that ties the different reports' conclusions together and makes proposals for where we could go from there in international responsibility law.

In Chapter 12, 'The Responsibility of Public Authorities in China', Frédéric Constant explains how, in the wake of the reforms implemented since the early 1980s and the desire to provide a legal framework for State action, successive statutes have laid the foundations for a system of responsibility of public authorities in the People's Republic of China. Despite the establishment of mechanisms to enforce State responsibility, the system still suffers from a number of shortcomings. Some are inherent in the reluctance of any State to be held responsible; others are more specific and outline the contours of a regime of responsibility specific to China at a time when the country wishes to assert a government model to compete with liberal democracy. In the background, a regime of political rather than legal responsibility has emerged which, on the one hand, limits the obstacles to public action to achieve efficiency and, on the other hand, emphasizes the government's duty to ensure common prosperity. The report looks at the Chinese bureaucratic culture, its history and the specificities of the current political system that are at the origin of this specifically Chinese conception of the responsibility of public authorities.

In Chapter 13, 'Liability of Public Institutions in Middle Eastern Law', Chibli Mallat responds to one of the central questions in the present book: is there, under international law, a specific Middle Eastern concept of liability for public institutions? While a simple answer is no, considering that the Nation-State was unknown in the region for the pre-modern corpus to acknowledge a liability of public authority in the international realm, the chapter proceeds, by way of *bricolage*, to examine the forms of liability comprised under the three subsets of the question in the volume. It finds in the classical tradition significant attention to the accountability of government under Qur'an 17:34 and its interpretations; a socially stratified understanding of the public/private realm; and a sophisticated corpus in the law of obligations that unifies contracts and torts under a strict liability regime in domestic law.

Ousmane Sidibé's Chapter 14, 'The Responsibility of Public Institutions in Africa: A Legal Framework in the Making' explains how, while it had hardly been recognized in the early years of independence, State responsibility gradually developed in French-speaking Africa from the 1990s onwards under the dual influence of French administrative law and the emergence of pluralist democracy. The development of pluralist democracy led to a renewal of constitutionalism and administrative law, thereby creating the conditions for a better protection of citizens' liberties and rights. In spite of this positive evolution, the analysis of African case law shows that redress for injury caused by public authorities appears to be doubly deficient: both in the amounts

allocated and in its execution by the administration. At the same time, however, redress for human rights violations is making concrete progress in all African regions (English speaking, French speaking, Arabic speaking, etc.), thanks in particular to the significant role played by the African Commission on Human and Peoples' Rights. Ultimately, the chapter argues that the full implementation of public institutions' responsibility is highly dependent on the permeation of a rule of law culture in African States.

Krzysztof Wojtyczek's Chapter 15, 'State Responsibility from a Central European Perspective', briefly presents the constitutional model of State responsibility in Central Europe as exemplified by four legal systems: the Czech, Hungarian, Polish and Slovak ones. In all four States, the legal rule providing for the reparation of damage caused by public authorities takes the shape of a subjective constitutional right, even though the provision requires implementation in ordinary legislation. The very generous system of the Polish Constitution led to some limitations and qualifications of the broad constitutional right by the case law. In Hungary, a similarly broadly phrased constitutional right coexists with quite restrictive legislative provisions and a case law which tends to go slowly and cautiously beyond the letter of the ordinary legislation. In the Czech Republic and Slovakia, the approach of the drafters of the Constitutions has been much more cautious and the precise content of the constitutional right is confirmed and specified in ordinary legislation. State responsibility mechanisms at the domestic level have proven quite effective in compensating material damage. The greatest remaining challenge in the State responsibility mechanisms surveyed in the chapter is moral damage.

In Chapter 16, 'Comparative and Prospective Comments on the "World Tour" of the Concept of Public Responsibility', our late colleague Mireille Delmas-Marty starts by observing that public responsibility is still understood in very different ways throughout the world, depending largely on the political, social and cultural background of each State. The Chinese, Middle Eastern, African and Central European examples presented bear witness to this reality and in particular to the close link between the development of public responsibility and the emancipation of the individual from the State and the collectivity. The great diversity of national and supranational practices on a world-wide scale – in a context marked by global challenges and by the still essential role of the Nation-State framework – makes a comparative legal approach essential, not only to prevent unwarranted standardization, but also to bridge differences and further compatibility.