

## International Responsibility for Global Environmental Harm: Collective and Individual

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*Note to Colloquium Participants. I would not normally offer this paper to the colloquium—it covers a lot of ground quickly and much more argument is required at many places. On the other hand, I am lucky that I will have your help developing those arguments. The paper was written for a conference on Theories of International Responsibility Law. I am not an expert on international responsibility law and the paper makes no contribution to that jurisprudence. My interest is the abstract one of how legal and moral responsibility of individuals, states, and collectives of both, all fit together as a normative matter, using global environmental harm as my case study. My attention to the substance of international responsibility law in the opening pages is primarily an attempt to show that my normative discussion is not incompatible with any features of existing law.*

*It might help the reader entirely unfamiliar with it to know from the outset that international responsibility law comprises international law's remedial or secondary norms that are triggered when a state (or other subject of international law) breaches a primary norm of conduct; and that the main such remedy is reparation to an injured state. This body of law was recently quasi-codified in the UN International Law Commission's Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA). The ILC approved the articles in 2001, but they have not been formally adopted by declaration or resolution in the General Assembly. Nor have they, as many countries favor, been adopted by states in the form of an international convention. But ARSIWA's influence has been considerable—akin, it seems to me, to a US Restatement of Law.<sup>1</sup> I should also say (what would have been obvious to participants at the conference) that the issue of collective responsibility under international law, both as a normative matter and as a matter of positive law, was introduced into the discussion by the article of*

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<sup>1</sup> For an account of the history of ARSIWA since 2001, see Frederica Paddeu and Christian Tams, 'Dithering, Trickling Down, and Encoding: Concluding Thoughts on the ILC Articles at 20' Symposium', *EJIL:Talk!* August 9, 2021, available [here](#).

*Nollkaemper and Jacobs that I start with. That paper and subsequent work by André Nollkaemper and his collaborators has been an invaluable resource for me.*

## **1. Responsibility and Law**

On their way to some suggestions about how international responsibility law may better account for cases of collective or shared responsibility, André Nollkaemper and Dov Jacobs raise some foundational objections to the existing conceptual structure of this area of law.<sup>2</sup> Their critique is compelling for a reader more fully at home in domestic than international law. The International Law Commission's Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>3</sup> is striking for appearing to embrace an idea that would in the domestic context most likely be regarded as radically revisionist. The thought that it is possible to give a general account of breach and remedy, an account that is detached from particular primary legal norms and so ignores differences among them, would be associated with skepticism about the substantive content of law as an order of norms; it would be associated with the view that legal rights and duties have reality only in virtue of the remedial consequences of breach. Such a view must explain in reductive, functional terms why (for example) contract damages are forward-looking while tort or delict damages are backward-looking; it cannot appeal to the underlying primary norms of contract and tort and their most plausible justifications to explain the difference in remedy.

So Nollkaemper and Jacobs are right, I think, to push back at the possibility of a unitary system of the law of responsibility, in which

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<sup>2</sup> André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359-438 (SRIL).

<sup>3</sup> UN Doc A/56/10, (2001) 2(2) *ILC Yearbook* 26.

the various forms of responsibility (responsibility based on fault, responsibility based on damage, ordinary wrongs, wrongs arising out of serious breaches of peremptory norms, and so forth) are subject to the same general principles of responsibility and . . . form a relatively coherent whole.<sup>4</sup> They acknowledge, however, that this was not actually the position of the drafters of ARSIWA. The main motivation for the distinction between primary and secondary norms of state responsibility, and the focus on the latter in ARSIWA, appears to have been a desire to codify what *could* be said about rules of responsibility that holds true independently of the content of underlying primary norms or obligations.<sup>5</sup> James Crawford adds a ‘more subtle point still’: that one reason to state general rules of responsibility, rather than leaving the matter of remedies to each area of law, was to establish a presumption of responsibility, rather than an opposite presumption that primary norms are ‘merely directive’.<sup>6</sup> The specification of default rules of responsibility is compatible with the possibility of an area of law displacing them:

A particular rule of conduct might contain its own special rule of attribution, or its own rule about remedies. In such a case, there would be little point in arguing about questions of classification. The rule would be applied and it would normally be treated as a *lex specialis*, that is, as excluding the general rule.<sup>7</sup>

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<sup>4</sup> SRIL, 400.

<sup>5</sup> SRIL, 410-12; Daniel Bodansky and John R. Crook, ‘Introduction and Overview’ (2002) 96 *American Journal of International Law* 773-91 at 780-81; James Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’, (2002) 96 *American Journal of International Law* 874-90 at 877.

<sup>6</sup> Crawford 877-8.

<sup>7</sup> Crawford 877.

In terminology from contract theory, ARSIWA can be seen as a set of majoritarian default rules, representing the rules of responsibility that most areas of law do or would embrace, but allowing that some areas of law do or would choose different ones (or none at all).<sup>8</sup>

The upshot is that as theorists of what the law might be, constrained by a commitment not to depart too dramatically from what it currently is, we are free to do what ARSIWA does not: tie our reflections on responsibility to the substantive content of the underlying norms. As my topic is environmental harm, it may be thought that this freedom is already clear, as compliance mechanisms already common in multinational environmental agreements (MEAs) lie outside the formal structure of international responsibility law as codified in ARSIWA. But there is an ambiguity here, one of many arising for the word ‘responsibility’ in this area. Nollkaemper and Jacobs write that states and international organizations do not ‘consider noncompliance mechanisms under international environmental treaties as a matter of international responsibility’.<sup>9</sup> They cite to a passage from Jutta Brunnée, which I quote in full:

MEAs usually allow parties both to raise concerns about the compliance of other parties and to bring themselves before the compliance body when they are experiencing compliance problems. The latter possibility must be understood against the backdrop of the collective action problems that MEAs typically address. As a result, the primary objective of compliance regimes is not to lay the blame for violations of treaty commitments but to achieve the greatest possible degree of compliance by the largest possible number of treaty parties.<sup>10</sup>

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<sup>8</sup> For the idea of majoritarian default rules, see Ian Ayres and Robert Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’, (1989) 99 *Yale Law Journal* 87-130.

<sup>9</sup> SRIL, 406-7.

<sup>10</sup> Jutta Brunnée, ‘Compliance Control’, in Geir Ulfstein (ed.) *Making Treaties Work* (Cambridge: Cambridge University Press, 2007), pp. 373-90, p. 383.

Nollkaemper and Jacobs here appear to suggest that the aim of achieving the greatest possible degree of compliance is not part of the justification of international responsibility law.<sup>11</sup> But as is clear from domestic private law, the justification of damages rules can be both that they provide compensation and that they provide incentives for compliance.<sup>12</sup> Further, the obligations of cessation and assurance of non-repetition,<sup>13</sup> as Nollkaemper and Jacobs themselves note, ‘have more to do with a return to legality than with reparation’.<sup>14</sup> As for ‘laying blame’, it isn’t clear that that is part of the point of traditional responsibility law, or needs to be. As the discussion to follow will show, my own view is that the aim of compliance regimes in international environmental law should precisely be to ensure maximum compliance. And I will not be understanding the phrase ‘international responsibility’ to be limited definitionally to contexts where the aim is reparation (compensation, restitution, or satisfaction)<sup>15</sup> or laying blame, or where a state’s responsibility can only be realized by formal invocation under the responsibility regime.<sup>16</sup> In Nollkaemper and Jacobs’ terms this may show that I have in mind something broader than state responsibility, namely state ‘accountability’.<sup>17</sup> But nothing turns on this terminological difference.

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<sup>11</sup> Though elsewhere, discussing compliance mechanisms under MEAs, they write: ‘While these institutions do not make formal determinations of state responsibility, they make findings on whether states meet their obligations and, if not, what consequences result’. SRIL, 403. This passage seems to be compatible with the position I take in the text.

<sup>12</sup> See Lewis Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, in André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015), 120-52.

<sup>13</sup> ARSIWA Art. 30.

<sup>14</sup> SRIL, 402.

<sup>15</sup> ARSIWA Arts. 31, 34-37.

<sup>16</sup> ARSIWA, Art. 42 provides for invocation by an injured state, but also allows for invocation by the international community as a whole in serious enough cases, the latter possibility already suggesting a concern with compliance as such rather than reparation.

<sup>17</sup> SRIL, 369. See also Jacqueline Peel, ‘Climate Change’, in André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017), pp. 1009-1050, p. 1038.

This brings us to the distinctions among types of responsibility ubiquitous in discussions of this topic. I will be operating with overlapping distinctions between, 1) legal and moral responsibility, 2) ex ante and ex post responsibility, and 3), within ex post responsibility, attributive and substantive responsibility.<sup>18</sup> Any of these senses of responsibility may be ascribed to individuals, institutions, and collectives of either. Take moral responsibility of individuals for illustration. I am ex ante responsible for the welfare of my children, and, I believe, ex ante responsible too in a different and weaker way for the welfare of everyone living. Responsibilities in this sense can be equally well expressed in terms of duties or obligations: a duty or special obligation to care for ones' children and a duty of beneficence. Ex post responsibility is a matter of tying a person to some past act or omission in a morally relevant way. To say that someone is responsible in the attributive sense for some act or omission is just to say that the act or omission is 'theirs' in some sense that makes it apt for moral appraisal. Often, causal responsibility will be sufficient for attributive responsibility. But attributive responsibility implies no blameworthiness or duties of repair, that is the domain of substantive responsibility. Substantive ex post judgments of responsibility express claims about what people are required to do and what sanctions, including blame, they are appropriately subject to, because of something they are responsible for in the attributive sense.

International legal responsibility for states, under ARSIWA, is substantive ex post legal responsibility: 'The substance or content of the international responsibility of a State under the articles' is 'the new legal relationship which arises upon the commission by a State of an internationally wrongful act'.<sup>19</sup> This new legal relationship is mostly concerned with reparation in ARSIWA, but that is not essential to the very idea of international responsibility so defined. As I have said, it is not infelicitous to

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<sup>18</sup> This last distinction is due to T.M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), 248 et seq.

<sup>19</sup> Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto, UN Doc. A/56/10, 2(2) *ILC Yearbook* (2001) 31 at 86

include the compliance mechanisms of MEAs, aiming as they do at ensuring compliance, under the heading of international legal responsibility.<sup>20</sup>

## **2. Varieties of Collective Moral Responsibility**

It will be helpful before going further to make some distinctions among varieties of collectives and what kinds of responsibility might be possible for each type. There is a large philosophical literature on this question for the moral domain.<sup>21</sup> One question that has been of considerable interest is whether collectives as such can have obligations and be ex post substantively responsible. It is not difficult to see how groups can be attributively responsible. To use a central example for what follows, suppose that a typical day's total greenhouse gas (GHG) emission of one typical person, considered on its own, does no harm.<sup>22</sup> Who then, is causing all the harm? We collectively are attributively responsible for the harm, it is something we are doing together as a group. But now is the collective itself ex post substantively responsible for the harm? And does the collective itself have an ongoing ex ante responsibility to cease harming the planet in this way?

Though there are complications to be explored below, it is natural to say that the collective itself is not substantively responsible either ex post or ex ante, but that each of us is responsible together with

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<sup>20</sup> For general discussion of compliance measures in MEAs see Geir Ulfstein, 'Dispute Resolution, Compliance Control and Enforcement in International Environmental Law', in Ulfstein, *Making Treaties Work*, pp. 115-33.

<sup>21</sup> The original inspiration for much of the discussion is Virginia Held, 'Can a Random Collection of Individuals be Morally Responsible?' (1970) 67 *The Journal of Philosophy* 471-81.

<sup>22</sup> By contrast, lifetime emissions of individuals, now that background atmospheric carbon levels are so high, almost certainly cause harm. For discussion, and defense of the proposition that even one gas-guzzling car ride in current conditions does harm, see John Broome, 'Against Denialism' (2019) 102 *The Monist* 110-129 and 'How Much Harm Does Each of Us Do?' in Mark Budolfson, Tristram McPherson, and David Plunkett (eds.), *Philosophy and Climate Change* (Oxford: Oxford University Press, 2021), pp. 282-91.

everyone else—each is responsible not considered as an individual, but as a member of the group.<sup>23</sup> Philosophers refer to this as *shared* responsibility, to be distinguished from *collective* responsibility in which the collective itself is substantively responsible. The distinction is sometimes put, following Virginia Held, by saying that collective responsibility is *non-distributive*—we are saying that the singular collective is responsible, not that the plural individuals are. This distinction between collective and shared responsibility is simply stipulative, but it is widespread and we might as well go along with it.<sup>24</sup>

To my mind, the importance of the existence of shared responsibility, alongside purely individual responsibility, can hardly be exaggerated. We need to appeal to shared responsibility to explain most of the important moral problems that face humanity. By contrast I find rather perplexing the recent interest in the question of collective moral responsibility in the strong sense just defined: the question of whether the collective itself can be culpable and bear obligations.<sup>25</sup> There is much debate among writers about the

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<sup>23</sup> For the notion of what ‘we together do’, see Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), pp. 67-86, and ‘What We Together Do’, unpublished ms. 1988.

<sup>24</sup> As Nollkaemper and Jacobs do, SRIL, 366-8. Arguably preferable is the terminology Roland Pierik adopts, ‘Shared Responsibility in International Law’, in Nollkaemper and Jacobs, *Distribution of Responsibilities in International Law*, pp. 36-61, p. 44: he uses ‘corporate’ for the kind of responsibility referred to in the text as ‘collective’ and ‘collective’ to refer to both corporate and shared responsibility.

<sup>25</sup> Works on the topic include Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); Larry May, *The Morality of Groups* (Notre Dame, Ind.: University of Notre Dame Press, 1987) and *Sharing Responsibility* (Chicago: University of Chicago Press, 1992); Margaret Gilbert, *On Social Facts* (New York: Routledge, 1989), *Living Together* (Lanham, MD: Rowman and Littlefield, 1996), *Sociality and Responsibility* (Lanham, MD: Rowman and Littlefield, 2000); Christopher Kutz, *Complicity* (Cambridge: Cambridge University Press, 2000); Holly Lawford-Smith, *Not in Their Name* (Oxford: Oxford University Press, 2019); Stephanie Collins, *Group Duties* (Oxford: Oxford University Press, 2019); Bill Wringe, ‘Needs, Rights, and Collective Obligations’, (2005) 57 *Royal Institute of Philosophy Supplement* 187-208 and ‘Global Obligations, Collective Capacities, and ‘Ought Implies Can’’, (2020) 177 *Philosophical Studies* 1523-38; Anne Schwenkenbecher, ‘Joint Moral Duties’, (2014) 26 *Ratio* 310-28; Tracy Isaacs, *Moral Responsibility in Collective Contexts* (Oxford: Oxford University Press, 2011); Christian List and Philip Pettit, *Group Agency* (Oxford: Oxford University Press, 2011); Toni Erskine, ‘Assigning Responsibilities to Institutional Moral Agents’, (2001) 15 *Ethics & International Affairs* 67-89



precise conditions under which it would be appropriate to predicate an obligation or substantive responsibility of a collective as such. Most of the discussion, though not all, assumes that a foundational requirement is that it be possible to regard the collective as a moral agent. Whether or not that is thought to be essential, the disagreements turn largely on what kinds of decision-making procedures and shared beliefs, intentions, or aims, are required before it is appropriate to hold a collective substantively responsible. The debate is largely driven by conceptual intuitions.

I am generally skeptical about the significance of conceptual disputes for normative matters.<sup>26</sup> But in particular, it is unclear to me why it matters especially whether alongside individual and/or shared moral responsibility, we can ascribe substantive responsibility to collectives as such. Suppose that not just Nazi leaders and compliant soldiers and guards and collaborating citizens (and so on—it's a long list) but *Germany* were responsible for the Holocaust. What difference would this make to our normative practice? It is not, as I will argue below, a precondition for holding the state of Germany *legally* responsible. Other than a purely expressive impact, it seems to me that the ability to say that the collective itself is culpable would be important only if it told us something about the responsibility of the people who make it up. That is, it matters whether the collective is morally responsible if that makes a difference to the moral responsibility of individuals. So it is a prior question what impact collective responsibility would have on the responsibility of individuals.

It seems immediately clear that it cannot be an implication of collective ex post responsibility that the individuals who make up the collective are each fully responsible for what the collective did. As Margaret Gilbert writes, such a view would justify a survivor of the bombing of Dresden blaming 'any

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and 'Coalitions of the Willing' and the Shared Responsibility to Protect', in Nollkaemper and Jacobs, *Distribution of Responsibilities in International Law*, pp. 227-64; David Miller, 'Holding Nations Responsible', (2004) 114 *Ethics* 240-68.

<sup>26</sup> For some writers the aim is not purely normative. Lawford-Smith, p. 3, writes that she is 'coming at this set of questions from the perspective of an interest in social metaphysics'.

given bomber *for the destruction of the city*'.<sup>27</sup> Distributing responsibility *equally* among all the members also seems obviously inappropriate in the case of collectives with hierarchical structures. But if we have to look to the importance of a person's role in the decision-making practices of the collective,<sup>28</sup> concluding rightly that, for example, George Bush and Richard Cheney were far more substantively responsible for the disastrous invasion of Iraq than any one soldier, or member of Congress who voted to authorize the war, then, as best I can tell, our thinking about the responsibility of individuals will not be affected by the interim conclusion that the collective itself was substantively responsible for what happened—we would end up in the same place if we just asked what is the level of responsibility of each individual for what the collective did.

Similarly, if we think about the *ex ante* responsibility of individuals for the acts of collectives it seems plausible to tie that to particular individuals' assigned roles within the collective.<sup>29</sup> The Prime Minister bears greater responsibility than the backbencher for the carrying out of the obligations of the government. But the Prime Minister has greater *ex ante* responsibility anyway, in virtue of her role. The strength and content of people's role obligations will of course depend not just on the relative importance of their roles, but also on the importance of the institution in which they have a role.<sup>30</sup> But again, it is unclear to me what difference it would make to the role-related obligations of individuals if we either could, or could not, say that the institution itself has an obligation. If you start with the assumption that collectives can be morally responsible, you are likely to be able to come up with a plausible account of the implications of that for the obligations of the members. But if you end up in the same place you would have been if you had just asked about the role obligations of the members, nothing will have been gained.

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<sup>27</sup> Margaret Gilbert, 'Collective Wrongdoing: Moral and Legal Responses', (2002) 28 *Social Theory and Practice* 167-187, at 181. Gilbert is here discussing Kutz's *Complicity*, in which the bombing of Dresden is used as a central example of collective action.

<sup>28</sup> Lawford-Smith, pp. 154-60, favors a view of this kind.

<sup>29</sup> See Collins, ch. 7.

<sup>30</sup> On role obligations, see Michael Hardimon, 'Role Obligations' (1994) 91 *Journal of Philosophy* 333-63.

Christian List and Philip Pettit do not agree that the responsibility of collectives is important only for what it tells us about the responsibility of individuals:

Not only is there a systematic basis for holding group agents responsible. There are real-world examples where the failure to do so generates a failure, intuitively, in justice. The ‘Herald of Free Enterprise’, a ferry operating in the English Channel, sank in the 1980s, drowning nearly two hundred people. An official inquiry found that the company running the ferry was extremely sloppy, with poor routines of checking and management. ‘From top to bottom the body corporate was infected with the disease of sloppiness’, But the Courts did not hold anyone responsible in what might seem to be appropriate measure, failing to identify individuals who were seriously enough at fault. As one commentator puts it, ‘the primary requirement of finding an individual who was liable . . . stood in the way of attaching any significance to the organizational sloppiness that had been found by the official inquiry’. Without going into the details of this case, it seems plausible to say that the company as a whole ought to be held responsible for what happened, both in law and in ordinary moral discourse.<sup>31</sup>

While the case for civil and even criminal legal liability for the corporation may be very strong in such a case, because it would supply appropriate incentives for structural reform and better practices, I fail to see the case for holding the corporation responsible in ‘ordinary moral discourse’. Perhaps a parallel consequentialist argument could be made for promoting a conventional moral discourse in which it is natural to say that collectives are responsible. This seems to me doubtful since the case for legal responsibility depends heavily on financial incentives. It is also an odd form of argument: Whereas legislatures can make law, we cannot similarly enact a moral discourse. But perhaps List and Pettit do not have a consequentialist argument in mind. After all, if the argument were purely consequentialist, their ‘systematic’ philosophical argument in favor of the idea of collective moral responsibility in the rest of

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<sup>31</sup> List and Pettit, 167. The quotations are from Eric Colvin, ‘Corporate Personality and Criminal Liability’ (1995) 6 *Criminal Law Forum* 1-44, at 17-18.

their book would not be necessary. But that leaves me wondering about the ‘failure in justice’. In a case where no individual is seriously at fault but some corporation or public institution causes severe harm, would there be a failure in justice if we were left with nowhere to assign serious moral responsibility? I find it hard to understand why justice is somehow served if we can say that though no person is seriously to blame, some nonperson is. I suspect that the inclination to think that the issue of collective moral responsibility is morally important turns on the mistaken idea that legal responsibility must track moral responsibility (discussed below).

I agree, then, with Christopher Kutz that ‘the trick lies ... not in modifying the fundamental bearer of accountability, but in expanding the scope of individual accountability by including an assessment of what an individual does with others’.<sup>32</sup> So let us turn to the deeply puzzling issue of shared responsibility.<sup>33</sup>

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<sup>32</sup> Kutz, *Complicity*, p. 7. Kutz’s own approach to the issue is different from my own broadly consequentialist account. His account turns on an idea of complicity such that when a collective action does wrong or harms, each intentional participant is accountable for the wrong or harm. The ground of his view ‘lies not in a consequentialist conception of accountability, but in a conception that relates agents to wrongs and harms in virtue of the content of their wills’ (p. 165). Kutz acknowledges that his approach does not fit environmental harm, since, for example, ‘individual polluters are not intentional participants in a collective act of pollution’ (pp. 166-7). His response is an expanded notion of participation to include participation in a way of life, and a focus on the symbolic rather than causal nature of our acts (ch. 6). See also Christopher Kutz, ‘Shared Responsibility for Climate Change: From Guilt to Taxes’, in Nollkaemper and Jacobs, *Distribution of Responsibilities in International Law*, pp. 341-365.

<sup>33</sup> There is by now a large literature on this issue as well. In addition to Parfit (works cited in n. ), foundational papers include Frank Jackson, ‘Group Morality’, in Philip Pettit, Richard Sylvan, and Jean Norman, (eds.), *Metaphysics and Morality* (Oxford: Blackwell, 1987), 91–110, and Warren Quinn, ‘The Puzzle of the Self-Torturer’ (1990) 59 *Philosophical Studies* 79–90. Other works include Chrisoula Andreou, ‘Environmental Damage and the Puzzle of the Self-Torturer’, (2006) 34 *Philosophy & Public Affairs* 95-108, Kai Spiekermann, ‘Small Impacts and Imperceptible Effects: Causing Harm with Others’, (2014) 38 *Midwest Studies in Philosophy* 75-90, Michael Otsuka, ‘The Paradox of Group Beneficence’, (1991) 20 *Philosophy & Public Affairs* 132-49, Shelly Kagan, ‘Do I Make a Difference?’ (2011) 39 *Philosophy & Public Affairs* 105-141, Julia Nefsky, ‘How You Can Help Without Making a Difference’, (2017) 174 *Philosophical Studies* 2743–2767, Alexander Dietz, 126 (2016) ‘What We Together Ought to Do’, *Ethics* 955-82. I wrote about the issue myself in Liam Murphy, ‘Derek Parfit on What We Together Do’,

As I have said, I assume that no one person's GHG daily emissions harm the planet. We could say the same for many other environmental harms, such as the effect on a city's air quality of driving a diesel car, the contribution of one family's take-out dinner to plastics pollution, and so on. The apparently paradoxical situation we appear to be in is that we together cause massive harm, while each of us causes none. One conclusion to draw is that of Walter Sinnott-Armstrong: 'It is better to enjoy your Sunday driving while working to change the law so as to make it illegal for you to enjoy your Sunday driving'.<sup>34</sup> This is not an absurd idea. It is not illegitimate to require as a matter of law that which legal subjects have no moral obligation to do (independently of law). I will take up this issue below when I return to the international responsibility of states. But it seems an implausible position in this kind of case: The harm is caused by what we do. Is morality completely unable to guide us to a better place?

A timely example is the case of vaccination.<sup>35</sup> From a public health (as opposed to a self-interested) perspective, no one person declining to be vaccinated against COVID-19 does any harm. But if no one gets vaccinated, we together cause enormous harm. The optimal number of people being vaccinated is less than 100%, since vaccination does carry some risks and herd immunity is achieved at less than 100% uptake. Let's say it is 80%. In a less practically significant way, the same is true of GHG emissions. There is presumably some minimal level of emission that is better than zero—for being no worse for the atmosphere but bringing whatever benefits the emitting allows. In the vaccination case, the first preference of each of us may be to be part of the 20% in a world of 80% vaccination, while our second preference would be a world where everyone is vaccinated, including ourselves. There is a prisoners' dilemma structure to the problem, since each trying for their first preference would lead to a result where all end up with their third preference of zero vaccination.

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unpublished ms. 1988, but did not have a good sense of how to make the kind of position I was defending precise. I found a way in Spiekermann's excellent article.

<sup>34</sup> 'It's Not My Fault: Global Warming and Individual Obligations', in Walter Sinnott-Armstrong and Richard B. Howarth (eds.) *Perspectives on Climate Change: Science, Economics, Politics, Ethics* (Amsterdam: Elsevier, 2005), 285–307, 307.

<sup>35</sup> I owe the suggestion and the way I elaborate it in the text to Lewis Kornhauser.

How are we going to reason our way out of this mess? We could appeal to nonconsequentialist considerations, having to do with fair-play, or solidarity. These may not help, however, since it is not obvious how doing something that causes no harm can be unfair or violate solidarity. These notions track the intuition that we should be willing to shoulder our share of the burdens if we are going to share in the benefits of cooperation. But that intuition has its clearest grip when the burdens contribute to the benefits. In any event, the more challenging task is to ask how we can reason our way out of the problem appealing only to consequentialist considerations—only, that is, to the harm that we do together. That, after all, is the salient thing going wrong in these cases.

The solution is to acknowledge two perspectives on our actions and their effects. There are the individual effects, the effects of my act considered on its own. In our cases, these effects are morally insignificant or nonexistent. And there are the effects of the acts of the group of which I am a part. I should consider not just the effects of what I do as an individual, but also those of what I do together with others, as part of a group. Though he later changed his mind, I believe that Parfit was right to say that even ‘if an act harms no one, this act may be wrong because it is one of a *set* of acts that *together* harm other people’.<sup>36</sup>

One of Parfit’s examples was that of the ‘harmless torturers’, in which a thousand torturers each press a button that causes no perceptible difference to the pain level of each of one thousand victims, but the collective effect of the thousand torturers pressing their buttons is to cause severe pain to all the victims.<sup>37</sup> If we assume that each torturer causes no harm by pressing their button and so is not for that reason acting wrongly, each does no wrong on their own. But each does act wrongly for causing harm together with the others. It is helpful to note that these kinds of cases involve an intransitive relation. If we imagine each torturer pressing the button in turn, then after each pressing the situation for the victims is no worse than it was before the pressing. However, after some number of pressings, say ten, the pain is

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<sup>36</sup> *Reasons and Persons*, 70.

<sup>37</sup> *Reasons and Persons*, 80. The example is based on one given by Jonathan Glover, in ‘It Makes No Difference Whether or Not I Do It’ (1975) 49 *Proceedings of the Aristotelian Society, Supp. Vol.* 171-190, at 174-5.

worse than it was ten pressings ago. This means that “no worse than” is here intransitive. This is similar to the intransitivity of “is indistinguishable from” in a series of color patches that change shade very gradually.<sup>38</sup>

There are serious problems with the idea of each doing nothing wrong considered as an individual, yet acting wrongly together with others. The most difficult concerns the question of membership in the group. It is tempting to say that since what I do doesn’t make any difference, I am not part of the relevant group whose acts do. But of course everyone can reason in that way, and then all is lost. The solution is to block the inference from the fact that it won’t make any difference what I do to the conclusion that I am not part of the group that does make a difference by pointing out that if enough others reason in this way, then their actions, *together with mine*, will make a difference. And I have no reason to assume that this will not happen. It is true that a certain number of us continuing to emit GHGs at our normal levels will not make any difference. But I have no justification for placing myself among that certain number, rather than among the larger number whose emissions do together make a difference.

Kai Spiekermann makes the point in a more precise way.<sup>39</sup> Paraphrasing Spiekermann and using the terms of my case, we can call a *minimal effective subset* of the set of all actions one that contains just enough actions such that if all actions in that subset are ‘emit’ rather than ‘not emit,’ morally relevant harm occurs. Any given individual’s action is an element in some of the minimal effective subsets. Each of those subsets can affect the level of harm if all of the actions in the set change from ‘not emit’ to ‘emit’ and vice versa. A given action contributes to expected harm together with others in a minimal effective subset if (i) that action is ‘emit’ and (ii) there is a positive ex ante probability that all other actions in the set are ‘emit’ and a positive probability that they are all ‘not emit’. Note that it is important that the other actions in the subset are not fixed. If they were fixed, our given individual’s action would not make a difference. What is wrong is to increase expected harm by emitting in a situation where that makes it

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<sup>38</sup> See Spiekermann, 80.

<sup>39</sup> Spiekermann, 86-9. He acknowledges the influence of Matthew Braham and van Martin Hees, ‘Degrees of Causation’ (2009) 71 *Erkenntnis* 323–44 and ‘An Anatomy of Moral Responsibility’ (2012) 121 *Mind* 606–34.

possible that there will be a minimal effective subset of emitting actions. To illustrate with the harmless torturers, imagine that while one button pressing makes no perceptible difference, ten pressings do. Each torturer should consider the possibility that his pressing will be one of a set of ten pressings that together will harm. If each torturer knows exactly what all the others will do, then his pressing will not be wrong because it will do no harm. But if it's possible both that ten (including him) will press, and that the other nine will not press, then it will be wrong to press.

It is a central feature of this account that it makes a difference here whether I act with other people or with nature. Suppose that the level of GHGs in the atmosphere is fixed at a certain high level though no one is emitting any more. In such a case, I will do no wrong if I alone emit. It is different if that same high level is due to the emissions of others. Then I must consider that my emission may be causing harm together with others.

That is the sketch of the account of shared responsibility for harmful outcomes. Many questions remain. One is the matter of quantifying the harm done by each when they harm together with others. This needs to be done as I may face a choice between causing a certain amount of harm through individual effects, and contributing to the harm done by a group. Naturally I want to choose the less harmful course, but to do that I will need to be able to quantify my share of the group-based harm. In some cases, such as vaccination, an equal share of the harm would make sense. In the case of GHG emissions, we are not faced with a binary decision, but one of degree, since one can emit more or less. That makes the distribution of responsibility to each group member more difficult.

There is a related, perhaps more serious, problem. In the case of vaccination, I face a simple choice. In the case of GHG emissions, I most certainly do not. As my world is currently structured, there is no simple choice between emit or not emit. So what exactly should we together be doing? The situation of course calls out for central planning—we hope that the government will determine a reasonable path forward and enforce compliance. But in the meantime, since we have concluded that it is *not* true that we do nothing wrong by continuing with business as usual, what exactly ought we to do? There seems to be no concrete, quantifiable answer available to us as individuals. One natural solution at



this point is to conclude that we cannot adequately characterize our moral situation in terms of right and wrong actions, but have to think in terms of an appropriate practical orientation, or disposition, or virtue. We should have the aim of reducing GHG emissions; we should be oriented towards that end in our deliberations, and be disposed to act accordingly.<sup>40</sup> The reason why we should have this disposition is that it will lead us to cause less harm together with others.

### **3. Collective versus Individual Legal Responsibility I: The Surface of the Law**

Returning at last to international law, the question of collective versus individual responsibility arises in a number of very different ways, reflecting the variety of kinds of responsibility and their relationships, and the motivation for the inquiry. We may focus first on actual or proposed regimes of international legal responsibility and ask simply whether these regimes do a good job dealing with situations where two or more public institutions are in some relevant sense implicated in a legal wrong. Whether the issue even comes up in an interesting way will, however, depend upon the nature of the primary norm. Nollkaemper and Jacobs rightly emphasize the distinction between international legal norms that are more in the nature of private law, and those that are more akin to public law. In an illustration well-suited to the current discussion, they write:

While, for instance, joint responsibility in regard to transboundary environmental harm may function in a way that resembles its domestic tort law origins (for instance when two upstream riparian states cause damage to a downstream state), joint responsibility functions in a different way in settings that resemble public or administrative law: for instance, in the context of noncompliant institutions under multilateral environmental agreements.<sup>41</sup>

The first kind of case involves primary norms in which the duty is not to harm, or to undertake due diligence with respect to transboundary environmental harm under the no-harm rule of customary

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<sup>40</sup> This conclusion is similar to that reached by Dale Jamieson, 'Climate Change, Responsibility, and Justice', (2010) 16 *Science and Engineering Ethics* 431-45 and 'When Utilitarians Should be Virtue Theorists', (2007) 19 *Utilitas* 160-183.

<sup>41</sup> SRIL, 403

international law.<sup>42</sup> Nollkaemper and Jacobs' two upstream riparian states is a case where two states together cause a harm. Arguably, another case would be climate change. Here, the issue of causation has been taken to be a problem for the availability of reparations under ARSIWA.<sup>43</sup> But as Jacqueline Peel notes, though it is difficult to establish causation on the part of any particular state, it is clear that all emitting states together have caused harm. If Vanuatu sinks, all emitting states caused this. The question that would remain is that of the distribution of responsibility and how, structurally, that can be achieved under existing law and legal institutional structures. It is often suggested that the idea of joint and several liability should be adopted from domestic law. Nollkaemper and Jacobs point out that this will not do if the state that pays in full is in practice, for lack of a forum, unable to seek contribution from the other states that share the responsibility.<sup>44</sup> This is a structural rather than a theoretical problem. Once again, it seems that in the case of climate change, this problem should in theory be easier to solve. One aim of joint and several liability is to transfer the burden of proving relative contributions from the plaintiff to the defendant.<sup>45</sup> If there is an easy way for the plaintiff to show contribution of a particular defendant, there is no need to shift this burden. Peel suggests that

each responsible state might be held responsible for a share of the harm, whether based on its percentage of total global GHG emissions (since industrialisation or from another given time point) or allocated according to some other equitable formula (e.g. per capita emissions, energy efficiency, or shares of a 'carbon budget').<sup>46</sup>

Peel characterizes this approach as an application of the idea of market-share liability that has developed in domestic tort law.<sup>47</sup> But actually it is not that. Market share liability comes into play where it cannot be

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<sup>42</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, 242, para. 29.

<sup>43</sup> Causation is required for reparation under Art. 31 (1). For discussion see Peel, 1041-45.

<sup>44</sup> SRIL, 423.

<sup>45</sup> For discussion of the incentive effects of joint and several liability, see Lewis Kornhauser, 'Economics of Joint and Several Liability', in Jennifer Arlen (ed.) *Research Handbook on the Economics of Torts* (Edward Elgar, 2013), pp.199-233.

<sup>46</sup> Peel, p. 1047, references omitted.

<sup>47</sup> *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980) is the seminal case in US law.

proved that the defendant's product was involved in causing the plaintiff's harm at all. For this reason the doctrine is applied cautiously and generally only where different manufacturers truly are making the very same thing. But there is no debate about the fact that each emitting country, together with all others, causes the harms of climate change. And the distributive principles Peel mentions involve no fictions; the choice between them is normative.

So there are doctrinal, structural, and normative issues that arise when considering cases of shared responsibility for harm—the 'private law' cases. But these questions do not appear to pose particularly difficult theoretical issues.

What then about the 'public law' case of compliance mechanisms under MEAs? Here again there is much doctrinal complexity. In cases where specific duties are set out, such as prohibitions of trade in endangered species under the Convention on International Trade in Endangered Species, or specific GHG emissions reduction targets for developed countries under the Kyoto Protocol, there is no issue of shared responsibility at the surface of the law. Whatever enforcement mechanism an MEA contains will simply enforce the duty in question, entirely without reference to what any other state is doing. In other cases, MEAs announce collective commitments of the parties, such as in the broad mitigation commitments of the United Nations Framework Convention on Climate Change and the Paris Agreement. These commitments arguably give rise to a collective obligation on the part of the parties 'to stabilise emissions at a level adequate to protect the climate system now and in the future, and to avoid dangerous anthropogenic warming (i.e. the 2°C/450ppm target or a lower precautionary level)'.<sup>48</sup> This however, leaves the parties in a legal quandary exactly like the moral quandary each individual faces with respect to GHG emissions discussed in the previous section. With no guidance on the allocation of emissions goals among the states nor guidance on how to assess the adequacy of states' efforts,<sup>49</sup> the most this shared obligation can amount to is an obligation to reconvene to figure things out in more detail. But the

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<sup>48</sup> Peel, 1024, citing Roda Verheyen, *Climate Change Damage and International Law* (Leiden: Martinus Nijhoff, 2005), p. 66.

<sup>49</sup> Peel, 1015.

Convention already commits them to that. As for the virtue-based solution embraced above for the moral predicament of individuals, it fits uneasily into the legal context because of the unavailability of enforcing a practical orientation or disposition, even in principle, and because it is not clear how to think about a state having a practical orientation in the first place.<sup>50</sup>

#### **4. Collective versus Individual Responsibility II: Beneath the Surface of the Law**

So long as the law does not simply announce a collective goal, but rather specifies states' obligations in a way that allows for monitoring compliance, there is no deep theoretical problem with shared responsibility at the surface of the law, even for cases where the obligations relate to harm that may be caused by more than one state. This is not to downplay, of course, the profound practical political obstacles, as well as problems associated with the institutional architecture and doctrinal fundamentals of international law, that stand in the way of an ideal international law to address the problem of global environmental harm.

But suppose we had an ideal MEA for the case of climate change, one that set out specific emissions targets for each state, backed by effective enforcement in the form of financial penalties. There would be no puzzle about shared responsibility at the surface of the law. But there may when it comes to the matter of justification.

The structure here is that of a collective of collectives. Each state has ex ante responsibility or obligations, and each can incur ex post substantive responsibility. But the costs in either case are not really born by states, any more than corporations really pay corporate tax. The members of the collectives bear the burdens. So the question of individual or collective arises in a different way: Is it justified to attach legal responsibility to the collective (the state) without inquiring into the underlying moral responsibility of the individuals who will bear the burdens?

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<sup>50</sup> On the in-principle appropriateness of enforcement as a marker of the legal, see Liam Murphy, 'Law Beyond the State: Some Philosophical Questions', (2017) 28 *European Journal of International Law* 203-32 at 217-26.

I wrote above that it is not a prerequisite of ascribing legal responsibility to a state that we regard it as capable of collective moral responsibility in the strong nondistributive sense. Domestic law can make legally responsible any kind of entity it likes: people, pigs, families, nongovernmental organizations, corporations, school leadership teams, football clubs, and so on. And the law can stipulate the extent of the responsibility of the entity in question. Corporations have certain rights and obligations but not others, and can be held legally responsible in various ways, but not others. In the infamous case of *Citizens' United v. Federal Electoral Commission*<sup>51</sup> a majority of the justices of the US Supreme Court held that corporations had free speech rights; the minority were of the view that they did not. For now, the issue is settled as a matter of US law. The point I am making is that the conditions for legal personality, and the scope of legal responsibility for different kinds of entity is determined by the content of the law. Leaving aside disputes about positivism and nonpositivism, it would be possible for a legal order to tie the appropriateness of legal personality and responsibility to capacity for moral responsibility. But I know of no evidence that this is a plausible way to understand any actual legal order.

Would it be plausible to insist, as a matter of external moral justification of the law, that there be no legal responsibility for some institution or other kind of collective unless the entity in question can bear moral responsibility in its own right? The well-known complaint of Antonio Cassese, dubbed by James Crawford and Jeremy Watkins 'the individualist challenge' is relevant here. I quote Crawford and Watkins:

In his textbook on international law, Antonio Cassese writes:

The international community is so primitive that the archaic concept of collective responsibility still prevails. Where States breach an international rule, the whole collectivity to which the individual State official belongs, who materially infringed that rule, bears responsibility . . . On the international plane, it is the whole State that incurs responsibility and which therefore has to take all the required remedial measures.

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<sup>51</sup> 558 U.S. 310 (2010).

Cassese gives the impression in this passage that whenever a state is held responsible in international law, the aggregate of persons in that state themselves incur responsibility. At one level this is misleading. A state, construed as an artificial legal person, is not the same as any ‘collectivity’ of natural persons, nor is the legal responsibility or liability of the state tantamount to that of any given population. But the conceptualization of state responsibility as a form of collective responsibility is nonetheless useful because it brings out an important line of complaint that can be directed at this area of international law, one that trades on the predominantly non-individualistic character of responsibility-ascriptions on the international plane.<sup>52</sup>

What is interesting here is that neither side in the discussion takes seriously the possibility that the full justification for the international legal responsibility of a state is that the state itself is morally responsible as a singular collective. Perhaps the right way to understand Cassese’s point is this: some have thought the legal responsibility of the state can be justified by saying that the state as a collective is morally responsible. But the idea of collective responsibility is primitive and archaic. (Why? Perhaps because even if it made sense, it does not follow from collective responsibility that each member of the collective is either fully or equally responsible for what the state did—as discussed above.) Crawford and Watkins, on the other hand, interpret Cassese’s challenge as follows: Since the state is, from the legal perspective, an artificial legal person, holding it legally responsible has no conceptual implications at all for the moral responsibility of a collective of persons. Both are saying, in different ways, that holding the legal person of the state responsible requires justification because it affects real people who themselves may not bear any moral responsibility for what the state did.

The individualist challenge does not appear to have force when we consider the ex ante responsibility of states under our ideal MEA. Individuals have a shared obligation to reduce emissions. Lacking any kind of moral central planning, all they can do to discharge that responsibility is to adopt a

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<sup>52</sup> 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. 283-98, at p. 289. The quote from Antonio Cassese is from *International Law* (Oxford: Oxford University Press, 2005), p. 241.

certain practical orientation or disposition. Suppose that their state did do some central planning, and came up with rules governing emissions that, in effect, took the deliberative burden away from the individuals. This is desirable as a ‘moral division of labor’.<sup>53</sup> It would be nice if we didn’t have to think about the potentially harmful effects of our patterns of behavior all the time. The trouble for each state, of course, is that it is but one state and the problem is global; the optimal solution can only be worked out at the global level. So an ideal MEA would make it possible for individual states to come up with the best domestic regimes which would, in turn transform individuals’ responsibilities to adopt a certain practical orientation towards GHGs into a set of rules that may be easier to follow.

So assuming that at the level of the MEA and of domestic law institutions come up with the right rules, there need be no conflict at all between the shared ex ante responsibility of individuals, and the responsibilities of states. Things are more complicated for the case of ex post responsibility—the case of imposed sanctions. A state’s failure to achieve emissions targets set by the ideal MEA is properly the responsibility of the government(s) of the state. It is true that each of us would still have the ex ante responsibility to adopt the appropriate practical orientation even if our government took no steps to legally regulate emissions with the aim of meeting the required target. But we as individuals cannot together be held ex post responsible for the failure to meet the target. Meeting the target is not something that we together have the means to do, except by accident. So the fault will lie with our officials. If under the MEA sanctions are imposed, however, these will burden all citizens, not just the officials. In earlier work I took a sanguine line with cases of this kind: Where the wrong is done by the officials, but the burden of the sanction falls on all of us, we cannot justify those burdens by saying that the citizens have either individual or shared responsibility for the wrong, because they do not. We have to justify those burdens in some other way, and the only way that seemed available was instrumentalist: we justify this kind of thing as part of the overall instrumental justification we offer for the state system itself.<sup>54</sup>

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<sup>53</sup> See Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1995), pp. 53-62.

<sup>54</sup> Liam Murphy, ‘International Responsibility’, in Besson and Tasioulas, pp. 299-315.

This now seems to me too one-sided a position, in that it ignores the responsibilities individuals have together to support and improve their own state and the state system generally.<sup>55</sup> We together, as individuals, have an ex ante responsibility to support and not undermine our states, and, so far as we can, international legality, for the sake of discharging our shared responsibility to promote justice and the common good.<sup>56</sup> So, for example, if each of us could induce our government to comply with international legal obligations by incurring some financial burden, that could be our responsibility. When the international legal order imposes similar burdens on us, we could, once again, think that the legal order was doing some of our work for us. In this case, the burden associated with the ex post responsibility of our state may help discharge our own ex ante responsibilities. The match will not be precise, of course, but this way of thinking about things does take the sting out of the idea that it is justifiable, on instrumental grounds, to impose burdens on blameless people.

I conclude then that the international responsibility of states, at least in the context of environmental harm, is both collective (in the weak or broad sense) and individual. At the foundation of the international responsibility of states is the shared responsibility of individuals.

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<sup>55</sup> I am influenced by Samantha Besson, 'State and Individual Secondary Liability in Case of International Organizations' Responsibility', (2017) 6 *Rivista di filosofia del diritto*, 51-78, at 60, and 'The Authority of International Law: Lifting the State Veil', (2009) 31 *Sydney Law Review* 343-380.

<sup>56</sup> This does not translate into a general duty on the part of individuals to obey the law. See Liam Murphy, 'The Normative Force of Law: Individuals and States', in John Gardner, Leslie Green, and Brian Leiter (eds) *Oxford Studies in Philosophy of Law, Vol. 3* (Oxford: Oxford University Press, 2018), pp. 87-122.