



UvA-DARE (Digital Academic Repository)

Shared obligations in international law

Nedeski, N.

Publication date

2017

Document Version

Other version

License

Other

[Link to publication](#)

Citation for published version (APA):

Nedeski, N. (2017). *Shared obligations in international law*. [Thesis, fully internal, Universiteit van Amsterdam].

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

1

INTRODUCTION

Throughout the years, international legal society has become increasingly interdependent.¹ Part of this change is that states are no longer deemed to act exclusively in their individual self-interest, but that more is at stake in international law.² States and international organizations (IOs) engage in cooperative activities and pursue common goals that cannot be achieved independently. In international legal literature this development has been linked to the rise of concepts such as multilateral obligations and obligations *erga omnes (partes)*,³ which recognize that multiple or even all states can have a right and legal interest when it comes to the performance of certain international obligations. In this context of interdependence, cooperation and common interests one might expect that states and/or IOs do not only share rights and legal interests but that they may also share international obligations.

In practice, there are various situations in which multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuit of common goals. In this respect one may think of the obligation of states parties to the Nuclear Non-Proliferation Treaty to pursue negotiations on a treaty on general and complete nuclear disarmament;⁴ the obligation of the European Union and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020;⁵ the obligation of France and the UK to take measures to maintain normal security and public order in and around

¹ André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual' ² Wolfgang Benedek and others (eds), 'Introduction', *The Common Interest in International Law* (Intersentia 2014) 1.

³ See e.g. Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217, 285; Isabel Feichtner, 'Community Interest in International Law', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007) para 39 <www.mpepil.com>; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' [2010] *EJIL* 387, 399.

⁴ Article VI Treaty on the Non-Proliferation of Nuclear Weapons (1968) 729 UNTS 161.

⁵ Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, 'Report on Its Seventh Session' (2011) FCCC/KP/CMP/2011/10/Add.1 4., 6: the commitment for the 'European Union and its member States for a second commitment period under the Kyoto Protocol are based on the understanding that these will be fulfilled jointly with the European Union and its member States, in accordance with Article 4 of the Kyoto Protocol.' Iceland's commitment is based on the same understanding.

the Coquelles Terminal;⁶ and the obligation of Australia and Nauru to take measures to prevent the inhuman treatment of asylum seekers and refugees held in offshore detention centres on the territory of Nauru, but which are under the effective control of both states.⁷

Judging from the increasing number of references to international obligations that are 'shared',⁸ 'joint',⁹ or 'collective',¹⁰ the idea that the fulfilment of international

⁶ This obligation can be derived from clauses 2.1 and 27.7 of the Concession Agreement concerning the Channel Fixed Link 1986.

⁷ Committee Against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' CAT/C/AUS/co/4-5, 23 December 2014 para 17.

⁸ Niels Frenzen, 'Extraterritorial Refugee Protection' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 512; Ilias Plakokefalos, 'Environmental Protection of the Deep Seabed' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 389; Henrik Ringbom, 'Ship-Source Marine Pollution' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 273; Kees Bastmeijer, 'Antarctica' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 412; Jacqueline Peel, 'Climate Change' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 1024; Andrea Gattini, 'Breach of International Obligations' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 26; Eric Wyler and León Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 304; Lawrence Gostin, *Global Health Law* (Harvard University Press 2014) 20; Ilias Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) 4 *Journal of International Dispute Settlement* 385, 385, 389; Marten Zwanenburg, 'International Humanitarian Law Interoperability in Multinational Operations' (2013) 95 *International Review of the Red Cross* 681, 703-704; Lilian del Castillo-Laborde, 'Equitable Utilization of Shared Resources', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2010) para 5 <www.mpepil.com>; Marie-Claire Cordonier Segger and others, 'Prospects for Principles of Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation' (2003) 12 *Review of European Community & International Environmental Law* 54, 54, 57.

⁹ Arie Trouwborst, 'Nature Conservation' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 992; Peel (n 8) 1015; Oliver De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084, 1152; André Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (CUP 2012) 307; Jonas Ebbesson, 'A Modest Contribution to Environmental Democracy and Justice in Transboundary Contexts: The Combined Impact of the Espoo Convention and Aarhus Convention' (2011) 20 *Review of European Community & International Environmental Law* 248, 254; Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008); Karl Wellman, 'Solidarity, the Individual and Human Rights' [2000] *Human Rights Quarterly* 639, 639, 644, 646, 649, 650-651; *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Separate Opinion Judge Shahabuddeen, 1992 ICJ reports* 270 286.

¹⁰ Peel (n 8) 1024, 1025; Margot Salomon, 'Is There a Legal Duty to Address World Poverty?' RCAS Policy Papers 2012/03 5; León Castellanos-Jankiewicz, 'Causation and International State Responsibility' SHARES Research Paper 07, ACIL 2012-07, available at www.sharesproject.nl and SSRN 64-65; Nienke van der Have, 'The Right to Development and State Responsibility: Can States Be Held to Account?' SHARES Research Paper 23(2013), ACIL 2013-06 5; Samantha Besson, 'La Pluralité d'Etats Responsables: Vers Un Solidarité Internationale?' (2007) 17 *Revue Suisse de Droit International et de Droit Européen* 13, 17. However, the term 'collective obligation' is not always used to indicate that an obligation is owed by multiple states or IOs. It is also used to indicate that an international obligation is owed to multiple states or IOs, see e.g. Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations

obligations is not always up to one duty-bearer only is gaining support in legal literature. These references generally remain unsubstantiated but raise several questions: what does it mean to speak of shared obligations in international law, is this a meaningful category and if so why?

A study of shared obligations in international law can contribute to a better understanding of the (non-)performance of international obligations binding upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals. When is a shared obligation fulfilled by which duty-bearer(s), and when is a shared obligation breached by which duty-bearer(s)? Moreover, a study of shared obligations in international law can, logically, contribute to a better understanding of the problem of shared responsibility in international law. When multiple states and/or IOs are bound to a shared obligation, does this automatically entail that they will share the international responsibility that arises in case of a breach of that obligation?

The present study examines the topic of shared obligations in international law, and aims to contribute to a better grasp of the structure of international obligations that are binding upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals.

The study consists of two parts. In Part I, the thesis develops a concept of shared obligations as an analytical tool through which to assess situations where multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. At this point, it is important to emphasize that the present study's understanding of shared obligations does not cover all international obligations that are binding upon multiple states and/or IOs simply because they arise from a multilateral source or rule. The states and/or IOs that bear a shared obligation stand in a relationship to one another that consists of more than just the fact that they are all parties to the same multilateral treaty or bound by the same rule of customary international law. It is this relationship that distinguishes obligations that are shared from obligations that are not shared.

The study clarifies this relationship between the bearers of a shared by elaborating on the three elements that are present whenever the present study speaks of a shared obligation.¹¹ First, a shared obligation has *two or more duty-bearers*, since one state or IO cannot 'share' an international obligation on its own. Second, the duty-

Bilateral or Collective in Nature?' [2003] EJIL 907. When used in this sense, the term 'collective obligation' is synonymous to the term 'multilateral obligation'. The concept of multilateral obligation is further discussed in Chapter 2, §2.4.2.ii.

¹¹ These three elements are thoroughly discussed in Chapter 3, §3.2.

bearers in question are bound to *a similar international obligation*, which is the case when multiple states and/or IOs are bound to an international obligation with similar normative content. Third, states and/or IOs are bound to a shared obligation if they are bound to a similar international obligation *that pertains to the same concrete case* or, in other words, the same constellation of facts. This is the case when multiple states and/or IOs agree to an obligation to work towards or achieve a common goal, or when multiple states and/or IOs are factually linked to a common situation. The latter includes situations in which multiple states and/or IOs exercise some form of authority or control over the same territory and/or individuals, and are consequently all bound to a similar international obligation with regard to the same territory and/or individuals.

An essential component of the present study's conceptualization of shared obligation is the introduction of a distinction between two types of shared obligations: divisible and indivisible shared obligations.¹² This distinction is relevant because it helps to ascertain *when* a shared obligation is fulfilled or breached *by which duty-bearer(s)*. Hence, it is the key to a better understanding of the (non-)performance of shared obligations.

A divisible shared obligation is characterized by the fact that it can be fulfilled or breached by each duty-bearer independently. The bearers of a divisible shared obligation are all bound to a similar international obligation in the context of cooperative activities or the pursuance of common goals, but each duty-bearer only has to do its 'share' to be released from the obligation. An example of a divisible shared obligation is the obligation of states X and Y to take measures to prevent an impending genocide in neighbouring state A. This obligation is divisible because it is possible for state X to fulfil this obligation by taking such measures (thereby doing its 'share'), while state Y at the same time breaches this obligation by failing to take any measures whatsoever (thereby failing to do its 'share'). The fulfilment or breach of a divisible shared obligation by its bearers is, quite simply, divisible.

An indivisible shared obligation is characterized by the fact that it can only be fulfilled or breached by all duty-bearers simultaneously. The bearers of an indivisible shared obligation are not merely bound to do their 'share', but rather are bound to jointly achieve a common result. An example of an indivisible shared obligation is the obligation of states A, B and C to reduce their aggregate greenhouse gas emissions with 40 per cent by the year 2020. This obligation is indivisible because it is not possible for state A to fulfil this obligation while states B and C breach it at the same time. The obligation will either be fulfilled by all duty-bearers if a 40 per cent

¹² The distinction between divisible and indivisible shared obligations is further developed in Chapter 4, §4.2.

reduction is indeed achieved by the year 2020, or it will be breached by all duty-bearers if a 40 per cent reduction is not achieved by the year 2020. The fulfilment and breach of an indivisible shared obligation by the duty-bearers is, quite simply, indivisible.

In Part II, the study sheds further light on the concept of shared obligations in international law by clarifying the relationship between shared obligations and shared responsibility. In doing so it first examines what are the implications of the shared nature of an international obligation for the *determination* of shared responsibility, which consists of establishing whether multiple states and/or IOs can be held internationally responsible for one or several internationally wrongful acts. Subsequently, the study proceeds to focus on the *content* of shared responsibility and assesses what are the implications of the shared character of the obligation breached for the nature of the secondary obligations of cessation and reparation that may arise when shared responsibility has been established.

For a comprehensive analysis of the implications of shared obligations for the responsibility of states and/or IOs, the study distinguishes between shared responsibility for one internationally wrongful act and shared responsibility for several internationally wrongful acts.¹³

The study finds that the relationship between shared obligations and shared responsibility is different depending on whether the shared obligation breached can be qualified as a divisible shared obligation or as an indivisible shared obligation. In this respect, it is only the position of indivisible shared obligations that is special. Because the structure of an indivisible shared obligation is characterized by the fact that it can only be fulfilled or breached by all duty-bearers simultaneously, a breach of an indivisible shared obligation always gives rise to the shared responsibility of all duty-bearers for one internationally wrongful act. This, in turn, has consequences for the content of responsibility: any secondary obligation of cessation or reparation that arises as a result of a breach of an indivisible shared obligation will also be shared by all duty-bearers and, moreover, can itself be qualified as indivisible.

This is different when it comes to divisible shared obligations. Considering that a divisible shared obligation can be fulfilled or breached by each duty-bearer independently, a breach of a divisible shared obligation does not necessarily give rise to shared responsibility. Whether or not a breach of a divisible shared obligation gives rise to shared responsibility depends on the facts that are specific to each case: has each duty-bearer done its share or not? Thus, the fact that multiple duty-bearers

¹³ See 1.1.6.ii below and, more thoroughly, Chapter 5, §5.1.

are bound to a divisible shared obligation is not, as such, a guarantee that a breach of that obligation will give rise to the shared responsibility of all duty-bearers.

As a final point, it appears that indivisible shared obligations are quite rare in practice, and this study has encountered only a few examples of indivisible shared obligations in practice. Even in the context of cooperative activities and the pursuance of common goals, it seems that the shared obligations incumbent upon multiple states and/or IOs are often divisible, which entails that it is possible for each duty-bearer to individually breach or fulfil the obligation in question.

This introduction sets out the framework for the present study. It discusses the scope of the research (§1.1), the research question and approach of the present study (§1.2), the relevance of the research (§1.3) and the structure of the thesis (§1.4).

1.1 Scope of the research

This section discusses the terms and concepts that are essential for an understanding of the scope of the research. It addresses the present study's understanding of international obligations and international responsibility (§1.1.1), the international law of obligations (§1.1.2), duty-bearers (§1.1.3), shared obligations (§1.1.4), divisible and indivisible shared obligations (§1.1.5) and shared responsibility (§1.1.6).

1.1.1 International obligations and international responsibility

This thesis maintains a strict distinction between the term international responsibility and the term international obligation. Both in legal literature and in ordinary language, a distinction between these two terms is not always maintained. The term responsibility is sometimes used to denote that one or more actors are under a legal obligation to do something or to refrain from doing something (which essentially amounts to responsibility *ex ante*), or as a way to express a normative judgment that one or more actors *should* act in a particular way but are not under a legal obligation to do so. For example, the notion of a 'responsibility to protect' in part indicates that states and international organizations are bound to certain international legal *obligations* to protect, but also intends to convey that states and international organizations *should* act in a certain way even in the absence of legal obligations.¹⁴

¹⁴ See e.g. Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 Human Rights Law Review 1.

Throughout this study the term international obligation is used solely to indicate that there is a legally binding obligation to do something or refrain from doing something that arises from international law.

The study considers the correlation between obligations and rights to be a general feature of international law.¹⁵ This means that every international obligation is part of a legal relation, and that legal relation consists of an obligation on one side and a correlative right on the other side.

The term international responsibility is used exclusively to refer to the responsibility of states or international organizations for internationally wrongful acts, as addressed in the ILC's Articles on State Responsibility (ASR)¹⁶ and its Articles on the Responsibility of International Organizations (ARIO).¹⁷ The three main topics covered by the ASR and ARIO are the determination of international responsibility (whether and under what conditions responsibility arises), the content of international responsibility (whether and under what conditions international responsibility gives rise to the secondary obligations such as the obligation of reparation) and the implementation of responsibility (whether and under what conditions a state or IO is entitled to respond to the international responsibility of another state or IO).

1.1.2 The international law of obligations

This study on shared obligations in international law does not focus specifically on international obligations that arise from a particular substantive area of international law, such as international environmental law, international trade law or international human rights law. The conceptualization of shared obligations takes place in the more general context of the international law of obligations, of which the law of international responsibility and the law of treaties are considered to be subsets.

Many domestic legal systems are familiar with the notion of a law of obligations,¹⁸ which consists of three main branches: the law of contract, the law of tort and the law of restitution and unjust enrichment. The main characteristic of the law of obligations is *not* that it provides an overview of (the content of) existing obligations, but rather that it provides for general rules regarding legal obligations and legal relations.

¹⁵ For a further discussion see §1.2.1.i below.

¹⁶ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) A/56/10.

¹⁷ International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (2010) A/66/10.

¹⁸ See e.g. Reinier Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Selier European Law Publishers 2013); Geoffrey Samuel, *Law of Obligations* (Edward Elgar Publishing 2010); Simon Whittaker, 'The Law of Obligations', *Principles of French Law* (OUP 2008); David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001); Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996).

General topics covered by the law of obligations include the creation of obligations and corresponding rights (arising from contract, tort or unjust enrichment); the performance of obligations;¹⁹ consequences of non-performance;²⁰ interpretation of contracts;²¹ conditions of liability for damage²² and plurality of parties to an obligation or right.²³

The international legal system also contains a body of general rules regarding international obligations and legal relations: an international law of obligations, with the law of treaties and the law of international responsibility²⁴ as its two main branches. The law of treaties is concerned with three general topics regarding legal obligations and legal relations: 'whether there is a treaty obligation, what is its content, and who are the parties to the obligation.'²⁵ The law of international responsibility is concerned with the general question of (non-)performance of international obligations, regardless of whether those obligations arise from a treaty or from another source.²⁶

1.1.3 Duty-bearers

The present study focuses on international obligations of states and addresses, to a lesser extent, international obligations of international organizations. Hence, the term duty-bearer used throughout this study is limited to states and international organizations. The thesis does not deal with individuals, multinational corporations

¹⁹ See e.g. articles 7:101 - 7:112 of the Principles of European Contract Law (PECL) in The Commission on European Contract Law, *Principles of European Contract Law: Parts I and II* (Ole Lando and Hugh Beale eds, Kluwer Law International 2000).

²⁰ See e.g. articles 8:101 - 8:109 PECL (on non-performance and remedies in general) and 9:101 - 9:510 PECL (on particular remedies for non-performance).

²¹ See e.g. articles 5:101 - 5:107 PECL.

²² See e.g. articles 2:101 - 3:201 of the Principles of European Tort Law (PETL) in European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (SpringerWienNewYork 2005).

²³ See e.g. articles 10:101- 10:111 PECL (on plurality of debtors) and articles 10:201 - 10:205 PECL (on plurality of creditors) in The Commission of European Contract Law, *Principles of European Contract Law: Part III* (Ole Lando and others eds, Kluwer Law International 2003). Various private legal systems distinguish between different categories of obligations in the case of a plurality of duty-bearers, and each category has different implications for (non-)performance. 'The issues and concepts [relating to] plurality of parties are familiar and part of a long European legal tradition', Marcel Fontaine, 'The New Provisions on Plurality of Obligors and of Obligees in the UNIDROIT Principles 2010' [2011] *Uniform Law Review* 549, 551.

²⁴ Crawford considers the law of international responsibility to be part of the international law of obligations. See James Crawford, *State Responsibility: The General Part* (CUP 2013) 99.

²⁵ James Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 310.

²⁶ Crawford, 'Responsibility to the International Community as a Whole' (n 25) 310. See also article 12 ASR: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character* (emphasis added).' The commentaries to article 12 ASR reiterate that 'the articles are of general application. They apply to all international obligations of States, whatever their origin may be.' International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 55, para 3. A similar provision has been included in article 10 ARIO.

or other non-state actors as bearers of international obligations. This would involve addressing whether and to what extent non-state actors are bound by international obligations, which is not a given when it comes to non-state actors.²⁷

This subsection discusses states as duty-bearers (i), international organizations as duty-bearers (ii) and finally, duty-bearers when states act through a common organ (iii).

i. States as duty-bearers

The capacity to be a bearer of international obligations is intrinsically linked to the possession of international legal personality.²⁸ As the original subjects of international law,²⁹ all states possess international legal personality and are the principal bearers of international obligations.³⁰

ii. International organizations as duty-bearers

An international organization possesses the capacity to bear international obligations only if it has legal personality. Where the legal personality of international organizations used to be a controversial idea in legal doctrine,³¹ today the legal personality of international organizations is no longer the subject of debate.³² Legal doctrine generally distinguishes between the qualification of an entity as an

²⁷ Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 *Netherlands International Law Review* 49, 50. For a discussion of international obligations incumbent upon non-state actors see e.g. Markos Karavias, *Corporate Obligations under International Law* (OUP 2013); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP 2002).

²⁸ Roland Portmann, *Legal Personality in International Law* (CUP 2010) 8.

²⁹ Christian Walter, 'Subjects of International Law', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007) para 26 <www.mpepil.com>.

³⁰ James Crawford, 'State Responsibility', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2006) para 1 <www.mpepil.com>; Catherine Brölmann and Janne Nijman, 'Legal Personality as a Fundamental Concept of International Law' in Jean d'Aspremont and Sahib Sing (eds), *Fundamental Concepts of International Law* (Edward Elgar Publishing 2017) 4.

³¹ Wilfred Jenks, 'The Legal Personality of International Organizations' (1945) 22 *British Yearbook of International Law* 267, 267; Catherine Brölmann, *The Institutional Veil in Public International Law* (Hart Publishing 2007) 57. At 39-64 Brölmann describes how the idea of a separate identity of international organizations became increasingly accepted in legal doctrine during the second half of the nineteenth century and the first half of the twentieth century, but that this idea of a separate identity did not (yet) amount to an image of legal personality.

³² Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2014) para 20 <www.mpepil.com>. 'Today, international organizations are unanimously recognized as subjects of international law having international legal personality (see Art. 2 lit a DARIO).' *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 ICJ reports* 73 89-90. 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'

international organization and the question whether an international organization has legal personality.³³ In practice, however, it seems that all entities that qualify as an international organization possess international legal personality.³⁴ This signifies that an international organization can be the bearer of obligations under international law.³⁵

An international organization is an independent legal entity with a legal personality distinct from its members, and is able to participate as such in the international legal order. Nevertheless, the dimension of member states is a complicating factor in any legal scenario that involves IOs,³⁶ and some clarifications are in order when it comes to international organizations and its member states as potential bearers of international obligations.

The present study looks at international organizations and its member states as duty-bearers from the outside perspective of general international law, rather than from within the institutional order of an international organization.³⁷ Within the institutional order of an IO, an international obligation that is incumbent upon an IO may be binding for its members on the basis of the internal law of that international organization.³⁸ From the outside perspective of international law, however, the fact that an IO is the bearer of an international obligation that arises from a treaty does not automatically entail that its members are bearers of that same international obligation. For example, if an IO concludes an international treaty it becomes bound to the obligations enshrined in that treaty, but its members will be bound to these obligations under general international law only if they themselves are parties to that treaty. This follows from the principle *pacta tertiis nec nocent nec prosunt* (a treaty does not create obligations or rights for a third State without its consent).³⁹ As is illustrated by the drafting history and rejection of article 36bis during the process of

³³ Brölmann (n 31) 19.

³⁴ Brölmann (n 31) 19.

³⁵ Nigel White, *The Law of International Organisations* (Manchester University Press 2005) 40.

³⁶ Catherine Brölmann, 'Member States and International Legal Responsibility: Developments of the Institutional Veil' (2015) 12 *International Organizations Law Review* 358, 359.

³⁷ This proceeds from the idea that there is a distinction between general international law and international institutional law, as in Brölmann (n 31) 12–13.

³⁸ See e.g. article 216(2) Treaty on the Functioning of the European Union (2008) OJ C115/13(TFEU), which stipulates that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.'

³⁹ Malgosia Fitzmaurice, 'Third Parties and the Law of Treaties' (2002) 6 *Max Planck Yearbook of United Nations Law* 37, 38. See article 34 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986, not yet entered into force) 25 *ILM* 543. (1986 VCLT) 'A treaty does not create either obligations or rights for third State or a third organization without the consent of that State or that organization.' Article 35 of the 1986 VCLT determines that '[a]n obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing.' The same provisions (referring only to states) can be found in article 34 and 35 Vienna Convention on the Law of Treaties (1969) 1155 *UNTS* 331. (1969 VCLT).

codifying the 1986 VCLT, the idea that there are situations in which a treaty gives rise to rights and obligations under general international law for member states of an IO if they are not themselves parties to the treaty has been abandoned.⁴⁰

The situation is different when both an IO and its member states are parties to a treaty. The prime examples of international treaties to which both an international organization *and* its members are parties can be found in the extensive practice of the European Union and its member states to conclude so-called 'mixed agreements'. Within the EU's legal order, the competence to legislate and adopt legally binding acts⁴¹ with regard to certain (but not all!) areas is divided between the EU and its member states. Because of this internal division of competences, the EU and some or all of its member states often become parties to the same international treaties. The main rationale behind this practice is that neither the EU nor its member states have the exclusive (internal) competence to act in all of the areas that are covered by the treaty in question, because the agreement 'falls partly within the competence of the [EU] and partly within that of the Member States.'⁴² Examples of mixed agreements include the WTO Agreement, the Kyoto Protocol, the Law of the Sea Convention, the Convention on the Rights of Persons with Disabilities and, after the EU's planned but delayed accession, the European Convention of Human Rights.

When an international organization and its members are parties to the same treaty, the general starting point in international law is that they are all internationally bound to the agreement as a whole.⁴³ Accordingly, all are considered to bear the full range of international obligations contained in that treaty (save for those cases where the IO or a member state has submitted a reservation that pertains to a particular obligation, or when the treaty itself imposes a certain obligation only on the IO or its members).

⁴⁰ For a discussion of draft article 36bis that was proposed during the codification of the 1986 VCLT see Brölmann (n 31) 213–225.

⁴¹ See articles 2, 3 and 4 Treaty on the Functioning of the European Union (2008) OJ C115/13 (n 38). Neuwahl explains that 'competence' in the EU legal order is about 'norm-setting power' only, and not about 'executive power' or 'judicial power'. See Nanette A Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EEC and Its Member States' (1991) 28 *Common Market Law Review* 717, 718–719. See also Andrés Delgado Casteleiro, *The International Responsibility of the European Union* (CUP 2016) 26; Esa Paasivirta and Pieter-Jan Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) 36 *Netherlands Yearbook of International Law* 169, 176.

⁴² Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001) 121.

⁴³ This follows from the principle of *pacta sunt servanda*, which is a principle fundamental to all legal systems. See Delgado Casteleiro (n 41) 35; Anthony Aust, 'Pacta Sunt Servanda', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007) para 1 <www.mpepil.com>. The principle is codified in article 26 VCLT (1969) and article 26 VCLT (1986): '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'

However, it is precisely this general starting point that has been called into question in the specific context of the EU and its member states as parties to mixed agreements.⁴⁴ The main topic of discussion in legal literature is whether the internal division of competences between the EU and its members has (or should have) external implications from the perspective of general international law. In this respect a distinction can be made between the implications for the external division of international obligations amongst the EU and its members (which is relevant for the present discussion of international organizations and their members as potential duty-bearers), and the implications for the division of international *responsibility* amongst the EU and its members in case of a breach of an obligation arising from a mixed agreement.

If the internal division of competences is indeed reflected in the external division of international obligations amongst the EU and its member states, this would mean that the EU and its member states are not necessarily bound to the mixed agreement as a whole, but rather that they bear only those international obligations that fall within their respective internal competences.

As is further discussed in chapter 3, the present study subscribes to 'what is probably the prevailing view' in legal literature,⁴⁵ which considers that if the division of competences is clearly disclosed to the other parties to the mixed agreement the EU and its member states are each bound to the part of the agreement for which they have competence. This means that they bear only part of the obligations contained in the agreement. However, in the case that the division of competences is not clearly disclosed, the other parties to the treaty can assume that the EU and its members are bound to the agreement as a whole and thus that they all bear the full range of obligations enshrined in that agreement. This view can be based on the principle of good faith.⁴⁶

iii. Duty-bearers when states act through a common organ

Not all arrangements by which states engage in cooperation and pursue common goals necessarily possess a legal personality of their own.⁴⁷ In legal literature and international case law, such arrangements without legal personality are often referred to as common organs. The fact that a common organ has no legal personality of its own denotes that it lacks the capacity to bear international obligations.

⁴⁴ Mirka Möldner, 'European Community and Union, Mixed Agreements', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2011) para 34 <www.mpepil.com>.

⁴⁵ See Chapter 3, §3.2.2.

⁴⁶ See Chapter 3, §3.2.2.

⁴⁷ Malcolm Shaw, *International Law* (Sixth Edition, CUP 2008) 1297.

In practice there have been various instances where multiple states act through a common organ in the context of cooperative activities and the pursuance of common interests. For example, in the *Certain Phosphate Lands in Nauru* case the ICJ noted that the Administering Authority for Nauru did not have an international legal personality distinct from that of Australia, New Zealand and the United Kingdom,⁴⁸ which were designated as the joint Authority that would exercise the administration of the territory of Nauru.⁴⁹ Rather than a separate legal person, the Administering Authority was a common organ of the three states.⁵⁰ Other examples of common organs with no legal personality of their own include the Coalition Provisional Authority (a common organ of the United States and the United Kingdom during their joint occupation of Iraq),⁵¹ and the Intergovernmental Commission overseeing the construction and operation of the Fixed Link (a common organ of France and the United Kingdom).⁵²

The lack of legal personality of a common organ is relevant for the purpose of identifying duty-bearers. In the context of the *Nauru* case the fact that the Administering Authority was not an international legal person meant that the Administering Authority as such was not the bearer of the obligations of trusteeship regarding the administration of the territory of Nauru. Instead, the obligations contained in the Trusteeship Agreement were incumbent upon Australia, New Zealand and the UK.⁵³ Related to the lack of capacity to bear obligations, the absence of legal personality of the Administering Authority also had the consequence that 'no responsibility of an organization was at issue and that only the states involved with the governance of Nauru could be addressed.'⁵⁴

If the Administering Authority *did* have a legal personality separate from Australia, New Zealand and the UK this would have entailed that it was an international organization rather than a common organ. In turn, this would have called for a clarification of who bears the obligations of trusteeship: the Administering Authority, the three states, or all of them? In such a case the above observations on international

⁴⁸ *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240 [47].

⁴⁹ Article 2 Trusteeship Agreement for the Territory of Nauru (1947) 10 UNTS 3.

⁵⁰ Matthew Saul, 'Internationally Administered Territories' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 19.

⁵¹ Christine Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing Ltd 2008) 174.

⁵² *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche SA v United Kingdom & France)*, Partial Award, 2007 [179].

⁵³ Saul (n 50) 19.

⁵⁴ Brölmann (n 31) 23.

organizations and its members as potential bearers of international obligations would apply.⁵⁵

1.1.4 Shared obligations

This study speaks of shared obligations when there are 1) multiple duty-bearers (states and/or IOs), which are 2) bound to a similar international obligation that 3) pertains to the same concrete case. These three elements are discussed in detail in chapter 3. At this point, some considerations on the scope of the concept of shared obligation are in order.

Even though the concept of shared obligation is relatively broad, it does not cover all international obligations that are binding upon multiple states and/or IOs simply because they arise from a multilateral rule or source. This would equate the concept of shared obligation to all international obligations that arise from a provision in a multilateral treaty or a rule of customary international law,⁵⁶ and such an understanding of shared obligations would not be particularly meaningful. Thus, the mere fact that multiple states and/or IOs are bound to a particular treaty does not necessarily mean that the obligations in that treaty fall within the scope of the concept of shared obligation.

The bearers of a shared obligation stand in a relationship to one another that consists of more than just the fact that the states and/or IOs in question are parties to the same treaty. It is this relationship that raises questions regarding the (non-)performance of shared obligations: when is a shared obligation fulfilled by which duty-bearer(s), and when is shared obligation breached by which duty-bearer(s)? The relationship between duty-bearers is expressed by the final element of the concept of shared obligation, which provides that multiple states and/or IOs are bound to a similar international obligation *that pertains to the same concrete case*. As is further explained in chapter 3,⁵⁷ this element indicates that there is an overlap between the (similar) international obligations of duty-bearers because these obligations apply to the same constellation of facts.

The similar international obligations of multiple duty-bearers pertain to the same concrete case when multiple states and/or IOs have bound themselves to an international obligation to work towards or even achieve a concrete common goal, such as the obligation of coastal states to seek to agree upon the measures necessary to coordinate and ensure the conservation and development of fish stocks occurring within the exclusive economic zones of all of them, or the obligation of Iceland, the EU

⁵⁵ See §1.1.3.ii above.

⁵⁶ See further on this point Chapter 3, §3.1.

⁵⁷ See Chapter 3, §3.2.3.

and its member states to achieve a 20 per cent reduction of their aggregate greenhouse gas emissions by 2020.

Moreover, the similar international obligations of multiple duty-bearers pertain to the same concrete case when multiple states and/or IOs are *factually* linked to a common situation, which includes situations in which multiple states and/or IOs exercise some form of authority or control over the same territory and/or individuals, and are consequently all bound to a similar international obligation with regard to the same territory and/or individuals. This is the case, for example, when two states jointly occupy the territory of another state and are both bound to the obligation 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources'⁵⁸ in the territory under their occupation, or when two states exercise effective control over an offshore detention centre and owe similar human rights obligations to the individuals detained in that detention centre.

Excluded from the scope of the concept of shared obligation are situations in which multiple states and/or IOs are bound to similar international obligations that pertain to *different* concrete cases. For example, each state party to the Vienna Convention on Diplomatic Relations is bound to the similar international obligation to take measures to protect the diplomatic premises present on their territory. However, each states party's obligation pertains only to the diplomatic premises present on each of their respective territories, and thus pertains to a different constellation of facts, which indicates that the obligations in this scenario are *not* shared.

1.1.5 Divisible and indivisible shared obligations

In this thesis the concept of shared obligation is presented as an overarching concept that encompasses the two categories of divisible and indivisible shared obligations. As has been briefly outlined above, a divisible shared obligation is characterized by its divisible structure of performance. It can be fulfilled or breached by each duty-bearer independently because each duty-bearer is bound to its 'share' only. An indivisible shared obligation is characterized by its indivisible structure of performance. It can only be fulfilled or breached by all duty-bearers simultaneously because all are bound to achieve a common result. Chapter 4 further expands upon the distinction between divisible and indivisible shared obligations.

⁵⁸ Enrico Milano, 'Occupation' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 741.

1.1.6 Shared responsibility

This thesis sheds further light on the concept of shared obligation in international law by clarifying the relationship between shared obligations and shared responsibility. For the purpose of this study, shared responsibility is defined as encompassing

'[S]ituations where a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors.'⁵⁹

This subsection discusses several aspects of this definition in order to fully clarify the present study's understanding of the notion of shared responsibility and delineate the scope of the present study: legal responsibility (i), a single harmful outcome (ii) and contributions consisting of one or several internationally wrongful acts (iii).

i. Legal responsibility

Whenever this study speaks of shared responsibility it refers solely to situations where multiple states and/or IOs are legally responsible under positive international law for contributing to a single harmful outcome. It thereby stays within the confines of the law of international responsibility as formulated in the ASR and ARIO.

It should be noted that the ASR and ARIO set out the general rules of international responsibility, and 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility' of a state and/or an IO are governed by special rules of international law.⁶⁰ This thesis focuses only on the general rules of international responsibility.

The ASR and ARIO present two grounds for international legal responsibility: the basic principle of responsibility of a state or IO for its *own* internationally wrongful act⁶¹ (which is within the scope of the present thesis), and the more ambiguous⁶²

⁵⁹ André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 6–7. In line with the present study's focus on states and international organizations as bearers of international obligations, this thesis focuses exclusively on contributions to a single harmful outcome by states and international organizations.

⁶⁰ Article 55 ASR; article 64 ARIO.

⁶¹ This basic principle is affirmed in article 1 ASR, which provides that '[e]very internationally wrongful act of a State entails the international responsibility of that State.' See also Crawford, *State Responsibility: The General Part* (n 24) 51. However, it must be noted that the ARIO have opted for a broader opening article. Article 1 ARIO stipulates that the Articles apply to 'the international responsibility of an international organization for *an* internationally wrongful act' (rather than solely to the responsibility of an international organization for its *own* wrongful acts). See Nataša Nedeski and André Nollkaemper,

ground for responsibility of a state or IO 'in connection with' the act of *another* state or IO (which is outside of the scope of the present thesis).

The present study focuses solely on the first ground for international responsibility in its analysis of the relationship between shared obligations and shared responsibility. This ground for international responsibility is based on wrongfulness: a state or IO is internationally responsible when it has committed an internationally wrongful act.⁶³ There is an internationally wrongful act of a state or IO when conduct consisting of an action or omission 1) constitutes a breach of an international obligation binding upon that state or IO, and 2) can be attributed to that state or IO.⁶⁴

It follows that international obligations are central to the determination of international responsibility based on wrongfulness. Applied to the present study's understanding of shared responsibility, *multiple* states and/or IOs can only be held legally responsible for contributing to a single harmful outcome if their contributions can be qualified as a breach of an international obligation.

The second ground for international responsibility is often referred to as 'attribution of responsibility',⁶⁵ and it constitutes an exception to the basic principle of responsibility of a state or IO for its *own* internationally wrongful conduct.⁶⁶ Attribution of responsibility is based on the existence of a special link⁶⁷ between a state or IO and (the conduct of) another state or IO, and not on wrongfulness as

'Responsibility of International Organizations "in Connection with Acts of States"' (2012) 9 International Organizations Law Review 33, 42–43.

⁶² It remains ambiguous whether these provisions can truly be seen as a separate ground for responsibility that is distinct from the basic principle of responsibility of a state or IO for its *own* internationally wrongful act. See fn. 66 below.

⁶³ Article 1 ASR; article 3 ARIO.

⁶⁴ Article 2 ASR; article 4 ARIO.

⁶⁵ See e.g. James Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014); Brölmann (n 36) 373; Nedeski and Nollkaemper (n 61) 37; Roberto Ago, 'Eighth Report on State Responsibility' (1979) A/CN.4/318 and Add.I to 4 paras 2–3.

⁶⁶ However, it remains ambiguous whether these provisions can truly be seen as formulating a separate ground for responsibility that is distinct from the basic principle of responsibility of a state or IO for its own internationally wrongful act. d'Aspremont notes that the provisions on attribution of responsibility 'generate an odd feeling of deceitfulness. Indeed, these rules convey the impression that, behind many of them, lurks a primary obligation of states and international organizations.' Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 International Organizations Law Review 15, 25. Interestingly, if one were to accept that these provisions indeed formulate primary obligations (e.g. establishing an obligation for states not to coerce other states), international responsibility for direction and control, coercion and circumvention would simply be covered by the basic principle of responsibility of a state or IO for its own wrongful conduct.

⁶⁷ Fry (n 65) 104. '[A]ttribution of responsibility concerns the relationship, factual or legal, between the party who commits the wrong and the party to which responsibility is attributed'.

such.⁶⁸ A state or IO can be held internationally responsible for the act of *another* state or IO in the case of direction and control,⁶⁹ coercion⁷⁰ or circumvention.⁷¹

The present thesis does not include this second ground for international responsibility in its analysis of the relationship between shared obligations and shared responsibility. While attribution of responsibility is certainly interesting for the topic of shared responsibility in international law (since it necessarily involves at least two actors), it is much less interesting from the perspective of the sharing of international obligations. Only the provisions on direction and control require that both the actor that directs and controls and the actor that is directed and controlled are bound to an international obligation that prohibits the conduct of the perpetrator.⁷² Moreover, considering that attribution of responsibility occurs on the basis of the existence of a special relationship between a state or IO and the perpetrator of conduct rather than on the basis of wrongfulness, this ground for responsibility pushes the role of international obligations to the background.

ii. A single harmful outcome

The concept of shared responsibility covers the legal responsibility of multiple states and/or IOs for their contributions to *a single harmful outcome*. The notion of a single harmful outcome is important because it creates the basis for the sharing of international responsibility: if each actor were to contribute to a *distinct* harm there would be no shared responsibility.⁷³

The notion of a single harmful outcome is broader than the notion of a single injury. In the ILC's system of international responsibility, injury is defined to include 'damage, whether material or moral',⁷⁴ and excludes 'merely abstract concerns or

⁶⁸ d'Aspremont characterizes the provisions on attribution of responsibility in the ASR and ARIО as a 'conceptual hotchpotch for those situations that did not fit with the binary concept of wrongfulness but which were still deemed sufficiently problematic to be included into the law of international responsibility.' d'Aspremont (n 66) 24.

⁶⁹ Article 17 ASR; article 15 ARIО; article 59 ARIО: 'A State [or international organization] which directs and controls another State [or international organization] in the commission of an internationally wrongful act is responsible *for that act*' (emphasis added).

⁷⁰ Article 18 ASR; article 16 ARIО; article 60 ARIО: 'A State [or international organization] which coerces another State [or international organization] to commit an act is responsible *for that act*' (emphasis added).

⁷¹ Article 17 ARIО; article 61 ARIО.

⁷² Article 17 ASR provides that 'a State which directs and controls another State in the commission of an internationally wrongful act is internationally responsible for that act if (...) the act would be internationally wrongful if committed by that State.' This entails that both the perpetrating State and the State that directs and controls should be bound by an international obligation prohibiting the conduct in question. The same applies when the relevant actors are international organizations, or a state and an international organization. See article 15 and 59 ARIО.

⁷³ Nollkaemper, 'Introduction' (n 59) 7.

⁷⁴ Article 31(2) ASR and article 31(2) ARIО.

general interests of a State which is individually unaffected by the breach.⁷⁵ The ILC's understanding of injury does not cover 'legal injury',⁷⁶ which can be defined as 'the immaterial injury inherent in breaches of the law'.⁷⁷ The term harmful outcome, however, encompasses all situations in which actors breach their obligations towards others, regardless of whether this outcome causes material or moral damage to a particular actor.⁷⁸

This is not to say that shared responsibility for contributing to a single harmful outcome does not cover situations where multiple actors contribute to a single material or moral damage; it does. For example, when multiple states cause damage to a downstream state by polluting a transboundary watercourse (thereby breaching their obligation to refrain from the pollution of transboundary watercourses), this is covered by the notion of a single harmful outcome.

The main point is that shared responsibility for contributing to a single harmful outcome does not necessarily require that material or moral damage be caused. For example, when multiple states are bound to the obligation to pursue negotiations on a treaty on general and complete nuclear disarmament, the fact that no such treaty has been concluded is covered by the notion of a single harmful outcome, even if no damage is caused to a particular actor.

The conceptualization of shared responsibility as contributions to a single harmful outcome rather than as contributions to a single injury (consisting of material or moral damage) is perfectly suited to operate within the confines of the positive law of international responsibility. In the ILC's system of international responsibility, responsibility can arise in the absence of (material or moral) injury: the traditional conception of international responsibility that included injury as a condition for responsibility has long been abandoned.⁷⁹ In the ASR and ARIO injury is a condition

⁷⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 91-92.

⁷⁶ Stern states that the notion of legal injury was not taken into account by the ILC, see Brigitte Stern, 'The Obligation to Make Reparation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 569; Brigitte Stern, 'A Plea For "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 93. Crawford similarly considers that the better view is that no notion of legal injury is included in the concept of injury in article 31 ASR, Crawford, *State Responsibility: The General Part* (n 24) 487.

⁷⁷ Stern, 'A Plea For "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' (n 76) 93.

⁷⁸ Nollkaemper and Jacobs (n 1) 367.

⁷⁹ Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 9; Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 194.

for the secondary obligation of reparation,⁸⁰ but not for international responsibility as such.⁸¹

iii. Contributions: one or several internationally wrongful acts

Whenever multiple actors contribute to a single harmful outcome, shared responsibility arises only if those contributions are internationally wrongful.⁸² This is the case when 1) each actor's contribution to a single harmful outcome constitutes a separate internationally wrongful act (IWA), which gives rise to shared responsibility for several IWAs, or when 2) multiple actors jointly commit a single internationally wrongful act, which gives rise to shared responsibility for one IWA.⁸³

Whenever multiple states and/or IOs commit one IWA, it is a given that they contribute to a single harmful outcome. Hence, any instance in which multiple actors jointly commit one IWA is covered by the notion of shared responsibility. However, when multiple states commit *several* IWAs it is not always the case that these wrongful acts contribute to a single harmful outcome. In such situations, the notion of single harmful outcome serves to discern between situations that fall within the scope of shared responsibility and situations that fall outside the scope of shared responsibility.

As is further explained in chapter 6, the distinction between shared responsibility for one IWA and shared responsibility for several IWAs has implications for the nature of the secondary obligations of cessation. Accordingly, the distinction between these two forms of shared responsibility is essential to a comprehensive examination of the relationship between shared obligations and shared responsibility.

1.2 Research question and approach

The main research question of this study is as follows:

'In what situations are international obligations shared rather than individual, and what are the implications of a breach of a shared obligation for the international responsibility of states and/or international organizations?'

⁸⁰ Article 31(1) ASR and article 31(1) ARIIO both provide that the responsible state or international organization 'is under an obligation to make full reparation *for the injury caused* by the internationally wrongful act.'

⁸¹ The conditions for international responsibility are 1) a breach of an international obligation and 2) attribution of conduct, see §1.1.6.i above.

⁸² With the exception of the provisions on attribution of responsibility discussed above, but this ground for responsibility is outside the scope of the present study.

⁸³ The distinction between shared responsibility for one IWA and shared responsibility for several IWAs is further discussed in Chapter 5, §5.1.

The present study is carried out from a legal positivist perspective and engages in doctrinal legal research on the basis of the traditional sources of international law.⁸⁴ In order to answer the research question this study takes two separate (but related) steps.

The first step consists of the conceptualization of shared obligations (§1.2.1). The study develops a concept of shared obligation as an analytical tool that covers the observed practice where multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. As pointed out above, references to international obligations that are 'shared', 'joint' or 'collective' in legal literature generally remain unsubstantiated, which means that there are no established views on what it means to speak of a shared obligation in international law for the present study to rely or further build upon.

The second step consists of an analysis of the implications of breaches of shared obligations in the positive law of international responsibility (§1.2.2). The study aims to clarify the relationship between breaches of shared obligations and shared responsibility by applying the law of international responsibility to the present study's conceptualization of shared obligations. It develops the argument that the relationship between breaches of shared obligations and shared responsibility depends on whether the shared obligation breached can be qualified as a divisible or indivisible shared obligation.

At this point, it is important to emphasize that the thesis does not aim to give a comprehensive overview of all international obligations that can be qualified as shared obligations, and neither does it aim to make normative claims regarding whether a particular international obligation should exist or whether it should be shared by multiple or all states and/or IOs. Rather, the concept of shared obligation will be relied upon as an analytical tool that can be applied to existing international obligations in positive international law. On the basis of the conceptualization of shared obligations in the present study it will be possible to categorize an international obligation in a particular situation as either 'shared' or 'not shared', and within the category of shared obligations it will be possible to categorize a shared obligation as either 'divisible' or 'indivisible'.

1.2.1 The conceptualization of shared obligations

This subsection sets out the present study's approach to the conceptualization of shared obligations, which is the focus of Part I of this thesis. First, the thesis distinguishes between bilateral and multilateral legal relations on the basis of

⁸⁴ Article 38 Statute of the International Court of Justice (1945) 33 UNTS 993.

Hohfeld's analysis of legal relations (i). Second, existing categorizations of obligations in the international law of obligations are used as a source of inspiration and analogy for the conceptualization of shared obligations (ii). Finally, the present study's understanding of the concept of shared obligation, including its sub-categories divisible and indivisible shared obligations, is the result of an iterative process of going back and forth between concept and practice (iii).

i. The distinction between bilateral and multilateral legal relations

This thesis applies Hohfeld's analysis of legal relations to obligations and rights in international law. The study considers the correlation between obligations and rights to be a general feature of international law. This means that every international obligation is part of a right-duty legal relation, which consists of an obligation on one side and a correlative right on the other side. By applying Hohfeld's analysis of legal relations to obligations and rights in international law the study provides a framework for distinguishing between bilateral and multilateral legal relations in international law in chapter 2.

The bilateral or multilateral character of a legal relation does not automatically follow from the bilateral or multilateral character of a treaty, or from the type of interest protected by a rule.⁸⁵ Rather, the bilateral or multilateral character of a legal relation depends on the number of legal persons that hold the respective legal positions in that legal relation.⁸⁶

Hence, any legal relation has an obligation on the one end, and a correlative right on the other end. In a bilateral legal relation, the obligation is held by *one* duty-bearer and the right is held by *one* right-holder. In a multilateral legal relation, the obligation is held by *multiple* duty-bearers or the right is held by *multiple* right-holders (or both). Hence, a multilateral legal relation is characterized by the *plurality of parties* on at least one of the two sides of a legal relation.

The distinction between bilateral and multilateral legal relations is relied upon throughout this thesis. First, it is applied to existing categorizations of obligations in the international law of obligations. Concepts such as interdependent obligations, integral obligations, multilateral obligations or *erga omnes (partes)* obligations all recognize that certain international obligations are owed *to* multiple or even all states simultaneously. Such obligations give rise to multilateral legal relations where the right is held by multiple right-holders. As is further argued in chapter 2, this indicates that the international law of obligations focuses solely on the possibility of

⁸⁵ See Chapter 2, §2.1.

⁸⁶ See Chapter 2, §2.2.

and potential problems raised by a plurality of right-holders; not on the possibility of and potential problems raised by a plurality of duty-bearers.

Moreover, the distinction between bilateral and multilateral legal relations has had an important role to play in the conceptualization of shared obligations. Initially, the current project had conceptualized shared obligations to solely cover the type of obligation that is now referred to as an indivisible shared obligation. A shared obligation was considered to give rise to a multilateral legal relation where the *obligation* is held by multiple states and/or IOs. In this sense, the concept of shared obligation was the mirror image of the concepts of multilateral or *erga omnes (partes)* obligation further discussed below,⁸⁷ which cover multilateral legal relations where the *right* is held by multiple states and/or IOs.

However, as a result of the iterative process described below,⁸⁸ the concept of shared obligation has been broadened and is no longer limited to international obligations that give rise to a multilateral legal relation where the obligation is held by multiple duty-bearers. An indivisible shared obligation gives rise to one multilateral legal relation where the obligation is held by multiple duty-bearers, whereas a divisible shared obligation gives rise to multiple bilateral legal relations; in each of these legal relations, the obligation is held by one duty-bearer only. This is further discussed in chapter 4.

Hohfeld's analysis of legal relations, the correlation between obligations and rights in international law, and the distinction between bilateral and multilateral legal relations are all further explored in chapter 2, primarily on the basis of legal literature and the work of the International Law Commission on the law of international responsibility and the law of treaties.

ii. Categories of obligations and multilateral legal relations in the international law of obligations

The conceptualization of shared obligation draws from existing legal concepts in the international law of obligations. Both the law of international responsibility and (to a lesser extent) the law of treaties have engaged with the idea of a plurality of parties by identifying different categories of obligations based on whether they are owed to only one state or IO, or to multiple states and/or IOs simultaneously. These categories of obligations approach multilateral legal relations from the perspective of the *right-holders* in a legal relation.

⁸⁷ See §1.2.1.ii below.

⁸⁸ See §1.2.1.iii below.

In this respect one may think in particular of the concepts of multilateral obligation and *erga omnes (partes)* obligation in the law of international responsibility, which are reflected in the ASR and ARIO.⁸⁹ These concepts, in turn, have been influenced by the categories of obligations identified by Sir Gerald Fitzmaurice in his capacity of ILC Special Rapporteur on the law of treaties.⁹⁰ Fitzmaurice's categories are in part reflected in article 60 of the 1969 Vienna Convention on the Law of Treaties and article 60 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

A multilateral obligation or *erga omnes (partes)* obligation is owed to multiple or even all states of the international community, and each multilateral or *erga omnes (partes)* obligation is part of a multilateral legal relation where the corresponding right is held by a plurality of right-holders. These concepts are further explored in chapter 2 of the thesis on the basis of legal literature and the ILC's work on international responsibility and, to a lesser extent, the law of treaties.

These categories of obligations have been an important source of inspiration and analogy for the conceptualization of shared obligations. In legal literature multilateral or *erga omnes (partes)* obligations are often described as expressions of the move beyond an exclusively bilateral view of legal relations in international law.⁹¹ Indeed, these concepts recognize that more than two states or IOs (in the form of one duty-bearer and one right-holder) can be legally involved when it comes to the fulfilment or breach of an international obligation. The concept of shared obligation similarly focuses on situations in which more than two states or IOs are legally involved.

However, where the concepts of multilateral obligation and *erga omnes (partes)* obligation cover situations with a plurality of states and/or IOs as right-holders, the concept of shared obligation aims to capture the opposite: situations with a plurality states and/or IOs as *duty-bearers*. This means that even though existing categorizations of obligations are used as a source of inspiration and analogy, these categories cannot as such be relied upon to cover the observed practice where multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. Thus, while inspired by existing categorizations of obligations, the concept of shared obligation is a self-standing concept that focuses on a plurality of duty-bearers rather than a plurality of right-holders.

⁸⁹ See articles 42 and 48 ASR and articles 43 and 49 ARIO.

⁹⁰ See International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 117–118, para 5. Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 162–164.

⁹¹ This point is further developed in Chapter 2.

iii. An iterative process

The concept of shared obligation was initially defined as the mirror image of the concepts of multilateral or *erga omnes (partes)* obligation. Since a multilateral or *erga omnes (partes)* obligation is part of a multilateral legal relation where the right is held by multiple right-holders, a shared obligation was considered to be a part of a multilateral legal relation where the obligation is held by multiple duty-bearers.

This initial understanding of the concept of shared obligation covered only those international obligations that are now defined as indivisible shared obligations (which are part of one *multilateral* legal relation where the obligation is held by multiple duty-bearers), and excluded divisible shared obligations (which involve multiple bilateral legal relations with each legal relation encompassing an obligation held by only one duty-bearer) from its definition.

The concept was then applied to practice. Various situations where multiple duty-bearers are bound to international obligations in the context of cooperative activities and the pursuance of common goals were evaluated in order to determine whether they would fall within the scope of the concept of shared obligation, including those obligations that have been referred to as 'shared', 'joint' or 'collective' in legal literature.

The conclusion derived from this exercise was that the concept of shared obligation at the time covered a very limited number of these situations. As a result, many situations in which states or IOs are bound to international obligations in the context of cooperative action and the pursuance of common goals fell outside the scope of the concept.

The concept of shared obligation was subsequently broadened to cover not only indivisible shared obligations (which appear to be quite rare in practice) but also divisible shared obligations. These two types of shared obligations are now considered to be sub-categories of the overarching concept of shared obligation. The distinction between these two types of shared obligations has become one of the main findings of the present study.

1.2.2 An analysis on the basis of the positive law of international responsibility

This subsection sets out the present study's approach to determining what are the implications of the shared nature of an international obligation for the nature of the international responsibility that arises in case of a breach. This is the focus of part II

of the thesis, which aims to clarify the relationship between shared obligations and shared responsibility.

In order to clarify this relationship the study analyses the existing legal framework of international responsibility (i) in the light of the present study's conceptualization of shared obligations (ii). This constitutes a positive law analysis that operates within the confines of the ILC system of international responsibility as formulated in the ASR and ARIO.

i. The existing legal framework of international responsibility

The present study's analysis of the existing legal framework of international responsibility is based, first and foremost, on the ILC's work on international responsibility. This includes the ILC's commentaries to the final ASR and ARIO as well as the ILC's extensive preparatory work leading up to these final articles.

The ASR are considered to be an authoritative reflection of customary international law relating to international responsibility,⁹² and are habitually relied upon by both international and domestic courts and tribunals.⁹³ Though the ARIO do not enjoy the same level of authority as the ASR,⁹⁴ there is no equally or more authoritative starting point for an analysis that involves the international responsibility of international organizations.⁹⁵

Since the second part of the thesis aims to clarify the relationship between shared obligations and shared responsibility, much of the analysis of the existing legal framework of international responsibility focuses on shared responsibility. Neither the ASR nor the ARIO have been drafted with explicit account taken of situations of shared responsibility, but the system of international responsibility as it stands is

⁹² Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 *International and Comparative Law Quarterly* 535; David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *AJIL* 866.

⁹³ UN General Assembly, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Report of the Secretary-General' (2013) UN Doc, A/68/72; Simon Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26 *Leiden Journal of International Law* 615.

⁹⁴ In its commentaries to the ARIO the ILC notes that '[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.' International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (n 17) 2-3, para 5.

⁹⁵ Nollkaemper, 'Introduction' (n 59) 3.

highly flexible and generally allows for the determination and implementation of shared responsibility.⁹⁶

Moreover, the analysis builds upon interpretations of the law of international responsibility that can be found in legal scholarship, and benefits particularly from the increasing attention in legal scholarship for the topic of shared responsibility in international law.

ii. In the light of the present study's conceptualization of shared obligations

The thesis applies the existing legal framework of international responsibility to the present study's conceptualization of shared obligations. This essentially constitutes an exercise in legal logic. By applying the ILC's system of international responsibility to breaches of shared obligations, chapters 5 and 6 aim to clarify the relationship between shared obligations and shared responsibility. The distinction between divisible and indivisible shared obligations is one of the common threads running through these chapters. Indeed, these chapters develop the argument that the relationship between shared obligations and shared responsibility is different depending on whether the shared obligation breached is divisible or indivisible. In this respect, it is only the position of indivisible shared obligations that is special, as it has automatic implications for shared responsibility.

Another distinction that is essential to fully clarify the implications of shared obligations for shared responsibility is the distinction between shared responsibility for one IWA or shared responsibility for several IWAs. As is further addressed in chapter 6, the distinction between shared responsibility for one or several IWAs has implications for the nature of the secondary obligations of cessation and reparation that may arise as a result of a breach of a shared obligation.

Chapter 5 analyses what are the implications of the shared nature of an international obligation for the *determination* of shared responsibility. It first introduces the distinction between shared responsibility for one internationally wrongful act and shared responsibility for several internationally wrongful acts. The chapter subsequently applies the two elements of breach of obligation and attribution of conduct - which are essential to the determination of international responsibility in the ILC's system of international responsibility⁹⁷ - to breaches of indivisible and divisible shared obligations.

⁹⁶ André Nollkaemper and Ilias Plakokefalos, 'Conclusions: Beyond the ILC Legacy' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 343.

⁹⁷ Article 2 ASR; article 4 ARIO.

Chapter 6 determines what are the implications of the shared nature of an international obligation for the *content* of shared responsibility, and in doing so focuses on the secondary international obligations of cessation and reparation. The ILC framework of international responsibility provides that several conditions need to be met before these secondary international obligations arise when an internationally wrongful act has been committed. The chapter applies these conditions to breaches of indivisible and divisible shared obligations and examines what are the implications of the nature of a shared obligation for the nature of the secondary obligations of cessation and reparation in case of a breach. The distinction between shared responsibility for one IWA and shared responsibility for several IWAs introduced in chapter 5 has an important role to play in this respect.

Chapters 5 and 6 find that the relationship between shared obligations and shared responsibility can to a large extent be clarified by proceeding from the current legal regime of international responsibility. This can be attributed to the fact that the law of international responsibility is a highly flexible body of law, which is a point that has already been made with regard to the topic of shared responsibility in general.⁹⁸ However, chapter 6 finds that in certain specific circumstances, the nature of the obligation of reparation cannot be determined by simply applying the ILC system of international responsibility to the concept of shared obligation. In the case that a breach of a divisible shared obligation gives rise to shared responsibility for several IWAs, and the distinct causal contribution of each wrongful act to the injury cannot be identified, it remains unclear how the obligation of reparation should be allocated amongst duty-bearers⁹⁹ since the law of international responsibility as it stands today does not offer a basis for allocation. A further discussion of potential grounds of allocation that looks beyond the positive law of international responsibility is outside the scope of the study.

As a final point, it should be noted that where possible the present study engages with the rare instances in practice where an international court or tribunal has been called upon to pronounce itself on international responsibility in a situation that is covered by the present study's conceptualization of shared obligations. In some of these cases parties to the proceedings have formulated an argument that relies upon a relationship between a 'joint obligation' and 'joint responsibility'.¹⁰⁰ However, up to

⁹⁸ Nollkaemper and Plakokefalos (n 96) 343.

⁹⁹ See Chapter 6, §6.2.3.

¹⁰⁰ In the *Eurotunnel* Arbitration claimants asserted that the obligation binding upon France and the UK should be qualified as a 'joint obligation' that generates 'joint liability', see *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [163, 167]. In the *Nauru* case a similar argument was made by Australia: 'Thus, it is clear that the obligations of the Administering Authority were undertaken jointly by the three Governments (...) Accordingly, any breach of the obligations of the Administering Authority would be, *prima facie*, the joint responsibility of the Governments of Australia, New Zealand and the United Kingdom.' See *Certain*

today no international court or tribunal has explored the potential relationship between the shared nature of an international obligation and the nature of the international responsibility that may arise as a result of a breach.

1.3 Relevance of the research

The prime value of this study's conceptualization of shared obligations lies in its distinction between divisible and indivisible shared obligations, that up to now has not been elaborated in international scholarship. In addition to contributing to the systematization of international obligations in general, this distinction contributes to an understanding of the *performance* of international obligations binding upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals. When multiple duty-bearers are bound to a divisible shared obligation, duty-bearers are each bound for their own part only. An individual duty-bearer of a divisible shared obligation can fulfil that obligation by doing its own part, and is released from the obligation when it has performed its share of the obligation. This is different when multiple duty-bearers are bound to an indivisible shared obligation. An indivisible shared obligation can only be fulfilled by all duty-bearers simultaneously, and an individual duty-bearer *cannot* be released from the obligation simply by performing a share of the obligation.

Moreover, the distinction between divisible and indivisible shared obligations contributes to an understanding of the *non-performance* or, in terms most frequently used in the law of international responsibility, the *breach* of shared obligations. This provides a basis for clarifying the relationship between shared obligations and shared responsibility. An important finding of this study is that a breach of a shared obligation has automatic implications for the determination and content of shared responsibility *only* if that obligation is of an indivisible character.

The potential connection between the shared nature of international obligations and the shared nature of international responsibility in case of a breach has been undertheorized in international legal scholarship. Various authors have explored the possibility of dual or multiple attribution of conduct and its connection to shared responsibility,¹⁰¹ but no comprehensive attempt has been made to clarify the relationship between shared obligations and shared responsibility.

Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections of the Government of Australia, 1990 Volume I [322]. In his Separate Opinion, Judge Shahabuddeen summarizes Australia's position as follows: 'the obligation to ensure rehabilitation (if it existed) was, by virtue of the terms of the Trusteeship Agreement, a joint obligation of Australia, New Zealand and the United Kingdom, with the result that Australia could not be sued alone'. See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Separate Opinion Judge Shahabuddeen, 1992 ICJ reports 270 (n 9).

¹⁰¹ See e.g. Enzo Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Malcolm Evans and Panos Koutrakos (eds), *The International*

All in all, the distinction between divisible and indivisible shared obligations enables a better grasp of the structure of international obligations that are binding upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals. This provides the bearers of shared obligations (as well as the actors that hold the corresponding right and/or that have a legal interest in the performance of that obligation) with clarity about the way in which they are legally bound to that obligation and the way in which this can affect responsibility relations in case of a breach.

Moreover, an understanding of the distinction is important when legal scholars and practitioners argue for a particular interpretation of the normative content of an international obligation that is covered by the present study's conceptualization of shared obligations. In particular, interpreting a shared obligation as one of conduct or one of result can make the difference between qualifying that obligation as divisible or indivisible,¹⁰² which, in turn, directly influences the performance of that obligation and the international responsibility that arises in case of a breach.

The distinction between divisible and indivisible shared obligations is not only relevant for its application to existing international obligations. It can also serve as a guideline during treaty negotiations when international obligations in pursuance of common interests are being formulated. A comprehension of the legal consequences of choosing for a particular type of shared obligation for the performance and breach of that obligation is not only relevant for states and IOs that may become the bearers of obligations and/or the holders of corresponding rights. It is also relevant for other actors that might participate in, or influence, processes of international lawmaking, such as NGOs, which might want to push for one type of shared obligation over another.

Finally, it should be noted that the sharing of international obligations by multiple states and/or IOs could have implications for topics other than the determination and content of shared responsibility. For example, the thesis does not address what are the implications of shared obligations for the *implementation* of shared responsibility: when a shared obligation is breached, can the responsibility of each of

Responsibility of the European Union: European and International Perspectives (Hart Publishing 2013); Paolo Palchetti, 'The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations' (2013) 95 *International Review of the Red Cross* 727; Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010); Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014); Bérénice Boutin, *The Role of Control in Allocating International Responsibility in Collaborative Military Operations* (Academisch Proefschrift, Universiteit van Amsterdam 2015).

¹⁰² See Chapter 4, §4.2.3.

the duty-bearers be invoked? And can counter-measures be taken against each of the states and/or IOs that are bound to the shared obligation breached? Another question that may come to mind in this context relates to the applicability of the Monetary Gold principle,¹⁰³ which provides that the ICJ cannot exercise its jurisdiction if an indispensable third party whose legal interests would form the very subject-matter of the decision is not a party to the proceedings in question.¹⁰⁴ When legal proceedings are instituted before the ICJ against a state or IO for the breach of a shared obligation, does the absence of the other duty-bearers in those proceedings necessarily trigger the indispensable third party rule? These questions, however, are outside the scope of the present study.

1.4 Structure of the thesis

Chapter 2 explores the move beyond a bilateral view of legal relations in the international law of obligations. It sets out how the law of international responsibility and (to a lesser extent) the law of treaties have engaged with the idea of a plurality of parties in international law and recognize that there are legal relations that exist between more than two international actors. The concepts of multilateral obligation and *erga omnes (partes)* obligation that have been developed in this context focus solely on multilateral legal relations with a plurality of right-holders and do not address the topic of plurality of duty-bearers. These concepts are relied upon as a source of inspiration and analogy in the present study's conceptualization of shared obligations. To be more precise, the concept of indivisible shared obligations is a mirror image of the concepts of multilateral and *erga omnes (partes)* obligations.

Chapter 3 develops a concept of shared obligation international law, which is used as an overarching concept covering two types of shared obligations throughout this thesis. The chapter explains that the main characteristic that distinguishes obligations that are shared from obligations that are not shared is that the states and/or IOs that bear the obligation stand in a special relationship to one another; a relationship that consists of more than just the fact that they are all parties to the same treaty or bound by the same rule of customary international law. In order to clarify this connection between the bearers of a shared obligation, the chapter elaborates on the three elements that are present when the study speaks of a shared obligation: there are 1) two or more duty-bearers, which are all 2) bound to a similar international obligation that 3) pertains to the same concrete case.

¹⁰³ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, 1954 ICJ Reports 19 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240 (n 48); *East Timor (Portugal v Australia)*, Judgment, 1995 ICJ Reports 90 102.

¹⁰⁴ For a discussion of the Monetary Gold doctrine see e.g. Alexander Orakhelashvili, 'The Competence of the International Cour of Justice and the Doctrine of the Indispensable Party: From Monetary Gold to East Timor and Beyond' (2011) 2 Journal of International Dispute Settlement 373.

Chapter 4 introduces the distinction between divisible and indivisible shared obligations, and in doing so draws from the concepts of multilateral obligation and *erga omnes (partes)* obligation that have been explored in chapter 2. It shows that the distinction between divisible and indivisible shared obligations is based on the structure of performance of a shared obligation.

Indivisible shared obligations give rise to a multilateral legal relation where the obligation is held by multiple duty-bearers. This type of shared obligations is the mirror image of the categories of multilateral and *erga omnes (partes)* obligations. When multiple states and/or IOs are bound to an indivisible shared obligation, they are all bound to achieve a common performance. An indivisible shared obligation can only be fulfilled or breached by all duty-bearers simultaneously, and a bearer of an indivisible shared obligation cannot be released from that obligation by performing only a share of that obligation because all of them are bound to achieve a common performance.

This is different when multiple states and/or IOs are bound to a divisible shared obligation, in which case each of them is bound only to its own share. A duty-bearer is released from the obligation if it performs its own share, and a divisible shared obligation can be fulfilled or breached by each duty-bearer independently. Divisible shared obligations involve multiple bilateral legal relations, and in each of these legal relations the obligation is held by only one duty-bearer.

Moreover, chapter 4 identifies several indicators for distinguishing between divisible and indivisible shared obligations. It argues that negative obligations of result and positive obligations of conduct that are shared by multiple duty-bearers are inherently divisible in nature and can therefore never be qualified as an indivisible shared obligation. A shared obligation is of an indivisible character only if it is a positive obligation of result that requires duty-bearers to achieve a common result, which appears to be relatively rare in practice.

Chapter 5 explores the implications of breaches of shared obligations for the determination of shared responsibility. It finds that there is an automatic connection between a breach of an indivisible shared obligation and shared responsibility for one internationally wrongful act. Furthermore, it finds that no such automatic relationship exists when it comes to breaches of divisible shared obligations. The determination of (shared) responsibility for breaches of divisible shared obligations depends primarily upon whether individual duty-bearers have done their share or not in a concrete case, which means that there are no automatic implications of breaches of divisible shared obligations for the determination of shared responsibility.

Chapter 6 explores the implications of breaches of shared obligations for the content of shared responsibility. It finds that there is an automatic relationship between the indivisible character of the shared obligation and the indivisible character of the secondary obligations of cessation and reparation that may arise in case of a breach. The chapter explains that this is due to the fact that a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA, as has been set out in chapter 5. Moreover, it finds that the divisible nature of a shared obligation has no automatic implications for the content of responsibility in case of a breach, which affirms the special position of indivisible shared obligations.