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THE CONCEPT OF SHARED OBLIGATIONS IN INTERNATIONAL LAW

This chapter conceptualizes shared obligations in international law. It should be recalled that the present study's understanding of a shared obligation is relatively broad.³¹⁶ The concept of shared obligations is an overarching concept that covers two types of shared obligations. The present chapter focuses on the overarching concept of shared obligations and does not address the distinction between the two categories of divisible shared obligations (which give rise to multiple bilateral legal relations) and indivisible shared obligations (which give rise to one multilateral legal relation). The distinction between these two types of shared obligations is the focus of chapter 4, and it is here that the categories of multilateral and *erga omnes (partes)* obligations discussed in the previous chapter will have a role to play.

By developing a concept of shared obligations the present study approaches the topic of plurality of parties from the perspective of the duty-bearers in legal relations, and thereby aims to contribute to a better grasp of the (non-)performance 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 concept of shared obligations set out in the present chapter can be relied upon to categorize an international obligation in a particular situation as either 'shared' or 'not shared'. This chapter explains that the main characteristic that distinguishes obligations that are shared from obligations that are not shared is the existence of a special connection between the bearers of a shared obligation. 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 treaty or bound by the same rule of customary international law. It is this relationship that gives rise to questions regarding the (non-)performance of shared obligations: when is a shared obligation fulfilled by which duty-bearer(s), and when is a shared obligation breached by which duty-bearer(s)?

In order to provide a complete understanding of this relationship between the bearers of a shared obligation, this chapter takes two steps. First, section 3.1

³¹⁶ See Chapter 1, §1.2.1.

distinguishes between sources of international law, international legal rules or norms and international obligations. The distinction between sources, rules or norms and obligations is relevant to the conceptualization of shared obligations because it is relied upon to support the assertion that the concept of shared obligations does not cover all international obligations that arise from a multilateral rule or source.

Subsequently, section 3.2 elaborates on the three elements that are present whenever this study speaks of a shared obligation: there are 1) two or more duty-bearers, which are 2) bound to a similar international obligation that 3) pertains to the same concrete case or, in other words, the same constellation of facts. The third and final element is key to an understanding of the relationship between the states and/or IOs that bear a shared obligation. As is further discussed below, the similar international obligations of multiple duty-bearers pertain to the same concrete case when multiple states or IOs agree to an international obligation to work towards or achieve a common goal, or when multiple states or IOs are factually linked to a common situation. The fact that the obligations pertain to the same concrete case indicates that there is an overlap between the similar international obligations of duty-bearers, which is what connects the bearers of a shared obligation. This connection between duty-bearers is the main characteristic that distinguishes obligations that are shared from obligations that are not shared.

3.1 Sources, rules, norms and obligations

Shared obligations are not to be equated to all international obligations that arise from a multilateral rule or source. This section sets out how the present study's understanding of the concepts of source (§3.1.1), rule or norm (§3.1.2) and obligation (§3.1.3) differ from one another, and ultimately addresses why this matters for the conceptualization of shared obligations (§3.1.4).

3.1.1 Sources of international law

Sources are used to ascertain international legal rules or legal norms³¹⁷ and thereby distinguish law from non-law; a rule is considered to be an international legal rule if it originates from a source of international law.³¹⁸ Sources of international law include international treaties, customary international law, general principles of law, unilateral declarations and binding decisions of international organizations.³¹⁹

³¹⁷ The terms rule and norm will be used as synonyms, see §3.1.2 below.

³¹⁸ Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 63.

³¹⁹ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 5, 19–23. Treaties, custom and general principles of international law are the traditional sources of international law enshrined in article 38 ICJ Statute. In practice, the ICJ also relies on manifestations of rights and obligations from sources *other than* the sources listed in this provision, including at least unilateral acts and (binding) decisions of IOs. See

Particularly in the case of a written source, such as a treaty, a distinction can be made between the *instrumentum* and the *negotium*. The rule or norm is the *negotium*, whereas the written document in which that rule or norm is enshrined is the *instrumentum*. The *negotium* is the content and the *instrumentum* is the container.³²⁰

3.1.2 International legal rules or norms

International legal rules or norms emerge from the sources of international law discussed above. In its work on international responsibility the ILC uses the term 'norm' as a synonym for 'rule',³²¹ and following the ILC in this respect the terms rules and norms will be used as synonyms throughout this study. According to the mainstream position in international law, a legal rule is a legal rule because it has its origin in a source of international law, and not because of its content.³²² It is thus not required that a legal rule formulates clear obligations before it can be considered a legal rule, and even legal acts 'whose content is totally non-normative' which 'fail to provide any precise directive as to which behaviour its authors are committed to follow, can still qualify as international legal rules.'³²³

Legal rules can give rise to international obligations. While discussing the difference between rules (or norms) and obligations in his second report on state responsibility, SR Ago considered that

'A rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations - rights, faculties, powers and obligations - to those to whom it is addressed. It is these situations which, as their appellation indicates, constitute law in the subjective sense; it is in relation to these situations that the subject's conduct operates. The subject freely exercises or refrains from exercising its subjective right, faculty or power and freely fulfils or violates its obligation, but it does not "exercise" the rule and likewise does not "violate" it. It is its duty which it fails to carry out and not the principle of objective law from which that duty flows.'³²⁴

Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 763.

³²⁰ Thirlway (n 319) 4; d'Aspremont (n 318) 174.

³²¹ The ILC uses the terms 'rule' and 'norm' as synonyms, see. See e.g. International Law Commission, 'Report on the Work of Its Twenty-Fifth Session' (1973) A/9010/REV.1 184; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) A/56/10 36.

³²² d'Aspremont (n 319) 175.

³²³ d'Aspremont (n 319) 176. See also pp. 177-178, where d'Aspremont discusses several cases before the ICJ where the ICJ considered that a treaty provision did not provide for any sort of obligation, and yet did not disqualify it as a legal rule.

³²⁴ Ago, 'Second Report on State Responsibility' (n 162) 192, para 45.

However, legal rules do not always give rise to obligations (and correlative rights), but can also give rise to other legal positions. In this respect, one may think of the different legal positions identified by Hohfeld.³²⁵ Consider, for example, the customary international rule that entitles a state to exercise legislative and judicial jurisdiction over crimes committed by its nationals abroad. As such, this rule certainly does give rise to an obligation, since it does not *oblige* a state to exercise jurisdiction over all crimes committed by its nationals abroad. Rather, the rule gives rise to a *power* to exercise jurisdiction which a state can choose to exercise or not. In the case that it chooses not to exercise the power this will not constitute a breach of an international obligation (unless there is a specific international obligation that obliges a state to make use of its power to exercise jurisdiction in a particular situation).

The same can be said for the rule that entitles a state party to a bilateral treaty to terminate or suspend that treaty in response to a material breach by the other state party, which is enshrined in article 60(1) VCLT. When state A commits a material breach of a bilateral treaty it has concluded with state B, state B does not become bound to an *obligation* to terminate or suspend the treaty in response. Rather, state B will have the *power* to do so, and is free to choose whether or not it will exercise that power. If it chooses not to terminate or suspend the bilateral treaty in response to state A's material breach, this will not be qualified as a breach of an international obligation.

3.1.3 International legal obligations

International obligations set out what international actors must do or what they must not do in order to remain in compliance with international law. Conduct that deviates from that which is required by an international obligation constitutes a breach of international law. The ILC has considered that an international obligation is a 'subjective legal phenomenon by reference to which the conduct of a subject is judged' as being in breach or in compliance with international law in a specific situation.³²⁶

International obligations arise from international legal rules;³²⁷ which in turn are qualified as legal rules because they emerge from sources of international law. Thus,

³²⁵ See Chapter 2, §2.2.1.

³²⁶ International Law Commission, 'Report on the Work of Its Twenty-Fifth Session' (n 322) 184.

³²⁷ See e.g. Constantin P Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 372., who considers that '[t]he obligation itself arises from a norm or rule which itself originates from one of the sources of public international law'; Karavias (n 27) 11., who considers that 'an obligation under international law logically presupposes as a minimum the existence of an international law rule, which demands of the obligor to act or prohibits the latter from acting in a certain manner'.

the term obligation describes a concept that is different from, yet related to, the concepts of 'source' or 'rule'.³²⁸ This is further illustrated below by looking at the understanding of international obligations in the ILC's work on the law of treaties (i) and the law of international responsibility (ii).

i. International obligations in the law of treaties

While treaties give rise to international obligations,³²⁹ the law of treaties does not focus on the concept of obligation as such. At an early stage in the codification of the law of treaties the ILC decided that its main focus would be on the treaty *instrument* (which is a source of international law) rather than on the treaty *obligations*.³³⁰ This entails that in the context of the law of treaties a distinction can be made between the treaty instrument (which is a source of international law) and the obligations that may arise from that source.

ii. International obligations in the law of international responsibility

The concept of international obligation is of paramount importance to the law of international responsibility. Responsibility for an internationally wrongful act arises only as a result of a breach of an international obligation,³³¹ and responsibility is thereby inherently dependent upon a breach of an international obligation. Indeed, in its commentaries to the ASR the ILC considers that '[t]he essence of a wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular obligation.'³³² Moreover, international responsibility for the breach of an international obligation can in turn give rise to new obligations such as the obligation of cessation and the obligation of reparation.³³³

In its work on international responsibility, the ILC has clarified its understanding of (the breach of) international obligations, and in doing so has distinguished between sources, rules or norms and obligations. First, the ASR and ARIIO stipulate that the breach of *any* international obligation is capable of giving rise to international

³²⁸ See also Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 342-343.

³²⁹ Fitzmaurice and Elias (n 90) 4. 'Treaties are one of the sources which give rise to international legal obligations.'

³³⁰ Rosenne, *Breach of Treaty* (n 191) 4; Rosenne, 'Bilateralism and Community Interest in the Codified Law of Treaties' (n 191) 205.

³³¹ With the possible exception of international responsibility 'in connection with' the act of another state or IO, which is outside the scope of the present study. See Chapter 1, § 1.1.6.i.

³³² International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 54.

³³³ However, these obligations do not automatically arise as a result of international responsibility; rather, additional criteria should be fulfilled. These secondary obligations are further discussed in Chapter 6.

responsibility, regardless of the origin of that obligation.³³⁴ The term 'origin' refers to 'all possible sources of international obligation, that is to say, all processes for creating legal obligations recognized by international law.'³³⁵

Second, the ILC has made a conscious choice to connect the arising of international responsibility to the breach of an international obligation, rather than to the breach of a rule or norm of international law.³³⁶ Not only has the ILC held that the use of the term 'obligation' most adequately reflects the terminology used in international judicial decisions and state practice;³³⁷ it has also considered that use of the term obligation is most accurate because the terms 'rule' and 'obligation' are used to describe different concepts.³³⁸

The distinction between rules and obligations is important because, for the purpose of determining international responsibility, what matters 'is not simply the existence of a rule but its application in the specific case to the responsible State.'³³⁹ Indeed a State does not by its act or omission 'fail to comply with a norm or rule, but with the obligation imposed on it by such a rule'³⁴⁰ in the case at hand. It follows that, in order to determine whether a breach of obligation has occurred, 'it is not sufficient to prove that a rule exists, what it prescribes and to whom it applies, but that it is also necessary, having regard to the particular circumstances prevailing at the time of its application, to specify to what extent the rule obligates States to follow a certain course of conduct in those circumstances.'³⁴¹

3.1.4 Relevance for the conceptualization of shared obligations

The above has outlined the difference between the concepts of sources, rules (or norms) and obligations in international law. In the context of the conceptualization of shared obligations, this distinction is relied upon to underscore that an obligation that arises from a multilateral rule or source does not automatically fall within the scope of the concept of shared obligations.

³³⁴ See article 12 ASR and article 10(1) ARIIO.

³³⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 55.

³³⁶ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 36, para 13.

³³⁷ International Law Commission, 'Report on the Work of Its Twenty-Fifth Session' (n 322) 184; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 36.

³³⁸ International Law Commission, 'Report on the Work of Its Twenty-Fifth Session' (n 322) 184. See also Crawford, 'Chance, Order, Change: The Course of International Law' (n 111) 186.

³³⁹ Yumi Nishimura, 'Source of the Obligation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 366.

³⁴⁰ International Law Commission, 'Summary Record of the 1361st Meeting' (1976) A/CN.4/SR.1361 7-8.

³⁴¹ André De Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer Law International 1996) 18.

Thus, a distinction must be made between the ‘multilateral’ or in a colloquial sense ‘shared’ nature of a source or rule and the nature of the obligations arising therefrom. This has also been noted by a few authors in relation to international obligations that are owed to a plurality of right-holders. Those authors assert that even if a legal rule applies to a plurality of states (for example because all states are a party to the same multilateral treaty), it is still possible that the obligations arising from that rule constitute so-called bilateral obligations³⁴² that give rise to bundles of bilateral legal relations, where the obligation is owed to another state individually (or in other words, where the right corresponding to that obligation is held by one right-holder only).³⁴³

Similarly, if a rule applies to a plurality of states, for example because it is a rule of customary international law or because it is enshrined in a multilateral treaty, this does not in and of itself indicate that those states will ‘share’ the obligations that arise from that rule. What distinguishes an obligation that is shared from an obligation that is not shared is that the duty-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 bound to the same multilateral rule or source. In its discussion of the three elements of a shared obligation, the next section further builds upon the assertion that the concept of shared obligations does not cover all international obligations that arise from a multilateral rule or source and, more importantly, clarifies the distinctive relationship between the bearers of a shared obligation.

3.2. Elements of a shared obligation

Throughout this study the concept of shared obligations is used as a broad and overarching concept, which includes both divisible and indivisible shared obligations. Accordingly, the present study’s understanding of shared obligations covers a wide range of international obligations that are binding upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals.

However, as has been reiterated several times throughout this chapter, the present study’s understanding of a shared obligation does not cover all international obligations that are binding upon multiple states and/or IOs simply because they arise from a multilateral source. International obligations that fall within the scope of the concept of shared obligations can be distinguished from obligations that fall outside the scope of the concept due to the distinctive relationship between the bearers of a shared obligation. This relationship is further elucidated in the present section by discussing the three elements of a shared obligation. These three elements

³⁴² For a discussion of bilateral obligations see Chapter 2, §2.4.2.i.

³⁴³ See e.g. Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 45; Crawford, ‘Multilateral Rights and Obligations in International Law’ (n 137) 342–343; Dominicé (n 177) 354.

are present whenever this study speaks of a shared obligation, regardless of whether it is a divisible or indivisible shared obligation.

First, a shared obligation has *two or more duty-bearers* (§3.2.1), since one state or IO cannot 'share' an international obligation on its own. Second, the duty-bearers in question are bound to *a similar international obligation* (§3.2.2), which is the case when multiple states and/or IOs are bound to an international obligation with similar normative content. These first two elements are not, as such, distinctive in the sense that most international obligations that arise from a multilateral rule or source give rise to a similar international obligation for multiple states and/or IOs. Indeed, when multiple states are parties to the same multilateral treaty such a treaty often gives rise to a similar international obligation for all parties. The same can generally be said when an international obligation arises from customary international law.

It is the third and final element of a shared obligation that is key to understanding the relationship between the bearers of a shared obligation, which distinguishes an international obligation that is shared from an international obligation that is not shared. States and/or IOs are bound to a shared obligation when they are bound to a similar international obligation *that pertains to the same concrete case* (§3.3.3). 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 (which can occur in the context of cooperative action).

3.2.1 Multiple duty-bearers

The first element of a shared obligation is almost self-explanatory. A shared obligation presupposes that there are multiple duty-bearers, since one state or IO cannot 'share' an international obligation on its own. Thus, qualifying an obligation as a shared obligation implies that there are at least two duty-bearers. This logically excludes scenarios where there is only one duty-bearer, for example when a bilateral treaty obliges one state party to provide a certain amount of development assistance to the other state party.

International legal rules often give rise to international obligations for a plurality of states. For example, the fact that multiple states are parties to a multilateral treaty generally indicates that all of these states are duty-bearers of some or all obligations contained in that treaty. The same can be said for obligations that arise from rules of international customary law.

It is also possible for the plurality of duty-bearers to consist of a combination of states and international organizations, for example if both an international organization and its member states are parties to the same multilateral treaty. Numerous examples of such treaties can be found in the practice of the EU and its member states to conclude mixed agreements.³⁴⁴ Examples of mixed agreements are the WTO Agreement, the Kyoto Protocol, the Law of the Sea Convention, the UN Convention on the Rights of Persons with Disabilities and, after the EU's planned but delayed accession, the European Convention of Human Rights. However, as is further considered below, the fact that the EU and its member states are parties to a mixed agreement does not always mean that they are all bound to a similar international obligation that pertains to the same concrete case.

Hence, a shared obligation presupposes that there are multiple duty-bearers, but the mere existence of a plurality of duty-bearers is not sufficient to speak of a shared obligation. The duty-bearers in question should also be bound to a similar international obligation that pertains to the same concrete case. This brings us to the next element.

3.2.2 Bound to a similar international obligation

The second element of a shared obligation is that the states and/or IOs in question are bound to a similar international obligation, which is the case when multiple states and/or IOs are bound to an obligation with similar normative content. The obligations of multiple duty-bearers are similar if they prescribe similar conduct, such as the obligation incumbent upon multiple states to take all measures in their power to prevent genocide, or if they prescribes the achievement of a similar result, such as the obligation of multiple states to refrain from acts of torture or the obligation of multiple states to provide full compensation for any damage caused by their joint launching of a space object.

This logically excludes scenarios in which multiple states and/or IOs are bound to a *different* international obligation. Imagine, for example, that in the case of an impending genocide by state A in state A's own territory, state A is bound to the obligation not to commit genocide, whereas state B is bound to the obligation to take measures within its power to prevent the impending genocide by state A. The obligation of state A and the obligation of state B have a different normative content and are thus not covered by the present study's understanding of a shared obligation. In another example, if an individual is extradited by state A to state B, where they will very likely be tortured, A's obligation in this concrete case would be the obligation of non-refoulement whereas B's obligation would be the obligation to abstain from acts

³⁴⁴ See Chapter 1, §1.1.3.ii.

of torture. Though the obligations pertain to the same concrete case (see the third and final element of a shared obligation discussed in §3.2.3), the obligations of state A and state B are not similar and therefore fall outside the scope of the concept of shared obligations.

When the duty-bearers involved consist of states only, it is relatively easy to determine whether each of them is bound to a similar international obligation. When multiple states are parties to the same multilateral treaty, the treaty is binding on all of them³⁴⁵ and states parties often bear the full range of international obligations contained in that treaty (save those situations in which a member state has made a reservation that pertains to a particular obligation in the treaty that has been accepted by the other states parties, or when a treaty provides that some obligations arise for one or more specific states only). It follows that a multilateral treaty often gives rise to similar international obligations for its states parties. The same is true when it comes to a rule of customary international law.

Examples of a similar international obligation binding upon multiple states include the obligation of all states parties to the Genocide Convention to refrain from committing genocide; the obligation of all states parties to the ICESCR 'to take steps, individually and through international assistance and co-operation (...) with a view to achieving progressively the full realization of the rights recognized by the present Covenant by all appropriate means';³⁴⁶ the obligation of states parties to the Law of the Sea Convention 'whose nationals exploit identical living resources, or different living resources in the same area' on the high seas to 'enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned',³⁴⁷ and the (customary) obligation of all states to provide reparation for their internationally wrongful acts that cause damage.³⁴⁸

When the duty-bearers involved consist of an IO and its member states, it can be more complicated to determine whether each of them is bound to a similar international obligation, particularly when the EU and its member states are involved. If an IO and its member states are parties to the same multilateral treaty, the treaty is binding on all of them.³⁴⁹ However, in the specific context of the EU and

³⁴⁵ This follows from the principle of *pacta sunt servanda*, which is fundamental to all legal systems. See Aust (n 43). The principle is codified in article 26 of both the 1969 and 1986 VCLT: '[e]very treaty is binding upon the parties to it and must be performed by them in good faith.'

³⁴⁶ Article 2 International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3. (Hereafter: ICESCR).

³⁴⁷ Article 118 LOSC. See also Elise Anne Clark, 'Strengthening Regional Fisheries Management - An Analysis of the Duty to Cooperate' (2011) 9 NZJPIIL 223.

³⁴⁸ ³⁴⁸ Möldner (n 44) 34.

³⁴⁹ See Chapter 1, §1.1.3.ii.

its member states as parties to mixed agreements³⁵⁰ it is a matter of controversy whether the EU and its members are bound to the whole agreement or only to the part of the agreement that falls within each of their (internal) competences.³⁵¹ The question whether the EU and its members are each bound to the whole mixed agreement or to only part of it is essential to determining whether the EU and its member states are bound to a similar international obligation.

If one accepts the idea the EU and its members are indeed bound only to the part of the agreement that falls within their respective competences, a provision in a mixed agreement that falls within an area of exclusive EU competence³⁵² will bind the EU only and will give rise to obligations for the EU only. It follows that such a provision cannot give rise to a similar international obligation for both the EU and its member states. Arguably, this idea is reflected in the *Swordfish* case before the International Tribunal for the Law of the Sea.³⁵³ In this case Chile instituted proceedings against the (then) European Community (EC) because vessels flying under the Spanish flag had been fishing for swordfish on the high seas adjacent to Chile's exclusive economic zone. It is conceivable that Chile chose to institute proceedings against the EC rather than Spain because the conservation of marine biological resources under the common fisheries policy is an exclusive EU competence,³⁵⁴ and it was the EC that was bound to the obligations that were the subject of this case; not Spain. If so, the *Swordfish* case represents a situation 'where the division of competence was indeed mirrored in the scope of external obligation'.³⁵⁵

The situation is more complex when a provision falls under an area of shared competence.³⁵⁶ In an area of shared competence, both the EU and its member states

³⁵⁰ See Chapter 1, §1.1.3.ii.

³⁵¹ Möldner (n 44) 34; Eva Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO' (2006) 17 EJIL 837, 839; Heliskoski (n 42) 21.

³⁵² Article 3 Treaty on the Functioning of the European Union (2008) OJ C115/13 (n 38). (Hereafter: TFEU):

1. The Union shall have exclusive competence in the following areas:

(a) customs union;
(b) the establishing of the competition rules necessary for the functioning of the internal market;
(c) monetary policy for the Member States whose currency is the euro;
(d) the conservation of marine biological resources under the common fisheries policy;
(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

³⁵³ *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)*, Order of 16 December 2009, ITLOS Reports 2008-2010, p 13.

³⁵⁴ Frank Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 EJIL 723, 738; Delgado Casteleiro (n 41) 145.

³⁵⁵ Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements' (n 9).

³⁵⁶ Article 4 TFEU:

are entitled to legislate and adopt legally binding acts. However, the member states can exercise their competence only to the extent that the EU has not exercised its competence. In the case that the EU exercises its competence, the EU becomes exclusively competent³⁵⁷ and the member states can no longer exercise their competence in the area in question, unless the EU decides to cease exercising its competence.³⁵⁸ Hence, if one accepts the idea that the EU and its members are bound only to the part of the agreement for which they are internally competent, 'there is a need to undertake a case-by-case analysis of whether a certain obligation is binding jointly on the Union and its Member States or on only one of them.'³⁵⁹

At this point, it should be mentioned that there exist different views on the role that the internal division of competences plays (or should play) in the apportionment of international obligations amongst the EU and its member states. These range from the view that the EU and its member states are bound to all provisions in a mixed agreement regardless of the division of competence³⁶⁰ to the view that the EU and its member states are bound only to those provisions that fall within their respective competences; regardless of whether the precise delimitation of competences is clear to the non-EU states parties to the agreement.³⁶¹ A comprehensive analysis of these different views is outside the scope of this thesis.

The present study chooses somewhat of a middle ground by subscribing to 'what is probably the prevailing view',³⁶² which considers that if the division of competences is clearly disclosed to the other parties to the mixed agreement, the EU and its

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

³⁵⁷ Paasivirta and Kuijper (n 41) 176.

³⁵⁸ See article 2(2) TFEU.

³⁵⁹ This view is discussed in Hoffmeister (n 356) 744.

³⁶⁰ This view is discussed in Heliskoski (n 42) 21.

³⁶¹ This view is discussed in Möldner (n 44) 37. See also the view of the European Commission set out in its comments to the ILC's work on the responsibility of international organizations International Law Commission, 'Responsibility of International Organizations: Comments and Observations Received from International Organizations' (2004) A/CN.4/545 26.

³⁶² Möldner (n 44) 35.

member states are each bound to the part of the agreement for which they have competence.³⁶³ If the division of competences is not clearly disclosed to the other parties to the convention, the EU and its member states are in principle bound to all of the obligations in the mixed agreement.³⁶⁴ This view can be based on the principle of good faith,³⁶⁵ which is '[o]ne of the basic principles governing the creation and performance of legal obligations.'³⁶⁶ It also follows from the principle of good faith that if the other parties to the treaty are aware of should have been aware of the present-day division of competences, the EU and its member states are bound to the part of the agreement for which they have competence.

The disclosure of the division of competences to the other parties to the agreement can occur in various manners, for example by means of a declaration of competences or by including a competence clause in a mixed agreement. However, it should be acknowledged that the internal division of competences 'is one of the most complex and debated issues in EU external relations law.'³⁶⁷ EU competence is subject to

³⁶³ See e.g. Christian Tomuschat, 'Liability for Mixed Agreements' in David O'Keefe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law & Taxation Publishers and the Europa Instituut 1983) 127. Tomuschat argues that if there is a competence clause, obligations in a mixed agreement should be divided amongst the EU and its member states according to their respective competences; Giorgio Gaja, 'The European Community's Rights and Obligations under Mixed Agreements' in David O'Keefe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law & Taxation Publishers and the Europa Instituut 1983) 133–134. Gaja states that the EU and its member states can demarcate their rights and obligations through competence clauses or declarations of competence, thereby giving rise to two separate sets of obligations (at 140). See also Marise Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' EUI Working Paper LAW No. 2006/22 21; Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties* (Martinus Nijhoff Publishers 1995) 24.

³⁶⁴ Paasivirta and Kuijper observe that the CJEU has implicitly taken the view that in absence of a declaration of competence the EU and the member states 'are together responsible for the performance of the obligations from the mixed agreement in question', see Paasivirta and Kuijper (n 41) 187. This observation is repeated in Pieter-Jan Kuijper, 'International Responsibility for EU Mixed Agreements' in C Hillion and P Koutrakos (eds), *Mixed agreements revisited: the EU and its member states in the world* (Hart 2010) 209–210. Talmon argues that if both the EU and its member states become parties to a treaty, and no specific declaration of competence has been made, 'the obligations under the treaty are incumbent upon all of them.' Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005) 416–417. Björklund notes that 'when both the EC and the member states have signed an agreement, both would have to be considered parties to the entire agreement (...) unless something in the text of the agreement limits this.' Martin Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?' (2001) 70 *Nordic Journal of International Law* 373, 388.

³⁶⁵ Björklund (n 366) 388–389; Talmon (n 366) 420. See also 'Advies Inzake Extern Optreden van de Europese Unie En Internationaal Recht, Commissie van Advies Inzake Volkenrechtelijke Vraagstukken (Advisory Committee on Issues of Public International Law)' (2014) Advies nr. 24. The Advisory Committee discusses the importance of the principle of good faith when it comes to determining the role that the internal division of competences plays in the apportionment of the obligations in a mixed agreement amongst the EU and its member states.

³⁶⁶ *Nuclear Tests (Australia v France), Judgment, 1974 ICJ Reports* 253 268, para 46.

³⁶⁷ Delgado Casteleiro (n 41) 111.

continuous change and evolution,³⁶⁸ and EU declarations of competence are rarely (if ever) updated.³⁶⁹ This entails that a declaration of competences does not always reflect the present day division of competences between the EU and the member states. Hence, the fact that at some point in time a declaration of competence has been made does not necessarily mean that third states are aware or should have been aware of the present-day division of competences.³⁷⁰

Some relatively uncontroversial examples of international obligations arising from a mixed agreement that are binding upon both the EU and its member states include the obligation of the (then) EC and its member states to provide 12.000 million ECU in financial assistance to the ACP states;³⁷¹ the obligation of the (then) EC and France to strictly limit pollution from land-based sources in lake Etang de Berre at the time of the Etang de Berre case;³⁷² and the obligation of the EU and its member states, together with Iceland, to reduce their aggregate emissions of greenhouse gases with 20 per cent by 2020 under the second commitment period of the Kyoto Protocol.³⁷³ In each of these examples, the EU and (some of) its member states are bound to a similar international obligation.

Other uncontroversial examples of international obligations in a mixed agreement that are binding upon the EU and its member states include obligations that fall within an area for which both the EU and its member states are fully competent, as would be the case for the human rights provisions in the ECHR after the EU's possible accession. Arguably, both the EU and its member states will be bound to these human rights provisions,³⁷⁴ which means that they can give rise to a similar international obligation for all of them.

³⁶⁸ Delgado Casteleiro notes that '[t]he ERTA principle is the perfect example of the evolutionary nature of EU competence. This principle recognizes the existence of EU powers not explicitly conferred by the Treaties, and establishes that the competence of the Union to conclude international agreements may arise not only from an express conferment by the Treaty, but may also flow implicitly from other provisions of the Treaty and from measures adopted within the framework of those provisions by EU institutions.' See Delgado Casteleiro (n 41) 118.

³⁶⁹ Delgado Casteleiro (n 41) 121.

³⁷⁰ Several authors mention the approach in Annex IX of the LOSC as an appropriate way to deal with the dynamic nature of EU competence, Delgado Casteleiro (n 41) 134; Heliskoski (n 42) 164; 'Advies Inzake Extern Optreden van de Europese Unie En Internationaal Recht, Commissie van Advies Inzake Volkenrechtelijke Vraagstukken (Advisory Committee on Issues of Public International Law)' (n 367) 30. Article 5 of Annex IX provides that any LOSC party can request the EU and its Member States to provide information as 'to which has competence in respect to any specific question'. If no clarification is provided, article 6 of Annex IX establishes that '[f]ailure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability'.

³⁷¹ See Chapter 5, §5.4.4.

³⁷² See Chapter 5, §5.4.5.

³⁷³ See Chapter 5, §5.4.6.

³⁷⁴ Tobias Lock, 'Accession of the EU to the ECHR - Who Would Be Responsible in Strasbourg?' in Diamons Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012) 117.: 'Atypically, the reason why both the EU and the Member States will have become parties to the ECHR is not the lack of competence of either to accede to the ECHR alone, but the desire to ensure a

Returning to the general theme of this subsection, the examples of multiple duty-bearers that are bound to a similar international obligation mentioned up until now suggest that international obligations with similar normative content generally arise from the same multilateral source. However, this is not necessarily the case. For example, it is perfectly possible for state A to be bound to the obligation not to commit torture because it is a party to the ICCPR, whereas state B is bound to the obligation not to commit torture because it is a party to the ECHR. The obligation not to commit torture in the ICCPR and the obligation not to commit torture in the ECHR can be qualified as similar international obligations since each prescribes the achievement of a similar result (i.e. abstaining from torture).

Though being bound to an international obligation with similar normative content is an important element of a shared obligation, not all such obligations are covered by the concept of shared obligations. If this were the case, the concept of shared obligations would be equated to most or even all obligations that arise from a multilateral rule or source. Thus, the fact that multiple states and/or IOs are bound to a similar international obligation does not automatically mean that they are bound to a shared obligation. This leaves the final and most important element of a shared obligation, which is key to understanding the distinctive relationship between the bearers of a shared obligation.

3.2.3 Pertaining to the same concrete case

The third and final element of a shared obligation is that multiple duty-bearers are bound to a similar international obligation that *pertains to the same concrete case*. The same concrete case should simply be understood as the same constellation of facts. The obligations of multiple duty-bearers pertain to the same concrete case when multiple states and/or IOs agree to an international obligation to work towards or achieve a common goal (i), or when multiple states and/or IOs are factually linked to a common situation (ii), which includes situations where all of them exercise some form of authority or control over the same territory and/or individuals.

This element is key to understanding the relationship between the bearers of a shared obligation, and it is this relationship that distinguishes obligations that are shared from obligations that are not shared but still arise from the same multilateral rule or source. The bearers of a shared obligation are connected because their similar international obligations overlap, which raises questions regarding their (non-) performance: who is bound to do what? And when is a shared obligation fulfilled or breached by which duty-bearer(s)?

complete protection of human rights. There is no reason to doubt that they are externally fully responsible for violations of the ECHR.'

It follows that when each state and/or IO is bound to a similar international obligation that pertains to a *different* concrete case, this does not fall within the scope of the present study's understanding of a shared obligation. For example, all states parties to the VCDR are bearers of the obligation to take measures to protect the diplomatic premises present on their territory, which entails that multiple states are bound to a similar international obligation. However, these similar international obligations generally pertain to a distinct constellation of facts. Indeed, each state's obligation pertains to those diplomatic premises that are present on its own territory; it does not pertain to diplomatic premises situated in another state's territory. There is no connection between the bearers of this obligation that consists of more than them being parties to the same treaty; the similar international obligations of the states parties to the VCDR do not overlap.

The same observations apply to the obligation to provide innocent passage through one's territorial waters. Even though all states are bound to an international obligation with similar normative content, each state's obligation to provide innocent passage pertains to a different concrete case: namely only to those ships passing through each state's own territorial waters, and not to ships passing through another state's territorial waters. The factual situation to which each state's obligation applies can be neatly separated from one another, which means that the obligations of the duty-bearers do not pertain the same constellation of facts. Some other examples of multiple states that are bound to similar international obligations that pertain to different concrete cases include the customary international obligation of states to take measures to make sure that activities within their territory do not cause significant transboundary harm, or the obligation of each state to treat foreign investors on its territory in accordance with the international minimum standard derived from customary international law.

This subsection will now consider various situations in which international obligations *do* pertain to the same concrete case. It should be emphasized in advance that the examples discussed below serve purely illustrative purposes and should by no means be seen as an exhaustive overview of situations in which states and/or international organizations are bound to a shared obligation.

i. Multiple states and/or IOs agree to an obligation to work towards or achieve a common goal

International obligations pertain to the same concrete case when multiple states and/or IOs agree to a similar international obligation to work towards or even achieve a common goal. The similar international obligations of multiple duty-bearers overlap because they are directed at a common goal.

It must be noted that when multiple states and/or IOs are bound to a similar international obligation in pursuance of a common goal, the question whether those states are 'merely' required to work towards a common goal or whether they are bound to in fact achieve that common goal can still be up for discussion.³⁷⁵ One uncontroversial example of an obligation of multiple states and an IO to achieve a common goal is the obligation of Iceland, the EU and its member states to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020.³⁷⁶ The bearers of this obligation have explicitly agreed to achieve a concrete common goal: a reduction of 20 per cent of their aggregate emissions by 2020.

A somewhat more controversial example of an obligation of multiple states to achieve a common goal is the obligation arising from article VI of the Nuclear Non-Proliferation Treaty (NPT). Some argue that article VI NPT gives rise to an obligation of states parties to conclude an international agreement on complete nuclear disarmament or even an obligation to achieve complete nuclear disarmament.³⁷⁷ The specific common goal that would need to be achieved in order to fulfil the obligation is the conclusion of an international agreement on nuclear disarmament, or even the achievement of nuclear disarmament itself. Others, however, have argued that states are 'merely' obliged to take steps to work towards this collective goal and are thus not required to achieve the conclusion of an international treaty or complete nuclear disarmament.³⁷⁸

All in all, there are not many examples in which one can claim without controversy that multiple international actors have agreed to *achieve* a common goal. There are many more examples of multiple international actors that have not necessarily agreed to *achieve* a collective goal but have rather agreed to take steps to *work towards* a concrete collective goal. In this respect, one may think of the obligation of

³⁷⁵ This is further addressed in Chapter 4, §4.2.3.

³⁷⁶ Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (n 5) 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.

³⁷⁷ See Chapter 4, §4.2.2.iii.

³⁷⁸ See Chapter 4, §4.2.2.iii.

all states to cooperate in bringing to an end a serious breach of an obligation arising from a peremptory norm;³⁷⁹ 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 both of them’;³⁸⁰ the obligation to ‘cooperate in respect of areas beyond national jurisdiction and other matters of mutual interest, for the conservation and sustainable use of biological diversity’;³⁸¹ the obligation of France and the UK to take appropriate steps to maintain security and public order in and around the Coquelles terminal; or the obligation of Annex I parties to the Kyoto Protocol to pursue limitation or reduction of greenhouse gas emissions from aviation and marine bunker fuels, working through the ICAO and IMO.³⁸²

ii. Multiple states and/or IOs are factually linked to a common situation

Moreover, the similar international obligations of multiple states pertain to the same concrete case when all of those states are factually linked to a situation or, in other words, when multiple states are connected to a factual situation that is common to all of them.³⁸³ This includes situations in which multiple states exercise some form of authority or control over the same territory and/or individuals, which can occur in the context of cooperative action. The simultaneous exercise of authority or control can give rise to scenarios where multiple states are bound to a similar international obligation that pertains to the same territory and/or individual.³⁸⁴ In such scenarios, the similar international obligations of multiple states pertain to the same concrete

³⁷⁹ Article 41 ASR. However, this provision is arguably an exercise in progressive development rather than a codification of positive law, see International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (n 16) 114, para 3.

³⁸⁰ Article 63 LOSC, see Bjørn Kunoy, ‘The Ambit of Pactum de Negotiatum in the Management of Shared Fish Stocks: A Rumble in the Jungle’ (2012) 11 Chinese Journal of International Law 689

³⁸¹ Article 5 Convention on Biological Diversity (1992) 1760 UNTS 79.

³⁸² Article 2(2) Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) 2303 UNTS 148.

³⁸³ The idea of multiple states involved in factual situation that is common to them is also used in Vassilis Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2014) 36 Michigan Journal of International Law 129, 172.

³⁸⁴ Compare Gammeltoft-Hansen and Hathaway, who discuss the situation in which ‘more than one state can be said to have jurisdiction and hence incur human rights responsibility’ for a given breach of a human rights obligation (which presupposes that all states involved are bound to a similar international obligation), Thomas Gammeltoft-Hansen and James Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 Columbia Journal of Transnational Law 235, 272–276. Howland speaks of ‘the idea that multiple states have human rights obligations to the same individual’, see Todd Howland, ‘Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights’ in Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 389. Van der Have observes that ‘multiple states may have obligations in relation to the same situation of gross human rights violations’, see Nienke van der Have, *The Prevention of Gross Human Rights Obligations under International Human Rights Law* (Academisch Proefschrift, Universiteit van Amsterdam 2017) 236.

case due to their simultaneous exercise of authority or control over the same territory and/or individual.

The simultaneous exercise of authority or control by multiple states can range from temporary exercise of authority or control to more permanent arrangements. An example of a more permanent exercise of control over the same territory by multiple states is when two or more states establish a condominium, which means that they equally exercise sovereignty over the same territory and its inhabitants.³⁸⁵ It seems no more than logical to assume that these states do not only share the rights and benefits that come with sovereignty over territory, but that they also share the obligations and burdens that come with that sovereignty.³⁸⁶ This means that it is possible for each of them to be bound to an obligation with similar normative content that pertains to the same territory and individuals present on that territory. Such obligations can include the obligation to protect the marine environment, the obligation to take reasonable steps to prevent activities within that territory from causing damage to other states, or the obligation to respect the right to self-determination of the peoples inhabiting the territory.

For a state to claim a condominium in a territory with another state (or states), each of them must admit that the territory belongs to it conjointly with the other state or states.³⁸⁷ While most condominiums are a thing of the past, some condominiums still exist; such as parts of the Gulf of Fonseca, which are subject to the joint sovereignty of El Salvador, Honduras and Nicaragua.³⁸⁸ Moreover, the establishment of a condominium has been proposed as a solution to ongoing territorial disputes, such as the West Bank and Gaza, Brčko in the former Yugoslavia, Gibraltar,³⁸⁹ the Caspian Sea³⁹⁰ and the disputed region of Abyei between North and South Sudan.³⁹¹

Another example of (potentially) overlapping sovereignty or jurisdiction is when multiple coastal states all 'have advanced claims to maritime sovereignty or jurisdiction over the same area'.³⁹² States do not only derive rights and benefits from maritime areas under their jurisdiction; they also have obligations with regard to

³⁸⁵ Malcolm Shaw, *International Law* (Seventh Edition, CUP 2014) 165.

³⁸⁶ Samuel observes that a condominium allows states to 'collaborate and build a community of shared rights and responsibilities' (emphasis added). See Joel H Samuels, 'Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution' (2008) 29 *Michigan Journal of International Law* 727, 774.

³⁸⁷ Samuels (n 388) 736.

³⁸⁸ See *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)*, Judgment, 1992 ICJ Reports 351; Shaw (n 387) 166.

³⁸⁹ Samuels (n 388).

³⁹⁰ Kamyar Mehdiyoun, 'Ownership of Gas and Oil in the Caspian Sea' (2000) 94 *AJIL* 179.

³⁹¹ Jack McNeily, 'A Condominium Approach to Abyei' (2012) 13 *Chicago Journal of International Law* 265.

³⁹² David Anderson and Youri van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' in S Jayakumar, Tommy Koh and Robert Beckman (eds), *The South China Sea Disputes and Law of the Sea* (Edward Elgar Publishing 2014).

such areas.³⁹³ For example, when two states have overlapping claims to the EEZ, their obligation to ensure ‘through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation’³⁹⁴ will (at least in part) overlap, as they will both be bound to an international obligation with similar normative content that pertains to the same maritime area.

An example of the simultaneous exercise of authority or control by multiple states of a more temporary nature is a trust territory where multiple states are appointed as Administering Authority.³⁹⁵ In the past, these arrangements had the purpose of promoting the advancement of the inhabitants of the trust territory and their progressive development towards independence or self-government³⁹⁶ When a trusteeship was appointed to a state, it thereby became bound to a range of duties of Trusteeship by virtue of its status of Administering Authority.

While trusteeships over territory have generally been granted to one state only, there is one known example of joint trusteeship: the administration of Nauru. Australia, New Zealand and the United Kingdom were designated as the joint Administering Authority that would be responsible for the administration of the territory of Nauru. Since the Administering Authority for Nauru did not have an international legal personality distinct from that of Australia, New Zealand and the United Kingdom,³⁹⁷ the Administering Authority was not the bearer of the obligations of Trusteeship pertaining to the territory of Nauru. Rather, the duties of Trusteeship that come with the status of Administering Authority were incumbent upon Australia, New Zealand and the UK.³⁹⁸ The three states were all bound to obligations with similar normative

³⁹³ See e.g. Anderson and van Logchem (n 394). Though the title of this article refers to ‘rights and obligations’ in areas of overlapping maritime claims, the authors only seem to discuss the rights and not the obligations.

³⁹⁴ Article 61 United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 (n 180). For the purpose of jointly protecting and preserving an area’s living resources and environment, sometimes joint maritime development regimes are established. See Yucel Acer, ‘A Proposal for a Joint Maritime Development Regime in the Aegean Sea’ (2006) 37 *Journal of Maritime Law & Commerce* 49, 54.

³⁹⁵ Articles 75 and 81 Charter of the United Nations (1945) 1 UNTS XVI (hereafter: UN Charter) stipulate that the appointment of states as Administering Authority can take place by agreement with the United Nations.

³⁹⁶ Article 74 UN Charter.

³⁹⁷ See Chapter 1, §1.1.3.iii.

³⁹⁸ Saul (n 50) 4. ‘As this was a situation in which three states were appointed as the Administering Authority, but only one state, Australia, actually undertook the administration, it might be contemplated that the obligations, especially those created through the Trusteeship Agreement, would differentiate between the three states. This was not the case, however. The relevant rules, such as Article 5 of the Trusteeship Agreement, do not differentiate between the three states.’ Indeed, throughout the proceedings in the *Certain Phosphate Lands on the Territory of Nauru* case before the ICJ, it appears that both Nauru and Australia agreed that the obligations of Trusteeship were incumbent upon the three states that were part of the Administering Authority. Australia argued that because the UN ‘had charged the *joint* authority with *legal* responsibility for the administration of Nauru’, the three states ‘had such responsibility [for the administration of Nauru] jointly, whether they chose to exercise it directly, or for convenience, to delegate

content, and these obligations all applied to the same concrete case: the administration of the territory of Nauru.

The obligations binding on Australia, New Zealand and the United Kingdom included the obligation to ‘administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System’,³⁹⁹ the obligation to guarantee the freedom of speech to the inhabitants of Nauru⁴⁰⁰ and – as was argued by Nauru before the ICJ⁴⁰¹ – the obligation to rehabilitate Nauru’s worked out phosphate lands (or to provide the financial means for such rehabilitation).⁴⁰² These obligations were incumbent upon the three states because they were all were appointed as Administering Authority. In the case that only one state would have been designated as the Administering Authority only that one state would have been bound to these obligations with regard to the territory of Nauru.

Another example of an exercise of authority or control by multiple states of a more temporary nature is when two or more states occupy the territory of another state. In such a situation all of the states involved are bound to the obligations that arise from the law of belligerent occupation, which ‘regulates the relationship between the occupying power on the one hand and the - wholly or partially - occupied states and its inhabitants.’⁴⁰³ For example, the territory of Iraq was occupied by both the US and the UK from mid-April 2003 to 29 June 2004. The Security Council recognized that the specific authorities, responsibilities and obligations ‘lay with both the United States and the United Kingdom as “occupying powers under unified command”’.⁴⁰⁴

In the context of their joint occupation of Iraq, the US and UK created the Coalition Provisional Authority (CPA) as ‘an administrative mechanism through which [they] could fulfil their responsibilities as occupying powers in control of Iraq.’⁴⁰⁵ The CPA was a joint organ of the UK and the US without legal personality,⁴⁰⁶ which means that these obligations were not binding upon the CPA itself.

its performance to one amongst them.’ See *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Counter-Memorial of the Government of Australia, 1993 Volume III* 204, para 526.

³⁹⁹ Article 3 Trusteeship Agreement for the Territory of Nauru (1947) 10 UNTS 3 (n 49).

⁴⁰⁰ Article 5(d) Trusteeship Agreement for the Territory of Nauru (1947) 10 UNTS 3 (n 49).

⁴⁰¹ In its memorial, Nauru argued that such an obligation could be derived from the existence of the trusteeship over the territory of Nauru, see *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Memorial of the Republic of Nauru, 1990 Volume I* [290].

⁴⁰² *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Memorial of the Republic of Nauru, 1990 Volume I* (n 403).

⁴⁰³ Dieter Fleck, *The Handbook of International Humanitarian Law* (OUP 2009) 271.

⁴⁰⁴ Talmon (n 9) 17.

⁴⁰⁵ Talmon (n 9) 3. Talmon notes that the existence of the CPA did not divest the two countries of their legal obligations as occupying powers in Iraq; they were thus still bound to international obligations in their capacity as occupying powers.

⁴⁰⁶ See Chapter 1, §1.1.3.iii.

It follows that in their capacity as occupying power, the US and the UK both owed a range of similar obligations to Iraq and its inhabitants,⁴⁰⁷ such as the obligation to 'take all the measures in [the occupying power's] power to restore and ensure, as far as possible, public order and safety' in Iraq,⁴⁰⁸ the obligation 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources' in Iraq,⁴⁰⁹ the obligation to maintain Iraqi correctional facilities at the level of internationally acceptable standards, and the obligation to use the funds of the Development Fund for Iraq in a transparent manner and only for the benefit of the Iraqi people.⁴¹⁰ Again, these obligations were shared only because two states occupied the territory of Iraq; in the case that only one state had occupied Iraq only that one state would have been bound to these obligations with regard to the territory of Iraq.

The exercise of authority or control by multiple states over the same territory and/or individuals need not necessarily be of a formal nature such as trusteeship or belligerent occupation. There are various other ways in which one or more states can be effectively linked to a situation by exercising effective control outside of its own territory. As the exercise of effective control over territory or individuals can give rise to a variety of obligations owed with regard to that territory or individuals (particularly in the area of international human rights law), this can give rise to a concrete factual situation in which multiple duty-bearers are bound to a similar obligation that pertain to the same individual(s).

For example, it has been argued that both Lithuania and the US exercised concurrent jurisdiction over the CIA black site operated on the territory of Lithuania.⁴¹¹ This denotes that not only Lithuania was bound to human rights obligations with regard to the individuals kept in the black site, but that the US was also bound to human rights obligations vis-à-vis these individuals due to the fact that it exercised control extraterritorially. An example of a similar international obligation potentially owed by both the US and Lithuania to the individuals kept in the black site is the obligation

⁴⁰⁷ However, it should be noted that the US and the UK are not always parties to the same treaties. This might in some instances result in the US and the UK *not* being bound to a similar international obligation, for example if a specific obligation arises only from a treaty to which the UK (but not the US) is a party and that obligation does not arise from customary international law.

⁴⁰⁸ Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 EJIL 661, 664.

⁴⁰⁹ Milano (n 58) 8–9; Talmon (n 9) 206; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) Judgment, 2005 ICJ Reports 168* [248].

⁴¹⁰ Talmon (n 9) 206.

⁴¹¹ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011) 153–154. See also Duffy, who asserts that the territorial states where black sites are located owe human rights obligations to the individuals kept in the black sites. Those obligations 'apply alongside the obligations of the states exercising power or control extraterritorially.' Helen Duffy, 'Detention and Interrogation Abroad: The "Extraordinary Rendition" Programme' in André Nollkaemper and Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 104.

to take measures to prevent unlawful detention, or the obligation to refrain from acts of torture and inhuman or degrading treatment.⁴¹²

Another concrete example of the exercise of authority or control by multiple states is the Australian practice of offshore processing and detention of asylum seekers and refugees in Papua New Guinea (PNG) and Nauru, which is based on bilateral transfer arrangements. Though Australia has maintained that it has no obligations towards these refugees and that their treatment is wholly a matter for the states of Nauru and PNG respectively,⁴¹³ this position is increasingly being called into question. While it is true that PNG and Nauru exercise *de jure* control over the refugees and asylum seekers that are held in detention in processing centres on their respective territories, it is argued that Australia continues to exercise significant *de facto* control over the asylum seekers and refugees that are detained in both PNG and Nauru.⁴¹⁴ This entails that more than one state is bound to (similar) international obligations with regard to these individuals.⁴¹⁵

Indeed, the UN High Commissioner for Refugees (UNHCR) has maintained that Australia has retained a high degree of control 'in almost all aspects of the bilateral transfer arrangements',⁴¹⁶ and that physical transfer of asylum-seekers from Australia to Nauru does not extinguish the legal responsibility of Australia. Rather, 'both Australia and Nauru have shared and joint responsibility⁴¹⁷ to ensure that the treatment of all transferred asylum seekers is fully compatible with their respective obligations under the 1951 [Refugee] Convention and other applicable international instruments',⁴¹⁸ such as the obligation to refrain from arbitrary and mandatory detention⁴¹⁹ and the obligation of non-refoulement.⁴²⁰ The UNHCR has said the same with regard to the transfer of persons from Australia to PNG.⁴²¹

⁴¹² Duffy (n 413) 105.

⁴¹³ Madeline Gleeson, 'Offshore Processing and Australia's Responsibility for Asylum Seekers and Refugees in Nauru and Papua New Guinea' (Andrew & Renata Kaldor Centre for International Refugee Law, UNSW 2015) 8.

⁴¹⁴ Frenzen (n 8) 17.

⁴¹⁵ Gleeson (n 415) 4.

⁴¹⁶ Gleeson (n 415) 23, para 128.

⁴¹⁷ It seems that the term 'responsibility' here is used in an *ex ante* sense: the responsibility to do something; to fulfil the obligations incumbent upon them,

⁴¹⁸ 'Monitoring Visit to the Republic of Nauru' (UNCHR 2013) 6 <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>>.

⁴¹⁹ 'Monitoring Visit to the Republic of Nauru' (n 420) 13 para 63.

⁴²⁰ 'Monitoring Visit to the Republic of Nauru' (n 420) 23 para 127. Frenzen also argues that when two states have concurrent jurisdiction over a person, those states will share the obligation of non-refoulement, Frenzen (n 8) 7.

⁴²¹ 'Monitoring Visit to Manus Islands, Papua New Guinea' (UNCHR 2013) 6 <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>>.

The Committee Against Torture has similarly established that the asylum seekers transferred to Nauru and PNG are within Australia's effective control because they have been transferred by Australia to offshore detention centres that are 'run with [Australia's] financial aid and with the involvement of private contractors of [Australia's] choice'.⁴²² Consequently, the transfers to offshore processing centres does not release Australia from its obligations under the Convention against Torture (CAT), such as the obligation to take measures to prevent acts of torture⁴²³ or other acts of cruel, inhuman or degrading treatment or punishment.⁴²⁴ When it comes to Nauru, which is a state party to the CAT like Australia, this means that Nauru and Australia are bound to similar obligations arising from the CAT with regard to the same factual situation. With regard to the individuals detained in processing centres on the territory of PNG, Australia appears to be the sole duty-bearer of the obligations under the CAT, though it might be argued that PNG is bound to similar obligations under other human rights treaties to which it is a party or under customary international law.

3.3 Conclusions

This chapter has discussed that the concept of shared obligations does not cover all international obligations that are binding on multiple states and/or IOs because they arise from a multilateral rule or source. The main characteristic that distinguishes obligations that are shared from obligations that are not shared is the existence of a connection between the bearers of a shared obligation 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. This connection between duty-bearers has been clarified by discussing the three elements that are present whenever the present study speaks of a shared obligation:

1. There are two or more duty-bearers, which are
2. Bound to a similar international obligation that
3. Pertains to the same concrete case, which is the case when
 - i. Multiple states and/or IOs have agreed to an obligation to work towards or achieve a common goal, or
 - ii. Multiple states and/or IOs are factually linked to a common situation

When multiple states are bound to the same multilateral treaty, it is often so that all of those states are bound to an obligation with similar normative content. The same is true when multiple states are bound to a rule of customary international law. Hence,

⁴²² CAT/C/AUS/co/4-5, 23 December 2014, para. 17

⁴²³ Article 2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85. (Hereafter: CAT).

⁴²⁴ Article 16 CAT.

this generally entails that there are 1) multiple duty-bearers, which are 2) bound to an international obligation with similar normative content. However, the mere fact that multiple states and/or IOs are bound to a similar international obligation that arises from multilateral rule or source does not necessarily mean that the obligations that arise from that treaty 3) pertain to the same concrete case. This is the case when i) multiple states and/or IOs agree to an obligation to work towards or achieve a common goal (e.g. the obligation of Iceland, the EU and its member states to achieve a 20 per cent reduction of their aggregate greenhouse gas emissions), or when ii) multiple states and/or IOs are factually linked to a common situation, which includes situations in which all of them exercise some form of authority or control over the same territory and/or individuals (e.g. the obligation of the US and the UK, during their joint occupation of Iraq, to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in Iraq).

The fact that the similar international obligations of multiple duty-bearers pertain to the same concrete case indicates that there is an overlap between the similar obligations of multiple states and/or IOs, which is what connects the bearers of a shared obligation. This connection between duty-bearers creates the basis for the sharing of international obligations and gives rise to questions on (non-)performance: is each state or IO bound to do its 'share' only or are all of them bound to achieve a common performance? When is a shared obligation fulfilled by which duty-bearer(s), and when is a shared obligation breached by which duty-bearer(s)? Hence, establishing that multiple states and/or IOs are bound to a shared obligation raises questions on (non-)performance; it does not, as such, contribute to a better understanding of the (non-)performance of such obligations.

The next chapter aims to answer these questions by introducing and examining the distinction between two types of shared obligations: indivisible shared obligations and divisible shared obligations. This distinction is the key to a better understanding of the (non-)performance of shared obligations, since it helps to ascertain who is bound to what and hence *when* a particular shared obligation is fulfilled or breached *by which duty-bearer(s)*.