



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.

4

DIVISIBLE AND INDIVISIBLE SHARED OBLIGATIONS IN INTERNATIONAL LAW

The previous chapter has shown that the concept of shared obligations covers an array of international obligations in a wide variety of situations. In this thesis the concept of shared obligations is used as an overarching concept within which a distinction is made between two types of shared obligations: divisible shared obligations and indivisible shared obligations. This chapter sets out the distinction between divisible and indivisible shared obligations. On the basis of this chapter it will be possible to categorize an international obligation that falls within the present study's understanding of shared obligations as either 'divisible' or 'indivisible'.

The distinction between divisible and indivisible shared obligations is relevant for two reasons in particular. First of all, the distinction is key to a better understanding of the (non-)performance of shared obligations. It can be relied upon to ascertain when a particular shared obligation is fulfilled by which duty-bearer(s), and when a shared obligation is breached by which duty-bearer(s).

Second, as is further explored in Part II of this study, the divisible or indivisible nature of a shared obligation can have implications for the nature of international responsibility that arises in case of a breach. To be more precise, *indivisible* shared obligations have automatic implications for shared responsibility, whereas this is not the case for *divisible* shared obligations. The distinction between divisible and indivisible shared obligations is one of the common threads running through chapter 5, which addresses the implications of shared obligations for the *determination* of shared responsibility, and chapter 6, which discusses the implications of shared obligations for the *content* of shared responsibility.

Section 4.1 introduces the distinction between divisible and indivisible shared obligations, and shows that the distinction between divisible and indivisible shared obligations is based on the structure of performance of a shared obligation. Moreover, it shows that the present study's understanding of indivisible shared obligations draws from the concepts of multilateral obligations and *erga omnes (partes)* obligations that have been discussed in chapter 2.

An indivisible shared obligation gives rise to one multilateral legal relation where the obligation is held by multiple bearers, and it is the mirror image of the existing concepts 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. The structure of performance of an indivisible shared obligation is, quite simply, indivisible, which means that the obligation can only be fulfilled by all duty-bearers simultaneously when the common performance is achieved or breached by all duty-bearers simultaneously when the common performance is not achieved.

A divisible shared obligation gives rise to multiple bilateral legal relations, and in each of these legal relations the obligation is held by one bearer. When multiple states and/or IOs are bound to a divisible shared obligation, each duty-bearer is bound only to its own 'share'. The structure of performance of a divisible shared obligation is divisible, which means that it is possible for a state or IO to individually fulfil or breach the obligation by doing (or failing to do) its share.

After introducing the distinction between divisible and indivisible shared obligations, section 4.2 presents several indicators for qualifying a shared obligation as divisible or indivisible. Determining whether a shared obligation is divisible or indivisible is essentially a question of interpretation: what does the shared obligation ask of its bearers? Does it require its bearers to achieve a common performance or does it require each of them to do their share only? The section shows that the qualification of a shared obligation as either divisible or indivisible can be facilitated by two categorizations of international obligations that are commonly employed in international law: the distinction between positive and negative obligations, and the distinction between obligations of result and conduct.

Finally, section 4.3 briefly discusses some considerations that may have a role to play in the choice between divisible and indivisible shared obligations, when international obligations in pursuance of common goals are being formulated during treaty negotiations.

4.1 Introducing two types of shared obligations

This section introduces the distinction between divisible and indivisible shared obligations. It shows that the distinction between divisible and indivisible shared obligations is based on the structure of performance of a shared obligation.

When multiple states and/or IOs are bound to an indivisible shared obligation (§4.1.1), all duty-bearers are bound to achieve a common performance. The performance of an indivisible shared obligation by its bearers is indivisible: as soon

as it is fulfilled it is fulfilled by all duty-bearers simultaneously, and as soon as it is breached it is breached by all duty-bearers simultaneously. It is not possible for a state or IO to be the only one to fulfil or breach an indivisible shared obligation, since the performance is not divisible.

The category of indivisible shared obligations is the mirror image of the categories of multilateral and *erga omnes (partes)* obligations discussed in chapter 2. An indivisible shared obligation gives rise to one multilateral legal relation where the obligation is held by a plurality of duty-bearers.

This is different when multiple states and/or IOs are bound to a divisible shared obligation (§4.2.2), in which case each duty-bearer is bound only to its own share. The performance of a divisible shared obligation by its bearers is divisible. This means that it is possible for one duty-bearer to individually fulfil or breach the obligation; it can be released from the obligation by simply doing its share. By doing its share it does not release other duty-bearers from the obligation (who remain bound to do their share). A divisible shared obligation gives rise to multiple bilateral legal relations, and in each of these legal relations the (similar) obligation is held by one duty-bearer.

4.1.1 Indivisible shared obligations

When multiple states and/or IOs are bound to an indivisible shared obligation, they are all bound to achieve a common performance. For example, one may think of a situation in which multiple states oblige themselves to reduce their combined tuna catches with 20 per cent before the year 2020, without any indication as to which state will fulfil what part of this commitment. All of these states are bound to achieve a common performance: a 20 per cent reduction of their combined tuna catches before the year 2020.

The performance of an indivisible shared obligation by its bearers is indivisible. As soon as the common performance required by the obligation is achieved, it is fulfilled by all duty-bearers and, accordingly, all bearers are released from the obligation. Applied to our example, the obligation will be fulfilled by all duty-bearers simultaneously as soon as the 20 per cent reduction of combined tuna catches is achieved before the year 2020. However, if the common performance is not achieved, the obligation is breached by all duty-bearers. Applied to our example, the obligation will be breached by all duty-bearers if the combined tuna catches are *not* reduced by 20 per cent by 2020. It is not possible for an indivisible shared obligation to be fulfilled by one of its bearers while another bearer breaches it; it is either fulfilled by all duty-bearers simultaneously or breached by all duty-bearers simultaneously.

Because fulfilment or breach of the obligation *by the duty-bearers* is indivisible, it does not matter what individual duty-bearers have done in their efforts to comply with this obligation; the only thing that matters is whether the common performance has been achieved. This entails that an individual duty-bearer will generally be much more dependent upon its fellow duty-bearers for the fulfilment of indivisible shared obligations than is the case with divisible shared obligations. Admittedly, this problem does not arise with each and every indivisible shared obligation. For example, if multiple states are bound to an obligation to pay a certain amount of development assistance to another state, it is not practically impossible for only one duty-bearer to achieve this common performance by paying the required amount; thereby fulfilling the obligation. However, one can also imagine examples of indivisible shared obligations where the common performance is much more difficult or even impossible to achieve without the participation of other duty-bearers, such as the obligation of multiple states to reduce their combined tuna catches with 20 per cent before the year 2020 mentioned in the paragraph above, or the obligation of two states to conclude a bilateral treaty on a particular topic.⁴²⁵

As is further discussed in chapter 5,⁴²⁶ the indivisible character of a shared obligation has automatic implications for the determination of shared responsibility. Considering that any breach of an indivisible shared obligation automatically constitutes a breach by all duty-bearers, this automatically results in the shared responsibility of all duty-bearers for one internationally wrongful act.

The concept of indivisible shared obligations in the present study resembles the category of 'solidary' or 'joint and several' obligations⁴²⁷ that is known in many domestic legal systems.⁴²⁸ In domestic (private) law, the main characteristic of a solidary obligation is that each of the bearers is bound to perform the whole obligation; the performance of the obligation cannot be divided.⁴²⁹ For example, when A lends 10.000 euros to B and C together, and the contract does not specify which duty-bearer must pay back what part of the loan, some domestic legal systems

⁴²⁵ For a discussion of international obligations to *conclude* an agreement (or: *pacta de contrahendo*) see §4.2.2.iii below.

⁴²⁶ See Chapter 5, §5.2.

⁴²⁷ The Commission of European Contract Law (n 23); Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition* (Selier European Law Publishers 2009). Also referred to as 'joint and several obligations' in UNIDROIT Principles of International Commercial Contracts, with commentaries 2010.

⁴²⁸ UNIDROIT Principles of International Commercial Contracts, with commentaries (n 428). The commentaries to these principles claim that the category is known to all legal systems, albeit with differences in detail and terminology.

⁴²⁹ Article 11.1.1 Principles of International Commercial Contracts (PICC) provides that each duty-bearer is bound for the whole obligation, article 10:102 Principles of European Contract Law (PECL) provides that each duty-bearer is bound to render one and the same performance, and article 4:102 Draft Common Frame of Reference (DCFR) provides that each duty-bearer is bound to perform the obligation in full.

assume that both duty-bearers are bound to a solidary obligation.⁴³⁰ In such a case, both B and C are bound to pay back the 10.000 euros in full. This means that as soon as the full 10.000 euros is paid to A, the obligation will be fulfilled by both duty-bearers simultaneously;⁴³¹ but as long as the full amount is not paid *none* of the duty-bearers will fulfil the obligation. Accordingly, A cannot be released from the obligation if it pays only a share of the full amount; the obligation is either fulfilled by all duty-bearers simultaneously if the 10.000 euros is paid or by none of them.

An indivisible shared obligation gives rise to *one* multilateral legal relation, and in this legal relation the obligation is held by a plurality of duty-bearers:

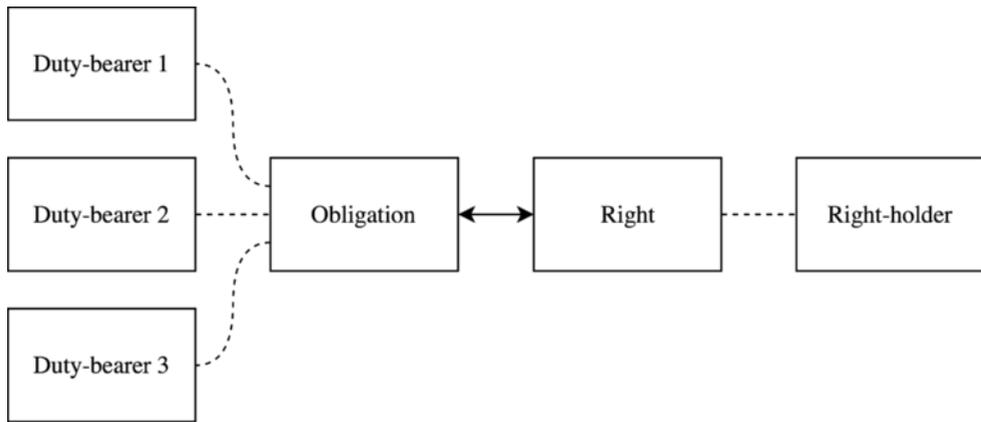


Figure 4. 1: An indivisible shared obligation gives rise to one multilateral legal relation.

This legal relation is, quite literally, the mirror image of the multilateral legal relation that arises from a multilateral or *erga omnes (partes)* obligation.⁴³² It should be

⁴³⁰ The PECL, DCFR and PICC all provide for a presumption of solidarity whenever multiple duty-bearers are bound to an obligation, though they acknowledge that there are domestic legal systems that do not provide for such a presumption. See article 10:102 PECL; article 4:103 DCFR and article 11.1.2 PICC. The PECL provides that this presumption of solidarity can be displaced if the parties have expressly or implicitly indicated their wish to be bound by separate obligations, The Commission of European Contract Law (n 23) 64. According to the PICC, a presumption of solidarity in the case of a plurality of duty-bearers is justified by international commercial practice, see UNIDROIT Principles of International Commercial Contracts, with commentaries (n 428). The PECL and DCFR do not justify their presumption based on practice, but rather point out that solidarity as a default rule is clearly better from the right-holder's perspective, von Bar and Clive (n 428) 977; The Commission of European Contract Law (n 23) 63. In contrast, there are domestic legal systems that have chosen for a presumption of separateness, e.g. Dutch law provides for a presumption of separateness of obligations (with some exceptions, e.g. in the case of obligations that are indivisible by nature), see article 6:6 Civil Code of the Netherlands: '[i]s een prestatie door twee of meer schuldenaren verschuldigd, dan zijn zij ieder voor een gelijk deel gebonden'.

⁴³¹ When the whole obligation has been performed, this automatically discharges all of the other duty-bearers in their relation with the right-holder. See article 10:107 PECL; article 4:108 DCFR and article 11.1.5 PICC.

⁴³² Compare figure 2.5 in Chapter 2, §2.4.4.

recalled that multilateral and *erga omnes (partes)* obligations are defined as international obligations that are owed to multiple states and/or IOs or even to the international community as a whole. Such an obligation produces the opposite image: a multilateral legal relation where the corresponding *right* is held by multiple *right-holders*.⁴³³

Interestingly, the structure of performance of multilateral or *erga omnes (partes)* obligations has also been described as 'legally indivisible' in legal literature,⁴³⁴ because such an obligation cannot be performed in relation to one right-holder only. If a multilateral obligation is fulfilled it is fulfilled towards all right-holders simultaneously; and if it is breached it is breached towards all right-holders simultaneously.⁴³⁵ However, this indivisible structure of performance differs from that of an indivisible shared obligation, because it approaches the performance of obligations from a different perspective. When it comes to multilateral and *erga omnes (partes)* obligations, it is the performance *towards the right-holders* that is indivisible, considering that it is only possible to respect or infringe upon the right of all right-holders simultaneously. Hence, it is submitted that it is more appropriate to qualify the corresponding *right* as indivisible.

The indivisibility of the right corresponding to a multilateral obligation can be illustrated by the following example. State A is bound to the obligation not to conduct nuclear tests as embodied in the 1963 Nuclear Test Ban Treaty, and it owes this obligation to all parties to the treaty. As long as state A abstains from nuclear testing, it will respect the corresponding right of all right-holders. There is simply no way in which state A can respect the right of only one or some of the right-holders while simultaneously infringing upon the right of other right-holders. The same can be said the other way around. As soon as state A *does* conduct a nuclear test it will infringe upon the corresponding right of all right-holders simultaneously, since all of them hold the right that state A abstains from nuclear testing. It cannot infringe upon the right of only some of the right-holders; a breach of the obligation will necessarily infringe upon the corresponding right of all of them.

The present study's understanding of indivisible shared obligations draws from these existing categories of obligations, but approaches the performance of obligations (and the legal relations involved) from the perspective of the duty-bearers. Indeed,

⁴³³ Multilateral and *erga omnes (partes)* obligations are discussed in Chapter 2, §2.4.2.ii.

⁴³⁴ Azaria (n 200) 104; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2015) 349; Gazzini (n 177) 725; Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 130; Olivia Lopes Pegna, 'Counter-Claims and Obligations Erga Omnes before the International Court of Justice' (1998) 9 EJIL 724, 724, 732; Claudia Annacker, 'The Legal Régime of Erga Omnes Obligations in International Law' (1994) 46 *Austrian Journal of Public and International Law* 131, 136; Gaetano Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) A/CN.4/444 and Add. 1-3 para 92; Sachariew (n 106) 281.

⁴³⁵ Gazzini (n 177) 725.

the performance of an indivisible shared obligation *by its bearers* is indivisible: if it is fulfilled it is fulfilled by all of its bearers simultaneously, and if it is breached it is breached by all of its bearers simultaneously.

4.1.2 Divisible shared obligations

When multiple states and/or IOs are bound to a divisible shared obligation, each is bound only to its own 'share'. For example, one may think of a scenario where states X, Y and Z are aware of a risk that genocide will occur on the territory of state A, and they are all under an obligation to take measures to prevent this impending genocide. In such a scenario, states X, Y and Z are bound to a similar international obligation that pertains to the same concrete case, which means that the obligation to prevent genocide in this scenario falls within the present study's understanding of shared obligations. However, each duty-bearer is bound to do its own share only. States X, Y and Z are not bound to achieve a common performance but are each bound to do their share by taking measures that are within their power to prevent genocide.

Other examples of multiple states that are bound to a divisible shared obligation include the obligation of multiple states to refrain from providing aid or assistance to state X, whose army is committing war crimes and crimes against humanity against its own population; and the obligation of multiple states that sponsor the same entity to undertake activities in the Area to take all measures 'that are necessary to prevent, reduce and control pollution of the marine environment from any source'.⁴³⁶

The performance of a divisible shared obligation by its bearers is divisible. It is possible for one duty-bearer to separately breach a divisible shared obligation by failing to do its share, while another duty-bearer at the same time fulfils that divisible shared obligation. A bearer of a divisible shared obligation is released from the obligation as soon as it has done its share; regardless of whether or not the other duty-bearers have done their share. This can be illustrated by the example of the obligation of states X, Y and Z to take measures to prevent an impending genocide on the territory of state A. It would be perfectly possible for state X to take the measures that are required of it by the obligation, thereby doing its share and fulfilling the obligation to prevent genocide, while states Y and Z fail to take the necessary measures and consequently breach the obligation to prevent genocide. Essentially, the fulfilment or breach of the shared obligation by states X, Y and Z is divisible.

This does not mean that it is not possible for the bearers of a divisible shared obligation to all fulfil or breach the obligation in question simultaneously. If neither X,

⁴³⁶ See article 194(1) LOSC; Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (n 8) 395. See also Chapter 5, §5.4.8.

Y nor Z take any measures to prevent the impending genocide on the territory of state A, all duty-bearers will be deemed to have breached the obligation because they have all failed to do their share. If all of them do take all measures within their power to prevent the impending genocide all duty-bearers have done their share and will be deemed to have fulfilled the obligation. Nevertheless, the fact that it is *possible* for each bearer to independently fulfil or breach the obligation is what makes a shared obligation divisible rather than indivisible.

As is further discussed in chapter 5,⁴³⁷ the divisible character of shared obligations has no automatic implications for the determination of shared responsibility. Precisely because divisible shared obligations can be breached by each duty-bearer independently, a breach of a divisible shared obligation does not always give rise to the shared responsibility of all duty-bearers.

The concept of divisible shared obligations resembles the category of 'divided' or 'separate' obligations⁴³⁸ that is known in many domestic (private) legal systems.⁴³⁹ An example of such a divided obligation is when A lends 10.000 euros to B and C, but B and C are 'merely' bound to repay their own share only, for example because the contract explicitly provides that each of them is bound to pay back half of the total amount. In such a situation, there are multiple duty-bearers but each of them is bound only for its share of 5000 euros; the obligations are divided amongst duty-bearers.

Because the bearers of divided obligations are each bound for their share only, fulfilment (or breach) by one duty-bearer does not automatically entail fulfilment (or breach) by the other duty-bearer. If B pays its share of 5000 euros to A, B will be deemed to have fulfilled its obligation and is released from the obligation; but this does not relieve C of its similar obligation to pay 5000 euros. Likewise, if B breaches its obligation by not paying 5000 euros this will not automatically entail that C has breached its obligation. The duty-bearers of 'divided obligations' can fulfil or breach their respective obligations individually.

The divisible structure of performance of a divisible shared obligation can be visualized by looking at the legal relations involved. The bearers of divisible shared obligations are each bound to a similar international obligation that pertains to the same concrete case, which meant that divisible shared obligations are covered by the present study's understanding of shared obligations. Unlike an indivisible shared

⁴³⁷ See Chapter 5, §5.3.

⁴³⁸ von Bar and Clive (n 428). The category of divided obligations is referred to as 'separate obligations' in The Commission of European Contract Law (n 23); UNIDROIT Principles of International Commercial Contracts, with commentaries (n 428).

⁴³⁹ The Commission of European Contract Law (n 23) 59.

obligation, a divisible shared obligation does not give rise to *one* multilateral legal relation but rather to multiple bilateral legal relations that are separate from one another. Each duty-bearer's similar international obligation is part of a distinct legal relation. Essentially, a divisible shared obligation gives rise to *multiple* legal relations and *multiple* (similar) obligations, and in each of these legal relations the obligation is held by only one duty-bearer:

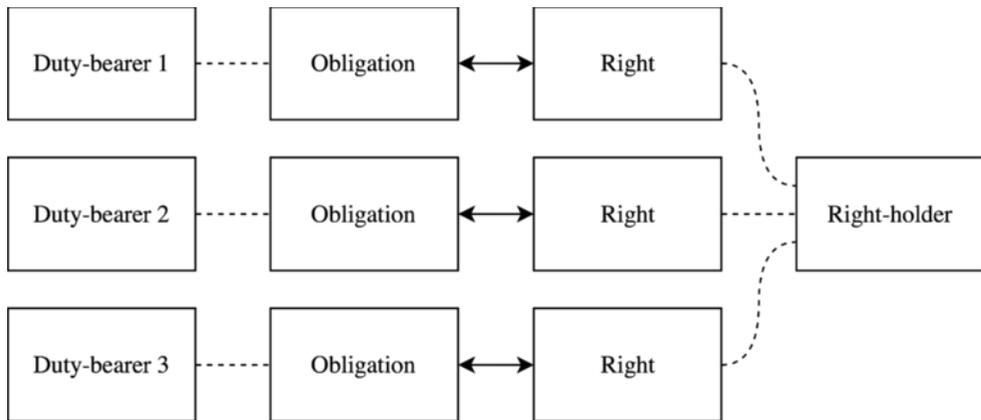


Figure 4.2: A divisible shared obligation gives rise to multiple bilateral legal relations.

It should be reiterated that the present analysis approaches legal relations and the performance of obligations from the perspective of the duty-bearers. The fact that the legal relations in the figure above are separate from one another illustrates that each bearer of a divisible shared obligation is bound only to its own share and can, as a consequence, individually fulfil or breach the obligation.

Admittedly, the figure above simplifies matters somewhat when it comes to the potential *right-holders* of the corresponding right. It is possible that each duty-bearer owes a divisible shared obligation to one right-holder only (as shown in the figure above), in which case 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 and the corresponding right is held by one right-holder. However, it is also possible that each duty-bearer owes a divisible shared obligation to a plurality of right-holders, in which case that divisible shared obligation gives rise to multiple *multilateral* legal relations because the corresponding right is held by multiple right-holders. In each of these legal relations, the obligation would be held by one duty-bearer and the corresponding right would be held by multiple right-holders. This is, however, not the focus of the present analysis, considering that the conceptualization of shared obligations does not approach legal relations from the perspective of the right-holders but from the perspective of the duty-bearers. For the sake of simplicity it is

considered that a divisible shared obligation gives rise to multiple bilateral legal relations, because the obligation in each of those legal relations is held by only one duty-bearer.

In essence, the distinction between divisible and indivisible shared obligations is based on the divisible or indivisible structure of performance of a shared obligation from the perspective of its bearers. When multiple states and/or IOs are bound to an indivisible shared obligation, all of them are bound to *one* obligation that obliges its bearers to achieve a common performance. It follows that the obligation can only be fulfilled by all duty-bearers simultaneously (if the common performance is achieved) or breached by all duty-bearers simultaneously (if the common performance is not achieved). Divisible shared obligations involve multiple states and/or IOs that are bound to a similar international obligation that pertains to the same concrete case; but each duty-bearer is bound to its share only. As a consequence, an individual duty-bearer can fulfil or breach the obligation by doing its share or failing to do its share, regardless of whether the other duty-bearers have done theirs.

4.2 Indicators for qualifying a shared obligation as divisible or indivisible

Qualifying a shared obligation as divisible or indivisible basically comes down to a question of interpretation of the content of that obligation: what does the obligation ask of its bearers? Are multiple states and/or IOs bound to achieve a common performance, or is each of them bound only to its own share?

This section shows that the qualification of a shared obligation as either divisible or indivisible can be facilitated by two categorizations of international obligations that are commonly employed in international law: the distinction between positive and negative obligations (§4.2.1) and the distinction between obligations of result and conduct (§4.2.2).

When applied to any international obligation, the distinction between positive and negative obligations and the distinction between obligations of conduct and result contributes to a better understanding of the performance of that obligation: what does the obligation ask of its bearer(s), and when is it fulfilled or breached? This section shows how these categories can be relied upon specifically as indicators for determining the divisible or indivisible character of a shared obligation (§4.2.3). Indeed, when applied to a particular shared obligation these categories help clarify whether that shared obligation can be breached or fulfilled by each duty-bearer independently; or whether it can only be breached or fulfilled by all duty-bearers simultaneously.

4.2.1 Positive obligations and negative obligations

The distinction between positive and negative obligations differentiates between obligations that require their bearers 'to do' something and obligations that require their bearers 'not to do' something.⁴⁴⁰ The distinction between positive and negative obligations is often discussed in the context of international human rights law,⁴⁴¹ but it can be applied to international obligations regardless of the subject-area.⁴⁴²

A positive international obligation is an obligation 'to do' something, and it requires that its bearer(s) engage in some form of positive action. Depending on the obligation involved, the positive action required by the obligation can be to take measures in pursuance of a certain result (an obligation of conduct) or to achieve a certain result (an obligation of result). The distinction between obligations of conduct and obligations of result is further discussed in §4.2.2 below.

If the bearer(s) of a positive obligation undertake the positive action that is required of them, the obligation will be fulfilled. If the bearer(s) fail to take that action (for example by taking no action at all or by engaging in a different type of action) the obligation will be breached. For example, the obligation of state A to prosecute or extradite a person suspected of acts of torture that is present on its territory⁴⁴³ requires positive action by state A in order to be fulfilled: the actual prosecution or extradition of a person. The same can be said for the obligation of each state to take measures to ensure that conduct that takes place within a state's territory does not cause significant damage to other states.⁴⁴⁴

A negative international obligation is an obligation 'not to do' something, and it requires that its duty-bearer(s) abstain from a certain course of conduct. If the duty-bearer(s) abstain from that conduct, the obligation will be fulfilled. But if the duty-bearer(s) do not abstain from that conduct (or in other words: engage in the prohibited conduct) the obligation will be breached. For example, the obligation of state B to not conduct atmospheric nuclear tests requires that state B abstains from

⁴⁴⁰ Economides (n 329) 373; Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations', *The Oxford Handbook of International Human Rights Law* (OUP 2013) 562. Without using the terms positive and negative obligations, Latty distinguishes between obligations 'to do' and obligations 'not to do', see Franck Latty, 'Actions and Omissions' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 356–358.

⁴⁴¹ Shelton and Gould (n 441) 564.

⁴⁴² Economides (n 329) 373.

⁴⁴³ Article 7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85 (n 425).

⁴⁴⁴ This is an obligation under customary international law, see *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v Albania)*, Judgment, 1949 ICJ reports 4 22; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ Reports 226 242.

conducting atmospheric nuclear tests, and the obligation of state C not to use force against another states requires that state C abstains from the use of force.

4.2.2 Obligations of result and obligations of conduct

The distinction between obligations of result and obligations of conduct originates from domestic (civil) law.⁴⁴⁵ In accordance with the domestic civil law understanding of the distinction, obligations of result require the achievement of a specific result. Obligations of conduct (also referred to as obligations of means) are best efforts obligations that 'merely' require that appropriate measures are taken *in pursuance of* a certain result; without requiring that the result is in fact achieved. The present study subscribes to this civil law understanding of the distinction.

However, there is a different way in which the distinction can be understood. Influenced by the reports of Special Rapporteur Ago, the ILC has long used the terms 'obligations of conduct' and 'obligations of result' in quite a different way. This subsection starts by discussing the ILC's initial understanding of obligations of conduct and result, which was included in the 1996 Draft ASR but removed on second reading. It then sets out the civil law understanding of the distinction between obligations of conduct and obligations of result, which is relied upon in this thesis. The subsection ends by addressing some of the difficulties that are encountered when applying the distinction between obligations of conduct and obligations of result in practice. This, in turn, can make it more difficult to qualify a particular shared obligation as divisible or indivisible.

i. The distinction between obligations of result and conduct in the 1996 Draft ASR

The distinction between obligations of result and obligations of conduct has gained recognition in international law after SR Ago discussed these categories in his reports on state responsibility. At the time, Ago's work on the topic was seen as somewhat of a 'pioneering effort'.⁴⁴⁶ While national legal systems generally treat the topic of breach of obligation quite extensively, international legal doctrine did not have much to say on the matter (or at least it did not at the time).

⁴⁴⁵ Ago, 'Sixth Report on State Responsibility' (n 255) 12; James Crawford, 'Second Report on State Responsibility' (1999) A/CN.4/498 para 57; Economides (n 329) 375; Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' [1999] EJIL 371, 380; Gattini (n 8) 35; Crawford, *State Responsibility: The General Part* (n 24) 221.

⁴⁴⁶ International Law Commission, 'Report on the Work of Its Fifty-First Session' (1999) A/54/10 70.

In his reports Ago knowingly departed from the way in which the distinction between obligations of result and conduct is traditionally understood in domestic law.⁴⁴⁷ According to Ago, obligations of conduct and obligations of result both require the achievement of a result. He argued that these two categories of obligations differ only in the freedom that is left to the duty-bearer(s) as to *the choice of means* by which they are to achieve that result.⁴⁴⁸ An obligation of result requires that the duty-bearer(s) achieve a particular result, but it leaves the duty-bearer(s) free in their choice of means to achieve that result. An obligation of conduct also requires that the duty-bearer(s) achieve a certain result, but it specifically prescribes the particular means that need to be used by the duty-bearer(s) in achieving that result.⁴⁴⁹ Thus, where an obligation of result offers the duty-bearer a choice of means, an obligation of conduct requires the duty-bearer to engage in specifically determined conduct.⁴⁵⁰

Ago's understanding of the distinction between obligations of conduct and obligations of result not only departed from the civil law understanding of the distinction, but also led to a completely opposite categorization of obligations in some instances.⁴⁵¹ As an example of an obligation of result Ago mentioned the obligation of the receiving state to take appropriate steps to protect the premises of a diplomatic mission, as this obligation does not prescribe which steps a receiving state should take but rather leaves the receiving state free to choose the means by which it will fulfil its obligation.⁴⁵² As an example of an obligation of conduct Ago referred to the obligation to adopt legislation on a specific topic, since this obligation specifies the means that are to be used by its duty-bearer(s).⁴⁵³ With regard to the categorization of these two obligations, the civil law understanding of the distinction between obligations of conduct and result would reach the opposite conclusion.

Ago's understanding of the distinction between obligations of conduct and obligations of result was incorporated into the 1996 Draft ASR.⁴⁵⁴ The ILC included the distinction between obligations of conduct and result in the ASR on first reading

⁴⁴⁷ Gattini (n 8) 35.

⁴⁴⁸ Ago, 'Sixth Report on State Responsibility' (n 255) 7; 17.

⁴⁴⁹ Crawford, 'Second Report on State Responsibility' (n 446) 23; International Law Commission, 'Draft Articles of Parts One, Two and Three Provisionally Adopted by the Commission on First Reading' (n 164) 134.

⁴⁵⁰ Crawford, 'Second Report on State Responsibility' (n 446) 25. Dupuy (n 446) 375–376.

⁴⁵¹ Crawford, 'Second Report on State Responsibility' (n 446) 26; Philippe Gautier, 'On the Classification of Obligations in International Law' in Holger P Hestermeyer (ed), *Coexistence, Cooperation and Solidarity: Liber Amoricum Rüdiger Wolfrum, Volume I* (Martinus Nijhoff 2012) 856; Dupuy (n 446) 375; James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 EJIL 435, 441.

⁴⁵² Ago, 'Sixth Report on State Responsibility' (n 255) 9, para 17.

⁴⁵³ Ago, 'Sixth Report on State Responsibility' (n 255) 5, para 5.

⁴⁵⁴ Articles 20 and 21 of the 1996 Draft ASR, see International Law Commission, 'Draft Articles of Parts One, Two and Three Provisionally Adopted by the Commission on First Reading' (n 164).

because it considered that these categories could provide guidance in determining whether a certain conduct constitutes a breach of an international obligation.⁴⁵⁵

On second reading, the provisions that were based on Ago's understanding of the distinction between obligations of conduct and result were removed from the ILC's work on state responsibility.⁴⁵⁶ The removal of Ago's understanding of the distinction from the ASR arguably 'marked a return to the traditional conception of the distinction'.⁴⁵⁷ Several authors have argued that the traditional civil law understanding of obligations of conduct and obligations of result should be seen as the 'better' or 'correct' view.⁴⁵⁸ As is further discussed below, this view is supported by the ICJ's position in the Bosnian Genocide case.⁴⁵⁹

ii. The civil law understanding of obligations of conduct and result

The present study subscribes to the civil law understanding of obligations of conduct and result. In domestic civil law, the nature of the obligation imposed on a duty-bearer depends on the degree of probability that the objective of the obligation will be achieved.⁴⁶⁰ An obligation of result is imposed when achievement of the objective of the obligation 'is highly probable'.⁴⁶¹ In the case that achievement of the objective 'is essentially more unpredictable' an obligation of conduct is imposed, which is aimed at reducing risk and does not require the achievement of the objective as such.⁴⁶²

⁴⁵⁵ International Law Commission, 'Draft Articles of Parts One, Two and Three Provisionally Adopted by the Commission on First Reading' (n 164) 133. 'In order to determine whether a certain conduct of the State constitutes a breach of an international obligation incumbent upon it, it is necessary to know whether the obligation is in the nature of an obligation "of conduct" or "of means" or, on the contrary, an obligation "of result".'

⁴⁵⁶ International Law Commission, 'Report on the Work of Its Fifty-First Session' (n 447) 163. 'It was felt that if the Commission intended to be consistent with its own decision to focus only on secondary rules, it had to delete articles 20 and 21 as adopted on first reading. See also Gattini (n 8) 36. 'The fact that a more in-depth analysis of the content of such obligations would have drawn the ILC into the tangles of primary norms (...) was probably one of the main reasons why the ILC eventually decided to dispose of most of the distinctions proposed by Ago.'

⁴⁵⁷ Economides (n 329) 377. Gautier states that Ago's understanding of the distinction 'has not survived the passing of time', see Gautier (n 452) 856–857.

⁴⁵⁸ Economides (n 329) 377; Dupuy (n 446) 378; Ilias Plakokefalos, 'Prevention Obligations in International Environmental Law' (2012) 23 *Yearbook of International Environmental Law* 3, 31. Gautier asserts that the traditional civil law understanding of obligations of conduct and obligations of result 'is based on common sense', see Gautier (n 452) 856.

⁴⁵⁹ Crawford, *State Responsibility: The General Part* (n 24) 231.

⁴⁶⁰ Crawford, 'Second Report on State Responsibility' (n 446) 25; Jean Combacau, 'Obligations de Résultat et Obligations de Comportement' in Daniel Bardonnet (ed), *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (Pedone 1981) 196. See also Dario Alessi, 'The Distinction between Obligations de Résultat and Obligations de Moyens and the Enforceability of Promises' (2005) 5 *European Review of Private Law* 657.

⁴⁶¹ Crawford, 'Second Report on State Responsibility' (n 446) 25.

⁴⁶² Crawford, 'Second Report on State Responsibility' (n 446) 25.

According to the civil law understanding of the distinction, an obligation of result requires the achievement of a specific result. This means that an obligation of result is fulfilled only when that result is achieved. If the result is not achieved the obligation is breached, regardless of whether the bearer(s) of the obligation have used their best efforts in pursuing that result. Essentially, obligations of result are 'obligations to succeed'⁴⁶³ and 'involve in some measure a guarantee of the outcome'.⁴⁶⁴

An obligation of result can be either a positive obligation or a negative obligation.⁴⁶⁵ The obligation of a coastal state to enforce its laws and regulations with regard to dumping within its territorial sea⁴⁶⁶ is both an obligation of result and a positive obligation 'to do' something. The obligation of a state party to the GATT to abstain from imposing quantitative restrictions on the importation of products from the territory of another contracting state⁴⁶⁷ is an obligation of result and a negative obligation 'not to do' something.

An obligation of conduct is a best efforts obligation.⁴⁶⁸ It requires that its bearer(s) endeavour⁴⁶⁹ to realize a certain result; that they do all in their power *in pursuance* of a particular result, but without ultimate commitment to achieving the result.⁴⁷⁰ This means that an obligation of conduct can be fulfilled if a duty-bearer has done all in its power by taking certain measures in pursuance of a result, even if the result that is pursued by these measures is not achieved. An obligation of conduct will be breached if the duty-bearer(s) have not taken those measures that are within their power in pursuance of a particular result, regardless of whether the result has or has not been achieved.

Considering that an obligation of conduct is always an obligation 'to do' something, there is no such thing as a negative obligation of conduct.⁴⁷¹ Hence, all obligations of conduct belong to the category of positive obligations. For example, the obligation of a receiving state to take appropriate steps to protect the premises of a diplomatic mission is a positive obligation of conduct.

⁴⁶³ Economides (n 329) 377. Economides refers to Combacau (n 461) 196.

⁴⁶⁴ Crawford, 'Second Report on State Responsibility' (n 446) 25; Dupuy (n 446) 378; Alessi (n 461) 684.

⁴⁶⁵ Economides (n 329) 377–378.

⁴⁶⁶ Article 216 LOSC.

⁴⁶⁷ Article XI GATT.

⁴⁶⁸ Crawford, 'Second Report on State Responsibility' (n 446) 25; Crawford, *State Responsibility: The General Part* (n 24) 231; Gautier (n 452) 856; Abi-Saab (n 115) 253.

⁴⁶⁹ Gautier (n 452) 856; Dupuy (n 446) 378; Gattini (n 8) 35. Economides observes that Combacau qualifies obligations of conduct as 'obligations of attempt', see Economides (n 329) 377.

⁴⁷⁰ Crawford, 'Second Report on State Responsibility' (n 446) 25; Dupuy (n 446) 378; Alessi (n 461) 684.

⁴⁷¹ Economides notes that 'negative obligations or obligations of abstention all belong to the category of obligations of result', reiterating Professor Reuter's view that negative obligations 'have a content which is more clearly determined than positive obligations, and consequently, breach thereof is easier to define.' See Economides (n 329) 377–378.

The traditional conception of obligations of conduct as best efforts obligations has been confirmed by the ICJ's position in the Bosnian Genocide case:⁴⁷²

'It is clear that the obligation in question [to prevent the crime of Genocide] is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible'⁴⁷³

Expressions in treaties that typically indicate that an obligation is one of conduct include obligations to 'take all measures', 'all appropriate measures', 'necessary measures', 'effective measures', 'appropriate measures', 'do everything in its power' and 'exercise due diligence'.⁴⁷⁴ An example is the obligation that follows from article 194(2) LOSC, which requires states to 'take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.'

Qualifying an obligation as one of conduct or one of result clarifies the content of that obligation and thereby enables a determination of when the obligation is fulfilled or breached. In this respect, it should be noted that fulfilment or breach of an obligation of result is generally easier to prove.⁴⁷⁵ A duty-bearer needs to achieve a specific result in order to fulfil the obligation, and it will breach the obligation if that result is not achieved. For example, the obligation of state X to achieve a total phase out of the manufacturing and import of methyl chloroform by 2015 requires that a predetermined result is achieved. The obligation will be fulfilled only if that phasing out is achieved by 2015, and it will be breached if that phasing out is not achieved by 2015. The obligation of state Y not to violate the sovereignty of another state also calls for a certain result to be achieved: the absence of a violation of the sovereignty of another state. It will be fulfilled as long as state Y indeed refrains from acts that violate the sovereignty of another state, and will be breached as soon as state Y acts in a way that does violate the sovereignty of another state, for example by providing support to armed opposition groups in another state.

⁴⁷² Crawford, *State Responsibility: The General Part* (n 24) 231.

⁴⁷³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 2007 ICJ Reports 43 [221].

⁴⁷⁴ Economides (n 329) 378.

⁴⁷⁵ Crawford, 'Second Report on State Responsibility' (n 446) 25.

This is different when it comes to obligations of conduct. The content of obligations of conduct is more flexible than that of obligations of result,⁴⁷⁶ as it needs to be determined on a case-by-case basis whether the measures taken by a duty-bearer in pursuance of a certain result (if any) were indeed that duty-bearer's best effort. It follows that breach or fulfilment of an obligation of conduct can be more difficult to prove. Whether or not particular measures are sufficient in order to fulfil the obligation generally depends on the circumstances of each case and the capabilities of the duty-bearer(s) in question.

This can be clearly illustrated by the ICJ's discussion of the obligation to prevent genocide in the Bosnian Genocide case. The ICJ explained that a state breaches the obligation to prevent genocide only if it 'manifestly failed to take all measures to prevent genocide which were within its power and which might have contributed to preventing the genocide.'⁴⁷⁷ Moreover, the ICJ considered that the measures that need to be taken by a particular state depend upon that state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide',⁴⁷⁸ which will differ from case to case and from state to state.

On paper, the distinction between obligations of result and conduct is straightforward and, indeed, based on common sense.⁴⁷⁹ An obligation of result requires that its bearer(s) achieve a particular result, whereas an obligation of conduct obliges its bearers to take appropriate measures in pursuance of a particular result, without committing them to the *achievement* of that result. However, as is further addressed below, in practice it is not always clear whether a specific obligation should be qualified as one of conduct or result. This, in turn, can make it more difficult to identify whether a particular shared obligation is divisible or indivisible (see §4.2.3).

iii. Difficulties encountered when applying the distinction in practice

Despite the clear difference between obligations of conduct and obligations of result on paper, it is not always apparent whether a specific obligation in practice should be categorized as one or the other. In essence, qualifying an international obligation as one of conduct or result comes down to a question of interpretation of the content of that obligation. In the case of treaty obligations, the content of obligations is determined on the basis of the rules of treaty interpretation enshrined in the articles

⁴⁷⁶ Economides (n 329) 375. Dupuy observes that obligations of conduct are characterised by their flexibility, see Dupuy (n 446) 376.

⁴⁷⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 ICJ Reports 43 (n 474) [430].

⁴⁷⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 ICJ Reports 43 (n 474).

⁴⁷⁹ Gautier (n 452) 856.

31 and 32 VCLT.⁴⁸⁰ The interpretation of international obligations arising from other rules and acts is based on different rules.⁴⁸¹

The potential difficulties encountered when qualifying an obligation as one of conduct or result can be illustrated by the discussion in legal doctrine about the interpretation of obligations to negotiate. Typically, the discussion revolves around the following question: does a specific obligation to negotiate constitute an obligation of result that requires duty-bearers to achieve the goal pursued by negotiations (such as the conclusion of a treaty or agreement on common action) or an obligation of conduct that 'merely' requires duty-bearers to negotiate in good faith in pursuance of a common goal?

In legal literature, a distinction is made between a *pactum de negotiando* and a *pactum de contrahendo*.⁴⁸² A *pactum de negotiando* amounts to an obligation to negotiate in good faith, and does not go so far as to require its bearers to conclude an agreement. But this does not mean that the obligation has no meaningful content. The ICJ has considered that an obligation to negotiate does not merely require duty-bearers 'to go through a formal process of negotiation'. Rather, 'they are under the obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.'⁴⁸³ If an obligation to negotiate constitutes a *pactum de negotiando*, it is an obligation of conduct that requires its bearers to make a genuine effort towards coming to an agreement, without obliging them to in fact achieve an agreement.

A *pactum de contrahendo* goes beyond obliging duty-bearers to negotiate in good faith; it amounts to an obligation to *conclude* an international agreement on a

⁴⁸⁰ The general rule of treaty interpretation is enshrined in article 31 VCLT, which provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Article 32 VCLT sets out that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.' For a thorough discussion of these rules of treaty interpretation see e.g. Richard K Gardiner, *Treaty Interpretation* (OUP 2015).

⁴⁸¹ See e.g. Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008). Orakhelashvili discusses the interpretation of unilateral acts, institutional decisions and customary international law at 465-510.

⁴⁸² Ulrich Beyerlin, 'Pactum de Contrahendo, Pactum de Negotiando' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1997); Hisashi Owada, 'Pactum de Contrahendo, Pactum de Negotiando', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2008) <www.mpepil.com>; Lord McNair, *The Law of Treaties* (Clarendon Press 1961) 27-30.

⁴⁸³ *North Sea Continental Shelf cases (Germany v Netherlands; Germany v Denmark)*, Judgment, 1969 ICJ reports 3 47.

particular topic.⁴⁸⁴ It 'binds duty-bearers to negotiate in good faith *and* to come to some positive result on an issue mentioned in the *pactum de contrahendo*.'⁴⁸⁵ Failure to achieve such a result amounts to a breach of the obligation, regardless of whether some parties have negotiated in good faith. If an obligation to negotiate is a *pactum de contrahendo*, it is an obligation of result. A *pactum de contrahendo* requires its bearers to achieve a specific result, to actually conclude an agreement, in order to fulfil the obligation.

It appears that obligations to negotiate that are qualified as a *pactum de contrahendo* are quite rare, and it is generally assumed that 'an obligation to negotiate does not imply an obligation to reach an agreement'.⁴⁸⁶ While various references can be found in legal literature to obligations to negotiate that are qualified as a *pacta de negotiando* or simply obligations of conduct,⁴⁸⁷ arguments that a particular obligation to negotiate should be qualified as a *pacta de contrahendo* are quite rare.⁴⁸⁸ Riphagen makes a similar observation when discussing international obligations to undertake common action (which generally come down to an obligation to negotiate):

⁴⁸⁴ Owada (n 483) 3–4.

⁴⁸⁵ David Simon, 'Article VI of the Non-Proliferation Treaty Is a Pactum de Contrahendo and Has Serious Legal Obligation by Implication' *The Journal of International Law and Policy* 3.

⁴⁸⁶ *Railway Traffic between Lithuania and Poland (Lithuania v Poland)*, *Advisory Opinion*, 1931 *PCIJ Series A/B no 42* 116.

⁴⁸⁷ For example, the obligation to seek to agree upon the measures necessary to ensure the conservation of shared fish stocks in article 63 LOSC is qualified as a *pactum de negotiando*, see Kunoy (n 382) 646; Satya Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (Martinus Nijhoff Publishers 1993) 646. Burke qualifies obligation to cooperate with a view to the conservation of highly migratory species arising from article 64 LOSC as an obligation to negotiate, as opposed to an obligation to reach agreement, see William T Burke, 'Highly Migratory Species in the New Law of the Sea' (1984) 14 *Ocean Development & International Law* 273, 283. Moreover, there are various cases in which international courts and tribunals refer to obligations to negotiate in good faith, rather than obligations to reach agreement, see e.g. *Railway Traffic between Lithuania and Poland (Lithuania v Poland)*, *Advisory Opinion*, 1931 *PCIJ Series A/B no 42* (n 487); *Tacna Arica Question (Chile v Peru)*, *Arbitral Award (1925)*, *Reports of International Arbitral Awards, VOLUME II* pp 921-958; *Lac Lanoux Arbitration (France v Spain)*, *Arbitral Award (1957)*, *Reports of International Arbitral Awards, VOLUME XII* pp 281-317; *North Sea Continental Shelf cases (Germany v. Netherlands; Germany v. Denmark)*, *Judgment*, 1969 *ICJ reports* 3 (n 484); *Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v Iceland)*, *Merits*, 1974 *ICJ reports* 3.

⁴⁸⁸ But see Article 9 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which obliges riparian states to 'enter into bilateral or multilateral agreements or other arrangements, where these do not yet exist, (...) in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact.' Tanzi et al note that '[t]he Water Convention is rather stringent with regard to the institutional aspect of cooperation with regard to the Riparian Parties, insofar as article 9 is mandatory about the *conclusion* of watercourse agreements' (emphasis added). Attila Tanzi, Alexandros Kolliopoulos and Nataliya Nikiforova, 'Normative Features of the UNECE Water Convention' in Attila Tanzi and others (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Brill - Nijhoff 2015) 122. See also the discussion on article VI NPT below, and Antonio Cassese, 'The Israel-PLO Agreement and Self-Determination' (1993) 4 *EJIL* 564, 565, who argues that the 'Declaration of Principles on Interim Self-Government Arrangements' signed in 1993 by Israel and the PLO gives rise to a set of *pacta de contrahendo* as well as a set of *pacta de negotiando*. This argument is reiterated in Owada (n 483) 18.

'[T]here are nowadays many international obligations of States to undertake common action in a particular field. Often such obligations leave it entirely to the States concerned to determine together which common action shall be taken. Failure to agree on a common action is, then, certainly not an internationally wrongful act. But failure to negotiate in good faith is, strictly speaking, an internationally wrongful act.'⁴⁸⁹

However, there is an important example of an international obligation to negotiate whose content is still the subject of debate: the obligation arising from article VI of the Nuclear Non-Proliferation Treaty (NPT), which provides that

'[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.'

On the one hand, it has been argued that this provision 'merely' gives rise to an obligation of conduct, requiring its bearers to make a genuine effort towards coming to an agreement on a treaty on nuclear disarmament. On the other hand, it has been suggested that the provision gives rise to an obligation to *conclude* an international agreement on nuclear disarmament. The latter view appears to be supported by the ICJ's 1996 Nuclear Weapons Advisory Opinion, where it held that

'the legal import of that obligation [arising from article VI NPT] goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to *achieve a precise result* - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.'⁴⁹⁰

In the subsequent passage, the ICJ speaks of a 'two-fold obligation to pursue *and* conclude negotiations';⁴⁹¹ hereby suggesting that article VI NPT gives rise to both an obligation of conduct and an obligation of result. This would mean not only that states parties to the NPT are obliged to take measures with a view to concluding an international agreement, but also that they are obliged to achieve the result of nuclear disarmament by concluding an international agreement on the matter.

⁴⁸⁹ Riphagen (n 143) 20.

⁴⁹⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226* (n 445). (Emphasis added).

⁴⁹¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226* (n 445). (Emphasis added).

The ICJ's considerations in its 1996 Opinion have prompted several scholars to argue that article VI NPT gives rise to a *pactum de contrahendo*, obliging states to achieve the result of disarmament by concluding an international agreement on nuclear disarmament.⁴⁹² Along similar lines, the Marshall Islands' application instituting proceedings before the ICJ against nine nuclear weapon states similarly argues that states are under the obligation to pursue negotiations *and* to achieve the result of nuclear disarmament.⁴⁹³

But this interpretation of article VI NPT has been firmly contested by other scholars. Turner argues that the ICJ 'almost certainly has reached the wrong conclusion with decisive unanimity' by stating that article VI encompasses an obligation to conclude negotiations⁴⁹⁴ as 'Article VI of the NPT does not, *and cannot reasonably be interpreted to*, obligate treaty parties to *conclude* anything - the obligation is clearly only to "pursue negotiations in good faith" towards that end.'⁴⁹⁵ Joyner asserts that there are 'very sound interpretative reasons to read Article VI precisely as its terms and their logical sequencing indicate',⁴⁹⁶ namely that each NPT party is under 'an individual obligation to pursue negotiations in good faith on effective measures relating to a treaty on general and complete disarmament.'⁴⁹⁷ Ford maintains that states parties 'are not legally required - and could not reasonable be legally required - to conclude such negotiations.'⁴⁹⁸ He argues that article VI NPT should be interpreted as an obligation to pursue negotiations in good faith, as this 'acknowledges the reality that a party may honestly try, but fail - perhaps through no fault of its own, such as in the event of a failure of good faith by other parties - to bring about a meaningful negotiation or agreement.'⁴⁹⁹

⁴⁹² Haralambos Athanasopoulos, *Nuclear Disarmament in International Law* (McFarland & Company 2000) 157; Simon (n 486); Hisakazu Fujita, 'The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons' [1997] International Review of the Red Cross <<http://www.icrc.org/eng/resources/documents/misc/57jfn.htm>>; Legal Memorandum by the International Association of Lawyers Against Nuclear Arms and the International Human Rights Clinic Human Rights Program, Harvard Law School, *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice* (International Human Rights Clinic Human Rights Program, Harvard Law School 2009).

⁴⁹³ See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Application instituting proceedings against the United Kingdom, 24 April 2014. In para 97 the Republic of the Marshall Islands argues that '[a]rticle VI of the NPT requires both conduct *and* result: States must not only negotiate in good faith with serious efforts to achieve the elimination of nuclear weapons, but must also actually *achieve* that result.'

⁴⁹⁴ Robert F Turner, 'Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine' in Michael N Schmitt (ed), *The Law of Military Operations: Liber Amoricum Professor Jack Grunawalt*, vol 72 (1996) 309.

⁴⁹⁵ Turner (n 495) 324.

⁴⁹⁶ Daniel H Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (OUP 2011) 101.

⁴⁹⁷ Joyner (n 497) 102.

⁴⁹⁸ Christopher A Ford, 'Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' (2007) 14 *The Nonproliferation Review* 401, 408.

⁴⁹⁹ Ford (n 499) 403.

The ICJ had a chance to further clarify the content of the international obligation(s) that can be derived from article VI NPT in the cases brought before it by the Marshall Islands. Unfortunately, the ICJ upheld the preliminary objections to its jurisdiction in all of these cases and, hence, will not proceed to the merits.⁵⁰⁰ Thus, its 1996 Opinion remains the ICJ's only pronouncement on the content of article VI NPT. The fact that the ICJ has interpreted article VI NPT as giving rise to an obligation to pursue *and* conclude negotiations provides strong support for the argument that states parties to the NPT are in fact bound to two obligations: an obligation of conduct, obliging states parties to pursue negotiations, and an obligation of result, obliging states parties to conclude an international treaty on general and complete nuclear disarmament under strict and effective international control.

As an obligation of result, the obligation to conclude an international treaty is breached when no international treaty on general and complete nuclear disarmament is concluded. For some states parties to the NPT this might mean that, if indeed no such treaty is concluded, they breach this obligation even if they themselves have negotiated in good faith. After all, the obligation to conclude a treaty on nuclear disarmament is not an obligation of conduct but requires the achievement of a concrete result. Interesting in this respect is the Marshall Islands' request to the ICJ to adjudge and declare that the UK, India and Pakistan are 'effectively preventing the great majority of non-nuclear weapon States from fulfilling their part of the obligations under Article VI of the Treaty and under customary law with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.'⁵⁰¹ Indeed, the fact that the UK, India and Pakistan are not actively working towards the common goal of concluding negotiations would make it difficult if not impossible for other states parties to fulfil an obligation to conclude negotiations.

The debate about the content of article VI NPT shows that it is not always clear whether an obligation is one of conduct or result. The ensuing analysis in §4.2.3 sets out that interpreting a shared obligation as one of conduct or one of result can make the difference between qualifying that obligation as divisible or indivisible.

⁵⁰⁰ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Preliminary Objections, ICJ Judgment of 5 October 2016; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Jurisdiction of the Court and Admissibility of the Application, ICJ Judgment of 5 October 2016; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, Jurisdiction of the Court and Admissibility of the Application, ICJ Judgment of 5 October 2016.

⁵⁰¹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, Application instituting proceedings against the Islamic Republic of Pakistan, 24 April 2014 23; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Application instituting proceedings against the Republic of India, 24 April 2014 25; *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Memorial of the Marshall Islands, 16 March 2015 40.

4.2.3 Categories of obligations as indicators for qualifying a shared obligation as divisible or indivisible

In order to qualify a shared obligation as divisible or indivisible, it needs to be determined whether that obligation can be fulfilled or breached *by each of the duty-bearers independently* or only *by all duty-bearers simultaneously*. When multiple states and/or IOs are bound to a divisible shared obligation, duty-bearers are each bound for their own 'share' only, which means that they can independently fulfil or breach the obligation in question. This is different when multiple states and/or IOs are bound to an indivisible shared obligation, in which case the duty-bearers are not merely bound to do their 'share' but are rather bound to achieve a common performance. Essentially, qualifying a shared obligation as divisible or indivisible calls for a determination of the content of that shared obligation: what does the obligation ask of its bearers?

The categories of obligations that have been discussed in this section can be relied upon as indicators for determining the divisible or indivisible character of a shared obligation. The table on the next page shows that qualifying a shared obligation as a positive or negative obligation and as an obligation of conduct or result indicates to a large extent whether the shared obligation in question is divisible or indivisible.

The table on the next page demonstrates that the categories of positive shared obligations, negative shared obligations, shared obligations of conduct and shared obligations of result allow for three possible combinations, which are further discussed below. First, a shared obligation can be a positive obligation of conduct, in which case the shared obligation is always divisible. Second, a shared obligation can be a positive obligation of result, in which case the shared obligation can be either divisible or indivisible. Third, a shared obligation can be a negative obligation of result, in which case the shared obligation is always divisible. It should be noted that the cell that represents the intersection between a negative shared obligation and a shared obligation of conduct is empty simply because there is no such thing as a negative obligation of conduct. As may be recalled, a negative obligation is always an obligation of result and an obligation of conduct is always a positive obligation.⁵⁰²

⁵⁰² See §4.2.2.ii above.

	Shared obligation of conduct	Shared obligation of result
Positive shared obligation	<i>A divisible shared obligation, e.g. the obligation of multiple coastal states to seek to agree upon the measures necessary to ensure the conservation of shared fish stocks.</i>	Can be either: <i>An indivisible shared obligation, e.g. when multiple states oblige themselves to reduce their combined amount of greenhouse gas emissions by 25 per cent by the year 2020; or</i> <i>A divisible shared obligation, e.g. when multiple states commit themselves to each reduce their own greenhouse gas emissions by 25 per cent by the year 2020.</i>
Negative shared obligation	X	<i>A divisible shared obligation, e.g. the obligation of states X and Y not to torture individuals in a detention centre over which they both exercise effective control.</i>

Table 4.1: Categories of obligations as indicators for qualifying a shared obligation as divisible or indivisible

First, it is submitted that when a shared obligation is a positive obligation of conduct, it is inherently divisible. As discussed in §4.2.2, an obligation of conduct is a best efforts obligation that obliges its bearer(s) to take all measures that are within its power in pursuance of a certain result. When multiple states and/or IOs are bound to a shared obligation of conduct, each of these states and/or IOs is bound only to its 'share'. Each duty-bearer is bound to take all measures within its power, and the specific measures that need to be taken are generally adaptable to the specific context to which the obligation applies and the capabilities of each duty-bearer. Hence, each duty-bearer can individually fulfil a shared obligation of conduct, even when the obligation in question pursues a common goal and that common goal is to be pursued by a plurality of duty-bearers. As soon as a duty-bearer has taken all measures that are within its power it has done its share and will be released from the obligation, regardless of whether the other duty-bearers have employed their best efforts.

For example, article 194 LOSC provides that states must take 'individually or jointly as appropriate, all measures (...) that are necessary to prevent, reduce and control pollution of the marine environment from any source' and article 5 of the Biological Diversity Convention obliges contracting parties to 'cooperate in respect of areas beyond national jurisdiction and other matters of mutual interest, for the

conservation and sustainable use of biological diversity'. Multiple states are bound to take measures in pursuance of a common goal, but each state is bound to its own share. Each duty-bearer is bound to take those measures that are within its power, which signifies that it is possible for a duty-bearer to individually fulfil or breach the obligation.

The same can be said when multiple states are bound to take all measures that are in their power to prevent an impending genocide on the territory of a neighbouring state. It is very well possible that one state takes the measures that are within its power, thereby doing its share and fulfilling the obligation, while another state fails to take (sufficient) measures, thereby breaching the obligation.

This does not mean that the bearers of divisible shared obligations of conduct are not obliged to engage with one another. Indeed, in order for the measures taken by a duty-bearer to be qualified as 'sufficient' or 'appropriate' it may very well be argued that the duty-bearer in question must try, with the means reasonably available to it (e.g. through diplomatic channels), to convince other duty-bearers to participate in pursuing the common goal. However, if it tries but fails to convince other duty-bearers to participate and the common goal pursued is not achieved, it will still be deemed to have fulfilled its obligation as long as it has employed its best efforts.

Second, it is submitted that in the case that a shared obligation is qualified as a positive obligation of result, the obligation can be either divisible or indivisible. Interestingly, the table indicates that a shared obligation can be indivisible only if it is a positive obligation of result. However, not all positive shared obligations of result are indivisible. It will depend on whether the duty-bearers are bound to achieve a common result (in which case all duty-bearers are bound to achieve a common performance), or whether each duty-bearer is bound to achieve its own individual result (in which case each duty-bearer is bound only to its own share).

This can be illustrated by the following example.⁵⁰³ When multiple states oblige themselves to reduce their combined amount of greenhouse gas emissions by 25 per cent by the year 2020, without any indication as to who will fulfil what part of the commitment, these states have bound themselves to achieve a common result: a 25 per cent reduction of combined emissions by 2020. The fulfilment and breach of this obligation is indivisible: if an overall emission reduction of 25 per cent is achieved all duty-bearers will fulfil the obligation, but if this overall result is not achieved the obligation will be breached by all duty-bearers simultaneously. Hence, it is *not*

⁵⁰³ This example is also used by Eckart (for the purpose of distinguishing between a situation in which multiple states author multiple unilateral acts and a situation in which multiple states together author a single unilateral act), see Christian Eckart, *Promises of States under International Law* (Hart Publishing 2012) 51–52.

possible for one duty-bearer to fulfil the obligation while another breaches it; the obligation is indivisible.

This would be different if those same states were to conclude a multilateral treaty in which each of them commits itself to reduce its own greenhouse gas emissions by 25 per cent. In this scenario, each state is bound to achieve its own result only and, therefore, to its own share. If one of these states succeeds in reducing its own emissions by 25 per cent it will be deemed to have fulfilled its obligation, regardless of whether the other states have done the same. The fulfilment and breach of these obligations is completely divisible.

Third, it is submitted that if a shared obligation is qualified as a negative obligation of result, it is inherently divisible. When multiple duty-bearers are obliged to abstain from a similar course of conduct with regard to the same concrete case, each of them is bound to its share only. For example, upstream states A and B can both be obliged to abstain from dumping pollutants with regard to the same international watercourse, in which case they are bound to a shared obligation. Each state is bound to its share only, and can individually breach or fulfil the obligation in question. While the duty-bearers may of course fulfil or breach the obligation at the same time by both doing their share, it is perfectly possible for state A to individually fulfil the obligation by abstaining from dumping pollutants while state B at the same time breaches its obligation by doing the opposite. State A and B are therefore bound to divisible shared obligations.

Another example is the obligation of state X and Y to refrain from acts of torture towards individuals in a detention centre over which they both exercise effective control. It is possible for both of them to simultaneously fulfil or breach the obligation, but it is also possible for each of them to individually fulfil or breach the obligation. When state X's soldiers engage in acts of torture towards the individuals in detention, thereby breaching the obligation, it is possible that at the same time state Y does not engage in such acts, thereby fulfilling the obligation.⁵⁰⁴ Thus, in this scenario the fulfilment and breach of the obligations of states X and Y is divisible.

To summarize, categorizing a shared obligation as a positive or negative obligation and as an obligation of conduct or result facilitates the process of determining whether the bearers of a shared obligation are bound to achieve a common performance or whether they are each bound to their own share. In particular, interpreting a positive shared obligation as one of conduct or one of result can make the difference between qualifying that obligation as divisible or indivisible.

⁵⁰⁴ Assuming for present purposes that the conduct of state X's soldiers are not simultaneously attributable to state Y.

The relevance of interpreting a shared obligation as one of conduct or result is clearly illustrated by the discussion about the content of the obligation arising from article VI NPT. If states parties to the NPT are 'merely' obliged to negotiate in good faith, they are bound to a divisible shared obligation. It would be perfectly possible for one duty-bearer to individually fulfil its obligation by trying to negotiate in good faith (thereby doing its share) while another duty-bearer at the same time breaches its obligation by refusing to negotiate. But if states parties are obliged to *conclude* negotiations and to achieve the result of nuclear disarmament, they are bound to an indivisible shared obligation that can only be fulfilled or breached by all duty-bearers simultaneously. In such a case states are not merely bound to their own share but are rather bound to achieve a common performance: a common result. As soon as the desired result is achieved, all duty-bearers will be deemed to have fulfilled the obligation; and if it is not achieved all duty-bearers will be deemed to have breached the obligation.

Another example of the relevance of interpreting a shared obligation as one of conduct or result is the obligation in article 2(1) of the ICESCR, which provides that:

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

The commentaries to the Maastricht Principles on Extraterritorial Human Rights Obligations of States in the Area of Economic, Social and Cultural Rights assert that this provision gives rise to a 'truly joint obligation to cooperate internationally, whereby one or several states are unable on their own to provide what is required to comply with the obligation.'⁵⁰⁵ There indeed seems to be little room for doubt that the global realization of economic, social and cultural rights pursued by this provision cannot be achieved by one or several states on their own. However, the question that is relevant for present purposes is: what does this obligation ask of its bearers? If the obligation requires states parties to *achieve* the end-result of the full global realization of economic, social and cultural rights (which would be a rather far-reaching interpretation), the obligation would be indivisible. However, if the provision gives rise to an obligation of conduct, requiring each of them to participate in overall cooperative efforts by taking measures within their power in pursuing this common goal, the obligation would be divisible.

⁵⁰⁵ De Schutter and others (n 9) 1152.

There are various examples of situations in which shared obligations oblige multiple states to take measures in pursuance of a concrete common goal, without them being obliged to in fact achieve that common goal. These are shared obligations of conduct that can be fulfilled or breached by each duty-bearer independently, and thus are to be qualified as divisible shared obligations. It is submitted that in principle most international obligations that require states to negotiate or cooperate require duty-bearers to *pursue* rather than *achieve* a common goal,⁵⁰⁶ which means that they can be qualified as obligations of conduct and not obligations of result.

In this respect one may think of the obligation that arises from article 63 LOSC, which obliges multiple coastal states to seek to agree upon the measures necessary to coordinate and to ensure the conservation and development of fish stocks that occur in the exclusive economic zones of all of them. This provision establishes an obligation to seek to reach agreement rather than an obligation to in fact reach agreement.⁵⁰⁷ As an obligation of conduct, it can be fulfilled by each duty-bearer independently. If one of the coastal states does its share by seeking to engage in discussions with the other coastal states with a view to establishing conservation measures,⁵⁰⁸ it will fulfil its obligation even if the other states refuse to negotiate altogether and no conservation measures are agreed upon in the end.

Another example of a shared obligation of conduct is the obligation that arises from article 2(2) Kyoto Protocol, which stipulates that Annex I parties 'shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.' This obligation does not designate that duty-bearers must achieve the common goal of limitation or reduction of greenhouse gas emissions from aviation and marine bunker fuels. Rather, it is an obligation of conduct that requires duty-bearers to take measures in pursuance of a limitation or reduction of greenhouse gas emissions from aviation and marine bunker fuels. Consequently, this obligation can be qualified as a divisible shared obligation.

⁵⁰⁶ See e.g. Economides, who argues that positive obligations formulated in a relatively weak way, such as obligations of cooperation, are generally obligations of means rather than obligations of result, Economides (n 329) 378. Abi-Saab argues that 'as far as the law of cooperation is concerned, it is more difficult to construct obligations 'to do' as obligations of result. Even in the most authoritarian systems, it is not always possible to guarantee that the common undertaking will be realized exactly according to plan, or that the plan will be fulfilled 100 per cent. We note here many obligations of means (i.e. of best efforts)', see Abi-Saab (n 115) 253. See also Riphagen, who asserts that obligations to undertake common action generally require states to negotiate in good faith and do not oblige them to agree on a common action, Riphagen (n 143) 20.

⁵⁰⁷ Kunoy (n 382) 37; Nandan and Rosenne (n 488) 646.

⁵⁰⁸ Kunoy (n 382) 40.

The same considerations apply to the obligation formulated in article 41 ASR that requires states to cooperate to bring to an end through lawful means any serious breach of an obligation arising under a peremptory norm of international law (which is arguably an exercise in progressive development rather than a codification of positive international law). This obligation does not require that states actually achieve the result of bringing to an end a serious breach, but rather imposes an obligation of conduct that obliges states to cooperate in pursuance of that common goal. Hence, in the case of a serious breach of an obligation under a peremptory norm, all states are bound to a divisible shared obligation to cooperate to bring that breach to an end.

Moreover, in cases where multiple states share international obligations because they are all connected to a common factual situation, these obligations generally do not require states to achieve a common result. Rather, it appears that many of the obligations incumbent upon duty-bearers in such a context consist of negative obligations of result or positive obligations of conduct, which are inherently divisible. For example, during the joint occupation of Iraq, the US and the UK were bound to the obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources, which is an obligation of conduct, and the obligation not to deport or transfer parts of their own civilian population into the territory it occupies, which is a negative obligation of result. One possible example of an obligation of the US and the UK to achieve a common result in this context is the obligation to maintain Iraqi correctional facilities at the level of internationally acceptable standards; assuming that this obligation obliges the US and the UK to achieve the result (rather than working towards the result).

Other examples of situations where multiple states are connected to a common factual situation similarly suggest that the states involved will rarely be bound to achieve a common result. For example, all states participating in the US led intervention in Syria are bound to the obligation to refrain from targeting civilians and civilian objects, which is a negative obligation of result. In another example, the fact that both Australia and Nauru exercise control over the refugees and asylum seekers that are held in detention in processing centres on the territory of Nauru entails that both states are bound to international obligations with regard to these individuals, such as the obligation to refrain from arbitrary and mandatory detention, which is a negative obligation of result, and the obligation to take measures to prevent inhuman treatment, which is a positive obligation of conduct.

This subsection has shown that a shared obligation is indivisible only if it requires duty-bearers to achieve a common result (rather than merely pursue it). Only then are the bearers of a shared obligation bound to achieve a common performance, as

opposed to being bound only to their own share. However, such positive obligations of result appear to be quite rare. Some examples include the obligation of the EU and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020 in the second commitment period of the Kyoto Protocol;⁵⁰⁹ the obligation of the EU and its member states to provide 12.000 million ECU in financial assistance to the African, Caribbean and Pacific Group of States;⁵¹⁰ the obligation of Australia, New Zealand and the UK to rehabilitate Nauru's worked out phosphate lands;⁵¹¹ and the obligation of two or more launching states to pay full compensation for the damage caused by their joint launching of a space object.⁵¹² These are all obligations that require their bearers to achieve a common result. The structure of performance of these obligations is indivisible: as soon as the common result required by the obligation is achieved, it is fulfilled by all of its bearers, and if that common result is not achieved the obligation is breached by all of its bearers.

4.3 Some considerations in the choice between divisible and indivisible shared obligations

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 goals are being formulated. In such a context, there are several considerations regarding the performance of shared obligations that may have a role to play in the choice between divisible and indivisible shared obligations.

Divisible shared obligations are attractive from the perspective of prospective duty-bearers, as being bound to a divisible shared obligation limits the risk that a breach of obligation might occur (particularly when it is a divisible shared obligation of conduct). For example, by agreeing to a divisible shared obligation of conduct in pursuance of a common goal states and/or IOs do not bind themselves to achieve that common goal, which is something that in most cases no individual duty-bearer will have complete control over. Rather, each state or IO 'merely' binds itself to work towards a common goal by taking measures that are within its power. As soon as it has done its share, it will be deemed to have fulfilled its obligation, regardless of whether the other duty-bearers have taken appropriate measures or whether the common goal is in fact achieved.

⁵⁰⁹ See Chapter 5, §5.4.6.

⁵¹⁰ See Chapter 5, §5.4.4.

⁵¹¹ See Chapter 5, §5.4.1.

⁵¹² Article V(1) Convention on the International Liability for Damage caused by Space Objects (1972) 961 UNTS 187.

This is different when it comes to indivisible shared obligations. The fulfilment of an indivisible shared obligation is not always within the full control of an individual duty-bearer; it may be dependent upon the other duty-bearers in order to achieve the common goal. If other duty-bearers do not participate, it is possible that a bearer of an indivisible shared obligation will breach that obligation 'through no fault of its own',⁵¹³ for example not because it failed to contribute to the achievement of a common result itself but because other duty-bearers failed to do so. This is the case, for example, when multiple states are bound to an indivisible shared obligation to conclude a multilateral treaty on nuclear disarmament, which truly cannot be achieved by any duty-bearer on its own. This might form a practical impediment to getting prospective duty-bearers to agree to an indivisible shared obligation, considering that states do not want to be held responsible for acts or omissions that they did not in fact commit.⁵¹⁴ However, it need not be a legal impediment, seeing that fault is not an element of international responsibility.⁵¹⁵

At the same time, precisely because a duty-bearer might breach an indivisible shared obligation due to the fact that *other* duty-bearers refuse to participate, an indivisible shared obligation that requires multiple duty-bearers to achieve a common result might provide a built-in incentive for duty-bearers to monitor the way in which other duty-bearers deal with the obligations that they share. A comparable argument is made in economic theory with regard to joint and several liability, which is common in many domestic legal systems.⁵¹⁶ This argument can be summarized as follows: if the liability of multiple actors is joint and several, actors may be held responsible for each other, and this creates an incentive to monitor one another.⁵¹⁷

Accordingly, being bound to an indivisible shared obligation can make an individual duty-bearer more committed to the achievement of the common goal. This is different when multiple states and/or IOs are bound to a divisible shared obligation, as it will be possible for duty-bearers to independently fulfil their respective obligations by doing their share. Once they do they will be released from the

⁵¹³ See Ford (n 499) 403. Ford argues against qualifying article VI NPT as an obligation to reach an agreement precisely because it might result in duty-bearers being held responsible for a failure to reach an agreement 'through no fault of their own', such as when certain duty-bearers put in their best effort to reach agreement but fail to achieve this result due to the other duty-bearers' refusal to cooperate.

⁵¹⁴ Anne van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 156. In a similar vein, Nollkaemper and Jacobs consider that 'states resist principles of responsibility that require them to be responsible for conduct other than their own', Nollkaemper and Jacobs (n 1) 386.

⁵¹⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 34.

⁵¹⁶ See Chapter 6, §6.2.1.

⁵¹⁷ van Aaken (n 518) 185; Michael Faure and André Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' [2007] *Stanford Journal of International Law* 123, 170; Tom Tietenberg, 'Indivisible Toxic Torts: The Economics of Joint and Several Liability' (1989) 65 *Land Economics* 305, 306.

obligation, regardless of what the other duty-bearers do and regardless of whether the goal pursued is in fact achieved. This lowers an individual duty-bearer's risk of incurring responsibility, but may also lower its dedication to the achievement of the common goal.

4.4 Conclusions

This chapter has set out the distinction between divisible and indivisible shared obligations, and has shown that the distinction between these two categories of shared obligations is based on the structure of performance of a shared obligation from the perspective of its bearers.

When multiple states and/or IOs are bound to an indivisible shared obligation, they are all bound to achieve a common performance. The structure of performance of an indivisible shared obligation is indivisible. It is either fulfilled by all duty-bearers simultaneously when the common performance is achieved, or it is breached by all duty-bearers when the common performance is not achieved. An indivisible shared obligation gives rise to a multilateral legal relation where the obligation is held by multiple duty-bearers, and as such it is the mirror image of the concepts of multilateral and *erga omnes (partes)* obligations discussed in chapter 2 (which give rise to multilateral legal relations where the right is held by multiple right-holders).

When multiple states and/or IOs are bound to a divisible shared obligation, each of them is bound only to its own share. The structure of performance of a divisible shared obligation is divisible, which entails that it is possible for one duty-bearer to breach the obligation by failing to do its share while another duty-bearer at the same time fulfils the obligation (and hence is released from the obligation) by doing its share. A divisible shared obligation gives rise to multiple bilateral legal relations, and in each of these legal relations the obligation is held by only one duty-bearer.

Qualifying a shared obligation as either divisible or indivisible essentially comes down to a question of interpretation of the content of that obligation: what does the obligation ask of its bearers? Does it oblige its bearers to achieve a common performance, or is each duty-bearer bound only to its own share? This determination is facilitated by two categorizations of international obligations that are commonly employed in international law: the distinction between positive and negative obligations, and the distinction between obligations of conduct and result. When a shared obligation is a positive obligation of conduct or a negative obligation of result, it is inherently divisible. A shared obligation can only be indivisible if it is a positive obligation of result, and even then it needs to be determined whether the duty-bearers in question are bound to achieve a common result (in which case all duty-bearers are bound to achieve a common performance) or whether each duty-bearer

is bound to achieve its own individual result (in which case each duty-bearer is bound only to its own share).