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### Shared obligations in international law

Nedeski, N.

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# 5

## BREACHES OF SHARED OBLIGATIONS AND THE DETERMINATION OF SHARED RESPONSIBILITY

This chapter aims to clarify the relationship between breaches of shared obligations and the determination of shared responsibility, and in doing so proceeds from the ILC framework of international responsibility. It finds that the implications of breaches of shared obligations for the determination of shared responsibility differ depending on whether the shared obligation breached is divisible or indivisible. Hence, the distinction between divisible and indivisible shared obligations is central to this chapter.

In this thesis, shared responsibility is defined as encompassing situations where multiple states and/or IOs contribute to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors.<sup>518</sup> It should be recalled that this study focuses only on international responsibility based on wrongfulness (and not on international responsibility based on the existence of special relationship between a state or IO and the perpetrator of conduct).<sup>519</sup> This signifies that, for the purpose of this study, shared responsibility arises only when multiple states and/or IOs contribute to a single harmful outcome by each committing a separate internationally wrongful act (IWA) or by jointly committing a single IWA.<sup>520</sup>

As is further addressed in chapter 6, the distinction between shared responsibility for one IWA and shared responsibility for several IWAs has implications for the nature of the secondary obligations of cessation and reparation that may arise as a result of a breach of a shared obligation (which form the *content* of shared responsibility). Thus, in order to fully clarify the implications of shared obligations for shared responsibility it is important for the present chapter to specify not only whether a breach of a shared obligation gives rise to shared responsibility, but also whether it gives rise to shared responsibility for one IWA or shared responsibility for several IWAs. Therefore, section 5.1 starts by introducing the distinction between these two situations of shared responsibility.

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<sup>518</sup> See Chapter 1, §1.1.6.

<sup>519</sup> See Chapter 1, §1.1.6.i.

<sup>520</sup> See Chapter 1, §1.1.6.iii.

Accordingly, there are *two* distinctions that are central to the analysis in this chapter (and the next). First, the distinction between divisible and indivisible shared obligations, and second, the distinction between shared responsibility for one IWA and shared responsibility for several IWAs.

The chapter subsequently proceeds to clarify the relationship between breaches of shared obligations and the determination of shared responsibility. It does so by applying the internal logic of the ILC system of international responsibility to breaches of shared obligations. Both the ASR and the ARIO provide that a state or IO is responsible for an internationally wrongful act when conduct consisting of an action or omission 1) constitutes a breach of an international obligation binding upon that state or IO, and 2) can be attributed to that state or IO.<sup>521</sup> These two elements of an internationally wrongful act are key to any determination of international responsibility.<sup>522</sup>

However, the fact that the obligations involved are shared by multiple states and/or IOs adds a layer of complexity to the process of determining international responsibility. The law of international responsibility provides that the breach of *any* international obligation that can be attributed to a state or IO results in responsibility for an internationally wrongful act. But when the international obligation breached is shared by multiple states and/or IOs the question arises: the international responsibility of whom? Does a breach of a shared obligation automatically give rise to shared responsibility for one IWA or several IWAs? If multiple riparian states are bound to an indivisible shared obligation to conclude an international treaty for the protection of a transboundary watercourse, does a breach of that obligation automatically give rise to the responsibility of all duty-bearers? And if civilian objects are targeted in the context of the US-led intervention in Syria, does this mean that all of the states participating in this intervention can be held responsible for a breach of the divisible shared obligation to refrain from targeting civilian objects?

Sections 5.2 and 5.3 clarify the implications of breaches of shared obligations for the determination of shared responsibility, and in doing so separately address breaches of indivisible shared obligations and breaches of divisible shared obligations. It should be recalled that an indivisible shared obligation is characterized by its indivisible structure of performance: as soon as it is fulfilled or breached, it is fulfilled or breached by all of its bearers simultaneously. A divisible shared obligation is characterized by its divisible structure of performance, which means that it is

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<sup>521</sup> Article 2 ASR and article 4 ARIO (provided that there are no circumstances precluding wrongfulness, see articles 20-25 ASR and 20-25 ARIO).

<sup>522</sup> Stern, 'The Elements of an Internationally Wrongful Act' (n 79).

possible for a duty-bearer to independently fulfil a divisible shared obligation while another one of the bearers breaches it.

Section 5.2 finds that there is an automatic relationship between breaches of indivisible shared obligations and shared responsibility for one IWA. It analyses the two elements of breach of obligation and attribution of conduct in the context of indivisible shared obligations. First, due to its indivisible structure of performance, a breach of an indivisible shared obligation always constitutes a breach by all of its bearers. Second, the conduct in breach of an indivisible shared obligation is always attributable to all bearers of the obligation on the basis of article 4 ASR or article 6 ARIO. Hence, an automatic relationship exists between a breach of an indivisible shared obligation and attribution of conduct to all duty-bearers, which indicates that a breach of an indivisible shared obligation always results in shared responsibility for one IWA.

Section 5.3 finds that there is no such automatic relationship between breaches of divisible shared obligations and shared responsibility for one IWA (or several IWAs). Breaches of divisible shared obligations can result in three potential outcomes in terms of international responsibility: shared responsibility for one IWA, shared responsibility for multiple IWAs, or the responsibility of only one duty-bearer for one IWA (which is not shared responsibility).

Whether or not a breach of a divisible shared obligation gives rise to shared responsibility for one or several IWAs depends on the facts of the situation in which the obligation is breached, and accordingly is dependent on extra-legal factors. First, a breach of a divisible shared obligation does not *necessarily* constitute a breach by all of its bearers. Due to its divisible structure of performance, a divisible shared obligation can be breached by only one of its bearers but it can also be breached by multiple or even all of its bearers. Second, the conduct in breach of a divisible shared obligation is not necessarily attributable to all duty-bearers. Overall, in terms of attribution of conduct, there are three possibilities. First, the obligation is breached by a single course of conduct that is attributable to multiple (or all) duty-bearers. Second, the obligation is breached by several *separate* courses of conduct, which can be attributed to each duty-bearer independently. Third, the obligation is breached by a course of conduct that is attributable to only *one* duty-bearer (and therefore not resulting in shared responsibility).

Sections 5.2 and 5.3 indicate that in the process of determining international responsibility for breaches of shared obligations, the distinction between divisible and indivisible shared obligations can be relied upon as an important tool. The position of indivisible shared obligations is special in this respect, since a breach of an

indivisible shared obligations automatically gives rise to shared responsibility for one IWA. The utility of the distinction between these two types of shared obligations in the determination of shared responsibility is further demonstrated in section 5.4, which applies the distinction between divisible and indivisible shared obligations to a selection of cases in practice that are covered by the present study's conceptualization of shared obligations.

### 5.1. Shared responsibility for one or several internationally wrongful acts

This section introduces the distinction between two situations of shared responsibility. Multiple states and/or IOs can contribute to a single harmful outcome by jointly committing a single internationally wrongful act (§5.1.1) or by each committing a separate internationally wrongful act (§5.1.2). The distinction between shared responsibility for one IWA and shared responsibility for several IWAs is recognized in the ILC's work on international responsibility, and has been relied upon by several authors in their analysis of (aspects of) shared responsibility.<sup>523</sup>

The distinction introduced in this section is relied upon throughout this chapter in its discussion of the implications of breaches of shared obligations for the determination of shared responsibility. Section 5.2 finds that a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA, whereas section 5.3 finds that a breach of a divisible shared obligation can give rise shared responsibility for one IWA, shared responsibility for several IWAs or the responsibility of only one state or IO.

Moreover, the distinction between shared responsibility for one IWA or for several IWAs has implications for the nature of the secondary obligations of reparation and cessation that may arise as result of a breach of a shared obligation, which are further addressed in chapter 6.

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<sup>523</sup> d'Argent separately analyses shared responsibility for several wrongful acts and shared responsibility for the same wrongful act in his analysis of the content of shared responsibility, see Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 211. Fry distinguishes between situations in which two or more states are responsible for only one IWA, as opposed to separate IWAs, Fry (n 65) 112. Tams distinguishes between 'responsibility triggered by independent wrongful acts' and 'responsibility triggered by interrelated wrongful acts' (the latter refers to the situation covered by article 47 ASR and 48 ARIIO), Christian Tams, 'Countermeasures against Multiple Responsible Actors' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 323–324. Messineo observes that whether an event is conceptualized as consisting of one wrongful act or as two separate wrongful acts may have consequences in terms of invocation of responsibility and the remedies available, Messineo (n 101) 79–80. Crawford identifies an overarching category of situations 'requiring attribution of conduct to multiple states', and within that category he draws a distinction between situations in which multiple states collaborate as co-authors of a wrongful act and situations where multiple states acting independently are responsible for different breaches in respect of the same injury, Crawford, *State Responsibility: The General Part* (n 24) 334.

### 5.1.1 Shared responsibility for one internationally wrongful act

Both the ASR and ARIO include one provision that expressly addresses the possibility of shared responsibility. Though strictly speaking the provision applies to the question of invocation, it is important in the present context for its recognition of the possibility of shared responsibility for one IWA. Article 47(1) ASR and article 48(1) ARIO provide that

‘Where several States [and/or IOs] are responsible for the same internationally wrongful act, the responsibility of each State [and/or IO] may be invoked in relation to that act.’

The ‘sameness’ of a wrongful act signifies that there is only one IWA that is committed by multiple states and/or IOs. This is to be distinguished from a situation in which multiple states commit several IWAs, which is further addressed in §5.1.2 below.

Crawford describes multiple state responsibility for one wrongful act as a situation in which ‘a plurality of states collaborate as co-authors of an internationally wrongful act’,<sup>524</sup> and equates this to Noyes and Smith’s description of situations in which states engage in concerted conduct in breach of an international obligation.<sup>525</sup> Noyes and Smith, in turn, draw a comparison between situations in which states engage in concerted conduct and the circumstance in municipal law where joint tortfeasors participate in a common breach of obligation.<sup>526</sup>

The ILC notes that article 47 ASR covers situations in which ‘a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them.’<sup>527</sup> Thus, in order to establish shared responsibility for one wrongful act a single course of conduct must be attributed to multiple international actors simultaneously. In legal literature, the attribution of a single course of conduct

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<sup>524</sup> Crawford, *State Responsibility: The General Part* (n 24) 334.

<sup>525</sup> Crawford, *State Responsibility: The General Part* (n 24) 334; John Noyes and Brian Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 *Yale Journal of International Law* 225, 228–229. See also Brian D Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (OUP 1988) 44, who speaks of ‘situations in which states engage in concerted conduct in breach of an international obligation.’

<sup>526</sup> Noyes and Smith (n 529) 229.

<sup>527</sup> International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (n 16) 124. The ILC’s commentaries to the ARIO acknowledge that ‘one could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.’ International Law Commission, ‘Draft Articles on the Responsibility of International Organizations, with Commentaries’ (n 17) 16. See also Messineo (n 101) 82.

to multiple states or IOs is generally referred to as dual or multiple attribution of conduct.<sup>528</sup>

But multiple attribution of a single course of conduct in and of itself is not sufficient to give rise to shared responsibility for one wrongful act. The single course of conduct should be internationally wrongful for all states and/or IOs involved, which means that all of them must be bound to an international obligation that prohibits the conduct in the concrete case at hand. When it comes to treaty obligations, it does not matter whether the obligation arises from one treaty to which all of them are parties or from multiple treaties, as long as all states and/or IOs involved are bound to an international obligation that prohibits the conduct in question.

The fact that a single course of conduct must be in breach of an obligation that is incumbent upon all states or IOs involved indicates that all of them must be bound to an international obligation with similar normative content in the concrete case at hand. It follows that shared responsibility for one IWA arises only if the states and/or IOs involved are bound to an obligation that falls within the present study's understanding of shared obligations.

As an example of the responsibility of multiple states for one internationally wrongful act, the ILC mentions that 'two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation'.<sup>529</sup> With this example 'the ILC envisaged a very peculiar situation made up of exceptional circumstances'.<sup>530</sup> As the entire operation (a single course of conduct) is carried out jointly by two or more states, the whole operation can be attributed to all of them on the basis of article 4 ASR (and, if one or more IOs are involved, article 6 ARIO).<sup>531</sup>

This would be the case in a scenario where two soldiers that each belong to different coalition partners in Iraq jointly patrol a certain area in a tank at the beginning of the conflict in 2003. If the two soldiers jointly operate the tank and a weapon fired by that tank unlawfully kills a civilian, this single course of conduct can be attributed to

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<sup>528</sup> See e.g. Messineo (n 101) 61–62; Cannizzaro (n 101); Palchetti (n 101) 739. See also the ILC's commentaries to the ARIO, International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (n 17) 16, para 4.

<sup>529</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 124.

<sup>530</sup> d'Argent (n 527) 244. Messineo seems to concur, noting that cases in which 'the same conduct is carried out jointly by two or more actors, each of whom is acting on behalf of a different state and/or international organization' are a rare occurrence. Messineo (n 101) 79.

<sup>531</sup> See Boutin (n 101) 106. With regard to conduct that is carried out jointly by two or more actors, Messineo observes that 'in some scenarios there may be one indivisible conduct that is attributable to two states acting together; see Messineo (n 101) 80.

both states.<sup>532</sup> If additionally, the states are bound to an international obligation that prohibits the conduct in question, they are all responsible for one IWA.

Another example of shared responsibility for one wrongful act is a situation in which two states 'act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river.'<sup>533</sup> This common organ does not have separate legal responsibility and as such cannot be held internationally responsible.<sup>534</sup> If state A and B pollute a boundary river through the common organ, the conduct carried out through the common organ (a single course of conduct) is attributable to both states on the basis of article 4 ASR and - if the conduct is in breach of an obligation binding upon both states - results in the international responsibility of both states for one and the same IWA.

In his separate opinion to the ICJ's Oil Platforms case, Judge Simma addressed shared responsibility for one IWA covered by article 47 ASR, which he referred to as responsibility for 'factually indivisible' wrongful acts.<sup>535</sup> The factually indivisible wrongful act in question consisted of the creation of negative economic, political and safety conditions in the Persian Gulf, which created dangerous conditions for shipping and doing commerce in the Gulf. He contended that, because both Iran and Iraq had contributed to the worsening of conditions in the Persian Gulf at the time, the creation of this environment was attributable to both states. On this basis, Simma concluded that the two states were responsible for a factually indivisible wrongful act.<sup>536</sup>

Most of the examples of shared responsibility for one IWA mentioned in legal literature concern multiple states or IOs that jointly engage in active conduct. However, as is further discussed in section 5.2 below, shared responsibility for one IWA can also result from a joint omission. In the case that multiple states and/or IOs are bound to an indivisible shared obligation, all of them are bound to achieve a common result. The failure to achieve that common result constitutes a joint

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<sup>532</sup> Messineo (n 101) 79. However, Messineo argues that many instances of joint conduct can also be conceptualized as consisting of several IWAs rather than one IWA attributable to multiple states.

<sup>533</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 124.

<sup>534</sup> See Chapter 1, §1.1.3.iii.

<sup>535</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, *Separate Opinion Judge Simma*, 2003 ICJ reports 324 [78].

<sup>536</sup> In this context, however, it should be pointed out that the creation of dangerous conditions for shipping and doing commerce in the Persian Gulf was in breach of article Article X(1) of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran. This treaty was not binding on Iraq, which means that it could not have given rise to an international obligation of Iraq. Accordingly, this particular factual scenario actually *does not* give rise to the responsibility of both states for one internationally wrongful act (assuming that there is no other treaty to which Iraq is a party that contains an international obligation with similar normative content).

omission, and this single course of conduct can be attributed to all bearers of the obligation. This gives rise to shared responsibility for one wrongful act.

### 5.1.2 Shared responsibility for several internationally wrongful acts

Not all situations of shared responsibility involve one IWA.<sup>537</sup> In its commentaries to article 47 ASR the ILC acknowledges that '[o]f course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage'.<sup>538</sup> Crawford calls this 'situations in which a plurality of states acting independently are responsible for different breaches in respect of the same injury'.<sup>539</sup> Both of these quotes focus on separate contributions to a single damage or injury, but the present thesis' understanding of shared responsibility encompasses contributions to *a single harmful outcome*, which is broader than the notion of a single injury.<sup>540</sup> Noyes and Smith do not focus on the (more limited) notion of a single injury but speak of situations where 'states engage in independent breaches of obligations with respect to a single event'.<sup>541</sup> Such independent breaches give rise to shared responsibility for several IWAs (as opposed to shared responsibility for one wrongful act), and are thus not covered by 47 ASR<sup>542</sup> and article 48 ARIO.

As is further discussed in chapter 6, the fact that multiple states and/or IOs are responsible for several IWAs that contribute to a single harmful outcome (rather than for a single IWA) has implications for the nature of the secondary obligations of cessation and reparation.

Shared responsibility for several internationally wrongful acts does not involve a single course of conduct that can be attributed to multiple states and/or IOs simultaneously. Rather, it involves several *separate* courses of conduct that are each internationally wrongful, and that can be attributed to each state and/or IO independently. These separate courses of conduct can give rise to shared responsibility if they all contribute to a single harmful outcome (this is a given when multiple states and/or IOs are responsible for one IWA). Moreover, each of the states and/or IOs involved should be bound to an international obligation that prohibits each actor's course of conduct.

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<sup>537</sup> Nollkaemper, 'Introduction' (n 59) 11.

<sup>538</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 125.

<sup>539</sup> Crawford, *State Responsibility: The General Part* (n 24) 334.

<sup>540</sup> See Chapter 1, section 1.1.6.ii.

<sup>541</sup> Noyes and Smith (n 529) 229. See also Smith (n 529) 44., who similarly refers to situations in which 'states engage in *independent* or several breaches of obligations with respect to a single event.'

<sup>542</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 125.

The separate courses of conduct can be in breach of a similar international obligation binding on all of the states or IOs involved. However, it is also possible that each of the separate courses of conduct is in breach of an international obligation that is *different* in terms of normative content. Hence, shared responsibility for several IWAs is not limited to breaches of international obligations that fall within the present study's understanding of shared obligations.

For example, when multiple states contribute to polluting a river by the separate discharge of pollutants,<sup>543</sup> this may give rise to shared responsibility for several internationally wrongful acts. Each state has separately contributed to polluting the river, and each state's respective discharge of pollutants can be attributed to each state independently on the basis of article 4 ASR. If all of the states in question are bound to an obligation that prohibits polluting the river, they will be internationally responsible for their contribution to a single harmful outcome.

Another example of shared responsibility for several wrongful acts is when state A extradites an individual to state B despite its awareness of a real risk that this individual will be subjected to torture and, upon arrival, the individual is indeed subjected to torture by officials of state B. In such a scenario states A and B are responsible for separate courses of conduct. Provided that the conduct of each state is prohibited by an international obligation incumbent upon it, state A will be responsible for the wrongful act of extradition (in breach of the obligation of non-refoulement) whereas state B will be responsible for the wrongful act of torture (in breach of the obligation not to commit torture), which both contribute to a single harmful outcome. This will give rise to shared responsibility for several internationally wrongful acts.

The above examples all concern shared responsibility that arises from active conduct. Shared responsibility for several IWAs can also arise when multiple omissions contribute to a single harmful outcome. Imagine, for example, that multiple states are bound to an obligation to take measures to prevent an impending genocide on the territory of a neighbouring state. None of them take any measures whatsoever, and acts of genocide are committed. Each state's failure to take measures can be attributed to each state separately, and constitutes a separate wrongful act.<sup>544</sup> All of these wrongful acts contribute to a single harmful outcome: the commission of genocide on the territory of the neighbouring state. Such a situation gives rise to shared responsibility for several IWAs.

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<sup>543</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 125.

<sup>544</sup> This is further explained in §5.3.2.i below.

## 5.2 Breaches of indivisible shared obligations and the determination of shared responsibility

This section sets out how the application of the ILC's framework of international responsibility to the concept of indivisible shared obligations logically indicates the conclusion that there is an automatic relationship between breaches of indivisible shared obligations and shared responsibility for one IWA. Shared responsibility for one IWA is the first situation of shared responsibility set out in section 5.1 above. A breach of an indivisible shared obligation cannot give rise to shared responsibility for *several* IWAs, which is the second situation of shared responsibility discussed above.

The two elements of breach of obligation and attribution of conduct are essential to any determination of international responsibility, and are analysed below in the context of indivisible shared obligations. First, it is argued that a breach of an indivisible shared obligation always constitutes a breach by all of its bearers (§5.2.1). This simply follows from the indivisible structure of performance of an indivisible shared obligation, which signifies that it can only be fulfilled or breached by all of its bearers simultaneously. Second, this section shows that when an indivisible shared obligation is breached, the conduct in breach of that obligation (which consists of a joint failure to achieve a common result) can be attributed to all duty-bearers simultaneously on the basis of article 4 ASR and 6 ARIO (§5.2.2). This gives rise to shared responsibility for one IWA.

### 5.2.1 Breach of an indivisible shared obligation

Article 12 ASR and 10(1) ARIO provide that there is a breach of an international obligation by a state or IO when the conduct of that state or IO is not in conformity with what is required of it by the obligation. Thus, whether or not an international obligation is breached, depends upon what is prescribed by the obligation in question.<sup>545</sup>

In terms of content, an indivisible shared obligation is a positive obligation of result that prescribes its bearers to achieve a common result,<sup>546</sup> such as an obligation that requires its bearers to reduce their common tuna catches by 35 per cent, or an obligation that requires its bearers to conclude an international treaty on a particular topic. This means that the obligation is breached in case of a failure to achieve that common result.

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<sup>545</sup> Crawford, *State Responsibility: The General Part* (n 24) 216. 'In determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, as applied to the facts of the case in hand.'

<sup>546</sup> See Chapter 4, §4.2.3.

Analysing the element of breach of obligation in the context of breaches of indivisible shared obligations is relatively straightforward. As mentioned above, the distinguishing characteristic of an indivisible shared obligation is its indivisible structure of performance.<sup>547</sup> This means that it is not possible for only one of the duty-bearers to breach the obligation while another duty-bearer at the same time fulfils the obligation. If the common result required by the obligation is achieved, the indivisible shared obligation is fulfilled by all duty-bearers, and if the common result is not achieved the indivisible shared obligation is breached by all duty-bearers. Accordingly, a breach of an indivisible shared obligation will always constitute a breach by all of its bearers.

For example, if states A and B bind themselves to the obligation to jointly take in a total of 20.000 Syrian refugees by means of a joint unilateral declaration, the obligation will be breached by both duty-bearers simultaneously when the common result of taking in 20.000 Syrian refugees is not achieved. This will be the case even if state A puts in its best efforts in its pursuit of the common result by taking in 10.000 Syrian refugees, whereas state B puts in no effort at all and plainly refuses to take in any Syrian refugees. Seeing that both states have bound themselves to achieve a common result (rather than having bound themselves to each achieve a specific individual result), the only thing that matters for the element of breach of obligation is whether the common result required by the obligation has been achieved.

Since neither state A nor state B has achieved the result prescribed by the obligation it does not matter what each of them has or has not done in its efforts to comply with the obligation. While it is true that some of the duty-bearers may be more at fault than others for the failure to achieve a common result, fault is not an element that is required for the determination of international responsibility.<sup>548</sup> Fault can only have a role to play in the process of determining responsibility if it is a constitutive element of the primary obligation breached, which is not the case in the present example (or in any of the other examples of indivisible shared obligations mentioned throughout this thesis).

All in all, because an indivisible shared obligation requires all of its bearers to achieve a common result, the failure to achieve that common result will constitute a breach by all of them.

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<sup>547</sup> See Chapter 4, §4.1.1.

<sup>548</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 34, para 3; Giuseppe Palmisano, 'Fault', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007) <www.mpepil.com>.

## 5.2.2 Attribution of conduct in breach of an indivisible shared obligation

The next element in the process of determining international responsibility for breaches of indivisible shared obligations is the element of attribution of conduct. By proceeding from the provisions on attribution of conduct in the ASR and ARIIO, it is argued that the conduct in breach of an indivisible shared obligation – which always consists of a failure to achieve a common result – is a single course of conduct that is automatically attributable to all duty-bearers. Hence, there is an automatic relationship between a breach of an indivisible shared obligation and multiple attribution of conduct to all of its bearers. This gives rise to shared responsibility for one IWA.

Considering that a breach of an indivisible shared obligation always consists of an omission (consisting of the failure to achieve a common result), some preliminary observations on the attribution of conduct consisting of an omission are in order.

An omission can be defined as ‘the failure to do what should be done’,<sup>549</sup> which signifies that there must be an obligation to do something before one can speak of a legally significant omission.<sup>550</sup> When a legally relevant omission has been identified, the question of attribution of conduct serves to identify *which* state(s) and/or IO(s) failed to act in the concrete case at hand, and thus which state(s) and/or IO(s) are internationally responsible for that omission. But because an omission does not consist of concrete physical acts, ‘the operation of the rules of attribution of conduct in relation to omissions operate at a greater level of abstraction’<sup>551</sup> compared to the way in which they operate in relation to active conduct that breaches an obligation.

Yet, the question of attribution of conduct that consists of an omission can be answered in a relatively straightforward manner. A failure to act can be attributed to the state and/or IO that was obliged to act in the concrete case at hand.<sup>552</sup> If state A is bound to an obligation to take appropriate steps in a concrete case, and no such steps are taken, this omission can be attributed to state A. Similarly, if state B is bound to an obligation to achieve a result in a concrete case, and that result is not achieved, this omission can be attributed to state B.

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<sup>549</sup> Crawford, *State Responsibility: The General Part* (n 24) 218.

<sup>550</sup> Crawford, *State Responsibility: The General Part* (n 24) 218. See also Gordon A Christenson, ‘Attributing Acts of Omission to the State’ (1990) 12 *Michigan Journal of International Law* 312, 326. ‘Whether an omission is attributable conduct, however, depends upon an international obligation by agreement or custom requiring action in the circumstances.’

<sup>551</sup> Latty (n 441) 361.

<sup>552</sup> See Miles Jackson, *Complicity in International Law* (OUP 2015) 195. Jackson discusses how attribution of conduct operates in the case of breaches of positive obligations: ‘by its very nature a failure on the part of the state to fulfil a positive obligation is conduct of that state. All of the legwork in such a case is done in determining the specific content of the specific obligation to take action and whether it was discharged.’

Essentially, a failure to act always takes place through a state or IO's own organs. Therefore, article 4 ASR and article 6 ARIIO provide the most appropriate legal basis for attribution of conduct in the case of an omission. These provisions provide, respectively, that '[t]he conduct of a State organ shall be considered an act of that State under international law' and that '[t]he conduct of an organ or agent of a international organization in the performance of functions of that organ or agent shall be considered an act of that organization'.

For example, in the *Tehran Hostages* case<sup>553</sup> Iran was obliged to take appropriate steps to protect the US Embassy in Tehran. As no steps to protect the US Embassy were taken, this omission was attributable to the state that was bound to take appropriate steps in the concrete case: Iran. In the *Belgium v. Senegal* case<sup>554</sup> Senegal was bound to the obligation to prosecute or extradite Mr. Habré, an individual suspected of acts of torture who was present on Senegalese territory. As Mr. Habré was neither prosecuted nor extradited, this omission was attributable to the state that was bound to prosecute or extradite Mr. Habré in the case at hand: Senegal.

These cases are clear illustrations of the idea that a failure to act can be attributed to the state(s) and/or IO(s) that was bound to act in the first place. In both cases a state was bound to act, and it was that state itself, embodied by its organs, that failed to act. The ICJ does not explicitly mention the basis for attribution of conduct, but it is submitted that this is glossed over solely because the attribution of an omission does not raise any complex questions of attribution.<sup>555</sup> In the case of an omission attribution of conduct simply occurs on the basis of the principle of attribution expressed in article 4 ASR (and article 6 ARIIO), which is the basic rule of attribution in the law of international responsibility.<sup>556</sup>

To summarize: an omission can be attributed to the state or IO that was obliged to act in the concrete case at hand on the basis of article 4 ASR and article 6 ARIIO. In the case of a breach of a positive obligation of conduct, the failure to take appropriate measures is attributable to the state or IO that was bound to take measures in the

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<sup>553</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, 1980 ICJ Reports 3.*

<sup>554</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 ICJ Reports 422 (n 301).*

<sup>555</sup> Stern notes that where there is an omission to act, 'it is not a question of attribution of the act of a private party, but rather a failure of the State itself to comply with its primary obligations.' Stern, 'The Elements of an Internationally Wrongful Act' (n 79) 209. d'Argent notes that '[b]y definition, a failure to act never raises any question of attribution, not even 'negatively'; pointing out a failure to act requires one to identify who had to act, so that the 'subjective' element at stake in the search for attribution is always satisfied by finding the wrongful omission.' Pierre d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) 1 *Questions of International Law* 17. See also Jackson (n 556) 195.

<sup>556</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 39, para 8.

case at hand. In the case of a breach of a positive obligation of result, the failure to achieve a particular result is attributable to the state or IO that was bound to achieve that result.

With this in mind, it can be inferred that an omission that consists of a failure to achieve a common result can be attributed to *multiple* states and/or IOs in the case that *multiple* states and/or IOs were bound to achieve that common result. This indicates that there is an automatic connection between a breach of an indivisible shared obligation (which always obliges multiple states and/or IOs achieve a common result) and multiple attribution of conduct to all duty-bearers on the basis of article 4 ASR and 6 ARIO. As soon as a breach of an indivisible shared obligation is established, the conduct in breach of that obligation can be attributed to all of its bearers. This gives rise to shared responsibility for one IWA.

Accordingly, multiple attribution of conduct to all states and/or IOs that bear the obligation is inherent to the breach of an indivisible shared obligation. Such an automatic connection between breach and attribution is rather exceptional, since the elements of breach and attribution are analytically distinct and are mostly considered separately in the process of determining international responsibility.<sup>557</sup> Arguably, however, the law of international responsibility as it stands fully accommodates the automatic connection between breach and multiple attribution of conduct in the case of a breach of an indivisible shared obligation.

For example, when five states agree to the indivisible shared obligation to reduce their combined yearly catches of beluga sturgeon by 75 per cent, they bind themselves to achieve a common result. The obligation will be breached by all duty-bearers simultaneously when the 75 per cent reduction is not achieved, and the conduct in breach of the obligation will consist of the failure to reduce the combined catches by 75 per cent. The question then arises: to which of the duty-bearer(s) can the failure to achieve the common result required by an indivisible shared obligation be attributed?

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<sup>557</sup> Legal scholars rarely discuss the potential connection between the elements of breach and attribution of conduct. However, in his first report SR Crawford notes that 'there may be a close link between the basis of attribution and the particular primary rule, even though the two elements are analytically distinct.' James Crawford, 'First Report on State Responsibility' (1998) A/CN.4/490 34. Condorelli and Kress observe that 'there undoubtedly exists a close link, in some cases extremely close, between the applicable primary rule and the rules of attribution. This is particularly the case in relation to conduct consisting of an omission, given that inaction cannot be identified except by identifying precisely what active conduct is required by the primary obligation.' Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 225.

The answer to this question can be inferred from the proposition that a failure to achieve a result can be attributed to the state and/or IO that was obliged to achieve that result in the concrete case at hand on the basis of article 4 ASR or 6 ARIO. If multiple duty-bearers are obliged to achieve a common result, and that common result is not achieved, this constitutes a common failure by all duty-bearers that can be attributed to all of them. In our example, the five states were obliged to achieve a common reduction of 75 per cent. The failure to reduce combined catches of beluga sturgeon by 75 per cent is a common failure of all duty-bearers that is simultaneously attributable to all duty-bearers on the basis of article 4 ASR.

It follows that a breach of an indivisible shared obligation gives rise to the international responsibility of all duty-bearers for one internationally wrongful act. From a legal perspective, there is only one failure that can be qualified as a breach of the obligation: the failure to achieve the common result. This joint failure is a single course of conduct that can be attributed to all duty-bearers. In such a case, multiple duty-bearers are responsible for a single course of conduct (a failure to achieve a common result) rather than for several courses of conduct (e.g. several independent failures to achieve an individual result). The shared responsibility that arises as a consequence can be qualified as shared responsibility for one wrongful act.

In another example, when the joint launching of a space object by state X and state Y results in damage, both states will become bound to an obligation to provide full compensation for the damage that has been jointly caused. This obligation of compensation is a primary obligation that has been agreed upon by states parties to the Space Liability Convention, and does not require that an internationally wrongful act has been committed.<sup>558</sup>

This indivisible shared obligation requires its bearers to achieve a common result: full compensation for the entire damage, and if full compensation is not provided the obligation will be breached by both duty-bearers. The individual behaviour of duty-bearers does not matter in this respect. Even if one of the duty-bearers provides compensation for half of the damage caused or even more, the obligation will be breached by both states if the common result of full compensation is not achieved. The failure to provide full compensation can then be attributed to both duty-bearers on the basis of article 4 ASR. This simply follows from the fact that both duty-bearers were bound to achieve the common result of full compensation, and full compensation was not provided. A single course of conduct (the failure to pay full compensation) can be attributed to both state X and Y, which gives rise to shared responsibility for one IWA.

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<sup>558</sup> Article V Convention on the International Liability for Damage caused by Space Objects (1972) 961 UNTS 187 (n 516).

In a final example, the indivisible shared obligation to conclude an international treaty on total nuclear disarmament<sup>559</sup> obliges its bearers to achieve a common result: the conclusion of an international agreement on nuclear disarmament. If no such agreement is concluded the obligation will be breached by all duty-bearers. In this respect, it does not matter whether some of the duty-bearers tried to the utmost of their capabilities to achieve the common goal and some others flat out refused to contribute to these endeavours. The obligation will be breached when the common result is not achieved, and the failure to conclude an international agreement will then be attributable to all duty-bearers on the basis of article 4 ASR; giving rise to shared responsibility for one wrongful act. This simply follows from the fact that all duty-bearers were bound to the obligation to conclude an international agreement on nuclear disarmament, and no such agreement was concluded.

### **5.2.3 Summary**

A breach of an indivisible shared obligation gives rise to the shared responsibility of all of its bearers for one internationally wrongful act. If multiple states and/or IOs are bound to an indivisible shared obligation, and the common result required by the obligation is not achieved, all duty-bearers will be deemed to have breached that obligation. The failure to achieve a common result constitutes a joint failure, and this single course of conduct can be attributed to all duty-bearers simultaneously. As is the case with attribution of any act of omission, attribution of conduct occurs on the basis of article 4 ASR or 6 ARIIO because a failure to act basically takes place through a state's or IO's own organs.

This section has shown that a breach of an indivisible shared obligation, multiple attribution of conduct and shared responsibility for one IWA go hand in hand. Accordingly, the fact that multiple states and/or IOs are bound to an indivisible shared obligation has automatic implications for the international responsibility for the states or IOs involved. This is a typical feature of indivisible shared obligations, since there is no such automatic relationship between breaches of divisible shared obligations and shared responsibility for one IWA (or shared responsibility for several IWAs).

### **5.3 Breaches of divisible shared obligations and the determination of shared responsibility**

This section shows that breaches of divisible shared obligations can result in three different outcomes in terms of international responsibility: shared responsibility for one IWA, shared responsibility for multiple IWAs, or the international responsibility

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<sup>559</sup> See Chapter 4, §4.2.2.iii and §4.2.3.

of only one state or IO for an IWA. Considering that the latter outcome encompasses the responsibility of only one state or IO, it falls outside the scope of the notion of shared responsibility. This indicates that a breach of a divisible shared obligation does not always give rise to shared responsibility. Whether or not a breach of a divisible shared obligation gives rise to shared responsibility for one IWA or shared responsibility for several IWAs is dependent on extra-legal factors, since it depends on the facts of the case at hand.

Hence, the determination of responsibility for breaches of divisible shared obligations is much less straightforward than is the case with breaches of indivisible shared obligations. The fact that multiple states and/or IOs are bound to a divisible shared obligation has no automatic implications for the international responsibility of the states or IOs involved.

In this section, the two elements of breach of obligation and attribution of conduct are analysed in the context of divisible shared obligations. First, a breach of a divisible shared obligation does not necessarily constitute a breach by all of its bearers (§5.3.1). This follows from the divisible structure of performance of a divisible shared obligation. A divisible shared obligation can be breached by only one of its bearers if only one of them fails to do its share. However, it is also possible for multiple or even all duty-bearers to breach a divisible shared obligation if some or all of them fail to do their share.

Second, the conduct in breach of a divisible shared obligation is not necessarily attributable to all of its bearers (§5.3.2). Overall, there are three possibilities in terms of attribution of conduct. First, the divisible shared obligation is breached by a single course of conduct that is attributable to multiple or all duty-bearers. This gives rise to shared responsibility for one IWA. Second, the divisible shared obligation is breached by multiple separate courses of conduct that can be attributed to each duty-bearer independently. Assuming that these separate courses of conduct contribute to a single harmful outcome, this gives rise to shared responsibility for several IWAs. Finally, the divisible shared obligation is breached by a single course of conduct that is attributable to only one duty-bearer. Since the latter scenario does not involve multiple states and/or IOs contributing to a single harmful outcome, it does not give rise to shared responsibility but rather to the international responsibility of only one state or IO.

### **5.3.1 Breach of a divisible shared obligation**

As mentioned above, whether or not an international obligation is breached depends upon what is prescribed by the obligation in question. In terms of content, a divisible shared obligation can be a positive obligation of conduct, a positive obligation of

result or a negative obligation of result.<sup>560</sup> All divisible shared obligations have in common that each bearer is bound for its share only.

When multiple duty-bearers are bound to a shared obligation of conduct, such as the obligation of multiple states that sponsor an entity to undertake activities in the Area to take measures to protect and preserve the environment,<sup>561</sup> the obligation is breached in case of a failure to take such measures. When multiple duty-bearers are bound to a positive shared obligation of result that requires each of them to achieve its own result, such as when multiple states bind themselves to *each* take in 2000 Syrian refugees, the obligation is breached in case of a failure to achieve such a result. Finally, when multiple duty-bearers are bound to a negative shared obligation of result that requires each of them to abstain from a certain course of conduct, such as the obligation of the states that are participating in the US-led intervention in Syria to refrain from targeting civilians and civilian objects in Syria,<sup>562</sup> the obligation is breached in the case of engagement in the prohibited course of conduct.

In case of a breach of a divisible shared obligation, it must be determined *by whom* the obligation has been breached. A breach of a divisible shared obligation does not automatically constitute a breach by all of its bearers. It follows from the divisible structure of performance of a divisible shared obligation that it is possible for only one or some of its bearers to breach it, while others fulfil the obligation.

Essentially, whether a divisible shared obligation is breached by one, some or all of its bearers cannot be predicted in advance because it depends on the facts of each case. Because each bearer is bound to its share only, it must be determined in the concrete case at hand whether each bearer has indeed failed to do its share. This is different in the case of a breach of an *indivisible* shared obligation, where the independent behaviour of each duty-bearer is irrelevant for the question of breach; all that matters is whether the common result has been achieved.

In the case of a breach of a divisible shared obligation, the individual behaviour of each duty-bearer *does* matter for the purpose of determining which of them has breached the obligation. For example, the states that are participating in the US-led intervention in Syria are all bound to the negative obligation to refrain from targeting civilians and civilian objects in Syria. This obligation is covered by the present study's understanding of shared obligations because they are all bound to a similar international obligation that pertains to the same concrete case. This shared

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<sup>560</sup> See Chapter 4, §4.2.3.

<sup>561</sup> See §5.4.8 below.

<sup>562</sup> This obligation follows from a rule of customary international law, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP) 3; Fleck (n 405) 614.

obligation can be qualified as divisible, because each bearer is bound to its own share only. This means that it is possible for only one of the states participating in the US-led intervention to independently breach the obligation, for example if France carries out an airstrike alone that targets a civilian hospital. In such a scenario, the obligation to refrain from targeting civilians and civilian objects is breached by France, but it is not breached by the other states.

However, one can also imagine a scenario in which multiple or all states participating in the US-led-intervention in Syria breach this divisible shared obligation, if multiple or all states fail to do their share. For example, if France, Turkey and the US each decide to independently send out military aircrafts to target one and the same civilian object, or when one military aircraft under the effective control of France, Turkey and the UK targets a primary school in Syria, the obligation to refrain from targeting civilian objects is breached by all three states.

### **5.3.2 Attribution of conduct in breach of a divisible shared obligation**

The next element in the process of determining responsibility for a breach of a divisible shared obligation is the element of attribution of conduct. By proceeding from the ASR and ARIO it is argued that the conduct in breach of a divisible shared obligation is not necessarily attributable to all of its bearers, which is illustrated by various hypothetical examples below. It follows that there is no automatic relationship between breaches of divisible shared obligations and shared responsibility for one IWA or several IWAs.

Whether or not conduct in breach of a divisible shared obligation can be attributed to one, some or all duty-bearers depends on the facts that are specific to each case of a breach. Overall, in terms of attribution of conduct in breach of a divisible shared obligation there are three possibilities: a single course of conduct that is attributable to multiple states and/or IOs, several separate courses of conduct that are attributable to each state or IO independently, or a single course of conduct that is attributable to only one state or IO.

Below, the discussion of attribution of conduct in breach of a divisible shared obligation separately addresses divisible shared obligations of a *positive* character and divisible shared obligations of a *negative* character. This is done for two reasons. First, attribution of conduct in breach of a positive obligation (which always consists of an omission) occurs solely on the basis of article 4 ASR and 6 ARIO, whereas attribution of conduct that breaches a negative obligation (which always consists of engaging in prohibited conduct) can potentially be based on any of the provisions on attribution of conduct in the ASR and ARIO. Second, this subsection finds that divisible shared obligations of a positive and negative character can both result in

shared responsibility for several IWAs, or in the international responsibility of only one state or IO. However, only divisible shared obligations of a negative character can give rise to shared responsibility for one IWA.

*i. Divisible shared obligations of a positive character and attribution of conduct*

The conduct in breach of a divisible shared obligation of a positive character always consists of an omission. Depending on whether the positive obligation in question is one of conduct or result, this omission consists of a failure to take measures in pursuance of a common result, or a failure to achieve an individual result. As has been noted above in relation to omissions, conduct consisting of an omission can be attributed to the state or IO that was bound to act in the concrete case at hand on the basis of article 4 ASR and 6 ARIO. This proposition has been applied to breaches of indivisible shared obligations (which are always positive obligations), and also applies in the context of breaches of divisible shared obligations of a positive character.

In the case of indivisible shared obligations, it has been considered that a failure to achieve the common result required by the obligation is a joint failure that is attributable to all of its bearers. Attributing an omission requires one to identify who had to act in the case at hand. Because all bearers of an indivisible shared obligation are bound to achieve one common result, the failure to achieve that common result necessarily constitutes a failure by all of them, resulting in shared responsibility for one wrongful act.

This is different in the case of divisible shared obligations of a positive character, which are also breached through acts of omission. Breaches of divisible shared obligations of a positive character cannot properly be conceptualized as a joint failure by all duty-bearers because they are not bound to achieve one common result. Rather, they are bound to each take measures in pursuance of a common result, or they are bound to achieve an individual result. Even in the case that multiple duty-bearers fail to do their share; these constitute individual omissions or, in other words, separate courses of conduct that are attributable to each duty-bearer individually. It follows that breaches of divisible shared obligations of a positive character cannot give rise to shared responsibility for one IWA.

Imagine, for example, the obligation of Australia and Nauru to take measures to prevent the inhuman treatment of the asylum seekers and refugees that are detained

in Australian processing centres on the territory of Nauru.<sup>563</sup> This is a positive obligation of conduct that obliges each of these two states to take measures that are within its power in order to prevent inhuman treatment with regard the same concrete case. As a divisible shared obligation it binds each bearer to its own share only, and it is possible for each duty-bearer to independently fulfil or breach the obligation. This means that it is possible that Nauru *does* take all measures that are within its power to prevent inhuman treatment of the asylum seekers and refugees detained on its territory, whereas Australia fails to take any measures whatsoever.

In this scenario, Australia's failure to take measures to prevent inhuman treatment constitutes an omission. We have established that an omission can be attributed to the state that was bound to act in the concrete case at hand on the basis of article 4 ASR. While it is true that in this particular scenario both states are bound to act by taking appropriate measures, each state is obliged to do its share by taking measures *itself*. The fact that no measures are taken by Australia can be attributed to Australia only, because only Australia's obligation extends to the measures taken by Australia. Australia's omission cannot be attributed to Nauru because the obligation of Nauru extends only to the measures that are or are not taken by Nauru itself, and does not extend to the measures that are or are not taken by Australia. Nauru has fulfilled the obligation by taking appropriate measures to prevent inhuman treatment, whereas Australia has breached the obligation by failing to take such measures. This leads to the international responsibility of Australia only.

A different possibility is that inhuman treatment of detained asylum seekers and refugees occurs and neither Australia nor Nauru has taken appropriate measures to prevent this inhuman treatment. As both states are obliged to take such measures in the same concrete case, and neither of them has acted in accordance with this obligation, Nauru's omission can be attributed to Nauru and Australia's omission can be attributed to Australia on the basis of article 4 ASR. These omissions constitute two separate failures, and both courses of conduct contribute to a single harmful outcome: the inhuman treatment of individuals detained in Australia's offshore processing centres on the territory of Nauru. This gives rise to shared responsibility for several IWAs, since each state is responsible for a separate course of conduct that can be separately attributed to it.

In a final hypothetical example, Japan, New Zealand and Australia bind themselves to an obligation to each reduce their respective Southern Bluefin Tuna catches by 20 per

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<sup>563</sup> The refugees and asylum seekers that are held in detention on the territory of Nauru continue to be under the *de facto* control of Australia, meaning that both states owe similar international obligations towards these individuals. See the discussion in Chapter 3, §3.2.3.ii.

cent. This is a positive obligation of result that obliges each bearer to achieve its own result, and as a divisible shared obligation it can be fulfilled or breached by each duty-bearer independently. Thus, it is possible that only one of the states breaches the obligation by failing to do its share whereas the others fulfil it. For example, If New Zealand fails to reduce its catches by 20 per cent and Japan and Australia each succeed in reducing their respective catches by the required percentage, only New Zealand will breach the obligation. This omission is attributable to New Zealand only, meaning that only New Zealand will be internationally responsible for a breach of this divisible shared obligation.

Another possibility is that all three states fail to reduce their individual catches by 20 per cent. In such a scenario, each state's respective failure can be attributed to each of them independently on the basis of article 4 ASR. Each failure constitutes a separate course of conduct, and all of them contribute to a single harmful outcome: the depletion of Southern Bluefin Tuna stocks. This gives rise to the shared responsibility of Japan, Australia and New Zealand for several IWAs.

*ii. Divisible shared obligations of a negative character and attribution of conduct*

The conduct in breach of a divisible shared obligation of a negative character always consists of engaging in the conduct that is prohibited by the obligation in question. In such a case, attribution of conduct can potentially be based on the full range of provisions on attribution of conduct in the ASR and ARIIO.

An example of a divisible shared obligation of a negative character is the obligation of states A, B and C to refrain from polluting a transboundary river. Broadly speaking, there are three possibilities when it comes to the attribution of conduct in breach of this obligation. First, the obligation is breached by a course of conduct that can be attributed to one state only. For example, if an entity that exercises elements of governmental authority of state A pollutes the river, this single course of conduct can be attributed to state A only on the basis of article 5 ASR. Assuming that states B and C refrain from polluting the river, this gives rise to the international responsibility of state A only.

The second possibility is that the obligation is breached by several separate courses of conduct that can be attributed to each state independently, for example if each state pollutes the river through its own organs. These courses of conduct can be attributed to each state independently on the basis of article 4 ASR. Each of these courses of conduct contributes to a single harmful outcome (the pollution of the

transboundary river), which gives rise to shared responsibility of states A, B and C for several IWAs.

The final possibility is that the obligation is breached by a single course of conduct that is attributable to all three states, for example if states A, B and C all exercise effective control over an entity that pollutes the river. This single course of conduct can be attributed to all three states on the basis of article 8 ASR; resulting in shared responsibility of states A, B and C for one IWA.

### 5.3.3 Overview

The above indicates that there is no automatic relationship between breaches of divisible shared obligations and shared responsibility for one IWA or several IWAs. Overall, breaches of divisible shared obligations can give rise to shared responsibility for one IWA, shared responsibility for several IWAs but also to the international responsibility of only one state or IO (which is not shared responsibility). Whether or not a breach of a divisible shared obligation results in shared responsibility (and if so, for one IWA or several IWAs) is mostly dependent upon the facts that are specific to each case of a breach. However, it should be noted in this respect that breaches of divisible shared obligations of a *positive* character cannot give rise to shared responsibility for one IWA.

Accordingly, the fact that multiple states and/or IOs are bound to a divisible shared obligation has no automatic implications for the international responsibility of the states and/or IOs involved. But this does not mean that international obligations that fall within the scope of the category of divisible shared obligation are irrelevant for the topic of shared responsibility. Arguably, the fact that multiple states and/or IOs are bound to a divisible shared obligation increases the likelihood that shared responsibility may arise. If multiple states or IOs (rather than only one state or IO) are bound to do something or refrain from doing something in the same concrete case, there is a chance that more than one of them will fail to do so. Moreover, in the scenarios discussed in this section the fact that states and/or IOs are bound to a divisible shared obligation makes it possible for shared responsibility to arise, since states and IOs can only be held internationally responsible for contributing to a single harmful outcome if that contribution constitutes a breach of an international obligation binding upon them.

However, divisible shared obligations do not hold a special position in this respect. States and/or IOs can also share responsibility if their contributions to a single harmful outcome are in breach of international obligations that are not covered by the present study's understanding of shared obligations. This is the case when multiple states and/or IOs are each bound to an international obligation with a

*different* normative content that pertains to the same concrete case. For example, if state Y extradites an individual to state X while it is aware of the risk that that individual will be subjected to torture (which constitutes a breach of Y’s obligation of non-refoulement) and state X subsequently tortures that individual (in breach of X’s obligation to refrain from acts of torture) both states can be held internationally responsible for contributing to a single harmful outcome. This gives rise to shared responsibility for several IWAs.

All in all, the findings in this section indicate that the fact that multiple states and/or IOs are bound to a divisible shared obligation does not necessarily mean that they will share responsibility in case of a breach. In the process of determining international responsibility, it is only the position of indivisible shared obligations that is special. When multiple states and/or IOs are bound to an indivisible shared obligation, the indivisible nature of the obligation *does* have automatic implications for the shared responsibility of duty-bearers in case of a breach.

Figure 5.1 below summarizes the findings of sections 5.2 and 5.3. It shows that a breach of an indivisible shared obligation can only result in one possible outcome: shared responsibility for one IWA. Overall, a breach of a divisible shared obligation has three potential outcomes (with the caveat that divisible shared obligations of a positive character cannot give rise to shared responsibility for one IWA):

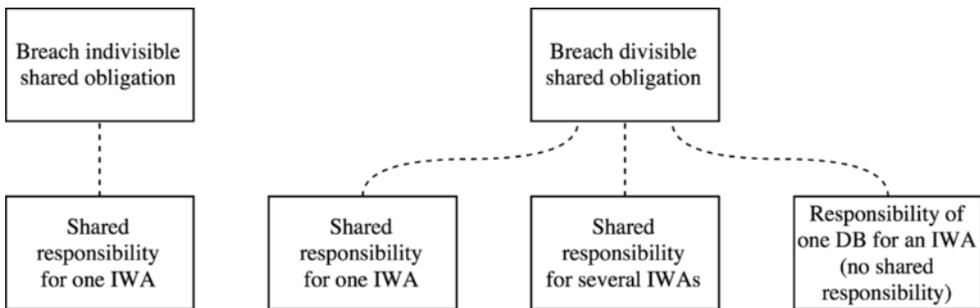


Figure 5.1: Breaches of shared obligations and the determination of shared responsibility

These findings underscore the importance of distinguishing between the two categories of shared obligations, and support the argument that in the process of determining international responsibility for breaches of shared obligations it is useful to identify whether the shared obligation in question is divisible or indivisible. This is further illustrated in the next and final section of this chapter, which applies the distinction between divisible and indivisible shared obligations to a selection of cases

in practice that are covered by the present study's understanding of the concept of shared obligations.

#### **5.4 Applying the distinction between divisible and indivisible shared obligations**

Based on the finding of sections 5.2 and 5.3 above, this final section serves to demonstrate the way in which the divisible or indivisible character of a shared obligation can be relied upon to facilitate the determination of shared responsibility in a concrete case of a breach. It will do so by relying on the distinction between divisible and indivisible shared obligations in the process of determining international responsibility, in a selection of cases in practice that are covered by the present study's understanding of shared obligations.

The scenarios discussed in this section serve an illustrative purpose and are not intended to provide an exhaustive overview of shared obligations in practice.

##### **5.4.1 The shared obligation to rehabilitate Nauru's worked out phosphate lands**

In 1947, Australia, the UK and New Zealand were designated as the joint Authority that would exercise the administration of the territory of Nauru.<sup>564</sup> As a result, the three states were bound to various obligations of trusteeship relating to the administration of the territory of Nauru.<sup>565</sup> One of these obligations was the obligation to rehabilitate Nauru's worked out phosphate lands, or to provide the financial means for such rehabilitation.<sup>566</sup>

The Administering Authority was a common organ<sup>567</sup> of Australia, the UK and New Zealand with no international legal personality of its own.<sup>568</sup> It follows that the Administering Authority was not a bearer of the obligation to rehabilitate Nauru's worked out phosphate lands.<sup>569</sup>

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<sup>564</sup> Article 2 Trusteeship Agreement for the Territory of Nauru (1947) 10 UNTS 3 (n 49).

<sup>565</sup> Article 3 Trusteeship Agreement for the Territory of Nauru (1947) 10 UNTS 3 (n 49).

<sup>566</sup> In its memorial, Nauru argued that such an obligation could be derived from the existence of the trusteeship over the territory of Nauru, see *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Memorial of the Republic of Nauru, 1990 Volume I* (n 403) [290].

<sup>567</sup> Messineo (n 101) 73; Crawford, *State Responsibility: The General Part* (n 24) 339; André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' in E Rieter and H de Waele (eds), *Evolving Principles of International Law. Studies in Honour of Karel C. Wellens* (Martinus Nijhoff Publishers 2012) 223; Talmon (n 9) 200–201.

<sup>568</sup> This was confirmed by the ICJ in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, 1992 ICJ Reports 240* (n 48) [47].

<sup>569</sup> See Chapter 1, §1.1.3.iii.

The obligation to rehabilitate Nauru's worked out phosphate lands is covered by the present study's understanding of shared obligations: Australia, the UK and New Zealand were bound to a similar international obligation that pertains to the same constellation of facts.

Interestingly, in the *Certain Phosphate Lands in Nauru* case before the ICJ, the nature of this obligation was a topic of debate. Nauru had instituted proceedings against Australia only, asserting that the obligation to rehabilitate Nauru's phosphate lands (or to provide the financial means for such rehabilitation) had been breached by Australia and that Australia should be held internationally responsible accordingly. However, in its preliminary objections, Australia contended that the obligation (if it existed) was a joint obligation of Australia, the UK and New Zealand. It argued that due to the joint nature of the obligation, a breach would result in the joint responsibility of the three states. The aim of this argument was to ensure that the ICJ would not rule on the merits of the case, with Australia trying to convince the Court that Nauru should have instituted proceedings against Australia, the UK and New Zealand jointly.<sup>570</sup>

Because the proceedings were discontinued in 1993 - before the ICJ could rule on the merits of the case - the ICJ was never to address the nature of the obligation of rehabilitation, and any implications this might have for the nature of international responsibility. In its judgment on the preliminary objections the ICJ simply held that proceedings could be instituted against Australia seeing that:

'It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.'<sup>571</sup>

In light of the present study's conceptualization of shared obligations, the obligation to rehabilitate Nauru's worked out phosphate lands can be qualified as an indivisible

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<sup>570</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections of the Government of Australia, 1990 Volume I* (n 100) [322]. Australia argued that 'it is clear that the obligations of the Administering Authority were undertaken jointly by the three Governments (...) Accordingly, any breach of the obligations of the Administering Authority would be, *prima facie*, the joint responsibility of the Governments of Australia, New Zealand and the United Kingdom.' In his Separate Opinion, Judge Shahabuddeen summarizes Australia's position as follows: 'the obligation to ensure rehabilitation (if it existed) was, by virtue of the terms of the Trusteeship Agreement, a joint obligation of Australia, New Zealand and the United Kingdom, with the result that Australia could not be sued alone'. See *Certain Phosphate Lands in Nauru (Nauru v. Australia), Separate Opinion Judge Shahabuddeen, 1992 ICJ reports* 270 (n 9).

<sup>571</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, 1992 ICJ Reports* 240 (n 48) [48].

shared obligation. The obligation requires its bearers to achieve a common result: the rehabilitation of Nauru's worked out phosphate lands. Due to its indivisible structure of performance, it is not possible for one of the three states to fulfil the obligation whereas another state breaches it. Indeed, it does not matter whether one state tried to initiate rehabilitation, or even whether it succeeded in providing part of the required rehabilitation of Nauru's worked out phosphate lands. The only thing that matters is whether the common result required by the obligation has been achieved or not. If the common result is not achieved, the obligation is breached by Australia, New Zealand and the UK.

It should be recalled that a failure to achieve a result is attributable to the state or IO that was bound to achieve that result in the concrete case at hand, on the basis of article 4 ASR or 6 ARIIO. Considering that Australia, New Zealand and the UK were all bound to achieve the common result of rehabilitation, a failure to achieve this common result is a joint failure that would be attributable to all of them simultaneously on the basis of article 4 ASR. This gives rise to shared responsibility for one IWA.

#### **5.4.2 The shared obligation to take appropriate steps to maintain security and public order in and around the Coquelles terminal**

The obligation to take appropriate steps to maintain security and public order in and around the Coquelles terminal was enshrined in the Concession Agreement between France and the UK ('the Principals') and the Channel Tunnel Group Limited and France-Manche S.A. ('the Concessionaires'), in which the two states undertook to permit the construction and operation of a Channel fixed link.<sup>572</sup> In the *Eurotunnel Arbitration*, the Tribunal confirmed that both France and the UK were obliged to take measures with regard to the French side of the Fixed Link,<sup>573</sup> considering that 'in the circumstances of the clandestine migrant problem as it existed in the Calais region in the period from September 2000 to until December 2002', both France and the UK

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<sup>572</sup> This obligation arises from clauses 2.1 and 27.7 of the Concession Agreement concerning the Channel Fixed Link (n 6). The provisions in this agreement give rise to various obligations for the Concessionaires, such as financial obligations, but also give rise to obligations for the UK and France. The Treaty of Canterbury, supplemented by a number of later agreements between France and the UK, lays down the international legal framework 'to permit the construction and operation of a Channel fixed link by private enterprise'. See *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, *Partial Award, 2007* (n 52) [52]. See also para 3 of the preamble to the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (France - United Kingdom) (1987), 1497 UNTS 334.

<sup>573</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, *Partial Award, 2007* (n 52) [316]. The Tribunal rejected the argument that the UK was responsible for the security of the Fixed Link on the UK side only, and that France was responsible for the security on only the French side. See Freya Baetens, 'Invoking, Establishing and Remediating State Responsibility in Mixed Multi-Party Disputes' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 433.

were obliged to take appropriate steps to maintain conditions of security and public order in and around the Coquelles terminal, 'acting through the IGC and otherwise'.<sup>574</sup>

France and the UK created the Intergovernmental Commission (IGC), which is a common organ with no legal personality of its own.<sup>575</sup> Consequently, the obligations that France and the UK owe to the Concessionaires are not incumbent upon the IGC itself. The IGC was established as a mechanism to enable France and the UK to fulfil their obligations under the Concession Agreement,<sup>576</sup> and its purpose is to supervise 'in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link'.<sup>577</sup>

The obligation to take appropriate steps to maintain security and public order in and around the Coquelles terminal is a shared obligation, as France and the UK are bound to an international obligation with similar normative content that pertains to the same concrete case: the Coquelles terminal.

Interestingly, in the *Eurotunnel Arbitration* the nature of this obligation was a topic of discussion. Claimants asserted that the obligation binding upon France and the UK was a joint obligation, giving rise to joint liability.<sup>578</sup> In its judgment, the Arbitral Tribunal did not expressly address the nature of this obligation and the potential implications for the nature of international responsibility in case of a breach. It did note that the Concession Agreement included a provision providing that all of the obligations of the Concessionaires are 'joint and several' whereas no equivalent provision was included that provided that all obligations of France and the UK are joint and several. In the absence of such a provision, the Tribunal considered that whether a breach of an obligation arising from the Concession Agreement would give rise to the responsibility of one or both states would 'depend on the particular obligation violated and on all of the circumstances'.<sup>579</sup>

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<sup>574</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, Partial Award, 2007 (n 52) [319].

<sup>575</sup> Baetens (n 577) 435; Messineo (n 101) 71; Crawford, *State Responsibility: The General Part* (n 24) 339; *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, Partial Award, 2007 (n 52) [179].

<sup>576</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche SA v United Kingdom & France)*, Dissenting Opinion of Lord Millett, 2007 [13]. 'The IGC was established as a mechanism to enable the Respondents to facilitate the exercise of their rights and the performance of their obligations under the Concession Agreement'.

<sup>577</sup> Article 10(1) Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaries of a Channel Fixed Link (France - United Kingdom) (1986) 1487 UNTS 334.

<sup>578</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, Partial Award, 2007 (n 52) [163, 167].

<sup>579</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, Partial Award, 2007 (n 52) [176, 187].

In light of the conceptualization of shared obligations in this thesis, the obligation to take appropriate steps to maintain security and public order in and around the Coquelles terminal is a divisible shared obligation. The obligation is one of conduct,<sup>580</sup> as it prescribes that its bearers are to take appropriate steps *in pursuance* of a common result (the maintenance of conditions of security and public order in and around the Coquelles terminal) without requiring them to achieve that common result. Each duty-bearer is bound to its share, it is bound to take appropriate steps *itself*, and as such can independently breach or fulfil the obligation. For example, the UK can fulfil the obligation by taking appropriate steps even if France takes no steps at all. After all, the obligation of the UK extends only to the steps that are or are not taken by the UK itself, and not to the steps that are or are not taken by France. If the UK takes appropriate measures, thereby fulfilling its obligation, and France at the same time fails to take any measures, this omission is attributable to France on the basis of article 4 ASR and will solely give rise to the international responsibility of France.

If neither France nor the UK take appropriate measures, both states breach the obligation. This was the case in the *Eurotunnel* Arbitration, where the Tribunal concluded that there was 'a combined failure of the Respondents to meet their obligations'.<sup>581</sup>

In considering whether France and the UK had taken appropriate steps, the Tribunal first noted that no measures had been taken through the IGC.<sup>582</sup> Moreover, no appropriate steps had been taken by each of the states independently. In the face of a failure to take steps through the IGC, it would still have been possible for the UK or France to independently take appropriate steps to maintain conditions of security and public order. The UK in particular could have 'undertaken certain actions to try to induce France to comply with the obligations resting upon both respondents', but it did not undertake any such actions.<sup>583</sup> It has been advanced that if the UK had 'done everything in its power to convince France to change course, but failed in achieving that goal, the discussion would presumably have run a different course'.<sup>584</sup> Indeed, by

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<sup>580</sup> Baetens (n 577) 437.

<sup>581</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [315].

<sup>582</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [317]. 'What the IGC as a joint organ failed to do, the Principals in whose name and on whose behalf the IGC acted equally failed to do.'

<sup>583</sup> Baetens (n 577) 437. The Tribunal noted that 'the record of the IGC, though it sometimes shows disagreement between the Principals, does not show a consistent and conscientious opposition by the United Kingdom to a unilateral French policy, such that the United Kingdom could argue that it did everything within its power to bring a clearly unsatisfactory situations promptly to an end.' *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [318].

<sup>584</sup> Baetens (n 577) 437-438.

doing so the UK would have fulfilled the divisible shared obligation to take appropriate steps, and only France could have been held responsible for a breach of this obligation.

But as neither France nor the UK had taken appropriate steps in this regard, acting either through the IGC or otherwise, both states had acted in breach of their obligation.<sup>585</sup> Each state's own omission, consisting of a failure to take appropriate steps, can be attributed to each state separately on the basis of article 4 ASR. These omissions contributed to a single harmful outcome (in the Tribunal's words, the 'clandestine migrant incursions at Coquelles'<sup>586</sup>) resulting in shared responsibility of France and the UK for several IWAs.

### **5.4.3 The shared obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in Iraq**

From mid-April 2003 to the end of June 2004 the United States and the United Kingdom jointly occupied the territory of Iraq. In view of their status as occupying power, both the US and the UK were bound to a range of international obligations pertaining to Iraq and its inhabitants.

The US and the UK created the Coalition Provisional Authority (CPA) as 'an administrative mechanism through which the coalition partners could fulfil their responsibilities as occupying powers in control of Iraq.'<sup>587</sup> Because the CPA is a joint organ<sup>588</sup> with no separate legal personality, the obligations of the two occupying powers are not binding upon the CPA itself.

One of the obligations binding upon the US and the UK as occupying powers of Iraq was the obligation 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources'.<sup>589</sup> This is covered by the present study's understanding of shared obligations, since both states were bound to an international obligation with similar normative content pertaining to the natural resources on the territory of Iraq.

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<sup>585</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [319].

<sup>586</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [315].

<sup>587</sup> Talmon (n 9) 187.

<sup>588</sup> Chinkin (n 51) 174.

<sup>589</sup> Milano (n 58) 8–9; Talmon (n 9) 206. In the *Armed Activities* case, the ICJ determined that 'the fact that Uganda was the occupying power in the Ituri district (...) extends Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.' See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) Judgment, 2005 ICJ Reports 168* (n 411) [248].

The obligation does not oblige the US and the UK to achieve a common result, for example to prevent each and every instance of looting, plundering and exploitation of natural resources in Iraq. Rather, it requires that duty-bearers take appropriate measures with the aim of preventing such looting, plundering and exploitation in Iraq. As an obligation of conduct, the obligation incumbent upon both the US and the UK is a divisible shared obligation.

Due to its divisible structure of performance it is possible for each bearer to independently breach or fulfil the obligation. It is perfectly possible for one of them to take appropriate measures while the other at the same time refuses to take any measures. For example, if the US takes appropriate measures whereas the UK fails to do so, this would constitute an omission on the part of the UK that is attributable to the UK only on the basis of article 4 ASR. This would give rise to the international responsibility of the UK only.

If neither of them take any measures, through the CPA or otherwise, each state's own omission will be attributable to each state separately on the basis of article 4 ASR. Assuming that these omissions contribute to a single harmful outcome (e.g. the plundering of a particular natural resource in Iraq), this gives rise to shared responsibility of the two states for several IWAs.

Since the US and the UK have established the CPA as a mechanism through which they can fulfil the obligations incumbent upon both of them, it would make sense for them to try to fulfil the obligation by cooperating through this common organ. This does not change the fact that if both of them fail to act, through the CPA or otherwise, the UK's failure to take measures would be attributable to the UK and the US' failure to take measures would be attributable to the US, both on the basis of article 4 ASR.

#### **5.4.4 The shared obligation to provide 12.000 million ECU in financial assistance to the ACP states**

The obligation to provide 12.000 million ECU in financial assistance to the African, Caribbean and Pacific Group of states (ACP states) in a five-year period arises from the Fourth Lomé Convention; a mixed agreement which was concluded in 1989 between the (then) EC<sup>590</sup> and its member states 'of the one part' and the ACP states 'of the other part'.<sup>591</sup>

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<sup>590</sup> With the entry into force of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007) C306/01 on 1 December 2009, the EU replaced and succeeded the EC.

<sup>591</sup> Peter-Tobias Stoll, 'Lomé Conventions', *Max Planck Encyclopedia of Public International Law, Volume II* (1997).

When it comes to mixed agreements, the present study subscribes to the view that if third parties to the mixed agreement are not aware and should not have been aware of the internal division of competences, the EU and its member states are in principle bound to all of the obligation in that agreement.<sup>592</sup>

In the absence of a public declaration of competence both the EC and its members were bound to the obligation to provide 12.000 million ECU in financial assistance to the ACP states.<sup>593</sup> This obligation falls within the present study's understanding of shared obligations, since the EC and its member states are bound to a similar international obligation, and this obligation requires all of them to achieve a common goal: the making available of 12.000 million ECU to the ACP states within a five-year period.

The assumption that both the EC and its member states were bound to this obligation is supported by the judgment of the European Court of Justice (ECJ) in *Case C-316/91*. In this case the European Parliament tried to convince the ECJ that the obligation to provide 12.000 million ECU in financial assistance to the ACP states was binding only upon the EC, because the provisions from which this obligation arose spoke only of 'the Community's financial assistance' and did not explicitly refer to the member states.<sup>594</sup>

The ECJ disagreed with the European Parliament's position. It considered that the agreement 'established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States were jointly liable to those latter states for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.'<sup>595</sup>

The use of the term jointly *liable* in this passage is somewhat unfortunate, as it might give the impression that the ECJ was talking about the question of responsibility for a breach of obligation rather than the question of being bound to an obligation.

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<sup>592</sup> See Chapter 1, §1.1.3.ii and the discussion in Chapter 3, §3.2.2.

<sup>593</sup> Kuijper notes that '[i]n a case concerning the *Cotonou* agreement (...) the ECJ has made it implicitly clear that in the absence of a public declaration on division of powers, the Community and its Member States are collectively responsible for fulfilling the obligations owed to third States', see Kuijper (n 366) 209–210. Hoffmeister argues that in this situation the EC and its member states were 'jointly liable for the fulfilment of every obligation' in the absence of a derogation laid down in the agreement, because it was an agreement on development cooperation. Development cooperation is an area of parallel competence, which is now enshrined in article 4(4) TFEU. When the Union exercises its competence in such an area, this does not prevent the member states from exercising their competence, and 'it would be impossible to identify certain parts of a given cooperation agreement as belonging exclusively to either the Union or the Member States'. See Hoffmeister (n 356) 743.

<sup>594</sup> *Case C-316/91, European Parliament v Council of the European Union* [1994] ECR I-00625 [21].

<sup>595</sup> *Case C-316/91, European Parliament v. Council of the European Union* [1994] ECR I-00625 (n 598) [29].

However, considering that the ECJ referred to the EC and its member states as being jointly liable *for the fulfilment* of obligations (rather than for a breach of obligations) it seems safe to assume that the ECJ intended to convey that all of them were bound to the obligations in the agreement. This assumption is supported by the ECJ's conclusion, in which it considered that 'the *obligation* to grant the Community's financial assistance falls on the Community and on its Member States, considered together.'<sup>596</sup>

This obligation can be qualified as an indivisible shared obligation, as it obliges multiple duty-bearers to achieve a common result: the making available of 12.000 million ECU to the ACP states within a five-year period. Due to its indivisible structure of performance, it is not possible for only one of the duty-bearers to fulfil the obligation whereas another breaches it. The obligation is fulfilled by all of its bearers if 12.000 million ECU is made available within a five-year period, and it is breached by all of its bearers if 12.000 million ECU is *not* made available within a five-year period.

In case of a breach, the conduct in breach of this obligation consists of a failure to achieve a common result: the making available of an overall amount of 12.000 million ECU in financial assistance within a five-year period. Attribution of conduct in this scenario is relatively straightforward. As both the EC and its member states were bound to achieve a common result, and that result has not been achieved, this constitutes a common failure that is attributable to all duty-bearers on the basis of article 6 ARIIO and article 4 ASR. This would give rise to the shared responsibility of the EC and its member states for one IWA.

#### **5.4.5 The shared obligation to strictly limit pollution from land-based sources in lake Etang de Berre**

Article 6(1) of the Athens Protocol to the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution<sup>597</sup> obliges the parties to the Protocol to 'strictly limit pollution from land-based sources in the Protocol area'. This is a mixed agreement to which the EU and some of its member states are parties. In the absence of a declaration of competence, it is assumed that both the EU and its member states are bound to this obligation.

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<sup>596</sup> Case C-316/91, *European Parliament v. Council of the European Union* [1994] ECR I-00625 (n 598) [33]. Emphasis added.

<sup>597</sup> Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (1980) 1328 UNTS 120.

This assumption is supported by the ECJ's judgment in the *Etang de Berre* case.<sup>598</sup> This case concerned pollution from land-based sources of a salt-water lake in France: lake Etang de Berre. The European Commission had instituted infringement proceedings against France because it believed that France had failed to fulfil the obligation to strictly limit pollution from land-based sources into lake Etang de Berre. The ECJ considered that the European Commission was entitled to institute such proceedings against France to ensure that it would comply with this obligation because the (then) EC itself 'had assumed responsibility for the due performance of the agreement'.<sup>599</sup> It hereby suggested that the (then) EC was also bound to the obligation to limit pollution with regard to Lake Etang de Berre.

Accordingly, both France and the EC were bound to the obligation to strictly limit pollution from land-based sources into Etang de Berre. This is a shared obligation, because France and the EC were bound to an obligation with similar normative content that pertains to the same concrete case: lake Etang de Berre.

Because there is some ambiguity as to what the obligation requires from its bearers, it cannot be stated with full certainty whether the obligation should be qualified as a divisible or indivisible shared obligation. During the infringement proceedings France argued that article 6(1) of the Athens Protocol gives rise to an obligation of conduct, and the Commission argued that it gives rise to an obligation of result. It appears that the ECJ has not chosen one position over the other.<sup>600</sup> The ECJ simply considered that article 6(1) gives rise to a 'particularly rigorous obligation' to 'strictly limit' pollution from land-based sources, and to do so by taking 'appropriate measures'.<sup>601</sup>

Interpreting this obligation as one of conduct or result is important for the characterization of the shared obligation as divisible or indivisible.<sup>602</sup> If the obligation in question requires its bearers to achieve the result of a strict limitation of pollution, the shared obligation of France and the EU can be qualified as an indivisible shared obligation. Indeed, both of them would both be bound to an obligation to achieve a common result: the result of strict limitation of pollution from land-based sources in

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<sup>598</sup> *Case C-239/03, Commission v French Republic [2004] ECR I-9325*. Kuijper notes that the idea underlying the ECJ's judgment in this case 'seems to have been that - in the absence of a declaration of competence relating to the international agreement in question - the Community and France were jointly responsible for controlling effluents from land into the *Etang de Berre*', Kuijper (n 366) 210. Hoffmeister notes that 'in the absence of a declaration of competence the ECJ acknowledged a Union interest to prevent France from polluting certain land, as otherwise the Union might become internationally responsible', Hoffmeister (n 356) 744.

<sup>599</sup> *Case C-239/03, Commission v. French Republic [2004] ECR I-9325* (n 602) [26].

<sup>600</sup> Pieter-Jan Kuijper, 'Case C-239/03, Commission v. French Republic' (2005) 43 *Common Market Law Review* 1491, 1498.

<sup>601</sup> *Case C-239/03, Commission v. French Republic [2004] ECR I-9325* (n 602) [50].

<sup>602</sup> See Chapter 4, §4.2.3.

lake Etang de Berre. Such an obligation can only be breached or fulfilled by both duty-bearers simultaneously.

The failure to achieve this common result would constitute a common failure that is automatically attributable to both the EU and France, considering that both of them would be bound to achieve the common result in question. A breach would therefore result in shared responsibility for one IWA.

On the other hand, interpreting the obligation arising from article 6(1) as obligating its bearers to take 'appropriate measures' without having to achieve the result of a strict limitation of pollution would mean that each bearer would be bound to its share only. In this interpretation, the shared obligation of the EU and France can be qualified as a divisible shared obligation that can be fulfilled or breached by each duty-bearer independently.

Consequently, several scenarios of breach and attribution can be envisaged. For example, it would be possible that the EU takes appropriate measures with the aim of strictly reducing pollution, while France takes no measures at all. The failure to take measures would then be attributable to France only, and would result in France's international responsibility but not in the international responsibility of the EU. It would also be possible that neither the EU nor France take any measures, which would mean that each of their respective failures to take appropriate measures would be attributable to each of them separately. In such a scenario, the failure of both France and the EU to take appropriate measures would result in shared responsibility for several IWAs.

#### **5.4.6 The shared obligation to achieve a 20 per cent reduction of aggregate greenhouse gas emissions**

In the Kyoto Protocol 'Annex I' states parties (which includes the EU and its member states) have agreed to emission reduction targets. Article 3(1) Kyoto Protocol allows its states parties to jointly fulfil their emission reduction commitments. During the Kyoto Protocol's first commitment period, the EU and 15 of its member states agreed to jointly fulfil their commitments by reducing their overall greenhouse gas emissions by 8 per cent in 2012. Now that the Kyoto Protocol's first commitment period has come to an end (and the joint emission reduction commitment has been fulfilled), the EU, 28 of its member states and Iceland have bound themselves 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.<sup>603</sup> This commitment can be

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<sup>603</sup> Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (n 5) 6. The commitment for the 'European Union and its member States for a second commitment period under the

qualified as a shared obligation, as multiple duty-bearers are bound to a similar international obligation that pertains to the same concrete case. This shared obligation is indivisible, since multiple duty-bearers are obliged to achieve a common result.

The Kyoto Protocol contains a special rule regarding the international responsibility that arises in case of a breach of the obligation to achieve a 20 per cent reduction of aggregate emissions, which sets aside the general rules on the determination of international responsibility enshrined in the ASR and ARIO.<sup>604</sup> The implications of this *lex specialis* for the determination of international responsibility for a breach of this indivisible shared obligation will be considered shortly. Before doing so, it is first demonstrated what would be the outcome if one were to proceed solely from the general rules of international responsibility.

It follows from its indivisible structure of performance that the obligation can only be fulfilled or breached by all duty-bearers simultaneously. If a 20 per cent reduction of aggregate emissions is achieved by 2020, the obligation is fulfilled by all duty-bearers, regardless of the actual level of emissions of each individual duty-bearer. The same goes the other way around. If a 20 per cent reduction is *not* achieved by 2020 the obligation is breached by all duty-bearers, regardless of the actual level of emission of each individual duty-bearer.

The conduct in breach of the obligation to achieve a 20 per cent reduction of aggregate greenhouse emissions consists of the failure to achieve this common result. Because all duty-bearers have bound themselves to achieve this common goal, a failure to do so will constitute a common failure that is automatically attributable to all duty-bearers. In principle, this denotes that the failure to achieve an overall 20 per cent reduction by 2020 would result in the shared responsibility of the EU, 28 of its member states and Iceland for one IWA.

However, such a conclusion is precluded by the rule enshrined in article 4(6) Kyoto Protocol, which provides that in the event of a failure to achieve a joint emission reduction in the framework of a regional economic integration organization that is a party to the Protocol (such as is the case with the EU), each member state of that organization shall be internationally responsible only for its own level of emissions, both individually and together with the organization. This provision was drafted to fit

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Kyoto Protocol are based on the understanding that these will be fulfilled jointly with the European Union and its member States, in accordance with Article 4 of the Kyoto Protocol.' Iceland's commitment is based on the same understanding.

<sup>604</sup> Articles 55 ASR and 64 ARIO provide that the articles of the ASR and ARIO 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the responsibility' of a state or international organization 'are governed by special rules'.

the specific situation of the EU<sup>605</sup> and suggests that the negotiators were aware of the fact that, under the general rules of international responsibility, a failure to achieve a joint emission reduction would result in the international responsibility of the EU, its 28 member states and Iceland.

Thus, whereas the application of the general rules of international responsibility to a breach of this indivisible shared obligation would have resulted in the shared responsibility of all duty-bearers for one IWA, the application of the special rule enshrined in article 4(6) Kyoto Protocol gives rise to a different outcome in terms of international responsibility.

It is still the case that if the common goal of a 20 per cent reduction is achieved by 2020, the obligation will be fulfilled by all duty-bearers and no responsibility will arise; regardless of whether each individual member states has achieved its individual required percentage of emission reduction. All bearers of the obligation are released from the obligation as soon as a common reduction of 20 per cent has been achieved.

However, if the common goal of a 20 per cent reduction is *not* achieved by 2020, international responsibility for a failure to achieve this common result does not automatically arise for all duty-bearers. In accordance with the special rule enshrined in the Kyoto Protocol, international responsibility arises only for those states that failed to achieve their individual target. If, in 2020, a reduction of aggregate emissions of only 19 per cent is achieved, the obligation is breached. At this point, it becomes relevant to consider the individual emissions of each of the 28 member states and Iceland. If, for example, only the Netherlands, Italy and Iceland have failed to achieve their individual targets, these three states are each responsible for their own level of emissions, together with the EU, giving rise to shared responsibility for several IWAs.

#### **5.4.7 The shared obligation to take all measures within one's power to prevent the Srebrenica genocide**

In 2007 the ICJ ruled that (then) Serbia and Montenegro had breached the obligation to take all measures within its power to prevent the Srebrenica genocide. In its judgment the ICJ considered that

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<sup>605</sup> Javier de Cendra de Larragán, 'Liability of Member States and the EU in View of the International Climate Change Framework: Between Solidarity and Responsibility' in Michael Faure and Marjan Peeters (eds), *Climate Change Liability* (Edward Elgar Publishing 2011) 62.

'[a] State's obligation to prevent, and the corresponding duty to act arise at the instant that the State learns, or should normally have learned of, the existence of a serious risk that genocide will be committed.'<sup>606</sup>

Now that new research of documents suggests that multiple states were aware or should have been aware of the existence of a serious risk of genocide in Srebrenica (not only Serbia but also the US, the UK and France)<sup>607</sup> it can be argued that all of these states were bound to take measures within their power to prevent the Srebrenica genocide.<sup>608</sup> Indeed, it may be recalled that already in 1993, 'Bosnia seriously considered the option to also bring before the Court other states, such as the United Kingdom, for their breach of the duty to prevent the commission of a genocide.'<sup>609</sup>

Considering that multiple states were bound to the obligation to prevent genocide in the same concrete case, these states were bound to a shared obligation. As pointed out by the ICJ, the obligation to prevent genocide is an obligation of conduct which requires its bearers to 'employ all means reasonable available to them'.<sup>610</sup> This indicates that the shared obligation in question is of a divisible character, which means that there is no automatic connection between a breach of this obligation and shared responsibility.

Due to its divisible structure of performance, it is possible that only one of the bearers of the obligation to prevent genocide in a concrete case fails to take such measures, whereas the other states take all measures that are reasonably available to them. Assuming that genocide takes place in such a scenario, only one state will be internationally responsible for a breach of the obligation to prevent genocide, as this omission will be attributable to that one state only. Since only one state is internationally responsible, this does not give rise to shared responsibility.

In another possible scenario, multiple or even all duty-bearers simultaneously fail to take measures and genocide occurs. Each duty-bearer's own omission can be attributed to it on the basis of article 4 ASR, which gives rise to shared responsibility of all duty-bearers for several IWAs.

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<sup>606</sup> *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) [431].

<sup>607</sup> Florence Hartmann and Ed Vulliamy, 'How Britain and the US Decided to Abandon Srebrenica to Its Fate' <https://www.theguardian.com/world/2015/jul/04/how-britain-and-us-abandoned-srebrenica-massacre-1995> (last accessed 15 June 2016) (2015).

<sup>608</sup> van der Have (n 386) 237.

<sup>609</sup> Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 *EJIL* 695, 697.

<sup>610</sup> *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).

#### 5.4.8 The shared obligation to ensure that activities in the Area are carried out in accordance with Part XI LOSC

In 2001, a consortium consisting of sponsoring states Bulgaria, Cuba, the Czech Republic, Poland, the Russian Federation and Slovakia (united in the Interoceanmetal Joint Organization (IOM)) signed a contract with the International Seabed Authority for the exploration of polymetallic nodules in the Clarion-Clipperton Zone in the North East Pacific.<sup>611</sup> It follows from article 139 LOSC that all of these sponsoring states are bound to the obligation to ensure that the exploration activities of the entity sponsored by all of them are carried out in accordance with Part XI LOSC. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, the Seabed Disputes Chamber clarified that this obligation requires sponsoring states to 'deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.'<sup>612</sup>

This signifies that the six sponsoring states are bound to a divisible shared obligation to take measures to ensure that exploration activities of the IOM are carried out in accordance with Part XI LOSC. Due to its divisible structure of performance the obligation can be fulfilled or breached by each duty-bearer independently. Thus, it is possible that Cuba is the only duty-bearer that fails to take the necessary measures, in which case it would be the only duty-bearer that can be held internationally responsible for a wrongful act. However, it is also possible that multiple or even all sponsoring states fail to take the necessary measures. In such a situation each state's own omission is separately attributable to it on the basis of article 4 ASR, and shared responsibility for several IWAs will ensue (assuming that these wrongful acts all contribute to a single harmful outcome, such as environmental harm caused by the sponsored entity).

#### 5.5 Conclusions

This chapter has explored the implications of breaches of shared obligations for the determination of shared responsibility, which differ depending on whether the shared obligation in question is divisible or indivisible. The findings of this chapter underscore the importance of distinguishing between divisible and indivisible shared obligations.

The chapter has found that the *indivisible* character of a shared obligation has automatic implications for the determination of shared responsibility, because a

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<sup>611</sup> Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (n 8) 395, fn. 70.

<sup>612</sup> 'Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, P. 10' (n 297) 110.

breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA. If an indivisible shared obligation is breached, this always constitutes a breach by all of its bearers. This follows from the indivisible structure of performance of an indivisible shared obligation; it can only be fulfilled or breached by all of its bearers simultaneously. If the common result required by the obligation is not achieved, it is breached by all duty-bearers. Thus, if Australia, New Zealand and the UK are bound to the indivisible shared obligation to rehabilitate Nauru's worked out phosphate lands, a failure to achieve this result constitutes a breach by all three states that bear the obligation.

Moreover, the conduct in breach of an indivisible obligation is automatically attributable to all duty-bearers, which gives rise to shared responsibility for one IWA. This is based on the proposition that an omission can be attributed to the state or IO that was obliged to act in the concrete case at hand on the basis of article 4 ASR and article 6 ARIO. It follows that failure to achieve a common result can be attributed to multiple states and/or IOs if all of them were bound to achieve that common result.

Thus, in a situation where Australia, New Zealand and the UK are bound to the indivisible shared obligation to rehabilitate Nauru's phosphate lands, a failure to achieve this common result can be attributed to the states that were bound to achieve that common result in the concrete case at hand: Australia, New Zealand and the UK. This gives rise to shared responsibility for one IWA. The same can be said in a situation where the EC and its member states are bound to the indivisible shared obligation to provide 12.000 million ECU in financial assistance to the ACP states. A failure to achieve this common result can be attributed to the EC and its member states on the basis of article 4 ASR and 6 ARIO, because all of them were bound to achieve the common result. This gives rise to shared responsibility for one IWA.

Breaches of *divisible* shared obligations have no such automatic implications for the determination of shared responsibility. This chapter has found that breaches of divisible shared obligations can give rise to three potential outcomes in terms of international responsibility: shared responsibility for one IWA, shared responsibility for several IWAs or the international responsibility of only one state or IO (which is not shared responsibility). It should be added that all divisible shared obligations can result in shared responsibility for several IWAs, or in the international responsibility of only one state or IO. However, only divisible shared obligations of a negative character can give rise to shared responsibility for one IWA.

This indicates that a breach of a divisible shared obligation does not always give rise to shared responsibility. Whether or not a breach of a divisible shared obligation

gives rise to shared responsibility essentially depends on the specific factual circumstances of the situation in which the obligation is breached.

For example, the fact that multiple sponsoring states are bound to the divisible shared obligation to take measures to ensure that exploration activities of a sponsored entity are carried out in accordance with Part XI of the LOSC has no automatic implications for the determination of shared responsibility. Each state is bound to do its share only, and due to its divisible structure of performance the obligation can be performed by each state independently. If only one sponsoring state fails to do its share, this constitutes a breach by only that one state which is attributable to that one state only. Such a scenario would give rise to the international responsibility of one state for an internationally wrongful act. However, if all sponsoring states fail to do their share all of them breach the divisible shared obligation, and each state's omission is separately attributable to it. Such a scenario would give rise to shared responsibility of all sponsoring states for several IWAs.

On a final note, this chapter has focused solely on the *determination* of shared responsibility, which consists of establishing whether multiple states and/or IOs can be held responsible for one or several internationally wrongful act(s) that contribute to a single harmful outcome. It has not addressed the new (secondary) international obligations that can arise as a result of international responsibility and form the *content* of international responsibility. This is the focus of the following chapter. If it is established that multiple duty-bearers are internationally responsible for a breach of a shared obligation, does this entail that they share the obligation of cessation and the obligation of reparation that can arise as a result of that responsibility? And if so, is that secondary shared obligation divisible or indivisible?