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### Shared obligations in international law

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# 6

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

This chapter aims to clarify the relationship between breaches of shared obligations and the content of shared responsibility. It proceeds from the assumption that shared responsibility for a breach of a shared obligation has been established, and focuses on the implications of the shared character of the (primary) obligation breached for the secondary international obligation of cessation and the secondary obligation to make full reparation that can arise as a result of that breach. These secondary obligations form the content of international responsibility.<sup>613</sup>

This chapter finds that the nature of secondary obligations that arise from a breach of a shared obligation depends, to a large extent, on whether the states and/or IOs in question share responsibility for one IWA or for several IWAs. Therefore, this chapter separately addresses breaches of shared obligations that give rise to shared responsibility for one IWA and breaches of shared obligations that give rise to shared responsibility for several IWAs. In doing so, the structure of this chapter further builds upon the findings of the previous chapter. It should be recalled that breaches of indivisible shared obligations always give rise to shared responsibility for *one* IWA. However, breaches of divisible shared obligations can give rise to shared responsibility for *one* or *several* IWAs (or international responsibility of only one of its bearers because only that one bearer committed an IWA - but such situations are outside the scope of this chapter).<sup>614</sup>

In its analysis of the implications of breaches of shared obligations for the content of shared responsibility, the present chapter proceeds from the ILC system of international responsibility. In the ILC's framework, the commission of an internationally wrongful act is a necessary but not a sufficient condition for secondary obligations to arise.<sup>615</sup> The obligation of cessation arises only if an internationally wrongful act is of a continuing character<sup>616</sup> and the obligation to make full reparation arises only if an internationally wrongful act has caused injury.<sup>617</sup> It

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<sup>613</sup> The ILC has defined the content of international responsibility as the new legal relations that arise from the commission of an internationally wrongful act, see International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 31, 86.

<sup>614</sup> Figure 5.1 in Chapter 5, §5.3.3 summarizes these findings.

<sup>615</sup> See *d'Argent* (n 527) 208.

<sup>616</sup> Article 30(a) ASR; article 30(a) ARIO.

<sup>617</sup> Article 31 ASR and article 31 ARIO.

should be recalled that the ILC considers the notion of injury to include material or moral damage and exclude legal injury.<sup>618</sup>

But as is the case with the determination of international responsibility,<sup>619</sup> the fact that the obligations breached are shared, adds a layer of complexity. If Lithuania and the US are both internationally responsible for breaches of the divisible shared obligation to take measures to prevent acts of torture in the CIA black site operated on the territory of Lithuania,<sup>620</sup> will both states become bound to the obligation of cessation? And if so, will Lithuania and the US each be bound to cease only part of the wrongful conduct or all of the wrongful conduct? And if Australia, New Zealand and the UK can be held internationally responsible for a breach of the indivisible shared obligation to rehabilitate Nauru's worked out phosphate lands, will all of them become bound to an obligation to make reparation for the injury suffered by Nauru? And if so, will each of them be bound to repair only part of the injury, or will all of them be bound to repair the whole injury? In other words: does a breach of a shared obligation give rise to shared obligations of cessation and reparation and if so, are those shared secondary obligations divisible or indivisible?

Section 6.1 addresses the implications of breaches of shared obligations for the nature of the obligation of cessation. It finds that when a breach of a shared obligation gives rise to shared responsibility for one IWA, and that act is of a continuing character, all responsible states and/or IOs become bound to cease that act. In such a case all of them are bound to achieve a common goal (cessation of that one IWA), which indicates that all of them are bound to an indivisible shared obligation of cessation. In the case that a breach of a shared obligation gives rise to shared responsibility for several IWAs, it needs to be determined for each of those acts whether it is of a continuing character. This can still give rise to a shared obligation of cessation for all responsible states and/or IOs, but the obligation will always be of a divisible character; requiring each responsible state or IO to cease only its *own* internationally wrongful act.

Section 6.2 addresses the implications of breaches of shared obligations for the nature of the obligation of reparation. It finds that when a breach of a shared obligation gives rise to shared responsibility for one IWA, and that act causes injury, all states and/or IOs that are responsible for the IWA become bound to an indivisible

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<sup>618</sup> See Chapter 1, §1.1.6.ii.

<sup>619</sup> See Chapter 5.

<sup>620</sup> Milanovic (n 413) 153–154. Milanovic describes this as a scenario of concurrent jurisdiction of both Lithuania and the US. On this basis it can be argued that both states were bound to a range of similar international obligations with regard to the same concrete case, including the obligation to prevent torture. See also Duffy (n 413) 104. Duffy asserts that the territorial states where black sites are located owe human rights obligations to the individuals kept in the black sites. Those obligations 'apply alongside the obligations of the states exercising power or control extraterritorially.'

shared obligation of reparation. In such a case full reparation can be claimed from each of the responsible states or IOs, which is comparable to joint and several liability in many domestic legal systems. However, the matter is much less straightforward when a breach of a shared obligation gives rise to shared responsibility for several IWAs. Unless the causal contribution of each wrongful act to the injury can be determined, the law of international responsibility as it stands provides no guidance regarding the nature of the obligation of reparation.

All in all, sections 6.1 and 6.2 indicate that the *indivisible* nature of a shared obligation has automatic implications for the content of shared responsibility. Since a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA, any secondary obligation of cessation or reparation that arises as a result of a breach of an indivisible shared obligation can, itself, be qualified as an indivisible shared obligation. Considering that a breach of a divisible shared obligation can give rise to shared responsibility for one or several IWAs, the *divisible* nature of a shared obligation, however, has no automatic implications for the content of international responsibility.

### **6.1 Breaches of shared obligations and the nature of the obligation of cessation**

This section clarifies the relationship between breaches of shared obligations and the nature of the obligation of cessation. Essentially, it examines whether a breach of a shared obligation automatically gives rise to a shared obligation of cessation for all duty-bearers, and if so, whether the duty-bearers in question are obliged to cease only part of the wrongful conduct or all of the wrongful conduct. This question basically comes down to the allocation of the obligation of cessation. The section separately examines breaches of shared obligations that give rise to shared responsibility for one IWA (§6.1.1) and breaches of shared obligations that give rise to shared responsibility for several IWAs (§6.1.2).

The obligation of cessation arises when an internationally wrongful act is of a continuing character. It is a positive obligation of result that is fulfilled as soon as the continuing wrongful act has been terminated. The obligation of cessation is aimed at the future performance of the obligation that has been breached, and therefore only arises if the obligation breached continues in force.<sup>621</sup> This means that if an obligation ceases to exist after its breach, no obligation of cessation can arise as a result of that

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<sup>621</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 88; Olivier Corten, 'The Obligation of Cessation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 547; Crawford, *State Responsibility: The General Part* (n 24) 460.

breach.<sup>622</sup> An example of an obligation that is unlikely to give rise to an obligation of cessation when breached is the indivisible shared obligation of the EU, 28 of its member states and Iceland to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020.<sup>623</sup> This obligation does not continue in force after 2020, which means that in case of a breach the internationally wrongful act cannot be of a continuing character and, consequently, cannot give rise to an obligation of cessation.

The connection between the nature of shared obligations and the nature of the obligation of cessation that may arise in case of a breach has not been addressed in practice. It can be observed that in general no international court or tribunal has addressed the allocation of the obligation of cessation in scenarios that involve breaches of shared obligations by multiple states and/or IOs. The *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* cases could have been interesting in this respect. In these cases, the Republic of the Marshall Islands requested the ICJ to order India, Pakistan and the UK to comply with their (shared) obligation to pursue and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;<sup>624</sup> which essentially amounts to a claim for cessation in a situation where states are bound to a shared obligation. Unfortunately, the ICJ ruled that it lacks jurisdiction to address the merits of these cases.<sup>625</sup>

This section finds that guidance for the allocation of the obligation of cessation that arises as a result of a breach of a shared obligation can be found by proceeding from the ILC system of international responsibility. Articles 30(a) ASR and 30(a) ARIO provide that the state or IO responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Accordingly, the obligation to cease a wrongful act arises only for the state and/or IO that is responsible for the wrongful act that is continuing, and it solely obliges a state and/or IO to cease the wrongful act for which it is responsible.

In the case that a breach of a shared obligation gives rise to shared responsibility for one IWA, this premise entails that an obligation of cessation arises for all responsible

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<sup>622</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 88.

<sup>623</sup> See Chapter 5, §5.4.6. Note that article 4(5) Kyoto Protocol contains a *lex specialis* that specifically addresses the international responsibility resulting from a breach of this obligation.

<sup>624</sup> *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Memorial of the Marshall Islands, 16 March 2015 (n 502); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Application instituting proceedings against the Islamic Republic of Pakistan, 24 April 2014 (n 502); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Application instituting proceedings against the Republic of India, 24 April 2014 (n 502).

<sup>625</sup> See the discussion in Chapter 4, §4.2.2.iii.

states or IOs (provided that the wrongful act is continuing). The obligation of cessation that arises binds all responsible states to cease the one IWA for which they are all responsible, which means that it is of an indivisible character. In the case that a breach of a shared obligation gives rise to shared responsibility for several IWAs, this premise entails that it needs to be determined for each wrongful act whether it is continuing. If each wrongful act is of a continuing character, each responsible state or IO becomes bound to cease its own IWA only.

### **6.1.1 Shared responsibility for one internationally wrongful act and cessation**

A breach of an indivisible shared obligation *always* gives rise to shared responsibility for one IWA, whereas a breach of a divisible shared obligation can give rise to three 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 for an IWA (which is not shared responsibility). Hence, the findings of this subsection apply to all breaches of indivisible shared obligations and, in some instances, breaches of divisible shared obligations.

When multiple states and/or IOs are responsible for one IWA, it needs to be determined whether that one act is of a continuing character. Both article 30(a) ASR and 30(a) ARIO provide that a continuing internationally wrongful act gives rise to an obligation to cease the wrongful act for the state or IO that is responsible for that act. By applying this premise to a situation in which *multiple* state and/or IOs are responsible for *one* wrongful act that is of a continuing character, it can only be concluded that an obligation to cease that act will emerge for *multiple* responsible states and/or IOs. Moreover, this shared obligation of cessation can be qualified as an indivisible shared obligation. It obliges its bearers to achieve a common result: the cessation of the one IWA for which they are all responsible.

Considering that breaches of indivisible shared obligations always give rise to shared responsibility for one wrongful act,<sup>626</sup> an obligation of cessation that arises as a result of a breach of an indivisible shared obligation will automatically arise for all responsible states. Imagine, for example, that state A and state B are bound to the indivisible shared obligation to provide full compensation for the damage caused by their joint launching of a space object. It should be recalled that this is a primary obligation of cessation.<sup>627</sup> If the common result of full compensation is not achieved, this common failure can be attributed to both states A and B and gives rise to shared responsibility for one IWA. Provided that the failure to provide compensation is of a

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<sup>626</sup> See Chapter 5, §5.2.

<sup>627</sup> For a brief discussion of this primary obligation of compensation see Chapter 5, §5.2.2.

continuing character, an obligation of cessation will arise for the state that is responsible for the wrongful act that is continuing. Seeing that in this scenario, both state A and state B are responsible for this one wrongful act, it follows that both of them will become bound to an obligation to cease that act. In this example, the wrongful act is ceased if full compensation is provided.

The structure of performance of this shared obligation of cessation is indivisible. It is not possible for duty-bearers to independently breach or fulfil the obligation, for example if state B ceases only part of the internationally wrongful act by paying for a part of the damage. Only if full compensation is provided, the internationally wrongful act will be ceased and the obligation of cessation will be fulfilled by state A and state B simultaneously. However, if the common result of full compensation is *not* achieved (either because none or only part of the damage is compensated), the obligation of cessation will be breached by both state A and state B.

In another example, if during their joint occupation of Iraq, the US and the UK had breached the indivisible shared obligation to maintain Iraqi correctional facilities at the level of internationally acceptable standards,<sup>628</sup> both states would have become internationally responsible for one IWA. Provided that this wrongful act would have been of a continuing character, both the UK and the US would have become bound to an indivisible shared obligation to cease the act for which they are both responsible.

Hence, the law of international responsibility as it stands accommodates the automatic connection between breaches of indivisible shared obligations and the arising of an indivisible shared obligation of cessation (provided that the internationally wrongful act in question is of a continuing character). This can be ascribed to the fact that a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA.

In some instances a breach of a divisible shared obligation can also give rise to shared responsibility for one IWA (though this is possible only if the divisible shared obligation in question is of a negative character).<sup>629</sup> Imagine, for example, that states X and Y are bound to the divisible shared obligation to refrain from polluting a transboundary river. States X and Y are not bound to achieve a common result; rather, each of them is bound to do its share by refraining from polluting the river. If a common organ of states X and Y dumps chemicals into the transboundary river, this single course of conduct is attributable to both states on the basis of article 4 ASR and gives rise to shared responsibility for one IWA. If the wrongful act is of a continuing

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<sup>628</sup> According to Talmon, this obligation was incumbent upon both states in their capacity as occupying power. See Talmon (n 9).

<sup>629</sup> See Chapter 5, §5.2.3.

character, both states become bound to an indivisible shared obligation to cease the one wrongful act for which they are both responsible.

Accordingly, when a breach of a shared obligation gives rise to shared responsibility for one IWA, all responsible states and/or IOs become bound to an indivisible shared obligation of cessation (provided that the wrongful act is of a continuing character). This obligation of cessation is not allocated amongst the responsible states or IOs; rather, it requires all of them to achieve a common result: cessation of the one IWA.

In the case that multiple states and/or IOs are bound to an indivisible shared obligation of cessation, cessation of the wrongful act may not be in the full control of each responsible state.<sup>630</sup> This observation may apply to *any* indivisible shared obligation, whether primary or secondary. When multiple states and/or IOs are bound to an indivisible shared obligation they are bound to achieve a common goal, and it may be practically impossible for one duty-bearer to achieve that common goal without the participation of some or all of the other duty-bearers.<sup>631</sup>

Admittedly, this problem does not arise with each and every indivisible shared obligation of cessation. When it comes to the above-mentioned example of the indivisible shared obligation of states A and B to cease their wrongful act by providing full compensation, it would generally be possible for state B to fulfil this obligation of cessation by providing full compensation even if state A refuses to participate.

However, one can also imagine an example of an internationally wrongful act that truly cannot be ceased by only one of the bearers of the obligation of cessation, and which requires the participation of all bearers of the obligation. Imagine, for example, that two riparian states are bound to an indivisible shared obligation to conclude a bilateral treaty regarding the protection of a transboundary lake.<sup>632</sup> The failure to conclude a bilateral treaty will give rise to shared responsibility of both states for one wrongful act, and if that act is of a continuing character, the riparian states will become bound to an indivisible shared obligation of cessation. Cessation of the wrongful act requires the conclusion of the bilateral treaty. If one of the two states is

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<sup>630</sup> d'Argent similarly notes that 'not all of them will be in the position to cease that wrongful act', d'Argent (n 527) 236.

<sup>631</sup> See Chapter 4, §4.1.1 and §4.3.

<sup>632</sup> Article 9 Convention on the Protection and Use of Transboundary Watercourses and International Lakes obliges riparian states to 'enter into bilateral or multilateral agreements or other arrangements, where these do not yet exist, (...) in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact.' Tanzi et al note that '[t]he Water Convention is rather stringent with regard to the institutional aspect of cooperation with regard to the Riparian Parties, insofar as article 9 is mandatory about the conclusion of watercourse agreements'. Tanzi, Kolliopoulos and Nikiforova (n 489) 122.



called upon to cease that act, however, it will not be able to do so if the other riparian state refuses to do its part. The same considerations apply to the indivisible shared obligation of states parties to the NPT to *conclude* negotiations on a treaty on nuclear disarmament, which is a result that cannot be achieved without the participation of all duty-bearers.<sup>633</sup>

But this does not change the fact that it follows logically from the ILC's system of international responsibility that all states and/or IOs responsible for one IWA become bound to achieve a common result: cessation of the one continuing wrongful act for which they are all responsible. This means that it is possible for a responsible state to become responsible anew for a breach of the indivisible shared obligation of cessation, not because of its own unwillingness to cease a wrongful act but because of the refusal of another responsible state to participate in putting that IWA to an end.

At the same time, the potential risk of incurring responsibility due to the conduct of others can provide a legal incentive for responsible states or IOs to induce other responsible states or IOs to participate in the cessation of wrongful conduct. This observation has been made before with regard to indivisible shared obligations in general,<sup>634</sup> and is similar to the argument made in economic theory that, in the case that actors might be held responsible for each other, this gives them an incentive to monitor one another.<sup>635</sup> Indeed, considering that the obligation of cessation is breached by all responsible states or IOs simultaneously if the internationally wrongful act for which they are all responsible is not ceased, it is in the interest of all responsible states or IOs that the act is terminated if they want to avoid being held responsible for a breach of the obligation of cessation.

### **6.1.2 Shared responsibility for several internationally wrongful acts and cessation**

Considering that a breach of an indivisible shared obligation can *never* give rise to shared responsibility for several IWAs, the findings of this subsection apply solely to breaches of divisible shared obligations that give rise to shared responsibility for several IWAs.

When multiple states and/or IOs breach a divisible shared obligation by several internationally wrongful acts, an obligation of cessation does not always arise for all responsible states and/or IOs. Because there are several wrongful acts rather than only one wrongful act, it needs to be determined in relation to each of those acts whether it is of a continuing character. After all, the ASR and ARIO provide that an

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<sup>633</sup> See the discussion in Chapter 4, §4.2.2.iii and §4.2.3.

<sup>634</sup> See Chapter 4, §4.3.

<sup>635</sup> Faure and Nollkaemper (n 521) 170; van Aaken (n 518) 185.

internationally wrongful act can give rise to an obligation to cease that act for the state or IO that is responsible for that act, but only if the act is of a continuing character. Hence, if only one of the wrongful acts is of a continuing character, an obligation of cessation will arise only for one of the responsible states and/or IOs and not for the others.<sup>636</sup> In the case that all of the wrongful acts are of a continuing character, an obligation of cessation will arise for all responsible states and/or IOs. This can be qualified as a divisible shared obligation of cessation, since each responsible state or IO is bound to cease its *own* internationally wrongful act only.

Imagine that Lithuania and the US both breach the divisible shared obligation to take measures to prevent acts of torture from taking place in the CIA black site operated on Lithuanian territory, which is under the effective control of both states.<sup>637</sup> In such a scenario, each of their respective failures are attributable to each of them separately, with the consequence that Lithuania and the US will share international responsibility for several wrongful acts.

In order to establish whether this factual scenario gives rise to an obligation of cessation for the US and Lithuania, it should be determined for each of those wrongful acts whether it is of a continuing character. If Lithuania ceases its wrongful act by taking measures to prevent torture, and the US continues its wrongful act by continuing to refrain from such measures, it follows from article 30 ASR that an obligation of cessation will arise solely for the US as the only state that is responsible for the wrongful act that is continuing. However, if both states continue their internationally wrongful conduct, the US and Lithuania will both become bound to the obligation of cessation.

Since such a shared obligation of cessation obliges each of them to cease their own internationally wrongful act,<sup>638</sup> it is of a divisible character. Indeed, each state is bound to cease only its own share of the wrongful conduct in the scenario at hand. As soon as Lithuania ceases its own wrongful act, the obligation of cessation incumbent upon Lithuania will be fulfilled. But this does not release the US from its obligation of cessation. The US' obligation will only be fulfilled when the US ceases its own wrongful act by taking measures to prevent acts of torture in the CIA black site on Lithuanian territory.

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<sup>636</sup> d'Argent (n 527) 215.

<sup>637</sup> Milanovic (n 413) 153–154.

<sup>638</sup> d'Argent makes a similar argument in the case that 'several subjects bear responsibility on the basis of attribution of conduct for several ongoing wrongful acts resulting in a single harmful outcome', see d'Argent (n 527) 215.

### **6.1.3 Summary**

This section has found that the nature of the obligation of cessation that arises as a result of a breach of a shared obligation depends primarily on whether the states and/or IOs involved are responsible for one IWA or several IWAs.

Since a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA, there is an automatic relationship between the indivisible nature of the shared obligation breached and the indivisible shared nature of the obligation of cessation that can arise as a result of that breach. Divisible shared obligations do not have such automatic implications for the nature of the obligation of cessation. In case of a breach of a divisible shared obligation the nature of the obligation of cessation depends on whether the breach gives rise to shared responsibility for one IWA or shared responsibility for several IWAs.

### **6.2 Breaches of shared obligations and the nature of the obligation to make reparation**

This section clarifies the relationship between breaches of shared obligations and the nature of the obligation of reparation. Essentially, it examines whether a breach of a shared obligation automatically gives rise to a shared obligation of reparation for all duty-bearers, and if so, whether the states and/or IOs in question are obliged to provide full reparation or whether each of them is obliged to provide reparation for only part of the injury. This essentially comes down to a question of allocation of the obligation to make reparation.

The section starts with a brief discussion of the notion of joint and several liability (§6.2.1), which is a common approach to the allocation of the obligation of reparation in domestic law. Essentially, joint and several liability entails that when multiple actors contribute to the same damage full reparation can be claimed from any of them. In the terms of the present study this amounts to an indivisible shared obligation of reparation, since all are bound to achieve the common result of full reparation. Though in international law joint and several liability does not seem to have come near to such a level of acceptance as in domestic legal systems, this section finds that the application of the ILC framework of international responsibility to breaches of shared obligations can, at least to some extent, produce a comparable outcome.

Subsequently, the section separately addresses the nature of the obligation of reparation in the case of breaches of shared obligations that give rise to shared responsibility for one IWA (§6.2.2) and breaches of shared obligations that give rise to shared responsibility for several IWAs (§6.2.3).

The obligation to make reparation arises only if injury has been caused.<sup>639</sup> It should be recalled that the ILC's understanding of injury encompasses material or moral damage and is narrower than the notion of a harmful outcome.<sup>640</sup> The obligation to make reparation is an obligation of result,<sup>641</sup> which obliges a state or IO to repair the injury that has been caused by the IWA for which it is responsible. Reparation can take the form of restitution, compensation and satisfaction<sup>642</sup> and aims to 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'<sup>643</sup>

The connection between the nature of a shared obligation and the nature of the obligation of reparation that may arise in case of a breach has not been explored in practice. There have been some cases in which an international court or tribunal has come close to addressing the allocation of the obligation of reparation in relation to factual scenarios that involved breaches of shared obligations by multiple duty-bearers. However, the few cases that came close to an answer were settled and discontinued before the court or tribunal in question was able to provide one. In the *Certain Phosphate Lands in Nauru* case,<sup>644</sup> the ICJ made clear that its judgment on preliminary objections did 'not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered'.<sup>645</sup> But before it could address this question in a decision on the merits, the case was settled amongst the two states involved in the proceedings. Australia agreed to pay the full amount claimed by Nauru without accepting legal responsibility;<sup>646</sup> and Nauru agreed to refrain from making any further claims against Australia, New Zealand or the UK on any matter concerning the joint administration of Nauru in general and phosphate mining in particular.<sup>647</sup> At a later point, the UK and New Zealand agreed to contribute to the settlement,<sup>648</sup> without making any public statements as to their legal responsibility.

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<sup>639</sup> Article 31 ASR and article 31 ARIO.

<sup>640</sup> See Chapter 1, §1.1.6.ii.

<sup>641</sup> *d'Argent* (n 527) 217.

<sup>642</sup> Articles 34 ASR and 34 ARIO.

<sup>643</sup> *Factory at Chorzów, (1928) PCIJ Ser A No 17* 47. This definition of the obligation to make reparation (...) has been reaffirmed on numerous occasions', Crawford (n 8) 481.

<sup>644</sup> See Chapter 5, §5.4.1 for a more detailed description of the facts of this case.

<sup>645</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, 1992 ICJ Reports 240* (n 48) [56].

<sup>646</sup> Article 1(1) Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru - Australia) (1993) 1770 UNTS 379; Crawford, 'Third Report on State Responsibility' (n 143) 74, para 271.

<sup>647</sup> Article 3 Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru - Australia) (1993) 1770 UNTS 379 (n 650).

<sup>648</sup> Crawford, 'Third Report on State Responsibility' (n 143) 74, para 271; Ramon E Reyes, 'Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru's Claims for Rehabilitation of Its Phosphate Lands' (1996) 16 *New York Law School Journal of International and Comparative Law* 1, 33.

Another example of a case that has come close to addressing the allocation of the obligation of reparation resulting from a breach of a shared obligation is the *Eurotunnel* arbitration. In the *Eurotunnel* arbitration,<sup>649</sup> the Arbitral Tribunal established that France and the UK had breached the obligation to take appropriate steps to maintain conditions of normal security and public order in and around the Coquelles Terminal, and concluded that the Claimants were entitled to recover the losses directly flowing from this breach.<sup>650</sup> Thus, both states were bound to an obligation of reparation. The Tribunal stated that it would address whether and on what basis any damage should be apportioned between France and the UK in the second phase of the proceedings;<sup>651</sup> but this next phase was terminated when the parties reached a settlement (the precise terms of which are not available to the public).<sup>652</sup>

This section finds that in the context of breaches of shared obligations, some guidance for the allocation of the obligation of reparation can be found by proceeding from the ILC system of international responsibility. Articles 31 ASR and 31 ARIO provide that the responsible state or IO 'is under an obligation to make full reparation for the injury caused by the internationally wrongful act'. The causal link between the wrongful act(s) and injury is essential in this respect. Accordingly, the obligation to make reparation arises only for the state and/or IO that is responsible for a wrongful act that has caused injury,<sup>653</sup> and it solely obliges a state and/or IO to make reparation for the injury caused by the wrongful act for which it is responsible.

In the case that a breach of a shared obligation gives rise to shared responsibility for one IWA, this proposition entails that all states and/or IOs that are responsible for that one IWA become bound to an indivisible shared obligation to provide reparation for the whole damage caused by that act. From a causal point of view, the one IWA for which multiple states and/or IOs are responsible is the sole cause of the injury. The outcome in terms of reparation is in many respects similar to joint and several liability.

In the case that a breach of a shared obligation gives rise to several IWAs, however, simply applying this proposition does not provide much guidance as to the nature of the obligation of reparation. Only if it is possible to identify in causal terms the part of

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<sup>649</sup> See Chapter 5, §5.4.2 for a more detailed description of the facts of this case.

<sup>650</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, *Partial Award, 2007* (n 52).

<sup>651</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, *Partial Award, 2007* (n 52) [351].

<sup>652</sup> Baetens (n 577) 435.

<sup>653</sup> Stern, 'The Obligation to Make Reparation' (n 76) 563. 'Where a State has been recognized as the author of an internationally wrongful act— whether the conduct consists of an act or an omission—it is not contested that the State has an obligation to make reparation for the injury caused by its conduct.'

the injury caused by each wrongful act, each responsible state or IO arguably becomes bound to an obligation to repair that part of the injury that was caused by its wrongful act. However, in most cases the specific causal contributions of each wrongful act cannot be determined, and international law as it stands does not adopt a particular ground for allocation of the obligation of reparation in such situations.

At this point a general observation is in order with regard to the requirement of causation, which is a topic that is surrounded by ambiguity.<sup>654</sup> In its commentaries to the ASR the ILC simply observes that there should be a 'sufficient causal link which is not too remote'<sup>655</sup> between the IWA and injury, and beyond that does not give any content to the causal link that is necessary for an obligation of reparation to arise.<sup>656</sup> It is beyond the scope of the present section to engage in a comprehensive analysis of causality. This section only considers what are the implications for the nature of the obligation of reparation in the case that a sufficient causal link is established between the internationally wrongful act(s) and the injury.

### 6.2.1 The notion of joint and several liability

The notion of joint and several liability (also referred to as solidary liability)<sup>657</sup> is a common approach to the allocation of the obligation of reparation in many domestic private legal systems.<sup>658</sup> Joint and several liability has been discussed regularly by international legal scholars in connection with the topic of shared responsibility in international law. Even though the current consensus amongst international legal scholars appears to be that joint and several liability is not part of general international law, it is shown in the remainder of this section that the application of the ILC's framework of international responsibility to breaches of shared obligations

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<sup>654</sup> See Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 *EJIL* 471.

<sup>655</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 93, para 10.

<sup>656</sup> Stern, 'The Obligation to Make Reparation' (n 76) 570; Castellanos-Jankiewicz (n 10) 42.

<sup>657</sup> See e.g. European Group on Tort Law (n 22) 138., which speak of 'solidary liability', and observe that this is 'essentially the same as the common law expression "joint and several liability"'. Brownlie has noted that the notion of joint and several liability is a common law notion and the notion of solidary liability is a civil law notion, see Stephan Wittich, 'Joint Tortfeasors in Investment Law' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 718.

<sup>658</sup> See European Group on Tort Law (n 22) 134–138; Noyes and Smith (n 529) 251–254; Roger Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 *Pepperdine Law Review* 233, 241, fn. 38., who refers to comparative research focused on commentary of tort laws in Austria, Belgium, Canada, China, the Czech republic, Denmark, England, Finland, France, Germany, Ireland, Israel, Italy, the Netherlands, New Zealand, Poland, Portugal, Scotland, South Africa, Spain Sweden, Switzerland and the United States; Noyes and Smith (n 529) 251–258., who discuss joint and several liability in 'Western' and 'non-Western' legal systems, including the former Soviet Union and the Shi'ite branch of Islamic law. See also the short survey of US, Canadian, British, French, Swiss and German tort law by Judge Simma in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Separate Opinion Judge Simma*, 2003 ICJ reports 324 (n 539).

can, to some extent, give rise to a comparable outcome in terms of the allocation of the obligation of reparation.

In domestic law joint and several liability is relied upon as a way to allocate the obligation to pay compensation among several tortfeasors that have all contributed to the same damage, for example when 'P suffers a broken neck in a collision between the vehicles of D1 and D2.'<sup>659</sup> In such situations, it is often not clear which of the tortfeasors caused what part of the damage. If the liability of multiple tortfeasors is 'joint and several' this entails, first of all, that each of them is liable to pay for the whole damage caused.<sup>660</sup> Essentially joint and several liability gives rise to an obligation of compensation that, when employing the terminology of the present study, can be qualified as an indivisible shared obligation of reparation. Indeed, joint and several liability entails that multiple duty-bearers become obliged to achieve a common result: the payment of full compensation for the whole damage caused.

Another important feature of joint and several liability is that the victim can claim full compensation from any of the tortfeasors (e.g. in legal proceedings before a court), and there is no need to involve any of the other tortfeasors in these proceedings. It is a matter for the liable entities to sort out their respective portions of liability and payment amongst themselves. The basis for sorting out the respective contributions of tortfeasors is usually provided in for in the law,<sup>661</sup> but there may also be a contract between the tortfeasors 'which provides for allocation of responsibility in the event of a claim by a third party.'<sup>662</sup>

In many domestic legal systems, joint and several liability is the accepted standard in cases of indivisible damage.<sup>663</sup> Some legal systems distinguish between situations where tortfeasors cause indivisible harm through concerted conduct and situations where indivisible harm is caused by independent acts of several tortfeasors (which roughly resembles the distinction made in the present study between shared

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<sup>659</sup> European Group on Tort Law (n 22) 147.

<sup>660</sup> Noyes and Smith (n 529) 251; Crawford, 'Third Report on State Responsibility' (n 143) 25; d'Argent (n 527) 244. See also article 9:101(2) Principles of European Tort Law (PETL), European Group on Tort Law (n 22) 142.

<sup>661</sup> d'Argent (n 527) 244; European Group on Tort Law (n 22) 142. For example, article 9:102(1) PETL provides that 'a person subject to solidary liability may recover a contribution from any other person liable to the victim in respect of the damage'. Article 9:102(2) states that 'the amount of contribution shall be what is considered just in the light of the relative responsibility for the damage of the person liable, having regard to their respective degrees of fault and to any other matters which are relevant to establish or reduce their liability.'

<sup>662</sup> European Group on Tort Law (n 22) 145.

<sup>663</sup> European Group on Tort Law (n 22) 138. See also: the overview provided in Noyes and Smith (n 529) 251-254; Alford (n 662) 245. Simma's survey of US, Canadian, British, French, Swiss and German tort law, which all provide for joint and several liability in the case of indivisible damage, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Separate Opinion Judge Simma*, 2003 ICJ reports 324 (n 539).



responsibility for one IWA and shared responsibility for several IWAs). In situations where several tortfeasors act independently and cause indivisible harm the accepted standard is often that of joint and several liability,<sup>664</sup> though less often so than in cases where the indivisible harm results from joint conduct.<sup>665</sup>

In international law the notion of joint and several liability does not seem to have come near to such a level of acceptance. In its commentaries to the ASR the ILC merely states that article 47(1) ASR neither recognizes nor excludes 'a general rule of joint and several liability'.<sup>666</sup> Though there have been some cases before an international court or tribunal where one of the parties to the proceedings based its argument on joint and several liability,<sup>667</sup> there has been no judicial recognition of joint and several liability as a part of general international law.<sup>668</sup> It has been pointed out that the few existing treaty provisions that expressly provide for joint and several liability<sup>669</sup> constitute a *lex specialis*,<sup>670</sup> and do not constitute sufficient evidence of a general rule of customary international law.<sup>671</sup> Though there are certainly legal scholars that have advocated for a concept of joint and several liability in international law,<sup>672</sup> others are hesitant or have downright rejected the existence of

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<sup>664</sup> The commentary to the PETL provides that where the independent acts of two persons combine in their effect to produce a single harm, each person is liable to the victim for the whole of the damage suffered by the victim. See European Group on Tort Law (n 22) 138. In their discussion of the content of municipal rules, Noyes and Smith note that joint and several liability is 'firmly established with respect to wrongdoers engaged in concerted conduct', and 'the same general rule of joint and several liability applies to wrongdoers acting independently with respect to a single event.' Noyes and Smith (n 529) 251.

<sup>665</sup> Alford (n 662) 241, 245.

<sup>666</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 125, para 6.

<sup>667</sup> See e.g. *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, Partial Award, 2007 (n 52) [187]; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240 (n 48) [48]; *Aerial Incident of 27 July 1955 (United States of America v Bulgaria)*, Memorial submitted by Government of the United States of America, 2 December 1958 229. See also the Separate Opinion of Judge Simma in the Oil Platforms case, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion Judge Simma, 2003 ICJ reports 324 (n 539),.

<sup>668</sup> Crawford, *State Responsibility: The General Part* (n 24) 330; Wittich (n 661) 711.

<sup>669</sup> For example, article 139(2) LOSC provides that damage caused by the failure of states parties or international organizations acting together to carry out their responsibilities under Part XI LOSC shall entail joint and several liability; Article V Space Liability Treaty provides that if damage is caused by states jointly launching a space object, they shall be jointly and severally liable for any damage caused. For a discussion of joint and several liability provided for in these provisions see Plakokefalos, 'Environmental Protection of the Deep Seabed' (n 8) 393; Pablo Mendes de Leon and Hanneke van Traa, 'Space Law' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 460–464; Morris Forkosch, *Outer Space and Legal Liability* (Martinus Nijhoff Publishers 1982) 86.

<sup>670</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 125, para 5.

<sup>671</sup> d'Argent (n 527) 245.

<sup>672</sup> Noyes and Smith (n 529); Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010); Alford (n 662); *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion Judge Simma, 2003 ICJ reports 324 (n 539); Wouter Vandenhoele, 'Shared Responsibility of Non-State Actors: A Human Rights Perspective' in Noemi Gal-Or, Cedric Ryngaert and



joint and several liability in general international law. Objections generally relate to the lack of practice<sup>673</sup> and the difficulty with transposing domestic law concepts to the international level.<sup>674</sup>

But in spite of the lack of acceptance in international law of the notion of joint and several liability as such, subsections 6.2.2 and 6.2.3 below find that the application of the ILC framework of international responsibility to breaches of shared obligations can, at least to some extent, produce comparable results.<sup>675</sup> In the case of a breach of a shared obligation that gives rise to shared responsibility for one IWA the outcome in terms of reparation is similar in several respects to that of joint and several liability. Such cases give rise to an indivisible shared obligation of reparation for all responsible states and/or IOs, and full reparation can be claimed from any of them. This could also be true in some cases where breaches of shared obligations give rise to shared responsibility for several IWAs depending on the ground for allocation, though the positive law of international responsibility as it stands provides no clear answers in this respect.

Still, there is an important difference between an indivisible shared obligation of reparation in international law and the notion of joint and several liability in domestic legal systems. General international law does not provide for a basis of the right of contribution when multiple states and/or IOs are bound to an indivisible shared obligation of reparation, whereas such a basis is generally provided for in regimes of joint and several liability in domestic law.

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Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill - Nijhoff 2015) 75. Graefrath states that 'joint and several liability seems absolutely justified when we have several perpetrators or co-authors of an internationally wrongful act,' but is critical of applying joint and several liability to cases of complicity. Bernhard Graefrath, 'Complicity in the Law of International Responsibility' [1996] *Revue Belge de Droit International* 371, 380.

<sup>673</sup> Wittich notes that in the context of state responsibility 'there has to date been no case where a court or tribunal applied the concept of joint and several liability', and consequently states that 'it would appear that the position under general international law is that the concept of joint and several liability does not form part of existing international law', Wittich (n 661) 711, 718. Crawford observes that 'judicial recognition of a notion of 'joint and several liability' as part of general international law is likewise limited', Crawford, *State Responsibility: The General Part* (n 24) 330. d'Argent mentions that debates about joint and several liability are shaped by a real lack of practice, which was already noted by Brownlie some thirty years ago, d'Argent (n 527) 245; Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (OUP 1983) 189.

<sup>674</sup> According to the ILC, 'it is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility are derived from different legal traditions, and analogies must be applied with care', see International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 124. A similar sentiment has been expressed in d'Argent (n 527); Crawford, *State Responsibility: The General Part* (n 24) 332.

<sup>675</sup> Along the same lines, d'Argent observes that 'the developments discussed in this chapter have to a large extent deflated the debate about joint and several responsibility in international law, as they have established that the practical benefit of such a regime, i.e. the possibility for the injured party to claim full reparation from any of the responsible states or organisations, actually exists in two specific situations'. d'Argent (n 527) 246–247.

## 6.2.2 Shared responsibility for one internationally wrongful act and reparation

A breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA, which means the findings of this subsection apply to all breaches of indivisible shared obligations. This subsection is relevant for breaches of *divisible* shared obligations only in those cases where they give rise to shared responsibility for one IWA (which is only possible if the divisible shared obligation in question is of a negative character).

When multiple states and/or IOs are responsible for one internationally wrongful act and that act causes injury, the application of articles 31 ASR and ARIO can only lead to the conclusion that all responsible states will become bound to an obligation to provide full reparation for the whole injury.<sup>676</sup> Indeed, 'from a causal point of view, the wrongful act is the only cause of the injury, even if several subjects bear responsibility for it.'<sup>677</sup> This shared obligation of reparation is of an indivisible character, because it requires its bearers to achieve a common result: the making of full reparation for the whole injury caused by one wrongful act.

Considering that breaches of indivisible shared obligations always give rise to shared responsibility for one wrongful act, an obligation of reparation that arises as a result of a breach of an indivisible shared obligation will automatically arise for all responsible states. For example, when Australia, the UK and New Zealand breach the indivisible shared obligation to rehabilitate Nauru's worked out phosphate lands by failing to provide such rehabilitation,<sup>678</sup> the three states will be responsible for one internationally wrongful act: the common failure to rehabilitate Nauru's worked out phosphate lands. If that wrongful act causes injury to Nauru,<sup>679</sup> Australia, the UK and New Zealand will become bound to a shared obligation to make full reparation for the whole injury caused by their common failure.

The obligation to make reparation cannot be divided amongst the three responsible states on the basis of their causal contributions to the injury, because the one wrongful act for which they are all responsible is the sole cause of the injury.<sup>680</sup>

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<sup>676</sup> d'Argent (n 527) 238. states that '[i]t seems difficult to argue that reparation for the whole injury could not be claimed from any of the various states or organisations responsible for the same wrongful act.'

<sup>677</sup> d'Argent (n 527) 238.

<sup>678</sup> See Chapter 5, §5.4.1. Not only the question of breach, but also the question of the existence of this obligation was part of the dispute in the Nauru case. However, the ICJ has not addressed either of these questions substantively. See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240 (n 48).

<sup>679</sup> In its memorial Nauru made a claim for various forms of loss caused to it, which included the costs of rehabilitation of the worked-out phosphate lands. See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Memorial of the Republic of Nauru, 1990 Volume I (n 403).

<sup>680</sup> d'Argent (n 527) 238. 'It seems difficult to argue that reparation for the whole injury could not be claimed from any of the various states or organisations responsible for the same wrongful act. From a

Rather, the obligation of reparation incumbent upon the three states obliges them to achieve a common result: full reparation for the injury caused by the common failure to rehabilitate Nauru's worked out phosphate lands. As soon as full reparation has been made, the obligation will be fulfilled by all duty-bearers, and if full reparation is not made, the obligation will be breached by all duty-bearers. If Australia offers reparation for part of the damage whereas the UK and New Zealand offer no reparation at all, the obligation will still be breached by all duty-bearers, considering that the common result required by the obligation (reparation for the whole damage) is not achieved.

The above considerations would have applied to the indivisible shared obligation of the EU and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gas emissions by 2020, had the Kyoto Protocol not contained a provision that allocates international responsibility as soon as the common reduction target is not achieved.<sup>681</sup> In the absence of such a provision, the failure to achieve a 20 per cent reduction of aggregate emissions by 2020 would give rise to shared responsibility of all duty-bearers for one internationally wrongful act. If this one wrongful act would cause injury, there would be an automatic causal link between the wrongful act of all duty-bearers and that injury, hence giving rise to an indivisible shared obligation of reparation for all of them.

The above indicates that the law of international responsibility as it stands accommodates the automatic connection between a breach of an indivisible shared obligation and, in the case that injury is caused, an indivisible shared obligation of reparation. Indeed, the fact that the (primary) shared obligation breached is indivisible has automatic implications for the causal link between wrongful conduct and injury. If an indivisible shared obligation is breached, the wrongful act itself consists of a joint failure to achieve a common result and, from a causal point of view; it is always that one act that is the sole cause of the injury.<sup>682</sup> Consequently, the obligation of reparation cannot be divided amongst duty-bearers on the basis of their causal contributions to the injury.

In some instances, shared responsibility for one IWA can also arise from a breach of a divisible shared obligation (though this is only possible if the divisible shared obligation in question is of a negative character). In such cases, the shared obligation

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causal point of view, the wrongful act is the only cause of the injury, even if several subjects bear responsibility for it.'

<sup>681</sup> See Chapter 5, §5.4.6.

<sup>682</sup> d'Argent (n 527) 238. 'It seems difficult to argue that reparation for the whole injury could not be claimed from any of the various states or organisations responsible for the same wrongful act. From a causal point of view, the wrongful act is the only cause of the injury, even if several subjects bear responsibility for it.'

of reparation that arises will be of an indivisible character. For example, if upstream states X and Y jointly breach a divisible shared obligation not to pollute a river through a common organ, they will both be responsible for one IWA. If this wrongful act causes damage to a downstream state, states X and Y will become bound to an indivisible shared obligation to make full reparation for the whole injury caused by that act. The obligation of reparation cannot be divided amongst states X and Y on the basis of their causal contributions, because the wrongful act for which they are both responsible is the sole cause of the injury to the downstream state. This means that full reparation can be claimed from any of the states responsible for the one internationally wrongful act.

All in all, when a breach of a shared obligation gives rise to shared responsibility for one IWA, all responsible states and/or IOs become bound to an indivisible shared obligation of reparation (provided that injury is caused by that act). This obligation of reparation is not allocated amongst each of the responsible states or IOs; rather, it requires all of them to achieve a common result: full reparation for the damage caused by one IWA.

Moreover, in the case that multiple states and/or IOs are bound to an indivisible shared obligation of reparation, it follows from the ILC's framework of international responsibility that full reparation can be claimed from any of them. Considering that article 47(1) ASR and 48(1) ARIO provide that '[w]here several states [or IOs] are responsible for the same internationally wrongful act, the responsibility of each state [or IO] may be invoked in relation to that act', it would be 'difficult to argue that reparation for the whole injury could not be claimed from any of the various states or [IOs] responsible for one and the same wrongful act.'<sup>683</sup> The only limitation in this respect is that the injured state or IO is not entitled to 'recover, by way of compensation, more than the damage it has suffered.'<sup>684</sup>

This outcome in terms of reparation resembles joint and several liability, which also entails that each actor that has contributed to the same damage is bound to pay for the whole damage caused, and that full reparation can be claimed from each actor.

However, there are two practical complications that may arise in the case that multiple states and/or IOs are bound to an indivisible shared obligation of reparation. These complications pertain to the internal relationship between the states and/or IOs that bear the obligation of reparation, but do not alter the fact that all of them are bound to an indivisible shared obligation to provide full reparation, and that full reparation can be claimed from any of them.

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<sup>683</sup> d'Argent (n 527) 238. See also Orakhelashvili, 'Division of Reparation between Responsible Entities' (n 676) 657. '[I]f the two States combine their efforts in committing the wrongful act, the injured State can hold each responsible State to account for the wrongful act as a whole.'

<sup>684</sup> Article 47(2)(a) ASR; article 48(3)(a) ARIO.

First, a complication may arise when full reparation is claimed from only one of the responsible states in the form of restitution, but the responsible state is not in the position to provide such restitution on its own. The indivisible nature of the obligation of reparation entails that when restitution is not provided, the obligation is breached anew by all of its bearers. However, this might induce the responsible state from whom full reparation is claimed to prompt the other responsible state(s) to participate in providing restitution. Indeed, if in the end the provision of restitution is not achieved the indivisible shared obligation of reparation will be breached by all responsible states. It is thus as much in the interest of the state that is in the position to provide restitution as it is in the interest of the state that is called upon to provide restitution that such restitution is in fact provided, since all of them will be internationally responsible if full reparation is not provided.

The second issue arises in a situation where one of the bearers of an indivisible shared obligation of reparation provides full reparation for the whole injury without any contributions on the part of the other duty-bearer(s). A duty-bearer may do so of its own accord, or because the injured state/IO has claimed reparation for the whole injury from only one of the duty-bearers.

As soon as full reparation is provided by one of the duty-bearers, the common result required by the obligation will be achieved and the obligation will be fulfilled by all of its bearers. All duty-bearers, including those that have not contributed to reparation, will subsequently be released from the obligation of reparation. This simply follows from the indivisible structure of performance of the obligation, which brings with it that the obligation is fulfilled as soon as the common result required by the obligation has been achieved (in this case: the provision of full reparation). The independent contributions (or lack thereof) of individual bearers of the obligation of reparation are irrelevant in this respect. This can result in a situation in which one duty-bearer has shouldered the entire burden imposed by an obligation of reparation that was binding upon multiple duty-bearers, and questions of contribution may subsequently arise between the duty-bearers.<sup>685</sup>

However, in the absence of a treaty provision providing for a right of recourse, there is no legal basis in general international law for the state or IO that has provided full reparation to make a claim for contribution against the other duty-bearers that did not contribute to that reparation. Even though the principle embodied in article 47(1) ASR and 48(1) ARIO is 'without prejudice to any right of recourse against the other responsible States or international organizations',<sup>686</sup> it does not provide a basis for a right of recourse either. When it comes to the right of recourse, international law may

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<sup>685</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 125, para 10.

<sup>686</sup> Article 47(2)(b) ASR and 48(3)(b) ARIO.

stand to gain from the much more sophisticated joint and several liability regimes in many domestic legal systems.

Accordingly, it may be worthwhile for states and/or IOs to specifically address the question of contribution in relation to shared obligations. This applies in particular to indivisible shared obligations, since a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA and, in the case that injury is caused by that act, automatically gives rise to an indivisible shared obligation of reparation.

### **6.2.3 Shared responsibility for several internationally wrongful acts and reparation**

Since breaches of indivisible shared obligations cannot give rise to shared responsibility for several IWAs, the findings of this section apply only to breaches of divisible shared obligations (in the case that they give rise to shared responsibility for several IWAs).

Articles 31 ASR and 31 ARIO stipulate that an obligation of reparation ensues only when injury is caused by a wrongful act. In the case of several IWAs, the causal link between each of those acts and the injury needs to be established. When divisible shared obligations are breached by several wrongful acts, it is possible that an obligation of reparation arises for one of the responsible states but does not arise for another responsible state, for example if one of the wrongful act is not in a causal relationship with the injury.<sup>687</sup> Only if a causal link can be established between all of the wrongful acts and the injury, an obligation of reparation will arise for all responsible states and/or IOs.

For example, imagine that four coastal states breach the divisible shared obligation to seek to agree upon the measures necessary to coordinate and ensure the conservation and development of a particular fish stock<sup>688</sup> that solely occurs within the exclusive economic zones of these four states. None of these states have taken any steps to try to agree upon the measures necessary, which means that all states share responsibility for several internationally wrongful acts. Now imagine that the fish stock in question goes extinct, and that a sufficient causal link can be established between each of these separate wrongful acts and the injury. By relying on article 31 ASR, which provides that an obligation of reparation arises for a responsible state

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<sup>687</sup> See also d'Argent (n 527) 222. In his discussion of the obligation of reparation in the case of several wrongful acts he asserts that '[i]f one of the wrongful acts cannot be said to be in a causal relationship with the injury, the entity responsible for that act will not be bound by the obligation to make reparation for that injury, despite the breach and its responsibility for it.'

<sup>688</sup> See article 63 LOSC.

whose wrongful act causes injury, it can be concluded that such a scenario would give rise to an obligation of reparation for all four responsible states (on apportionment see below).

Imagine another scenario where UK and the US during their joint occupation of Iraq breached the divisible shared obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources. Since neither the US nor the UK had taken appropriate measures, which means that both states were responsible for several internationally wrongful acts. Now imagine that the plundering of natural resources in Iraq took place on a large scale, and that a sufficient causal link can be established between each of these wrongful acts and the injury. It follows from the ILC's framework that an obligation of reparation (on apportionment see below) would have arisen for both the UK and the US.

The same logic can be applied to the situation that was the subject of the Eurotunnel case. In this case both France and the UK were responsible for a breach of the divisible shared obligation to take appropriate steps to maintain conditions of security and public order in and around the Coquelles terminal, which means that both states were responsible for several internationally wrongful acts.<sup>689</sup> The Arbitral Tribunal considered that 'the Concessionaires suffered losses as a result of clandestine migrant incursions at Coquelles', and that these losses were 'due in significant part to the combined failure of the Respondents to meet their obligations'.<sup>690</sup> Thus, placed in the ILC's framework of international responsibility, there was a causal link between the wrongful acts committed by each of the duty-bearers and the injury, which indicates that France and the UK were both bound to an obligation to make reparation for the damage caused by their respective failures to take steps to maintain security and public order in and around the Coquelles terminal.

The question that subsequently arose was whether France and the UK were both bound to make reparation for the whole injury suffered by the Concessionaires, or whether each of them was bound to make reparation for only part of the injury. In other words, what is the nature of the obligation of reparation incumbent upon France and the UK? Because the parties reached a settlement, the Tribunal in the Eurotunnel case did not answer this question.

The allocation of the obligation of reparation in a situation in which multiple states and/or IOs are responsible for *one* IWA is clear-cut, since from a causal point of view

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<sup>689</sup> See Chapter 5, §5.4.2.

<sup>690</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France), Partial Award, 2007* (n 52) [315].



that one wrongful act will be the only cause of the whole injury. However, in the case that a divisible shared obligation is breached by *several* wrongful acts, the issue becomes much more complicated. After all, there are *multiple causes* of the injury.

The basic premise that a state or IO is only bound to repair the injury that is caused by the IWA for which it is responsible<sup>691</sup> suggests that if it is possible to identify in causal terms the part of the injury caused by each wrongful act, each responsible state or IO will be bound to repair only that part of the injury that has been caused by its own IWA.<sup>692</sup> In such a case each state or IO responsible for a breach of a divisible shared obligation would become bound to an obligation of reparation, but only a share of reparation can be claimed from each of them.

However, in many cases it cannot be determined what part of the injury was caused by each wrongful act,<sup>693</sup> and 'the law is largely silent on how to determine shares of reparation in those situations where causation does not provide easy answers.'<sup>694</sup> Accordingly, in those cases where the distinct causal contribution of each wrongful act cannot be identified, the application of the ILC's framework of international responsibility does not provide guidance as to the nature of the obligation of reparation. A further discussion of potential grounds for allocation is outside the scope of the present study.

The observation can be made that certain standards for allocation could give rise to an indivisible shared obligations of reparation, where all of the responsible states and/or IOs are bound to repair the whole damage. For example, d'Argent submits that in the case that several IWAs are cumulative causes of an injury (in which case parts of the injury cannot be clearly allocated to each wrongful act), the equivalent cause theory should be preferred as a ground for allocation.<sup>695</sup> This approach 'favours the victim, as it considers that any of the wrongdoers is fully responsible for the injury because no causal wrongful act can be considered as more important than another'.<sup>696</sup> Consequently, each responsible state or IO would become bound to an indivisible shared obligation to make reparation for the whole injury. This outcome is

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<sup>691</sup> Article 31 ASR; article 31 ARIIO.

<sup>692</sup> Boutin (n 101) 216; d'Argent (n 527) 224. The ILC acknowledges that there can be cases 'where an identifiable element of injury can properly be allocated to one or several concurrently operating causes alone'. If 'some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State' then the extent of reparation to be made by that responsible state should be reduced accordingly. International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 93, para 13.

<sup>693</sup> Nollkaemper, 'Introduction' (n 59) 7.

<sup>694</sup> Nollkaemper and Plakokefalos (n 96) 351.

<sup>695</sup> d'Argent (n 527) 531.

<sup>696</sup> d'Argent (n 527) 229.



comparable to the outcome of joint and several liability in case of indivisible damage in many domestic legal systems.<sup>697</sup>

In conclusion, when a breach of a shared obligation gives rise to shared responsibility for several IWAs, the causal link between each act and the injury needs to be established. For example, if sponsoring states Bulgaria, Cuba, the Czech Republic, Poland, the Russian Federation and Slovakia all breach the divisible shared obligation to take measures to ensure that exploration activities of the Interoceanmetal Joint Organization (IOM) are carried out in accordance with Part XI LOSC, they will all be responsible for several internationally wrongful acts.<sup>698</sup> If the exploration activities of the IOM subsequently cause damage to the Area, an obligation of reparation will arise for all sponsoring states if each of their wrongful acts can be causally linked to the damage caused to the Area by the IOM.

As discussed above, the nature of this obligation of reparation will in principle depend on whether each of their wrongful acts can be causally linked to only part of the damage. If so, each state is bound to repair only the part of the damage that has been caused by its own wrongful act. If not, the nature of the obligation of reparation can be based on other grounds of allocation that are outside the scope of the present study. The positive law of international responsibility is not clear on this matter.

However, for this particular example the LOSC has incorporated a special rule on the allocation of the obligation of reparation<sup>699</sup> in situations as the one described above. 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 referred to this special rule in the LOSC and clarified that if damage is caused by the failure of multiple sponsoring states to take all necessary measures those sponsoring states will be jointly and severally liable,<sup>700</sup> so that full reparation can be claimed from all or any of them.<sup>701</sup> This essentially comes down to an indivisible shared obligation of reparation.

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<sup>697</sup> See §6.2.1 above.

<sup>698</sup> See Chapter 5, §5.4.8.

<sup>699</sup> Article 139(2) LOSC provides that 'damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability.'

<sup>700</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) 192. Article 139(2) LOSC provides that '[a] State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.'

<sup>701</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) 201.

## 6.2.4 Summary

This section has found that the nature of the obligation of reparation that arises as a result of a breach of a shared obligation depends primarily on whether the states and/or IOs involved are responsible for one IWA or for several IWAs.

Because a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA, a breach of an indivisible shared obligation always gives rise to an indivisible shared obligation of reparation (provided that injury has been caused by the wrongful act in question). Seeing that from a causal point of view the one wrongful act is the sole cause of the injury, all responsible states or IOs are bound to provide full reparation for the injury caused by the one IWA for which they are all responsible. Full reparation can be claimed from each of the responsible states and/or IOs, which is an outcome comparable to that of joint and several liability in many domestic legal systems. An important difference, however, is that international law as it stands does not provide for a right of recourse in the case that one responsible state or IO has provided full reparation.

In case of a breach of a divisible shared obligation, the nature of the obligation of reparation depends, first of all, on whether shared responsibility arises for one IWA or for several IWAs. If shared responsibility arises for one IWA (which is possible only if the divisible shared obligation is of a negative character), the nature of the obligation of reparation is indivisible; as described in the previous paragraph.

The matter is more complex when a breach of a divisible shared obligation gives rise to shared responsibility for several IWAs. Only if a causal link can be established between each of the wrongful acts and the injury, an obligation of reparation will arise for all responsible states and/or IOs. But this does not answer the question of apportionment: is each responsible for the whole injury or only for party of the injury? The ILC's framework of international responsibility provides guidance only if each wrongful act can be causally linked to a specific part of the injury, in which case each responsible state or IO is bound to repair only the part of the damage that was caused by its wrongful act. In those cases where the distinct causal contribution of each wrongful act cannot be identified, the nature of the obligation of reparation remains unclear.

## 6.3 Conclusions

This chapter has explored the implications of breaches of shared obligations for the content of shared responsibility. It has found that the *indivisible* nature of a shared obligation has automatic implications for the content of shared responsibility. This is due to the fact that a breach of an indivisible shared obligation always gives rise to

shared responsibility for one IWA. If that one IWA is of a continuing character all responsible states and/or IOs become bound to an indivisible shared obligation of cessation, obliging all of them to achieve cessation of the one IWA for which they are all responsible. Moreover, if that one IWA causes damage, all responsible states and/or IOs become bound to an indivisible shared obligation of reparation, binding all of them to provide full reparation for the entire damage caused. This outcome is comparable to the outcome of joint and several liability, which is a common approach to the allocation of the obligation of reparation in many domestic private legal systems. Altogether, if the primary obligation breached is an indivisible shared obligation, any secondary obligation that arises will itself be of an indivisible character.

The *divisible* nature of a shared obligation has no such automatic implications for the content of shared responsibility. In case of a breach of a divisible shared obligation the nature of secondary obligations depends primarily on whether shared responsibility arises for one IWA or for several IWAs. In a scenario where shared responsibility for one IWA ensues from a breach of a divisible shared obligation (which is only possible if the obligation in question is of a negative character), the considerations in the preceding paragraph apply. Any obligation of cessation or reparation that arises is an indivisible shared obligation.

In the case that a breach of a divisible shared obligation gives rise to shared responsibility for several IWAs, an obligation of cessation and reparation does not always arise for all responsible states and/or IOs. With regard to the obligation of cessation, it has to be determined for each wrongful act whether it is of a continuing character. If so, each responsible state or IO becomes bound to a divisible shared obligation of cessation that obliges each of them to cease its own wrongful act.

With regard to the obligation of reparation, it has to be determined for each wrongful act whether a causal link can be established between each of the wrongful acts and the injury. If so, an obligation of reparation arises for all responsible states and/or IOs. The law of international responsibility provides guidance as to the nature of this obligation of reparation only if it is possible to identify which part of the injury has been caused by each wrongful act. In such a case each responsible state or IO becomes bound to a divisible shared obligation to repair only that part of the injury that has been caused by its own wrongful act. However, in many cases it is impossible to identify in causal terms the part of the injury caused by each wrongful act, and the nature of the obligation of reparation in such situations remains unclear under the positive law of international responsibility.