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Shared obligations in international law

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MAIN FINDINGS AND CONCLUDING REMARKS

In the context of the increasing interdependence of the international legal system, international cooperation and the pursuance of common goals, one would expect that states and/or IOs do not only share rights and legal interests (as is acknowledged by concepts such as multilateral or *erga omnes (partes)* obligations),⁷⁰² but that they also share obligations. However, despite the increasing number of references in legal literature to international obligations that are 'joint', 'collective' or 'shared',⁷⁰³ there has been no comprehensive attempt to define what it means to speak of shared obligations in international law. This is particularly noteworthy due to the fact that in practice there are numerous situations in which multiple states and/or international organizations are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. Such situations can raise questions regarding the (non-)performance of international obligations: when is the obligation breached or fulfilled by which duty-bearer, and who can be held internationally responsible for what in case of a breach?

The aim of this thesis has been to examine the topic of shared obligations in international law, in order to contribute to a better understanding of the (non-) performance of international obligations that are incumbent upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals. The study has answered the following research question: in what situations are international obligations shared rather than individual, and what are the implications of a breach of a shared obligation for the international responsibility of states and/or international organizations?

This concluding chapter provides an overview of the main findings of this study (§7.1), followed by some concluding remarks (§7.2).

⁷⁰² See Chapter 2, §2.3 and §2.4.

⁷⁰³ See the introductory text to Chapter 1.

7.1 Main findings

The main findings of this study pertain to the conceptualization of shared obligations (§7.1.1) and the relationship between shared obligations and shared responsibility (§7.1.2).

7.1.1 The conceptualization of shared obligations

Part I of this thesis has focused on the conceptualization of shared obligations. The study has developed a concept of shared obligation as an analytical tool through which to assess situations where multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. On the basis of this conceptualization of shared obligations, it is possible to categorize an international obligation in a particular situation as either 'shared' or 'not shared', and within the category of shared obligations it is possible to categorize a shared obligation as either 'divisible' or 'indivisible'. The main findings of the first part of this study can be summarized as follows:

i. The one-sided approach to multilateral legal relations in the international law of obligations

The international law of obligations has engaged with the idea that legal relations do not necessarily involve two states or IOs only, and that this has consequences for responsibility and treaty relations. Chapter 2 has demonstrated that the law of international responsibility and the law of treaties recognize that certain international obligations are owed *to* multiple states or IOs simultaneously, with the principal consequence that multiple states or IOs are entitled to respond to an internationally wrongful act or a material breach of treaty. Such obligations give rise to multilateral legal relations where the corresponding right is held by multiple right-holders.

The international law of obligations approaches multilateral legal relations solely from the perspective of the *right-holders*, and has neglected to address the possibility of and potential consequences of a plurality of *duty-bearers*. In the law of treaties this is illustrated primarily by the categories of 'interdependent' and 'integral' obligations.⁷⁰⁴ The one-sided approach to multilateral legal relations in the law of international responsibility is best illustrated by the categories of 'multilateral' or '*erga omnes (partes)*' obligations,⁷⁰⁵ which have been influenced by the categorization of obligations in the law of treaties.

⁷⁰⁴ See Chapter 2, §2.3.1.

⁷⁰⁵ See Chapter 2, §2.4.2.

The focus of the concept of shared obligation is different from these existing concepts, since it focuses on the possibility of and potential problems raised by a plurality of *duty-bearers*. Still, these existing categories of obligations have served as an important source of inspiration and analogy in the conceptualization of shared obligations. To be more precise, the category of indivisible shared obligations developed in the present study is the mirror image of the categories of multilateral or *erga omnes (partes)* obligations, since it gives rise to a multilateral legal relation where the obligation is held by multiple duty-bearers (see below).

ii. The distinction between shared obligations and obligations that are not shared

The concept of shared obligations is an overarching concept that covers two types of shared obligations: divisible and indivisible shared obligations. It is a relatively broad concept, but it does not cover all international obligations that are binding upon multiple states or IOs simply because they arise from a multilateral rule or source.⁷⁰⁶

The main characteristic that distinguishes shared obligations from obligations that are not shared is the existence of a connection between the bearers of a shared obligation that consists of more than just the fact that they are all parties to the same multilateral treaty or bound by the same rule of customary international law. This relationship between the bearers of shared obligations has been clarified in chapter 3 by discussing the three elements of a shared obligation.

First, a shared obligation has *two or more duty-bearers*, since a state or IO cannot share an international obligation on its own.⁷⁰⁷ This logically excludes scenarios where there is only one duty-bearer, for example when a bilateral treaty obliges one state party to provide the other state party with a certain amount of development assistance.

Second, the duty-bearers in question are bound to *a similar international obligation*,⁷⁰⁸ which is the case when multiple states and/or IOs are bound to an obligation with similar normative content. This logically excludes scenarios where multiple states or IOs are bound to a different obligation. The obligations of multiple duty-bearers are similar when they prescribe the achievement of a similar result (such as the obligation of Australia, New Zealand and the UK to rehabilitate Nauru's worked-out phosphate lands or the obligation of state X and state Y to refrain from acts of torture towards individuals in a detention centre over which they both

⁷⁰⁶ See Chapter 3, §3.1.4.

⁷⁰⁷ See Chapter 3, §3.2.1.

⁷⁰⁸ See Chapter 3, §3.2.2.

exercise effective control), or when they prescribe similar conduct in pursuance of a result (such as the obligation of multiple coastal states to seek to agree upon the measures necessary to coordinate and ensure the conservation and development of fish stocks that occur in the exclusive economic zones of all of them or the obligation of the US and UK, in their capacity as occupying powers of Iraq, to take appropriate measures to prevent the looting, plundering and exploitation of natural resources).

Third, multiple duty-bearers are bound to a similar international obligation *that pertains to the same concrete case* or, in other words, the same constellation of facts.⁷⁰⁹ This is the case when a) *multiple states and/or IOs have agreed to an obligation to work towards or achieve a common goal* (such as the obligation of the (then) EC and its member states to provide 12.000 million ECU in financial assistance to the ACP states, or the obligation of France and the UK to take appropriate steps to maintain security and public order in and around the Coquelles terminal), or b) *multiple states and/or IOs are factually linked to a common situation* (for example when both Lithuania and the US exercise concurrent jurisdiction over the CIA black site operated on the territory of Lithuania and are both bound to refrain from acts of torture and inhuman or degrading treatment of the individuals held in that black site, or when the territory of Iraq was occupied by the US and the UK and both occupying states were bound to the obligation to take all the measures in their power to restore and ensure public order and safety in Iraq).

The third and final element is key to understanding the connection between the bearers of a shared obligation. The fact that the similar international obligations of multiple states and/or IOs pertain to the same concrete case indicates that there is an overlap between the (similar) obligations of duty-bearers, which raises questions regarding (non-)performance: when is a shared obligation fulfilled by which duty-bearer(s), and when is a shared obligation breached by which duty-bearer(s)?

iii. The distinction between two types of shared obligations: divisible and indivisible shared obligations

The distinction between divisible and indivisible shared obligations is key to a better understanding of the (non-)performance of shared obligations, and has been introduced and explored in chapter 4.

When multiple states and/or IOs are bound to an indivisible shared obligation, they are all bound to achieve a common performance.⁷¹⁰ An example is the obligation of multiple states to reduce their aggregate CO₂ emissions with 30 per cent by 2020. All

⁷⁰⁹ See Chapter 3, §3.2.3.

⁷¹⁰ See Chapter 4, §4.1.1.

of them are bound to achieve a common performance: the reduction of combined CO2 emissions with 30 per cent by 2020.

The performance of an indivisible shared obligation by its bearers is indivisible. It is either fulfilled by all duty-bearers simultaneously when the common performance is achieved, or it is breached by all duty-bearers simultaneously when the common performance is not achieved. Essentially this entails that for the performance of the obligation it does not matter what individual duty-bearers have done in their efforts to comply with the obligation. All that matters is whether the common performance has been achieved or not.

An indivisible shared obligation is the mirror image of the concept of multilateral or *erga omnes (partes)* obligations that is recognized in the law of international responsibility. An indivisible shared obligation gives rise to a multilateral legal relation where the obligation is held by multiple duty-bearers, whereas a multilateral obligation gives rise to a multilateral legal relation where the corresponding right is held by multiple right-holders. Interestingly, the structure of performance of multilateral or *erga omnes (partes)* obligations has also been described as legally indivisible, because it can only be fulfilled or breached *towards all right-holders simultaneously*.

When multiple states and/or IOs are bound to a divisible shared obligation,⁷¹¹ each of them is bound only to its own share. For example, when multiple states are bound to an obligation to refrain from polluting a transboundary river, each of them is bound to do its own share only by refraining from polluting the river.

The performance of a divisible shared obligation by its bearers is divisible. It is possible for one duty-bearer to separately fulfil a divisible shared obligation by doing its share while another duty-bearer at the same time breaches that divisible shared obligation by failing to do its share. This means that an individual duty-bearer can be released from a divisible shared obligation simply by doing its share, regardless of what the other duty-bearers have or have not done in order to comply with the obligation. The fact that one duty-bearer has done its share does not release the other duty-bearers from the obligation.

iv. Indicators for qualifying a shared obligation as divisible or indivisible

Determining whether a shared obligation is divisible or indivisible essentially amounts to a question of interpretation of the content of that obligation: what does the obligation ask of its bearers? Are all duty-bearers bound to achieve a common

⁷¹¹ See Chapter 4, §4.1.2.

performance, or is each of them bound only to its own share? This determination can be facilitated by relying on categorizations of obligations that are commonly employed in international law: the distinction between positive and negative obligations and the distinction between obligations of conduct and result.⁷¹² If a shared obligation is a positive obligation of conduct or a negative obligation of result, it is inherently divisible. A shared obligation can only be indivisible if it is a positive obligation of result, and even in such a case a distinction needs to be made between an obligation that obliges all bearers to achieve a common result (which is indivisible) and an obligation that obliges each bearer to achieve an individual result (which is divisible). Hence, an indivisible shared obligation always obliges its bearers to achieve a common result.

It follows that categorizing a shared obligation as positive or negative and as one of conduct or result facilitates the process of determining whether the bearers of the shared obligation are bound to achieve a common performance or whether each of them is bound only to its own share. In particular, qualifying a positive shared obligation as an obligation to *pursue* a common goal (which is an obligation of conduct) or an obligation to *achieve* a common goal (which is an obligation of result) can make the difference between qualifying that obligation as divisible or indivisible. However, the fact that it is not always clear whether a particular obligation is one of conduct or result can make it more difficult to qualify a particular shared obligation as divisible or indivisible. This is illustrated by the discussion about whether article VI NPT gives rise to an obligation to negotiate or conclude a treaty on nuclear disarmament.⁷¹³ If states parties to the NPT are only bound to negotiate in good faith (an obligation of conduct) in pursuance of the goal of nuclear disarmament, they are bound to a divisible shared obligation. However, if states parties are bound to conclude a treaty on nuclear disarmament or even to achieve the result of nuclear disarmament (an obligation of result), they are bound to an indivisible shared obligation.

7.1.2 The relationship between shared obligations and shared responsibility

Part II of this thesis has analyzed the implications of breaches of shared obligations in the positive law of international responsibility. These implications differ depending on whether the shared obligation breached is divisible or indivisible, which reaffirms the relevance of distinguishing between divisible and indivisible shared obligations. The main findings of part two of this study can be summarized as follows:

⁷¹² See Chapter 4, §4.2.3.

⁷¹³ See Chapter 4, §4.2.2.iii.

i. Breaches of indivisible shared obligations and shared responsibility

By proceeding from the ILC system of international responsibility, the study has found that a breach of an indivisible shared obligation has automatic implications for both the determination and the content of shared responsibility.

First, the study has found that there is an automatic relationship between breaches of indivisible shared obligations and shared responsibility for one IWA.⁷¹⁴ Due to its indivisible structure of performance, a breach of an indivisible shared obligation always amounts to a breach by all of its bearers. Moreover, because an indivisible shared obligation always requires its bearers to achieve a common result, the conduct in breach of an indivisible shared obligation always consists of a failure to achieve a common result. Considering 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 ASR, it can be inferred that a failure to achieve a common result can be attributed to all states and/or IOs that were bound to achieve that result. This denotes that there is an automatic connection between a breach of an indivisible shared obligation and multiple attribution of conduct to all bearers of the obligation, resulting in shared responsibility for one IWA.

Second, the study has found that the indivisible nature of a shared obligation has automatic implications for the content of shared responsibility. If the primary obligation breached is an indivisible shared obligation, any secondary obligation that arises is also an indivisible shared obligation.⁷¹⁵ This follows from the fact that a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA. If that wrongful act is of a continuing character, this gives rise to an indivisible shared obligation of cessation for all responsible states and/or IOs, requiring all of them to achieve cessation of the wrongful act for which they are all responsible. Moreover, if that wrongful act causes damage, all responsible states and/or IOS become bound to an indivisible shared obligation to provide reparation for the entire damage caused by the one IWA for which they are all responsible. Such an indivisible shared obligation of reparation resembles joint and several liability, which is a common approach to the allocation of the obligation of reparation in many domestic legal systems.

⁷¹⁴ See Chapter 5, §5.2.

⁷¹⁵ See Chapter 6, §6.1.3 and §6.2.4.

ii. Breaches of divisible shared obligations and shared responsibility

The study has found that, under the positive law of international responsibility, the fact that multiple states and/or IOs are bound to a divisible shared obligation has no automatic implications for the responsibility of states and/or IOs in case of a breach.

First, 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).⁷¹⁶ It should be noted, however, that the study has found that breaches of divisible shared obligations of a positive character cannot give rise to shared responsibility for one IWA, which means that breaches of such obligations can give rise to two potential outcomes: shared responsibility for several IWAs, or the international responsibility of only one state or IO.

Whether or not a breach of a divisible shared obligation gives rise to shared responsibility for one or several IWAs mainly depends of the factual circumstances of the situation in which the obligation is breached, which means that the outcome of a breach of a divisible shared obligation is dependent on extra-legal factors. Due to its divisible structure of performance, it is possible for only one or some of its bearers to breach the obligation while others fulfil the obligation. It follows that whether a divisible shared obligation is breached by one, some, or all of its bearers, cannot be predicted in advance and depends on the facts of each case. The same applies when it comes to attribution of conduct: whether or not conduct in breach of a divisible shared obligation can be attributed to one, some or all bearers of the obligation depends on the factual circumstances that are specific to each case of a breach.

Second, the study has found that the divisible nature of a shared obligation does not have automatic implications for the content of shared responsibility.⁷¹⁷ When a divisible shared obligation is breached, the nature of the secondary obligations that arise depends primarily on whether shared responsibility arises for one IWA or for several IWAs. If a breach of a divisible shared obligation gives rise to shared responsibility for one IWA (which, it should be recalled, is only possible if the obligation in question is of a negative character), any secondary obligation of cessation or reparation that arises is indivisible. This is comparable to the nature of secondary obligations that arise as a result of breaches of *indivisible* shared obligations, which always result in shared responsibility for one IWA.

⁷¹⁶ See Chapter 5, §5.3.

⁷¹⁷ See Chapter 6, §6.1.3 and §6.2.4.

However, in the case that a breach of a divisible shared obligation gives rise to shared responsibility for several IWAs matters become much more complex. With regard to the obligation of cessation, it needs to be determined for each wrongful act whether it is of a continuing character. If so, all duty-bearers become bound to a divisible shared obligation of cessation, requiring each state or IO to cease its *own* wrongful act only. An obligation of reparation arises for all duty-bearers only if a causal link can be established between each wrongful acts and the damage.

This leaves the question of the *nature* of that obligation of reparation: is each duty-bearer bound to provide only a share of reparation, or are all of them bound to provide full reparation? The positive law of international responsibility provides guidance only if it is possible to identify what part of the damage has been caused by which wrongful act, in which case each responsible state or IO becomes bound to repair only that part of the injury caused by its own wrongful act. In those cases where it is not possible to identify in causal terms what part of the damage has been caused by which wrongful act, the nature of the obligation of reparation remains unclear.

7.2 Shared obligations in international law: concluding remarks

The prime value of the present study's conceptualization of shared obligations lies in its introduction and analysis of the distinction between divisible and indivisible shared obligations, which up until now has not been elaborated in international scholarship. This final section offers some concluding remarks pertaining to the distinction between these two types of shared obligations in international law.

The relevance of a further systematization of international obligations in the law of international responsibility

The distinction between divisible and indivisible shared obligations in the present study indicates that there is merit to a further systematization of international obligations in the context of the law of international responsibility.

The ILC has been rather reserved about including categories of obligations in its work on international responsibility. This is directly related to the ILC's adoption of the distinction between primary rules, which 'define the content of international obligations, the breach of which gives rise to responsibility'⁷¹⁸ and secondary rules, which are concerned with 'the general conditions under general international law for the State [or IO] to be considered responsible for wrongful actions or omissions, and

⁷¹⁸ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 31.

the legal consequences which flow therefrom.⁷¹⁹ Both the ASR and ARIO purport to focus only on secondary rules.⁷²⁰

As a consequence, the ILC has included only those classifications or typologies of international obligations that it believed would have 'direct consequences within the framework of the secondary rules of [international] responsibility.'⁷²¹ Both the ASR and ARIO distinguish between obligations owed to a state or IO individually, obligations that are owed to a group of states and/or IOs and obligations that are owed to the international community as a whole.⁷²² The distinction between these categories of obligations has direct consequences for the secondary rules of international responsibility, as it is a decisive factor in determining the circle of states and/or IOs entitled to invoke international responsibility.⁷²³ However, neither the ASR nor the ARIO distinguish between obligations owed *by* one or multiple states and/or IOs.

By claiming to include only those categories of obligations that have direct consequences for the secondary rules of responsibility, the ILC seems to imply that classifications or typologies of international obligations that are not included in the ASR or ARIO have no direct consequences within the framework of the secondary rules of international responsibility. This might be one of the reasons why the potential connection between the shared nature of international obligations and the shared nature of international responsibility in case of a breach has been undertheorized in international legal scholarship.

Nevertheless, this thesis has found 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. If multiple states and/or IOs are bound to an indivisible shared obligation, this has automatic implications for the determination and content of shared responsibility. Interestingly, this denotes that the distinction between divisible and indivisible shared obligations could have had a place in the ILC's work on international responsibility. The distinction between these two types of shared obligations fulfils the ILC's own criterion for inclusion in the ASR and ARIO, as it has direct consequences within the framework of the secondary rules of international responsibility.

⁷¹⁹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 31.

⁷²⁰ On this point, see Chapter 2, §2.4.1.

⁷²¹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 54. See also Chapter 2, §2.4.1.

⁷²² See Chapter 2, §2.4.2.

⁷²³ See Chapter 2, §2.4.2.

Moreover, the study has found that interpreting a positive shared obligation as one of conduct or one of result can make the difference between qualifying that obligation as divisible or indivisible. Accordingly, the distinction between the categories of obligations of conduct and obligations of result (which has been removed from the ILC's work on international responsibility)⁷²⁴ can also have direct consequences for the secondary rules of responsibility.

Finally, it must be acknowledged that only the category of indivisible shared obligations has automatic implications for the secondary rules of international responsibility, and this type of shared obligation appears to be quite rare in practice (see below). Divisible shared obligations are much more common, and the fact that multiple states and/or IOs are bound to a divisible shared obligation has no automatic implications for the determination or content of shared responsibility. At the same time, the category of divisible shared obligations is a rather broad category, which raises the question whether there is merit to a further differentiation within that category. For example, chapter 5 of the present study has already found that only divisible shared obligations of a negative character can give rise to shared responsibility for one IWA, whereas divisible shared obligation of a positive character can never give rise to shared responsibility for one IWA.⁷²⁵

The predominance of divisible shared obligations in practice

Most international obligations that are incumbent upon multiple states and/or IOs in the context of cooperative action and the pursuance of common goals are structured in such a way that they can be fulfilled or breached by each duty-bearer independently. In other words, most of these obligations are divisible shared obligations,⁷²⁶ where each bearer of the obligation is bound only to its own share.

This observation is particularly interesting when viewed in the context of the increasing interdependence of international society, which has been accompanied by an increase in international cooperative action and the pursuance of common interests that cannot be achieved by any state or IO independently. It appears that as of yet these developments have not had much effect on the structure of performance of international obligations *from the perspective of the duty-bearers*. Essentially, divisible shared obligations represent a form of sharing that keeps the bearers of obligations apart, since it is possible for each bearer of a divisible shared obligation to be released from that obligation by doing its share, regardless of what the other duty-bearers do or fail to do.

⁷²⁴ See Chapter 4, §4.2.2.

⁷²⁵ See Chapter 5, §5.3.2.

⁷²⁶ This is discussed in Chapter 4, §4.2.3.

Moreover, seeing that a divisible shared obligation gives rise to multiple *bilateral* legal relations, most shared obligations do not involve multilateral legal relations. Hence, in practice, the move beyond a bilateral view of legal relations in the international law of obligations⁷²⁷ has not been particularly prominent when viewed from the perspective of the duty-bearers in legal relations. Only indivisible shared obligations, which bind multiple states and/or IOs to achieve a common result, give rise to a multilateral legal relation where the obligation is held by multiple duty-bearers, and such obligations seem to be quite rare in practice.

This predominance of divisible shared obligations is certainly not surprising if one considers that states are the principal makers of international law, and those same states do not want to be held responsible for actions or omissions that they themselves did not commit.⁷²⁸ Being bound to a divisible shared obligation limits the risk of incurring responsibility in the context of cooperative activities and the pursuance of common goals, whereas being bound to an indivisible shared obligation means that a breach *always* gives rise to the international responsibility of all duty-bearers and, if damage is caused, binds all of them to an indivisible shared obligation to provide full reparation.

⁷²⁷ This development is discussed in Chapter 2.

⁷²⁸ On this point see Chapter 4, §4.3.