UvA-DARE (Digital Academic Repository)

Concepts of Solidarity in the International Law of Obligations

Moving beyond a One-sided Conceptualization of Solidarity

Nedeski, N.

DOI

[10.2139/ssrn.3576519](https://doi.org/10.2139/ssrn.3576519)

Publication date

2020

Document Version

Submitted manuscript

[Link to publication](#)

Citation for published version (APA):

Nedeski, N. (2020). *Concepts of Solidarity in the International Law of Obligations: Moving beyond a One-sided Conceptualization of Solidarity*. (Amsterdam Law School Legal Studies Research Paper; No. 2020-11), (Amsterdam Center for International Law; No. 2020-09). Amsterdam Center for International Law, University of Amsterdam.
<https://doi.org/10.2139/ssrn.3576519>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UNIVERSITY OF AMSTERDAM

Amsterdam
Center for
International
Law

CONCEPTS OF SOLIDARITY IN THE INTERNATIONAL LAW OF
OBLIGATIONS
MOVING BEYOND A ONE-SIDED CONCEPTUALIZATION OF
SOLIDARITY

Nataša Nedeski

Amsterdam Law School Legal Studies Research Paper No. 2020-11

Amsterdam Center for International Law No. 2020-09

Concepts of solidarity in the international law of obligations

Moving beyond a one-sided conceptualization of solidarity

Nataša Nedeski*

Abstract

Concepts such as obligations *erga omnes*, interdependent obligations and *jus cogens* aim to clarify the implications of solidarity in international legal relationships for the (non-) performance of international obligations. Various scholarly accounts focus on the way in which these concepts have contributed to international law's structural transformation towards greater solidarity and the effectuation of common interests in positive international law. This paper sheds new light on this familiar narrative. By proceeding from Hohfeld's understanding of legal relations, it uncovers how existing concepts of solidarity focus solely on one side of international legal relationships, namely that of the right-holders. This has contributed to a preoccupation with optional solidarity in the international law of obligations; addressing the implications of solidarity for the circle of state(s) and/or international organizations(s) that are entitled to respond to an internationally wrongful act or material breach of treaty.

However, solidarity may also manifest itself amongst the duty-bearers in legal relations. In order to fully capture the legal implications of international law's structural change towards cooperation and the pursuit of common interests, the international law of obligations is in need of concepts that further engage with this other side of legal relations. With this in mind, the paper introduces and explores the concept of shared obligations. The implications of solidarity amongst the bearers of obligations are not optional, but concern the performance of obligations, shared responsibility and the nature of the secondary obligations of cessation and reparation that may arise as a result of such responsibility.

* Assistant Professor of Public International Law, University of Amsterdam, e-mail: n.nedeski@uva.nl. This paper draws from and further builds upon the author's PhD research, see N. Nedeski, *Shared obligations in international law* (PhD thesis, University of Amsterdam 2017). It is to be presented at the 2020 ESIL Research Forum 'Solidarity: The Quest for Founding Utopias of International Law'.

Keywords

International law of obligations; solidarity; multilateral legal relations; Hohfeld; erga omnes obligations; interdependent obligations; integral obligations; shared obligations; law of treaties; international responsibility

1. INTRODUCTION

1.1 Solidarity and the changing structure of international law

The story of the changing structure of international law is well-known amongst international legal scholars, and it is intrinsically tied to the idea of international solidarity. The classical Westphalian international legal system, so the story goes, was exclusively concerned with enabling the peaceful coexistence of sovereign states.¹ As such, its main focus was on keeping states 'peacefully apart'.² This was reflected in the structure of international law, as it consisted solely of bilateral, reciprocal legal relations amongst states. In terms of substance, the rules of international law mainly imposed rules of abstention with the purpose of delimiting the spheres of sovereignty of states, such as rules on the delimitation of boundaries, as well as rules facilitating the reciprocal exchange of benefits between states, such as rules regulating diplomatic relations.³

Naturally, this is only the beginning of the story. Since at least 1815 a change has been taking place that has impacted the structure of international law,⁴ as it moved away from its exclusive preoccupation with coexistence towards a system of cooperation. Underlying this development is the increasing interdependence of international society, following from a growing awareness of common interests that cannot be achieved within a strictly bilateral paradigm.⁵ Considering that the achievement of common objectives is an important aspect of solidarity,⁶ this development can easily be (and has indeed been) connected to the idea of international solidarity.⁷

¹ Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964).

² David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966), 28.

³ Isabel Feichtner, 'Community Interest in International Law', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007) para 2 <www.mpepil.com>.

⁴ James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours* 204.

⁵ Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217, 234; André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 370; Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014) 1.

⁶ Rüdiger Wolfrum, 'Solidarity' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 404. See also Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (CUP 2004) 18, observing from the perspective of social and political theory that the goal or objective of solidarity can be to realize common interests.

⁷ Simma (n 6) 229.

This change has impacted the substance of international law, which no longer consists exclusively of rules enabling peaceful coexistence but also includes rules that serve to achieve and protect interests that transcend individual state interests. Such common interests may encompass universal fundamental values shared by the international community as a whole, as well as interests shared by smaller groups of states.⁸

Moreover, and quite essential for the purpose of the present paper, the pursuit of common interests through international law has had the effect that legal relations are no longer being construed as exclusively bilateral and reciprocal, existing between pairs of states only.⁹ This entails that today there are various instances in practice where the performance of an international obligation is not solely a matter between one right-holder and one duty-bearer. After all, in the context of cooperation and the pursuit of common goals multiple actors may have a right or legal interest in the performance of an international obligation; and the performance of an international obligation may be up to more than one state or international organization.

Various concepts have emerged that not only recognize the existence of solidarity in international legal relationships, but which simultaneously aim to clarify the implications of such solidarity for the (non-)performance of international obligations. In this respect one may think of concepts such as obligations *erga omnes*, interdependent obligations and *jus cogens*. As will be further discussed in section 2, through these notions it is recognized that it is possible for a legal relation to exist between more than two international actors, and that this may have relevant legal implications. Various scholarly accounts focus on the way in which these concepts have contributed to international law's structural transformation towards greater solidarity and the effectuation of common interests in positive international law.¹⁰

⁸ Feichtner (n 4) paras 3–4; Christian Tams, 'Individual States as Guardians of Community Interests', *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 380.

⁹ Marina Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' [2002] EJIL 1099; Simma (n 6) 223; K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State"' [1988] NILR 273, 273.

¹⁰ Simma (n 6); Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' [2010] EJIL 387, 389.

This paper aims to shed some new light on this familiar narrative by enquiring to what extent existing concepts of solidarity capture the implications of solidarity for the (non-)performance of obligations. By proceeding from Hohfeld's understanding of legal relations, the first part of the paper uncovers how existing concepts of solidarity focus solely on one side of international legal relationships, namely that of the right-holders. Because of this, existing concepts have contributed to a preoccupation with what will be termed 'optional solidarity' in the international law of obligations, which focuses primarily on the implications of solidarity for the circle of state(s) and/or international organizations(s) that are entitled to respond to an internationally wrongful act or material breach of treaty.

However, in order to fully capture the legal implications of international law's structural change towards cooperation and the pursuit of common interests, the international law of obligations is in need of concepts that further engage with the other side of legal relations: that of the duty-bearers. With this in mind, the second part of the paper introduces and explores the concept of 'shared obligations', aiming to capture the extent and implications of solidarity amongst duty-bearers in international legal relationships.

1.2 Solidarity and the law of obligations

The law of obligations is a term that is not commonly employed in international legal discourse, but it is a familiar notion in many domestic legal systems.¹¹ In domestic (civil) law it describes a body of law that consists of three main branches: the law of contract, the law of tort and the law of restitution and unjust enrichment. The main characteristic of the law of obligations is that it provides for general rules regarding legal obligations and legal relations, covering general topics such as the creation of obligations, the performance of obligations and consequences of non-performance.

¹¹ See e.g. Reinier Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Selier European Law Publishers 2013); Geoffrey Samuel, *Law of Obligations* (Edward Elgar Publishing 2010); Simon Whittaker, 'The Law of Obligations', *Principles of French Law* (OUP 2008); David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001); Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996).

In the international legal system one may similarly find such a body of general rules, with the law of treaties and the law of international responsibility as its two main branches.¹² This international law of obligations provides a general legal framework for assessing the performance of international obligations as well as the implications of their non-performance. The present analysis focuses on concepts of solidarity in this general context of the international law of obligations.

The notion of solidarity and the law of obligations are inherently connected. The origin of the term solidarity can be traced to the Roman law of obligations,¹³ where the notion of *obligatio in solidum* referred to obligations with a plurality of debtors, in which case all were bound to a common performance and creditors could claim the full performance from any of them. French lawyers started applying the term *solidarité* in the sixteenth century when referring to a common responsibility for debts incurred by one of the members of a group.¹⁴ Comparable conceptions can still be found in domestic legal systems today, many of which address the topic of plurality of parties in legal relations.¹⁵ These concepts give expression to some form of solidarity on both sides of legal relations. First, one may find concepts in domestic private law that cover situations where multiple persons have a right to the performance of the same obligation, which includes concepts such as solidary or joint rights.¹⁶ Moreover, one may find concepts in domestic private law that cover situations where multiple persons are bound by a duty to perform the same obligation, which includes concepts such as solidary or joint obligations.¹⁷

¹² See generally Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans, Green and co 1927). Lauterpacht contends that many rules and concepts of international law (including those in the law of treaties and the law of state responsibility) draw from Roman law and other private law sources and analogies. See also James Crawford, *State Responsibility: The General Part* (CUP 2013) 99, who notes that the law of international responsibility is part of the international law of obligations.

¹³ Kurt Bayertz, 'Four Uses of "Solidarity"' in Kurt Bayertz (ed), *Solidarity* (Springer 1999).

¹⁴ Stjernø (n 7) 27.

¹⁵ '[T]he issues and concepts [relating to] plurality of parties are familiar and part of a long European legal tradition', Marcel Fontaine, 'The New Provisions on Plurality of Obligors and of Obligees in the UNIDROIT Principles 2010' [2011] *Uniform Law Review* 549, 551.

¹⁶ See for instance article 10:201 Principles of European Contract Law (PECL), The Commission on European Contract Law, *Principles of European Contract Law: Part III* (Ole Lando and others eds, Kluwer Law International 2003)..

¹⁷ See for instance articles 10:101 and 10:102 PECL.

1.3 Hohfeld's analysis of legal relations: the correlation between obligations and rights

By taking a closer look at existing conceptual manifestations of solidarity in the *international* law of obligations, it will be exposed that these concepts contribute to a one-sided approach to solidarity. Existing concepts focus only on one side of international legal relationships; thereby simultaneously neglecting the existence and implications of solidarity on the other side of legal relations. The analysis proceeds from Hohfeld's understanding of legal relations, and a few remarks on Hohfeld's work and its application to legal relations in international law are thus in order.

Hohfeld's analysis of legal relations is essentially based on the understanding that each legal relationship consists of two legal positions (or: two sides) that stand in a correlative relation to one another. Hohfeld's work identifies eight legal positions in total that can be grouped together into four pairs of correlatives. Each pair of correlatives, in turn, forms a different type of legal relation.¹⁸ For present purposes the focus lies on only one of these types of legal relations, namely right-duty relations. Such legal relations always consist of two legal positions: an obligation on the one side and a right on the other side. A legal obligation (or duty) is defined as 'that which one ought or ought not to do'¹⁹ and always has a right as its correlative, which in turn is defined as a right (or claim) to the performance of a correlative obligation.

Some consider this correlation between obligations and rights to be a general feature of international law.²⁰ In his second report on state responsibility, Special Rapporteur Ago deemed it 'perfectly legitimate in international law to regard the idea of a breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others', arguing that this correlation 'admits of no exception'.²¹ However, the same idea has been firmly critiqued by others. Notably, Simma has accused those embracing this view of

¹⁸ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* by Wesley Newcomb Hohfeld (Walter Wheeler Cook ed, Yale University Press 1920) 36.

¹⁹ Hohfeld (n 19) 38.

²⁰ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) A/56/10 35.

²¹ Roberto Ago, 'Second Report on State Responsibility' (1970) A/CN.4/217 and Corr. 1 and Add. 1 192–193.

upholding a 'rigidly traditionalist' and 'bilateral-minded' view of international law, where obligations exist only 'at the level of relations between States individually'.²² According to Simma, 'the theoretical understanding of the structure of international law according to which the law exhausts itself in correlative rights and obligations of its subjects' lies at the very 'basis of a bilateralist view of international legal relationships'.²³

It is submitted that the assumption that the correlation between obligations and rights necessarily reduces *all* legal relationships to bilateral legal relations between two subjects is inaccurate. Hohfeld's analysis quite simply serves to illustrate that a legal relationship covers two ends of the same stick,²⁴ with each end embodying one legal position: an obligation on the one end and a correlative right on the other. This does not inherently entail that any such legal relation must be bilateral, with one subject bearing the obligation and one subject holding the corresponding right.²⁵ While not primarily concerned with the number of legal persons that hold an obligation or right in a particular legal relationship, even Hohfeld explicitly acknowledged that it is possible for an obligation or a right in a legal relation to be held by *multiple* legal persons.²⁶ In such cases a right-duty relationship exists between more than two legal persons and, as a consequence, cannot be considered to be bilateral.

All in all, Hohfeld's analysis of legal relations constitutes a useful tool for breaking down legal relations between international actors and uncovering the extent in which existing concepts of solidarity capture the implications of solidarity for the (non-)performance of international obligations for the parties to both sides of legal relations.

1.4 Structure

²² Simma (n 6) 230, 232.

²³ Simma (n 6) 231.

²⁴ Curtis Nyquist, 'Teaching Wesley Hohfeld's Theory of Legal Relations' [2002] *Journal of Legal Education* 238, 238.

²⁵ For a similar view see for instance James Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325, 436–437. He observes that Hohfeld 'was certainly not seeking to reduce legal relations to the form classically understood as a bilateral right-duty relation of two States in international law. Any use of his analysis to achieve such a result is illegitimate.'

²⁶ Hohfeld (n 19) 93.

Against this background, section 2 focuses on the way in which solidarity is reflected in the international law of obligations, examining existing concepts of solidarity in the law of treaties and the law of international responsibility. After concluding that those conceptual manifestations of solidarity solely focus on the right-holders in legal relationships, in section 3 the paper subsequently addresses the existence and implications of solidarity amongst duty-bearers.

2. REFLECTIONS OF SOLIDARITY IN THE INTERNATIONAL LAW OF OBLIGATIONS

As evidenced by the various concepts of solidarity explored in this section, throughout the codification of the law of treaties and the law of international responsibility, the international law of obligations has moved away from the classical idea that international law solely creates bilateral legal relations between its subjects. This section examines the extent in which these concepts capture the existence of solidarity in international legal relationships as well as the implications of such solidarity for the (non-)performance of international obligations.

2.1 Concepts of solidarity in the law of treaties

The move beyond a bilateral view of legal relations was not a particularly prominent theme during the codification of the law of treaties. Nonetheless, the 1969 and 1986 Vienna Conventions on the Law of Treaties (VCLT) – the ultimate products of the ILC’s codification efforts – contain a few provisions that (implicitly) recognize the existence of solidarity in international legal relations and address some of the problems raised by the move beyond a purely bilateral construction of legal relations in the context of the law of treaties. Underlying these provisions are various concepts of solidarity. The concepts of interdependent and integral obligations (2.1.1) as well as the notion of peremptory norms (2.1.2) recognize that some obligations are owed to multiple states or even to the international community as a whole, and that this may have relevant legal implications. Not only have these notions left manifest traces in several provisions of the VCLT, they have also influenced – as will be seen further below in section 2.2 - the ILC’s approach to multilateral legal relations in its work on the law of international responsibility.

2.1.1 Interdependent and integral obligations

The categories of interdependent and integral obligations are components of a tripartite distinction between types of obligations that may arise from multilateral treaties. Introduced by ILC Special Rapporteur Fitzmaurice in his reports on the law of treaties, this classification has been ‘applied to all types of legal relations, irrespective of their source, and is generally

accepted as workable and analytically sound.²⁷ Essentially, the distinction gives expression to the idea that some obligations give rise to purely bilateral legal relations between pairs of states, whereas other types of obligations give rise to multilateral legal relations.²⁸ In the latter case, some form of solidarity amongst the states that are parties to those legal relations can be identified.²⁹

In his reports, Fitzmaurice essentially contends that different types of obligations may have different legal implications in case of non-performance. Capturing these differences constitutes the main rationale behind his categorization. When it comes to what at the time was called a “fundamental breach”³⁰ of a multilateral treaty, Fitzmaurice argues that the classification of the breached obligation as either “reciprocal”; “interdependent” or “integral” determines whether one or more states parties to the treaty are entitled to respond to that fundamental breach by refusing the performance of their own treaty obligations. The distinction between these three types of obligations has left manifest traces in article 60 VCLT, which addresses the entitlement of states and IOs to respond to a material breach of treaty by suspension or termination.

The category of reciprocal obligations has little to do with solidarity in legal relations. Such obligations consist of ‘a mutual and reciprocal interchange of benefits or concessions as between the parties.’³¹ They are owed by each state party individually to each other state party individually and give rise to purely bilateral legal relationships. For instance, each state party to the Vienna Convention on Diplomatic Relations individually owes an obligation to protect the diplomatic premises present on its territory to each other state party individually. This obligation gives rise to a bilateral legal relation between state A and state B; between

²⁷ Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 54.

²⁸ This classification has been said to represent a shift away from an exclusively bilateral conception of legal relations in the law of treaties, see Spinedi (n 10) 1104.

²⁹ Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 151.; DN Hutchinson, ‘Solidarity and Breaches of Multilateral Treaties’ 59 *British Journal of International Law* 151, 155.

³⁰ The notion of “fundamental breach” was later replaced by the concept of “material breach”, which is still used today. See Humphrey Waldock, ‘Second Report on the Law of Treaties’ (1963) A/CN.4/156 and Add.1-3 76.

³¹ Sir G Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) A/CN.4/107 30.

state A and state C; between state A and state D; and so on.³² In principle, the (non-)performance of a reciprocal obligation is solely a matter for the two parties to each bilateral legal relationship in question. The category of reciprocal obligations is reflected in article 60(2)(b) VCLT,³³ which provides that a state party to a multilateral treaty is entitled to suspend the operation of the treaty between itself and the defaulting party if it is “specially affected” by a material breach. In the case that state A were to breach the obligation to protect the diplomatic premises of state C, state C would be the one specially affected by such a breach.

The remaining two categories of interdependent and integral obligations both reflect some form of solidarity in the structure of the underlying legal relationships, with distinct legal implications in case of non-performance. Obligations of the interdependent type are ‘of such a kind that, by reason of the character of the treaty, their performance by any party is necessarily dependent on an equal and corresponding performance by all the other parties.’³⁴ An example would be an obligation arising from a treaty on disarmament, where the obligation of each party to disarm would necessarily be ‘dependent on a corresponding performance of the same thing by all of the other parties.’³⁵ Solidarity in the structure of the legal relationship lies in the fact that the obligation is to be performed by every party vis-à-vis every other party simultaneously.³⁶

Interdependent obligations cannot be reduced to ‘reciprocal exchanges between pairs of states’,³⁷ and give rise to multilateral legal relations, where one state bears the obligation and multiple states hold the corresponding right. Staying with the example of the treaty on disarmament, the obligation of state party A to disarm is owed to all other parties to the treaty, which means that all of them hold the corresponding right that state A will engage in disarmament. Should state A perform its obligation by successfully disarming, it would fulfil the obligation towards all other states parties simultaneously. If, however, it were to breach

³² Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2008) 745, para 19. The Vienna Convention on Diplomatic Relations regulates ‘in multilateral form what are essentially bilateral legal relations between the parties.’

³³ Bruno Simma and Christian Tams, ‘Article 60’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 1365; Fitzmaurice and Elias (n 30) 152.

³⁴ Fitzmaurice (n 32) 30–31.

³⁵ Fitzmaurice (n 32) 54.

³⁶ Simma and Tams (n 34) 1365, para 38.

³⁷ Tams (n 28) 55–56.

its obligation due to a failure to disarm, it would infringe upon the corresponding right that is held by all other states parties to the treaty. Hence, because the right corresponding to an interdependent obligation is held in common by all other parties to the treaty, one party's non-performance would simultaneously affect all other parties to the treaty.³⁸

In terms of the legal consequences of such solidarity in the underlying legal relationship, Fitzmaurice argued that a fundamental breach involving an interdependent obligation would entitle all other parties to refuse performance of that interdependent obligation in response; even if they are not specially affected by that breach.³⁹ This idea is reflected in article 60(2)(b) VCLT,⁴⁰ which provides that each of the other parties to a multilateral treaty is entitled to suspend the operation of the treaty in whole or in part 'if the treaty is of such a character that a material breach of its provision by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty'.

The final category of obligations require an 'absolute' or 'integral' performance and arise from 'law-making treaties (...), system or régime creating treaties (...) or treaties involving undertakings to conform to certain standards and conditions, or)...) any other treaty where the juridical force of the obligation is inherent, and not dependent on the corresponding performance by the other parties to the treaty.⁴¹ Examples include obligations arising from human rights treaties, maritime conventions setting standards for safety at sea and treaties 'of the social or humanitarian kind, the principal object of which is the benefit of individuals.'⁴²

Much like interdependent obligations, an integral obligation cannot be reduced to reciprocal legal relations between pairs of states as it is not owed to one party in particular.⁴³ Rather, such obligation gives rise to multilateral legal relations where each state party bound by the obligation owes that obligation to all other parties to the treaty. It has been noted that all states bound by an integral obligation 'have the same interest in seeing the obligation

³⁸ Bruno Simma and Christian Tams, 'Reacting Against Treaty Breaches' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 592.

³⁹ Fitzmaurice (n 32) 31.

⁴⁰ Simma and Tams (n 34) 1365; Fitzmaurice and Elias (n 30) 152.

⁴¹ Fitzmaurice (n 32) 31.

⁴² Sir G Fitzmaurice, 'Fourth Report on the Law of Treaties' (1959) A/CN.4/120 46, see footnote 12.

⁴³ Fitzmaurice and Elias (n 30) 147; Tams (n 28) 56.

observed', and Fitzmaurice even viewed this category as 'obligations towards the whole world.'⁴⁴

Again, solidarity is reflected in the fact that the right corresponding to an integral obligation is held in common by a plurality of states. However, in terms of legal consequences, Fitzmaurice considered that because 'neither juridically, nor from the practical point of view, [the obligation of any party is] dependent on a corresponding performance by the others', a breach of an integral obligation can *never* entitle any of the other parties to the treaty to refuse performance of their own integral obligations. This would entail, for instance, that one cannot respond to a breach of the obligation to distinguish between combatants and non-combatants in times of armed conflict by refusing to perform that obligation in response. At least part of what was envisaged by Fitzmaurice here is covered by article 60(5) VCLT,⁴⁵ which stipulates that suspension or termination is not allowed in response to a material breach of 'provisions relating to the protection of the human person contained in treaties of a humanitarian character'.

2.1.2 Peremptory norms

Article 53 VCLT defines a peremptory norm as 'a norm accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' While the history of the notion of peremptory norms (or: *jus cogens*) does not begin with its incorporation into the law of treaties,⁴⁶ its adoption into the VCLT – as well as the ILC's work preceding the VCLT – has been one of the most significant developments relating to peremptory norms, and has served to solidify the concept as part of international law.⁴⁷ Commentators have pointed to this concept as evidence of the shift away from a strictly

⁴⁴ Fitzmaurice (n 32) 54.

⁴⁵ Simma and Tams (n 34) 1369; Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' [2003] EJIL 907, 911.

⁴⁶ For an overview of the historical evolution of the concept of *jus cogens* see Dire Tladi, 'First Report on Jus Cogens' (2016) A/CN.4/693 9 et seq.

⁴⁷ Ibid. p. 15

bilateral conception of legal relations⁴⁸ as well as the recognition of solidarity and common interests amongst states.⁴⁹

The VCLT does not address the potential implications of the peremptory nature of an international legal norm for the (non-)performance of obligations, and the concept of peremptory norms is not reflected in the regime that regulates the permissibility of legal responses to treaty breaches discussed above. Instead, articles 53 and 64 VCLT focus on the overall invalidity of treaties that conflict with *jus cogens* norms, providing respectively that ‘a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law, and ‘[i]f a peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’

Nonetheless, the notion of peremptory norms remains a relevant concept for present purposes. Considering that peremptory norms give rise to obligations that are owed to the international community as a whole,⁵⁰ the concept of peremptory norms constitutes another acknowledgement of the existence of solidarity in international legal relationships. Indeed, the mainstream position in legal scholarship is that there is at the very least some overlap between the notion of peremptory norms and *erga omnes* obligations that are owed to the international community as a whole,⁵¹ as peremptory norms give rise to obligations *erga omnes* (which are further discussed below). As such, the inclusion of the notion of peremptory norms in the VCLT constitutes an acknowledgement of the fact that certain international obligations give rise to multilateral legal relations, where the corresponding right is held in common by multiple right-holders.⁵²

2.2 Concepts of solidarity in the law of international responsibility

⁴⁸ Spinedi (n 10) 1101.

⁴⁹ Simma (n 6) 285 et seq; Villalpando (n 11) 402 et seq.

⁵⁰ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 67–68.

⁵¹ Erika de Wet, ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 555; Giorgio Gaja, ‘The Protection of General Interests in International Law’ (2013) 364 *Recueil des Cours* 9, 55; Tams (n 28) 146; International Law Commission (n 21) 111, para 7.

⁵² Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017) 23 et seq.

For a long time, the law of international responsibility was viewed primarily through a bilateral lens. International responsibility was deemed to arise when one state breached an obligation that it owed individually to one other state, and the ensuing responsibility relations were presumed to arise solely between a single responsible state and a single injured state. However, with the growing recognition of a category of obligations whose breach would be ‘so grave and injurious, not only to one State but to all States, that a State committing them would be automatically held responsible to all States’,⁵³ the abandonment of a strictly bilateral conception of legal relations came to be one of the main themes in the ILC’s work on international responsibility. This has found expression in several concepts of solidarity.

The first recognition of solidarity in international legal relationships in the law of international responsibility was evidenced by the proposed distinction between crimes and delicts (2.2.1), which – as is well-known to those versed in the law of responsibility – was eventually abandoned by the ILC. Concepts of solidarity that did make the final cut and are hence reflected in the final ARSIWA and ARIO are the notions of multilateral and *erga omnes (partes)* obligations (2.2.2) as well as the notion of serious breaches of obligations under peremptory norms (2.2.3). Much like the concepts of solidarity in the law of treaties discussed above, these notions recognize that some obligations are owed to multiple states or even to the international community as a whole, and that this may have relevant legal implications.

2.2.1 The emergence of the distinction between international crimes and international delicts

Considering that the ILC’s first Special Rapporteur García-Amador focused solely on state responsibility arising from injuries caused to the person or property of aliens on that state’s territory, it is not necessarily surprising that the ILC’s earliest codification efforts examined the rules of international responsibility from a purely bilateral perspective. García-Amador’s final draft on international responsibility revolved around obligations whose breach would result in injury to aliens, such as the denial of justice and negligence in the performance of the

⁵³ Spinedi (n 10) 1113.

duty of protection.⁵⁴ In principle these obligations are owed by each state individually to each alien on its territory individually, giving rise to bilateral right-duty relationships.⁵⁵

This changed when (soon to be Special Rapporteur) Ago suggested that the ILC should focus not on the 'rules of substance laying down international rights and duties of states' but rather on 'the aspects and consequences of the violation, by states, of the obligations deriving from these rules'.⁵⁶ This would entail that the state responsibility project would not be limited to responsibility for breaches of obligations concerning the treatment of aliens. Instead, the breach of *any* obligation could be a source of international responsibility. His proposal persuaded the ILC, which soon determined that its work on the topic would focus on 'the definition of the general rules governing the international responsibility of the State'.⁵⁷ This provided the basis for what is known today as the distinction between primary rules, which 'define the content of international obligations, the breach of which gives rise to international responsibility' but are not the focus of the law of responsibility, and secondary rules, which are concerned with 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.⁵⁸

In his capacity of Special Rapporteur, Ago argued that – notwithstanding the formal distinction between primary and secondary rules – it was necessary to distinguish between 'various kinds of obligations placed on States in international law'.⁵⁹ After all, different kinds of obligations could give rise to different kinds of legal consequences in case of a breach. Particularly relevant in view of this section's exploration of concepts of solidarity, in his 1976 report Ago distinguished between breaches of "ordinary" obligations, which would qualify as

⁵⁴ FV García-Amador, 'Sixth Report on International Responsibility' (1961) A/CN.4/134 and Add.1 46–47.

⁵⁵ Spinedi (n 10) 1108. However, see also Roberto Ago, 'Fifth Report on State Responsibility' (1976) A/CN.4/291 and Add.1 and 2 and Corr.1 30. Ago observed that international obligations relating to the treatment of foreigners may be 'a matter offering perhaps less opportunity than others of singling out exceptionally important obligations breaches of which could have very serious consequences for the international community as a whole.' Nevertheless, 'here, too, internationally wrongful acts of that category can occur.'

⁵⁶ 'Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee)' (1963) A/CN.4/152 227–228; Roberto Ago, 'First Report on State Responsibility' (1969) A/CN.4/217 and Corr. 1 and Add. 1 127.

⁵⁷ 'Report of the International Law Commission on the Work of Its Fifteenth Session' (1963) A/CN.4/163 224.

⁵⁸ International Law Commission (n 21) 31.

⁵⁹ Ago, 'Second Report on State Responsibility' (n 22) 178.

international delicts, and breaches of obligations whose respect is of fundamental importance to the international community as a whole, which he qualified as international crimes.⁶⁰ Where obligations whose breach results in an international delict give rise to bilateral right-duty relations,⁶¹ obligations whose breach amounts to an international crime reflect solidarity amongst those to whom the obligation is owed: all states of the international community.

Essentially, the need to distinguish between international delicts and international crimes was prompted by the conviction that the breach of each type of obligation corresponds to a different regime of international responsibility.⁶² One could say that the main idea underlying this conviction is that solidarity in primary legal relationships gives rise to some form of solidarity in the secondary legal relationships that arise as a result of a breach. The view that international crimes give rise to an aggravated regime of responsibility was gaining an increasing amount of support in legal scholarship, particularly after the VCLT's express acknowledgement of the existence of peremptory norms⁶³ and the ICJ's notorious *obiter dictum* referencing the essential distinction between 'the obligations of a State towards the international community as a whole [obligations *erga omnes*], and those arising vis-à-vis another State in the field of diplomatic protection' in *Barcelona Traction*.⁶⁴

The different legal consequences that may arise as a result of different types of internationally wrongful acts were thoroughly discussed by Ago's successor, Special Rapporteur Riphagen. The latter contended that the distinction between crimes and delicts has relevant legal implications for 1) the state or states entitled to respond to an internationally wrongful act by obtaining reparation or taking countermeasures⁶⁵ and 2) the international obligations of third states.⁶⁶ Even though the notion of international crime did not make it into the final 2001 Articles on State Responsibility, in considering this notion the ILC acknowledged that an international obligation can be owed to multiple states simultaneously and that this may have

⁶⁰ Ago, 'Fifth Report on State Responsibility' (n 56) 26.

⁶¹ Linos-Alexander Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4 EJIL 341, 346.

⁶² Ago, 'Fifth Report on State Responsibility' (n 56) 26.

⁶³ See section 2.1.2 above

⁶⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Judgment*, 1970 ICJ reports 3 32.

⁶⁵ Riphagen, Willem, 'Sixth Report on State Responsibility' (1985) A/CN.4/389 and Corr.1 & Corr.2 5–6.

⁶⁶ Riphagen, Willem (n 66) 13.

consequences in the law of international responsibility.⁶⁷ As will be seen in the following subsections this idea is still reflected in the final ARSIWA and ARIO, though it is expressed through concepts other than that of an international crime.

2.2.2 Multilateral and *erga omnes* (partes) obligations

The concept of multilateral obligations, of which obligations *erga omnes* (partes) are considered to be a subcategory, was introduced into the ILC's work on international responsibility by Crawford, the ILC's final Special Rapporteur on state responsibility. Crawford argued that the notion of state crimes 'detracted from the more important task of defining more systematically the consequences of different categories of obligations (...) that [are] generally recognized, including obligations *erga omnes*.'⁶⁸ In order to accomplish this more important task, he distinguished between "bilateral obligations", which are owed individually to another state, and "multilateral obligations", which are owed to a group of states or even the international community as a whole.⁶⁹ This distinction draws from Fitzmaurice's classification of multilateral treaty obligations as well as article 60 VCLT.⁷⁰

The notion of bilateral obligations covers 'obligations to which there are only two parties' and are owed individually to a particular state (or international organization).⁷¹ This does not mean that it is impossible for state A to owe the same bilateral obligation to multiple states at the same time. For instance, a receiving state may owe 'identical bilateral obligations' to a large number of sending states, but it owes these obligations to each sending state individually; hence giving rise to bilateral legal relationships.⁷² Crawford considered that in case of a breach of a bilateral obligation, only the particular state to which that obligation was owed (e.g. state B, whose diplomatic premises on state A's territory were not protected) can be injured by its

⁶⁷ See Crawford, 'Multilateral Rights and Obligations in International Law' (n 26) 455. 'In considering State crimes, the very assumption of bilateralism is challenged.'

⁶⁸ 'Report of the International Law Commission on the Work of Its Fiftieth Session' (1998) A/53/10 251.

⁶⁹ James Crawford, 'Third Report on State Responsibility' (2000) A/CN.4/507 8, 44; Crawford, 'Multilateral Rights and Obligations in International Law' (n 26) 344.

⁷⁰ Crawford, 'Third Report on State Responsibility' (n 70) 40, 47, 49–50; Fitzmaurice and Elias (n 30) 147; Pierre-Marie Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' [2002] EJIL 1053, 1059.

⁷¹ Crawford, 'Third Report on State Responsibility' (n 70) 99, 103.

⁷² Crawford, 'Third Report on State Responsibility' (n 70) 103.

breach. As an injured state, that state is legally entitled to respond by invoking responsibility or by taking countermeasures. This is reflected in articles 42(a) ARSIWA and 43(a) ARIO, which stipulate that a state or IO can be qualified as “injured” if the obligation breached is owed to that state or IO individually. As a result, the individual right-holder of a bilateral obligation can respond to a breach of that obligation by invoking responsibility and by taking countermeasures.⁷³

Unlike bilateral obligations, the concept of multilateral obligations captures solidarity in international legal relationships. The notion covers obligations that are ‘owed not individually to a particular State, but to a collective, a group of States, or even to the international community as a whole.’⁷⁴ Accordingly such obligations cannot be reduced to bundles of bilateral legal relations but rather give rise to legal relations where the corresponding right is held in common by multiple right-holders. This has consequences for the performance of a multilateral obligation: it cannot be performed or breached in relation to only one of the states to which the obligation is owed⁷⁵ but will always be performed or breached in relation to all right-holders simultaneously.

As a result of this solidarity amongst right-holders, Crawford considered that the breach of a multilateral obligation would entitle all states to which that obligation is owed to respond. However, he argued that the forms in which those states are entitled to respond should be differentiated, and for this purpose distinguished between three subcategories of multilateral obligations. These subcategories are reflected in articles 42 and 48 ARSIWA as well as articles 43 and 49 ARIO. Depending on the type of multilateral obligation breached,⁷⁶ these provisions stipulate that all of the states and/or IOs to which a multilateral obligation is owed is entitled to respond either as an “injured state or IO”, or as a “state or IO *other than* an injured state

⁷³ International Law Commission (n 21) 117.

⁷⁴ Crawford, ‘Third Report on State Responsibility’ (n 70) 46.

⁷⁵ Tams (n 28) 49–50.

⁷⁶ With the caveat that if one of the states or IOs to which the obligation is owed is “specially affected” in the sense of articles 42(b)(i) ARSIWA and 43(b)(i) ARIO, that state or IO is entitled to respond as an injured state or IO regardless of the type of multilateral obligation.

or IO".⁷⁷ The latter category of states or IOs are entitled to respond to a wrongful act, but unlike an injured state or IO are not entitled to resort to all means of redress.⁷⁸

Articles 48(1)(b) ARSIWA and 49(3) ARIIO provide that 'if the obligation breached is owed to the international community as a whole', any state or IO is entitled to invoke responsibility as a state or IO *other than* an injured state or IO. This covers the first subcategory of multilateral obligations identified by Crawford: obligations *erga omnes*, which have been the subject of extensive academic debate ever since the *Barcelona Traction* case. Some examples include the obligation not to commit genocide, the obligation to refrain from acts of aggression,⁷⁹ the obligation to respect the right of self-determination⁸⁰ and the obligation of sponsoring states to take measures to preserve the environment of the high seas and the Area.⁸¹

The second subcategory of multilateral obligations identified by Crawford is covered by articles 48(1)(a) ARSIWA and 49(1) ARIIO, which stipulate that if 'the obligation breached is owed to a group of States [or international organizations] (...) and it established for the protection of a collective interest of the group', any of the states or IOs to which the obligation is owed is entitled to invoke responsibility as a state or IO other than an injured state or IO. Such obligations *erga omnes partes* are 'owed to all the parties to a particular regime', and examples include obligations relating to biodiversity, global warming and obligations arising under a regional human rights treaty.⁸² In its order on provisional measures in *The Gambia v.*

⁷⁷ For a convincing critique of the notion of "a state other than an injured state" see Brigitte Stern, 'A Plea For "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 96, 102. She considers that '[i]f a State is the beneficiary of an obligation that has been breached, it is hard to see how one could consider that it is not an injured state', arguing for a reconstruction of the concept of injured state by including states that have suffered only legal injury and subsequently distinguishing between different types of injury: 'there would be one concept, that of injured State, which may suffer different forms of injury (material, moral or legal).'

⁷⁸ They may claim performance of the obligation of reparation only 'in the interest of the injured State or of the beneficiaries of the obligation breached', see article 48(2)(b) ARSIWA. Moreover, the question whether such states are entitled to take countermeasures has been left deliberately unresolved by the ILC. In its commentaries to the ARSIWA, the ILC notes that cases where a state other than an injured state takes countermeasures 'are controversial and the practice is embryonic.' International Law Commission (n 21) 129. For a different view see Tams (n 28) 311.

⁷⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Judgment*, 1970 ICJ reports 3 (n 65) 33.

⁸⁰ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, para. 180

⁸¹ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p 10 [180].

⁸² Crawford, 'Third Report on State Responsibility' (n 70) 47, 106.

Myanmar, the ICJ recently reaffirmed the *erga omnes partes* character of various obligations arising from the Convention Against Torture and the Genocide Convention.⁸³

Finally, articles 42(b)(ii) ARSIWA and 43(b)(ii) ARIO provide that if an obligation is owed to a group of states or IOs and the breach of the obligation is 'of such a character as radically to change the position of all other States [or IOs] to which the obligation is owed with respect to the further performance of the obligation', all those to which the obligation is owed are entitled to respond as an injured state. This covers the third subcategory of multilateral obligations identified by Crawford,⁸⁴ and in its commentaries the ILC notes that this provision resembles article 60(2)(c) VCLT discussed above,⁸⁵ which in turn is based on Fitzmaurice's typology of obligations in the context of the law of treaties.

2.2.3 Serious breaches of obligations arising under peremptory norms

Both the ARSIWA and the ARIO have incorporated the notion of serious breach of an obligation arising under a peremptory norm of general international law. Articles 41 ARSIWA and 42 ARIO stipulate that serious breaches of such obligations give rise to additional legal consequences that 'go beyond those ordinarily applying to internationally wrongful acts.'⁸⁶ These provisions have been said to replace the "aggravated regime" of responsibility envisaged connected to the notion of international crimes during the ILC's earlier work.⁸⁷ All in all, the inclusion of the notion of serious breach of an obligation arising under a peremptory norms can be seen as yet another recognition of the existence of solidarity in international legal relationships. As has been briefly discussed above,⁸⁸ peremptory norms are commonly

⁸³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, ICJ, *Order on Provisional Measures*, 23 January 2020, para. 41.

⁸⁴ Crawford refers to this final subcategory as "integral obligations", which he defines as obligations whose breach 'necessarily affects the enjoyment of the rights or the performance of obligations of the other State parties' to a treaty, see Crawford, 'Third Report on State Responsibility' (n 70) 40. While he rightly attributes the origin of this notion to Fitzmaurice, the terminology used by Crawford is somewhat unfortunate as this final type of "multilateral obligation" corresponds to what in Fitzmaurice's classification would be an "interdependent obligation", see also Fitzmaurice and Elias (n 30) 162.

⁸⁵ International Law Commission (n 21) 119.

⁸⁶ Gaja (n 52) 124.

⁸⁷ Eric Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147. See also section 2.2.1 above

⁸⁸ Section 2.1.2

considered to give rise to obligations *erga omnes*, which give rise to legal relations where the corresponding right is held in common by multiple right-holders.

Interestingly, the additional legal consequences that arise from the character of the obligation in combination with the intensity of the breach are not primarily geared towards the state(s) or international organization(s) that are responsible for the breach in question. Rather, a serious breach of an obligation arising under a peremptory norm gives rise to new obligations for *other* states or IOs, which are obliged to 'cooperate to bring to an end through lawful means' any serious breach. In addition, they must abstain from recognizing as lawful a situation created by a serious breach, and from rendering aid or assistance in maintaining that unlawful situation.⁸⁹

2.3 Analysis: Capturing the existence and implications of solidarity in legal relationships

The above exploration shows that various concepts in the international law of obligations recognize the existence of solidarity in international legal relationships. However, if one looks at these concepts through a Hohfeldian lens it soon becomes clear that they reflect a one-sided approach to the existence of solidarity in legal relations, thereby solely capturing the implications of solidarity for right-holders (2.3.1). This approach has contributed to a conceptual preoccupation with what may be called optional solidarity in the international law of obligations (2.3.2).

2.3.1 Solidarity amongst right-holders

Both the law of treaties and the law of international responsibility approach solidarity in international legal relationships solely from the perspective of the right-holders in legal relations. It is submitted that, as a result of this focus on only one side of legal relationships, existing legal concepts do not fully capture the potential implications of solidarity for the (non-)performance of international obligations.

⁸⁹ Article 41 ARSIWA and 42 ARIO.

When it comes to the law of treaties, the notions of interdependent and integral obligations (which are today reflected to some extent in article 60 VCLT) recognize that certain obligations in multilateral treaties are owed to all other parties to the treaties simultaneously, and that this has implications for the (non-)performance of treaty obligations. The VCLT's inclusion of the notion of peremptory norms can similarly be seen as an affirmation that certain international obligations give rise to multilateral legal relations where the corresponding right is held in common by multiple right-holders. Such obligations cannot be performed towards only one right-holder, but is necessarily performed or breached towards all of them simultaneously.

It can certainly be said that these concepts of solidarity contribute to a better understanding of the (non-)performance of treaty obligations that are owed *to* multiple states or IOs. They are useful tools in determining the consequences of non-performance⁹⁰ of certain types of obligations for those states and IOs that share the corresponding right. The existence of solidarity amongst right-holders in primary legal relations directly influences the circle of states that is entitled to respond to a material breach of treaty by suspending that treaty. In the case of interdependent obligations, solidarity amongst right-holders brings with it that each of them would be entitled to suspend the operation of the treaty since each would be affected by non-performance; whereas in the case of integral obligations the effect of solidarity is that *none* of those to whom the obligation is owed would be entitled to suspend the treaty; a direct result of the common interests of states parties in the absolute and integral performance of integral obligations under all conditions.⁹¹

What is striking is that none of these concepts capture the possibility of and potential implications of international obligations that are held in common by multiple *duty-bearers*. It therefore seems that the law of treaties lacks concepts to address the existence of solidarity on the side of duty-bearers in legal relations. This could in part be explained by the ILC's decision to focus on the treaty *instrument* rather than on treaty *obligations* during its

⁹⁰ Though, in the context of the law of treaties, limited to a material breach of treaty as defined in article 60(3) 1969 VCLT (which does not cover all instances of non-performance).

⁹¹ Fitzmaurice (n 32) 31.

codification efforts.⁹² As a result of this choice, the law of treaties has a relatively narrow focus when it comes to the (non-)performance of treaty obligations: it is concerned with the issue of (non-)performance of obligations only insofar as it has consequences for the validity or binding effect of the treaty instrument.⁹³

Here lies an important difference between the law of treaties and the law of international responsibility, since the law of responsibility is all about the (non-)performance of international obligations. It deals with the conditions for and legal consequences of the commission of an internationally wrongful act, which consists of the non-performance (or: breach) of *any* international obligation by a state or international organization.⁹⁴ This suggests that the existence of and the potential problems raised by legal relationships with a plurality of duty-bearers might more properly fall within the ambit of the law of international responsibility.

Nonetheless, the concepts of solidarity in the law of international responsibility display a similar focus on solidarity amongst states and/or international organizations in their capacity as right-holders only. The concepts of multilateral obligations, *erga omnes (partes)* obligations and – to a certain extent – the notion of serious breaches of obligations arising under peremptory norms all recognize that certain international obligations do not give rise to bilateral legal relations amongst pairs of states, but are rather owed *to* a plurality of states and/or international organizations. None of these concepts capture the existence of solidarity amongst the bearers of obligations, and serve primarily to determine which states or international organizations are entitled to respond to a breach of an international obligation. This might very well be a result of the fact that the ILC in its approach to the law of international responsibility was very much influenced by the approach to multilateral legal relations in the law of treaties, causing it to overlook the existence and implications of solidarity amongst duty-bearers.

⁹² Shabtai Rosenne, *Breach of Treaty* (Grotius Publications Limited 1985).

⁹³ James Crawford and Simon Olleson, 'The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility' (2000) 21 *Australian Yearbook of International Law* 55, 59. In the *Gabcikovo-Nagymaros Project* case, the ICJ considered that the 1969 VCLT 'confines itself to defining – in a limitative manner – the conditions in which treaty may lawfully be denounced or suspended.' *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 1997 ICJ Reports 7 [47].

⁹⁴ Article 12 ARSIWA and article 10(1) ARIO.

2.3.2 Optional solidarity?

All in all, this one-sided conceptualization of solidarity in the international law of obligations creates the impression that the consequences of solidarity in legal relations are predominantly optional. In the case of non-performance of obligations that are owed to multiple states or international organizations, an entitlement arises for all of these right-holders to respond to the breach in question. Such an entitlement is, however, an option; not an obligation, meaning that states and international organizations remain legally free to choose the extent in which they will effectuate solidarity in practice.

This optional solidarity has long fascinated many a legal scholar, as evidenced by the great wealth of literature examining and at times even fully dedicated to existing conceptual manifestations of solidarity such as peremptory norms and obligations *erga omnes*.⁹⁵ At the same time, it is noteworthy that the optional nature of solidarity has been the subject of debate, with various scholars arguing that the entitlement to respond to breaches of certain types of obligations has been or should be transformed into an obligation to respond to such breaches.⁹⁶ While the existence and extent of such third state obligations has been a matter of contention,⁹⁷ today the idea reflected in articles 41 ARSIWA and 42 ARIO, namely that serious breaches of obligations arising under peremptory norms impose three particular obligations on third states: the obligations of non-recognition, non-assistance and cooperation, appears to enjoy rather broad support.⁹⁸

⁹⁵ Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 2000); Tams (n 28); André De Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer Law International 1996); Dupuy (n 71); Crawford, 'Multilateral Rights and Obligations in International Law' (n 26); Simma (n 6); Ulf Linderfalk, 'What Is So Special About Jus Cogens? - On the Difference between the Ordinary and Peremptory International Law' [2012] *International Community Law Review* 3; Orakhelashvili (n 51); Costelloe (n 53).

⁹⁶ Lea Brilmayer and Isaias Yemane Tesfaldet, 'Third State Obligations and the Enforcement of International Law' (2011) 44 *International Law and Politics* 1; Eric Wyler and León Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014). See also Judge Simma's Separate Opinion in the *Armed Activities* case, asserting that 'Uganda had the right – indeed the duty – to raise the violations of international humanitarian law'.

⁹⁷ Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers 1989) 836.

⁹⁸ Costelloe (n 53) 192 et seq. These obligations have found support in the *Chagos*, *Wall* and *Namibia* Advisory Opinions of the International Court of Justice and the *La Cantuta* case before the Inter-American Court of Human Rights. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory

But while these discussions aim to take the debate on solidarity in the international law of obligations beyond exclusively optional solidarity, they still focus on the implications of solidarity amongst states or international organizations in their capacity as right-holders. The implications of serious breaches of peremptory norms are not necessarily geared towards those that have committed the (serious) breach of obligations (they would be the bearer(s) of the primary obligation in such a scenario) but rather follow from the common interest that states and international organizations have in their performance.

Thus, what remains overlooked is the question what solidarity might mean on the side of the bearers of primary international obligations. This conceptual gap is quite remarkable, considering that in practice there are various situations in which multiple states and/or international organizations are bound to an international obligation in the context of cooperative activities and the pursuit of common goals, and are accordingly connected in the performance of an obligation. To what extent does this point to solidarity amongst those that bear a particular international obligation, and what does this mean for the performance of such obligations (who is bound to do what) and international responsibility in case of a breach (who can be held responsible for what)? It might be recalled that in the domestic law of obligations one may find various concepts that cover situations where multiple persons are bound by the duty to perform the same obligation,⁹⁹ including the notion of ‘solidary obligation’, and it is recognized that the consequences of a plurality of duty-bearers may vary depending on how the duty-bearers are bound.¹⁰⁰

In the following section this paper moves beyond the current one-sided conceptualization of solidarity in the international law of obligations, aiming to capture the existence and

Opinion of 25 February 2019, para. 182; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 200, para. 159; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 54, para. 119; *La Cantuta v. Perú (Merits, Reparations and Costs)*, Series C, No. 162, Judgment, 29 November 2006, Inter-American Court of Human Rights, para. 160. See also Dire Tladi, ‘Third Report on Peremptory Norms of General International Law (Jus Cogens)’ (2018) A/CN.4/714 33 et seq.

⁹⁹ Section 1.2 above.

¹⁰⁰ The Commission on European Contract Law, *Principles of European Contract Law: Parts I and II* (Ole Lando and Hugh Beale eds, Kluwer Law International 2000) xxi.

implications of solidarity amongst duty-bearers in international legal relationships. It does so through the concept of shared obligations.

3. SHARED OBLIGATIONS IN INTERNATIONAL LAW: SOLIDARITY AMONGST THE BEARERS OF INTERNATIONAL OBLIGATIONS?

The performance of an international obligation is not always up to only one state or international organization. In practice there are various situations in which *multiple* states and/or international organizations are bound to an international obligation in the context of cooperative activities and the pursuit of common goals. In this respect, one may think of the obligation of the European Union and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate greenhouse gas emissions by 2020;¹⁰¹ the obligation of states parties to the Nuclear Non-Proliferation Treaty (NPT) to pursue negotiations on a treaty on nuclear disarmament;¹⁰² the obligation of coastal states to seek to agree upon measures to coordinate and ensure the conservation and development of fish stocks that occur in each of their exclusive economic zones;¹⁰³ and the obligation of Australia and Nauru to take measures to prevent the inhuman treatment of asylum seekers and refugees held in offshore detention centres on the territory of Nauru, but which were under the effective control of both states.¹⁰⁴

In all of these examples, multiple states or international organizations are connected in the performance of an international obligation. In this section it is argued that in such situations one can speak of solidarity amongst the bearers of international obligations, and that the existence of such solidarity can have relevant legal implications for (non-)performance. It starts by introducing the concept of shared obligations (3.1). This concept captures the practical phenomenon of sharing obligations, which is not captured by existing concepts of solidarity. The focus then turns to the ways in which solidarity may manifest itself amongst the bearers of a shared obligation. It is argued that this may differ depending on whether the obligation in question is “divisible” or “indivisible”, and that these two different

¹⁰¹ Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, ‘Report on Its Seventh Session’ (2011) FCCC/KP/CMP/2011/10/Add.1 4., 6, where it is stated that the commitment for the ‘European Union and its member States for a second commitment period under the Kyoto Protocol are based on the understanding that these will be fulfilled jointly with the European Union and its member States, in accordance with Article 4 of the Kyoto Protocol.’ Iceland’s commitment is based on the same understanding.

¹⁰² Article VI Treaty on the Non-Proliferation of Nuclear Weapons (1968) 729 UNTS 161.

¹⁰³ Article 63 United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3.

¹⁰⁴ Committee Against Torture, ‘Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia’ CAT/C/AUS/co/4-5, 23 December 2014 para 17.

manifestations of solidarity have different implications for the structure of performance of shared obligations (3.2). The paper concludes with some brief reflections on the implications of solidarity amongst duty-bearers for the secondary legal relations that may arise in case of a breach (3.3).

3.1 The concept of shared obligations: capturing a practical phenomenon

The concept of shared obligations reflects the idea that performing obligations does not always occur in a vacuum, and captures situations where multiple states and/or international organizations are connected in the performance of an international obligation. Such a connection is present when 1) two or more states or international organizations are bound to a similar international obligation that 2) pertains to the same constellation of facts. These two elements combined indicate that there is an overlap between the obligations of multiple states and/or international organizations. It is this connection between the bearers of a shared obligation that points to the existence of solidarity amongst duty-bearers, and brings questions regarding (non-)performance to the forefront: who is bound to do what, and who can be held responsible for what in case of a breach?

3.1.1 Multiple bearers of a similar obligation

The concept of shared obligations presupposes that multiple states or international organizations are bound to a similar international obligation. An international actor cannot “share” an obligation on its own, and it would be difficult to speak of solidarity amongst duty-bearers in the performance of international obligations if a particular obligation were to bind only one state or international organization. The obligations incumbent on multiple states or international organizations are similar when they have similar normative content; for instance, if they prescribe similar conduct (such as an obligation to take measures to prevent pollution) or the achievement of a similar result (such as the obligation of multiple states to refrain from acts of torture).

It should be emphasized that the mere fact that multiple states or organizations are bound to a similar international obligation does not automatically entail that the obligation in question

is shared. Such an assertion would equate all obligations that arise from a multilateral rule or source to shared obligations. This would be incorrect, since it is perfectly possible for a legal rule that binds a plurality of states to give rise to separate bilateral legal relations,¹⁰⁵ where there is no connection amongst either the plurality of right-holders or duty-bearers. This brings us to the second element of a shared obligation, which is key to understanding the distinctive relationship between the bearers of a shared obligation.

3.1.2 Obligations pertaining to the same constellation of facts

When multiple states or international organizations share an international obligation, there is another element at play that is indicative of the connection between the bearers of the obligation in the performance of that obligation: the similar obligations of multiple states and/or international organizations pertain to the same constellation of facts. This results in an overlap between the obligations of multiple duty-bearers and connects them in the performance of that obligation.

As long as the similar obligations of multiple duty-bearers do not pertain to the same constellation of facts, they are simply not shared obligations. For example, while all states may be bearers of the same obligation to provide innocent passage through one's territorial waters, in principle each state's obligation pertains only to vessels passing through its own territorial waters; and not to vessels passing through another state's territorial waters. Because each state's obligation pertains to a different constellation of facts, their obligations quite simply do not overlap and require a purely individualized performance.

So when *do* the obligations of multiple states or organizations pertain to the same constellation of facts? Broadly, one may identify situations where multiple states or international organizations agree to an international obligation to work towards or achieve a common goal (i), and situations where multiple states or international organizations are legally or factually linked to a common situation (ii).

¹⁰⁵ Crawford, 'Multilateral Rights and Obligations in International Law' (n 26) 342–343; Tams (n 28) 45.

i. *Multiple states or international organizations agree to an obligation to work towards or achieve a common goal*

An overlap in international obligations can be the result of multiple states or international organizations agreeing *ex ante* to a similar international obligation to work towards or achieve a common goal. In this respect, it should be noted that when multiple states or organizations are bound to a similar obligation in pursuance of a common goal, the question whether those states are 'merely' required to work towards a common goal or whether they are bound to in fact achieve that common goal can still be the subject of debate. For instance, some argue that article VI NPT gives rise to an obligation of states parties to conclude an international agreement on complete nuclear disarmament or even an obligation to achieve complete nuclear disarmament.¹⁰⁶ The specific common goal that would need to be achieved in order to fulfil such an obligation would be the conclusion of an international agreement on nuclear disarmament, or – as some would argue – even the achievement of nuclear disarmament itself. Others, however, have argued that states are 'merely' obliged to take steps to work towards this collective goal and are thus not required to achieve the conclusion of an international treaty or complete nuclear disarmament.¹⁰⁷

An uncontroversial example of an obligation of multiple states and an IO to achieve a common goal is the obligation of Iceland, the EU and its member states to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gases by 2020.¹⁰⁸ The bearers of this obligation have explicitly agreed to achieve a concrete common goal: the reduction of 20 per cent of their aggregate emissions by 2020. There are many more examples of multiple

¹⁰⁶ Haralambos Athanasopoulos, *Nuclear Disarmament in International Law* (McFarland & Company 2000) 157; Simon (n 485); Hisakazu Fujita, 'The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons' [1997] International Review of the Red Cross <<http://www.icrc.org/eng/resources/documents/misc/57jfn.htm>>. See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Application instituting proceedings against the United Kingdom, 24 April 2014. In para 97 the Republic of the Marshall Islands argues that '[a]rticle VI of the NPT requires both conduct and result: States must not only negotiate in good faith with serious efforts to achieve the elimination of nuclear weapons, but must also actually achieve that result.'

¹⁰⁷ Robert F Turner, 'Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine' in Michael N Schmitt (ed), *The Law of Military Operations: Liber Amoricum Professor Jack Grunawalt*, vol 72 (1996) 324; Daniel H Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (OUP 2011) 101.

¹⁰⁸ Supra note 101.

international actors that have not necessarily agreed to *achieve* a collective goal but have agreed to take steps to *work towards* a particular common goal. One may think, for instance, of the obligation of France and the UK to take appropriate steps to maintain security and public security and public order in and around the Coquelles terminal, which was the subject of the *Eurotunnel* case.¹⁰⁹ Other examples include the obligation of coastal states to seek ‘to agree upon the measures necessary to coordinate and ensure the conservation and development’ of fish stocks that occur within the exclusive economic zones of both of them¹¹⁰ or the obligation of Annex I parties to the Kyoto Protocol to pursue limitation or reduction of greenhouse gas emissions from aviation and marine bunker fuels, working through the ICAO and IMO.¹¹¹

ii. *Multiple states or international organizations are legally or factually linked to a common situation*

Moreover, obligations may overlap when multiple states or international organizations are legally or factually linked to a factual situation that is common to all of them.¹¹² This includes situations in which multiple states exercise some form of authority or control over the same territory and/or individuals.

An example of the simultaneous exercise of authority or control by multiple states is the trusteeship over Nauru, where Australia, New Zealand and the United Kingdom were designated as the joint Administering Authority that was responsible for the administration of the territory of Nauru. As a result of this joint administration, all three states were bound to obligations with similar normative content that applied to the same constellation of facts, namely the administration of the territory of Nauru. These obligations include – it was argued

¹⁰⁹ *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche SA v United Kingdom & France), Partial Award, 2007.*

¹¹⁰ Article 63 LOSC, see Bjørn Kunoy, ‘The Ambit of Pactum de Negotiatum in the Management of Shared Fish Stocks: A Rumble in the Jungle’ (2012) 11 Chinese Journal of International Law 689

¹¹¹ Article 2(2) Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) 2303 UNTS 148.

¹¹² The idea of multiple states involved in factual situation that is common to them has been used in Vassilis Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2014) 36 Michigan Journal of International Law 129, 172.

by Nauru before the ICJ - the obligation to rehabilitate Nauru's worked out phosphate lands (or to provide the financial means for such rehabilitation).¹¹³ Another example would be the joint occupation of Iraq by the US and the UK, where the latter two states both owed a range of similar obligations to Iraq and its inhabitants in their capacity as occupying power.¹¹⁴

The exercise of authority or control by multiple states over the same territory and/or individuals need not necessarily be of such a formal nature as the above-mentioned example of trusteeship. Because the exercise of effective control over territory or individuals can give rise to a variety of obligations pertaining to that territory or individuals (particularly in the area of human rights law), this can give rise to concrete scenarios in practice where multiple duty-bearers are bound to a similar obligation pertaining to a common situation. For instance, it has been argued that both Lithuania and the US exercised concurrent jurisdiction over the CIA black site operated on the territory of Lithuania.¹¹⁵ This denotes that not only Lithuania was bound to human rights obligations pertaining to the individuals kept in the black site (such as the obligation to take measures to prevent inhuman treatment or unlawful detention), but that the US was also bound to similar human rights obligations vis-a-vis these individuals. The possibility of overlapping obligations in cases of extraterritorial jurisdiction is increasingly being discussed in legal literature.¹¹⁶

¹¹³ In its memorial, Nauru argued that such an obligation could be derived from the existence of the trusteeship over the territory of Nauru, see *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Memorial of the Republic of Nauru*, 1990 Volume I [290].

¹¹⁴ Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008).

¹¹⁵ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011) 153–154. See also Duffy, who argues that the human rights obligations of territorial states where black sites are located 'apply alongside the obligations of the states exercising power or control extraterritorially.' Helen Duffy, 'Detention and Interrogation Abroad: The "Extraordinary Rendition" Programme' in André Nollkaemper and Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 104.

¹¹⁶ For instance, Besson has asserted that joint effective control and jurisdiction can give rise to joint duties, Samantha Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 166. See also Oliver De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084, 1097. Here it is stipulated that '[e]xtraterritorial obligations differ from territorial obligations (...) in that such obligations can be shared with other states.'

3.2 Two manifestations of solidarity amongst duty-bearers: indivisible and divisible shared obligations

When multiple states or international organizations share an international obligation, solidarity amongst bearers of the obligation may manifest itself in two different ways. Since, as will be argued throughout the remainder of this paper, these different manifestations of solidarity have different implications for (non)performance, they will be captured by two distinct categories of obligations: indivisible and divisible shared obligations.

3.2.1 Indivisible shared obligations

The most far-reaching manifestation of solidarity amongst the bearers of a shared obligation can be found in cases where they are bound to an indivisible shared obligation. A shared obligation is indivisible when it binds multiple states or international organizations to achieve a common performance. Because an indivisible shared obligation requires its bearers to *achieve* (rather than merely pursue) a common performance, a shared obligation can be indivisible only if it is an obligation of result.¹¹⁷ A hypothetical example would be a situation in which multiple states oblige themselves to reduce their combined tuna catches with 20 per cent before the year 2030. All of these states are together bound to achieve a common performance, namely the reduction of their combined tuna catches with an agreed upon percentage.

When it comes to the performance of an indivisible shared obligation there is a particularly strong connection between duty-bearers. A direct consequence of the fact that all duty-bearers are bound to achieve a common performance is that the obligation can only be fulfilled or breached by all of its bearers simultaneously. Applied to our hypothetical example, as soon as the 20 per cent reduction of aggregate tuna catches is achieved before the year 2030 the obligation is fulfilled by all that bear the obligation. Should this common performance not be achieved, the obligation is necessarily breached by all duty-bearers.

¹¹⁷ An obligation of result requires that its bearer(s) successfully achieve a specific result, Constantin P Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 377.

Hence, performance of the obligation is indivisible. It does not matter what individual duty-bearers have or have not done in their efforts to comply with an indivisible shared obligation; all that matters is whether the common performance has been achieved.

This resembles the category of 'solidary' or 'joint and several' obligations that is known in many domestic legal systems. In domestic (private) law, the main characteristic of a solidary obligation is that each of the bearers is bound to perform the whole obligation; the performance of the obligation cannot be divided.¹¹⁸ For example, if A lends 10.000 euros to B and C together, and the contract does not specify who must pay back what part of the loan, both B and C are bound to pay back the 10.000 euros in full.¹¹⁹ This means that as soon as the full 10.000 euros is paid to A, the obligation will be fulfilled by both duty-bearers simultaneously; but as long as the full amount is not paid none of them will fulfil the obligation. Accordingly, B cannot be released from the obligation if it pays only a share of the full amount; the obligation is either fulfilled by all of its bearers if the 10.000 euros is paid or it is fulfilled by none of them.

In the context of international law, this particular type of shared obligation seems to be quite rare (at least as long as we stay within the realm of primary obligations). Some examples include the obligation of the EU and its member states, together with Iceland, to achieve a 20 per cent reduction of aggregate greenhouse gas emissions;¹²⁰ the obligation of the EU and its member states to provide 12.000 million ECU in financial assistance to the African, Caribbean and Pacific Group of States;¹²¹ the obligation of Australia, New Zealand and the UK to rehabilitate Nauru's worked out phosphate lands;¹²² and the (primary) obligation of two or more launching states to pay full compensation for the damage caused by their joint launching of a space object.¹²³

¹¹⁸ Article 11.1.1 Principles of International Commercial Contracts (PICC) provides that each duty-bearer is bound for the whole obligation, article 10:102 Principles of European Contract Law (PECL) provides that each duty-bearer is bound to render one and the same performance, and article 4:102 Draft Common Frame of Reference (DCFR) provides that each duty-bearer is bound to perform the obligation in full.

¹¹⁹ Article 10:102 PECL; article 4:103 DCFR and article 11.1.2 PICC.

¹²⁰ Supra note 101.

¹²¹ Peter-Tobias Stoll, 'Lomé Conventions', *Max Planck Encyclopedia of Public International Law, Volume II* (1997); *Case C-316/91, European Parliament v Council of the European Union* [1994] ECR I-00625.

¹²² Supra note 113.

¹²³ Article V(1) Convention on the International Liability for Damage caused by Space Objects (1972) 961 UNTS 187.

Essentially, the indivisible structure of performance of an indivisible shared obligation brings with it that the legal fates of duty-bearers are inherently tied together. After all, the obligation can only be fulfilled or breached by all of them simultaneously. This is a particularly far-reaching manifestation of solidarity, especially if one considers that a bearer of an indivisible shared obligation can breach that obligation (and incur (shared) responsibility)¹²⁴ through no fault of its own: not because it failed to contribute to the achievement of the common result itself but because other duty-bearers failed to do so. It may thus be dependent on the behaviour of others in order to achieve the common goal required by the obligation. This is the case, for example, when multiple states are bound to an indivisible shared obligation to *conclude* a treaty on a particular topic, which is a common goal that truly cannot be achieved by any duty-bearer on its own.¹²⁵

3.2.2 Divisible shared obligations

When multiple states or international organizations are bound to a divisible shared obligation, each of them is bound only to its own “share”. For instance, one may think of a scenario where states X, Y and Z are under an obligation to take measures to prevent an impending genocide that they are aware is bound to take place on the territory of neighbouring state A. Even though the similar obligations of the three states overlap, it cannot be said that they are bound to achieve a common performance. Rather, each of them is bound to do its share by taking those measures that are within their power aimed at the prevention of genocide.

In essence, qualifying a shared obligation as either divisible or indivisible comes down to a question of interpretation of the content of that obligation: what does the obligation ask of its bearers? Are multiple states and/or IOs bound to achieve a common performance, or is

¹²⁴ See section 3.3 below.

¹²⁵ E.g. 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.’ Attila Tanzi, Alexandros Kolliopoulos and Nataliya Nikiforova, ‘Normative Features of the UNECE Water Convention’ in Attila Tanzi and others (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Brill - Nijhoff 2015) 122.

each of them bound only to its own share? It has been contended above that a shared obligation can only be indivisible if it is an obligation of result (as long as multiple actors are bound to achieve a *common* result). It is submitted, in addition, that in the case that a shared obligation is an obligation of conduct it is inherently divisible. After all, an obligation of conduct is a best efforts obligation¹²⁶ that, when incumbent on a plurality of states or international organizations, can be said to bind each of them to their own share. Each state or international organization bound by such an obligation is bound to take all measures that are in its power *in pursuance of* a particular result, and the specific measures that should be taken in order to fulfil the obligation may differ depending on the context in which the obligation arises and the capabilities of each duty-bearer.

There are various examples of shared obligations of conduct that essentially oblige multiple states or international organizations to take measures in pursuit of a common goal, without obliging them to in fact achieve that common goal.¹²⁷ One may think of the obligation of multiple sponsoring states to take measures to ensure that activities in the Area are carried out in accordance with Part XI of the United Nations Convention on the Law of the Sea;¹²⁸ the obligation of the EU and France to take appropriate measures to strictly limit pollution from land-based sources into lake Etang de Berre;¹²⁹ the obligation of the Australia and Nauru to take measures to prevent inhuman treatment of individuals held in processing centres over which they both exercised effective control;¹³⁰ and the obligation of the US and the UK in their

¹²⁶ Philippe Gautier, 'On the Classification of Obligations in International Law' in Holger P Hestermeyer (ed), *Coexistence, Cooperation and Solidarity: Liber Amoricum Rüdiger Wolfrum, Volume I* (Martinus Nijhoff 2012) 856.

¹²⁷ See e.g. Economides, who argues that positive obligations formulated in a relatively weak way, such as obligations of cooperation, are generally obligations of means rather than obligations of result, Economides (n 118) 378. Abi-Saab argues that 'as far as the law of cooperation is concerned, it is more difficult to construct obligations 'to do' as obligations of result. Even in the most authoritarian systems, it is not always possible to guarantee that the common undertaking will be realized exactly according to plan, or that the plan will be fulfilled 100 per cent. We note here many obligations of means (i.e. of best efforts)', see Georges Abi-Saab, 'Whither the International Community?' (1998) 9 EJIL 248, 253. See also Riphagen, who asserts that obligations to undertake common action generally require states to negotiate in good faith and do not oblige them to agree on a common action, Willem Riphagen, 'Fourth Report on State Responsibility' (1983) A/CN.4/366 and Add.1 & Add.1/Corr.1 20.

¹²⁸ Article 139 United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 (n 82) para 110.

¹²⁹ *Case C-239/03, Commission v French Republic* [2004] ECR I-9325. From this case it can be deduced that 'in the absence of a declaration of competence relating to the international agreement in question, the Community and France were jointly responsible for controlling effluents from land into the *Etang de Berre*', Pieter-Jan Kuijper, 'Case C-239/03, Commission v. French Republic' (2005) 43 Common Market Law Review 1491, 210.

¹³⁰ Supra note 104.

capacity as occupying powers to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in Iraq.¹³¹

In any case, the performance of such obligations is divisible, since it is possible for a duty-bearer to independently breach or fulfil the obligation. This entails that the connection (and, one might say, the solidarity) between the bearers of a divisible shared obligation in the performance of that obligation is not as strong as that between the bearers of indivisible shared obligations. For instance, in the above-mentioned hypothetical scenario it would be perfectly possible for state X to take the measures that are required of it by the obligation in the specific circumstances of the case, thereby doing its share and fulfilling the obligation to prevent genocide, while the other two states fail to take the necessary measures and consequently breach the same obligation by failing to do their respective shares.

But does this divisible structure of performance entail that there exists no solidarity amongst the bearers of a divisible shared obligation? It is submitted that this question should be answered in the negative. Even though each of them is in principle bound only to its own share, this does not mean that the bearers of a divisible shared obligation are not obliged to engage with one another in the performance of their share. Implementing one's share of the obligation in complete isolation will often not be conducive to achieving the goal ultimately pursued by a divisible shared obligation, and employing one's efforts to engage in some form of cooperation may be among the measures that are reasonably available to each of the duty-bearers. For instance, in the context of their joint occupation of Iraq, the US and the UK created the Coalition Provisional Authority as an administrative mechanism through which they could fulfil their obligations.¹³² In a similar vein, Besson has argued in favour of a duty to set up institutions and procedures to effectively implement the overlapping obligations of multiple states under the European Convention on Human Rights,¹³³ which may arise as a result of the exercise of concurrent jurisdiction.

¹³¹ Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008) 206; Enrico Milano, 'Occupation' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017).

¹³² Talmon (n 132) 3.

¹³³ Besson (n 117) 168.

Engaging with the other bearers of a divisible shared obligation could also mean that a state or international organization must try with the means reasonably available to it (e.g. through diplomatic channels) to convince other duty-bearers to participate in pursuing the common goal. Compare for instance the considerations of the Arbitral Tribunal in the *Eurotunnel* case when it was asked to evaluate whether the obligation to take measures to maintain security in and around the Coquelles terminal – which was incumbent upon both France and the United Kingdom – had been fulfilled. In its determination it took into account that ‘the record (...) though it sometimes shows disagreement between [France and the United Kingdom], does not show a consistent and conscientious opposition by the United Kingdom to a unilateral French policy, such that the United Kingdom could argue that it did everything within its power to bring a clearly unsatisfactory situation promptly to an end.’¹³⁴ Accordingly, the UK could have ‘undertaken certain actions to try to induce France to comply with the obligations resting upon both respondents’,¹³⁵ but did not undertake any such actions; thereby failing to do its share.

All in all, while solidarity amongst the bearers of a divisible shared obligation does not manifest itself as strongly as it does amongst the bearers of indivisible shared obligation, duty-bearers remain connected in the performance of the obligation that at the end of the day binds all of them.

3.3 Solidarity and secondary legal relations

In section 2 it was set out how solidarity amongst *right-holders* can give rise to solidarity in the secondary legal relations that arise as a result of a breach of an obligation, entitling all right-holders to respond in cases of non-performance. Now that we have turned our focus to solidarity amongst the duty-bearers in legal relationships, the question arises whether such solidarity has implications for the secondary legal relations that arise in case of non-

¹³⁴ *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)*, Partial Award, 2007 (n 110) para 318.

¹³⁵ Freya Baetens, ‘Invoking, Establishing and Remedying State Responsibility in Mixed Multi-Party Disputes’ in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 437.

performance. The short answer here is yes, and the purpose of this final subsection is to briefly reflect on the different implications that may follow from the existence of solidarity amongst the bearers of divisible and indivisible shared obligations.

Overall, when multiple states or international organizations share an international obligation, a breach of that obligation may give rise to the shared responsibility of all of them. Shared responsibility is understood here as responsibility that arises when multiple states and/or international organizations contribute to a common harmful outcome by committing one or more internationally wrongful acts.¹³⁶ In such cases, all of them may become bound to the secondary obligations of cessation and reparation.¹³⁷ Interestingly, whenever this point arrives we are again confronted with the phenomenon of shared obligations, and solidarity may once again manifest itself amongst the bearers of these secondary obligations.

Before proceeding on this point, some preliminary observations are in order regarding the relationship between sharing obligations and sharing responsibility. It follows from the indivisible structure of performance of an indivisible shared obligation that any breach gives rise to the responsibility of all states and international organizations that bear the obligation. Considering that all duty-bearers are bound to achieve a common result, the failure to achieve that result constitutes a joint failure by all of them; giving rise to shared responsibility for the same wrongful act.¹³⁸ Accordingly, the strong connection between the bearers of an indivisible shared obligation has automatic implications for the circle of states that can be held responsible in case of a breach.

When it comes to breaches of divisible shared obligations, however, the determination of (shared) responsibility is more diffuse. Because such an obligation binds each duty-bearer to its own share only, it is possible for only one or some of those that bear the obligation to

¹³⁶André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 6–11. See also Principle 2, André Nollkaemper and others, 'The Guiding Principles on Shared Responsibility in International Law' (forthcoming 2020) *European Journal of International Law*.

¹³⁷ Articles 30 and 31 ARSIWA; articles 30 and 31 ARIO.

¹³⁸ The "sameness" of a wrongful act signifies that there is only one internationally wrongful act that is committed by multiple states or international organizations, see Crawford, *State Responsibility: The General Part* (n 13) 334; International Law Commission (n 21) 124.

breach it while others fulfil the obligation, meaning that such breaches may – but do not always – give rise to the responsibility of all duty-bearers. This goes to show that the consequences of solidarity amongst duty-bearers may vary depending on how the duty-bearers are bound.¹³⁹

3.3.1 A shared obligation of cessation

The obligation of cessation is geared towards the restoration of the legal relationship affected by the wrongful act(s) committed, and therefore arises only for a state or international organization if the wrongful act for which it is responsible is continuing.¹⁴⁰ Hence, in the case that multiple states or international organizations are responsible for one and the same wrongful act that is of a continuing character, an obligation to cease that act will emerge for all of them. Such a shared obligation of cessation is of an indivisible character, as it obliges all responsible actors to achieve a common result: the cessation of the one act for which they are all responsible.

Considering that breaches of indivisible shared obligations always result in shared responsibility for the same wrongful act, an obligation of cessation that arises as a result of a breach of such an obligation will necessarily arise for all duty-bearers. Imagine, for instance, that the EU and its member states had breached their obligation to achieve the common result of providing 12.000 million ECU in financial assistance to a group of third states, giving rise to the shared responsibility of all of them. In such a case, all of them would have become bound to an indivisible shared obligation to cease this one wrongful act (which is to be distinguished from any obligation of reparation that arises for the damage caused by such a wrongful act).

Matters are different in situations where states or international organizations share responsibility for multiple wrongful acts, for instance in the case where both France and the UK breach the divisible shared obligation to take measures to maintain security and public order in and around the Coquelles terminal, by each failing to do their own share of the

¹³⁹ Compare the rationale provided by the Commission on European Contract Law for its formulation of different categories of obligations with a plurality of duty-bearers, *supra* note 100.

¹⁴⁰ Articles 30(a) ARSIWA and 30(a) ARIO.

obligation. Provided that each of their wrongful acts are of a continuing character, an obligation of cessation arises for both states. The nature of that shared obligation of cessation will be divisible because *multiple* wrongful acts have been committed, and each responsible actor becomes bound to cease its own internationally wrongful act only.¹⁴¹ But while this means that each of them is solely obliged to cease its *own* wrongful act, this does not mean that duty-bearers are in no way connected in the performance of their obligation of cessation. Depending on the influence that each of them is able to exert over the other bearers of a divisible shared obligation of cessation they may very well be required to try, with the means reasonably available to them, to induce the others to cease their wrongful conduct.¹⁴²

3.3.2 A shared obligation of reparation

A responsible state or international organization is bound to make full reparation for the injury caused by the internationally wrongful act.¹⁴³ This obligation is an expression of the remedial function of the law of international responsibility, which has as one of its main goals to restore the *status quo ante* and place the injured party 'in the position which would, in all probability, have existed if that act has not been committed.'¹⁴⁴

Unlike the obligation of cessation, the obligation of reparation does not relate to the wrongful act as such. Rather, it relates to the injury that has been caused by the wrongful act, and hence depends on a causal link between wrongful act(s) and injury. It arises only for a state or international organization that is responsible for a wrongful act that has caused injury, and it solely obliges that state or organization to make reparation for the injury that has been caused by the wrongful act for which it is responsible.

¹⁴¹ Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 215.

¹⁴² Compare the earlier discussion on the performance of divisible shared obligations in section 3.2.2. See also Principle 9(2) and accompanying commentaries of the Guiding Principles on Shared Responsibility, Nollkaemper and others (n 137).

¹⁴³ Articles 31 ARSIWA and 31 ARIO.

¹⁴⁴ *Factory at Chorzów*, Permanent Court of International Justice, Jurisdiction, Judgment No. 8, 1927, PCIJ Series A, No. 9, p. 47. On the remedial function of the law of international responsibility see Dinah Shelton, 'Righting Wrongs: Reparations in the Articles of State Responsibility' (2002) 96 AJIL 833-856.

When applied to a context in which multiple states are responsible for the same wrongful act (which is always the case when an indivisible shared obligation is breached), and that act causes injury, the above considerations can only lead to the conclusion that all of them will become bound to an obligation to provide full reparation for the whole injury. After all, there is only one wrongful act for which multiple states are responsible, and that one act is the sole cause of the whole injury.¹⁴⁵ So if, for instance, Australia, the UK and New Zealand indeed breached the indivisible shared obligation to rehabilitate Nauru's worked out phosphate lands by failing to achieve this common result, the three states would be responsible for the same internationally wrongful act: the common failure to rehabilitate Nauru's phosphate lands. If that one wrongful act caused injury to Nauru,¹⁴⁶ all of them would be bound to a shared obligation to make full reparation for the whole injury caused by their common failure. This shared obligation of reparation is indivisible, as it requires its bearers to achieve a common result: the provision of full reparation for the whole injury caused by their wrongful act. As a result, full reparation can be claimed from any of them.¹⁴⁷

Overall this outcome in terms of reparation resembles the notion of "solidary" or "joint and several liability" that is familiar to many domestic legal systems,¹⁴⁸ a notion which quite similarly entails that full reparation can be claimed from any of the actors that have contributed to the same damage, either singly or in combination.

At first sight, the nature of the obligation of reparation may appear to be less straightforward in those cases where multiple states or international organizations share responsibility as a result of breaches of divisible shared obligations, since breaches of such obligations can (and often do) give rise to shared responsibility for *multiple* wrongful acts. Let us proceed from a hypothetical scenario in which the US and UK have breached their divisible shared obligation

¹⁴⁵ d'Argent (n 142) 99; Besson (n 117) 173.

¹⁴⁶ In the case instituted before the ICJ by Nauru, the latter made a claim for various forms of loss caused to it, which included the costs of rehabilitation of its worked-out phosphate land. See *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Memorial of the Republic of Nauru*, 1990 Volume I (n 114).

¹⁴⁷ It follows from article 47(1) ARSIWA and 48(1) ARIO that where several states or international organizations are responsible for the same wrongful act, the responsibility of each of them may be invoked in relation to that act.

¹⁴⁸ European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (SpringerWienNewYork 2005) pp. 134–138; John Noyes and Brian Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale Journal of International Law* 225, pp. 251–254; Roger Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 *Pepperdine Law Review* 233, p. 241, fn. 38.

to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in Iraq, by each failing to do its share. In the case that both of their internationally wrongful acts contribute to a common injury, both states will become bound to an obligation to make reparation. But could full reparation be claimed from each of them, or can they be required to repair only part of the injury?

No tailor-made solutions are to be found in the framework of the ARSIWA and ARIO in cases of multiple contributions to injury. Nevertheless, one could argue that an indivisible shared obligation to make full reparation should be imposed when injury is caused by breaches of divisible shared obligations, even if those breaches result in shared responsibility for multiple wrongful acts.¹⁴⁹ As long as each contribution to the common injury cannot be clearly distinguished so as to have caused an identifiable part of the injury,¹⁵⁰ the burden to determine who caused what should not be placed on the injured party. This is particularly so if one takes into account that the protection of the right of injured persons to obtain full reparation is one of the main functions of the law of international responsibility. Instead, the burden should be shouldered in solidarity by the states or international organizations responsible for breaching the divisible shared obligation, obliging each of them to make full reparation for the situation they jointly created.

4. CONCLUSIONS

Where the domestic law of obligations has developed concepts that give expression to solidarity on both sides of legal relationships, conceptual manifestations of solidarity in the international law of obligations have remained focused solely on one side of legal relations: that of the right-holders. This one-sided conceptualization of solidarity is problematic if one considers that the pursuit of common interests by states or international organizations may have implications for *both* sides of legal relationships. Surely, on the side of right-holders, it is possible for multiple actors to share a right or legal interest in the performance of a particular

¹⁴⁹ See also Nollkaemper and others (n 137), commentaries to Principle 10.

¹⁵⁰ In relation to concurrent causes the ILC has stated that 'unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct', International Law Commission (n 21) 93–94.

international obligation. Existing concepts of solidarity capture this phenomenon and help determine the extent in which solidarity amongst right-holders translates into a shared entitlement to respond to situations of non-performance, reflecting a form of optional solidarity.

However, on the side of duty-bearers, it is also possible for multiple actors to share an international obligation. In practice, there are various situations in which multiple states and/or international organizations are bound to an international obligation in the context of cooperative activities and the pursuit of common goals. Yet a conceptual gap has remained, making it more difficult to capture the implications of solidarity amongst duty-bearers for the (non-)performance of international obligations. In its aim to move beyond this current one-sided conceptualization of solidarity in the international law of obligations, the present paper has introduced the concept of shared obligations. It has argued that solidarity may also manifest itself amongst the duty-bearers in legal relations. Understanding such manifestations of solidarity brings with it the potential of contributing to greater solidarity and the effectuation of common interests in international law. The implications of solidarity amongst the bearers of obligations are not optional, but concern the performance of obligations, shared responsibility and the nature of the secondary obligations of cessation and reparation that may arise as a result of such responsibility.