



Shared Obligations in International Law.

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SUMMARY

SHARED OBLIGATIONS IN INTERNATIONAL LAW

Chapter 1 Introduction

Throughout the years, international legal society has become increasingly interdependent. States and international organizations engage in cooperative activities and pursue common goals that cannot be achieved by any of them independently. In this context of interdependence, cooperation and pursuance of common interests one might expect that states and/or IOs do not only share rights and legal interests (which is generally recognized in international legal literature) but that they may also share international obligations.

In practice, there are various situations in which multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. Moreover, one may find an increasing number of references to international obligations that are 'shared', 'joint' or 'collective' in legal literature, which suggests that the idea that the fulfilment of international obligations is not always up to one duty-bearer only is gaining support. These references generally remain unsubstantiated but raise several questions: what does it mean to speak of shared obligations in international law, is this a meaningful category and if so why?

This study examines the topic of shared obligations in international law and aims to contribute to a better understanding of the (non-)performance of international obligations that are incumbent upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals. When is a shared obligation fulfilled by which duty-bearer(s), and when is a shared obligation breached by which duty-bearer(s)? This can, logically, contribute to a better understanding of the problem of shared responsibility in international law. When multiple states and/or IOs are bound to a shared obligation, does this automatically entail that they will share the international responsibility that arises in case of a breach?

The study consists of two parts. In Part I (Chapters 2-4), the thesis develops a concept of shared obligations as an analytical tool through which to assess situations where multiple states and/or IOs are bound to an international obligation in the context of cooperative activities and the pursuance of common goals. An essential component of the study's conceptualization of shared obligations is the introduction of a distinction

between two types of shared obligations: divisible and indivisible shared obligations. In Part II (Chapters 5-6), the study sheds further light on the concept of shared obligations in international law by clarifying the relationship between shared obligations and shared responsibility. By proceeding from the positive law of international responsibility, the thesis develops the argument that the relationship between breaches of shared obligations and shared responsibility depends on whether the shared obligation in question is divisible or indivisible.

Chapter 2 The move beyond a bilateral view of legal relations in the international law of obligations

The international law of obligations has engaged with the idea that legal relations do not necessarily involve two states only, and that this has implications for treaty and responsibility relations. The ILC's work on international responsibility and, to a lesser extent, the ILC's work on the law of treaties, recognizes that certain international obligations are owed *to* multiple or even all states and/or IOs simultaneously, with the principal consequence that multiple states and/or IOs are entitled to respond to a breach of an international obligation or a material breach of treaty. Such obligations give rise to multilateral legal relations where the corresponding right is held by multiple right-holders. Concepts such as interdependent obligations, integral obligations, multilateral obligations and obligations *erga omnes (partes)* all convey that an international obligation is owed to multiple states and/or IOs simultaneously, which entails that multiple states and/or IOs have a right or legal interest when it comes to the performance of that obligation.

It follows that the international law of obligations has approached the move beyond a bilateral view of legal relations in international law solely from the perspective of the *right-holders* in legal relations, and has neglected to address the possibility of and potential consequences of a plurality of *duty-bearers* for the (non-)performance of international obligations. The present study's conceptualization of shared obligations aims to fill this gap by focusing on obligations with a plurality of duty-bearers, not on obligations where the corresponding right is held by a plurality of right-holders.

Hence, the focus of the concept of shared obligations differs from the focus of the categories of obligations discussed in this chapter. However, as is further discussed in Chapter 4, the categories of multilateral and *erga omnes (partes)* obligations serve as an important source of inspiration and analogy in the conceptualization of shared obligations.

Chapter 3 The concept of shared obligations in international law

The present study's understanding of shared obligations is relatively broad. The concept of shared obligations is an overarching concept that covers two types of shared obligations. Chapter 3 focuses on the overarching concept of shared obligations and does not address the distinction between divisible and indivisible shared obligations. This distinction is addressed in Chapter 4, and it is here that the categories of multilateral and *erga omnes (partes)* obligations have a role to play.

The main characteristic that distinguishes obligations that are shared from obligations that are not shared is the existence of a connection between the bearers of a shared obligation that consists of more than just the fact that they are all parties to the same treaty or bound by the same rule of customary international law. It is this relationship that gives rise to questions of (non-)performance: when is a shared obligation fulfilled or breached by which duty-bearer(s)?

Chapter 3 clarifies this relationship between the bearers of a shared obligation by discussing the three elements that are present whenever the present study speaks of a shared obligation. First, a shared obligation has two or more duty-bearers, since a state or IO cannot share an international obligation on its own. Second, the duty-bearers in question are bound to a similar international obligation or, in other words, an obligation with similar normative content.

The third and final element is key to understanding the relationship between the bearers of a shared obligation: the similar international obligations of multiple states and/or IOs pertain to the same concrete case or, in other words, the same constellation of facts. This is the case when multiple states and/or IOs agree to an obligation to work towards or achieve a common goal (such as the obligation of Iceland, the EU and its member states to achieve a 20 per cent reduction of their aggregate emissions of greenhouse gas emissions by 2020) or when multiple states and/or IOs are factually linked to a common situation. The latter includes situations in which multiple states exercise some form of authority or control over the same territory and/or individuals that results in all of them being bound to a similar international obligation with regard to that territory and/or individual(s). For example, in their capacity as occupying powers of Iraq the US and the UK both owed a range of similar international obligations to Iraq and its inhabitants.

Chapter 4 Divisible and indivisible shared obligations in international law

An indivisible shared obligation binds multiple states and/or IOs to achieve a common result. For example, when states A, B and C are bound the obligation to reduce their combined catches of Southern Bluefin Tuna by 50 per cent in a five year period, states A, B and C are bound to achieve a common result. The structure of performance of this obligation is indivisible, which denotes that the obligation can only be fulfilled or breached by all duty-bearers simultaneously when that common result has (or has not) been achieved. Hence, for the performance of an indivisible shared obligation it does not matter what individual duty-bearers have done in their efforts to comply with the obligation. All that matters is whether the common result has been achieved or not. Only shared obligations that are indivisible give rise to a multilateral legal relation where the obligation is held by multiple duty-bearers. Accordingly, an indivisible shared obligation is the mirror image of a multilateral and *erga omnes (partes)* obligation.

A divisible shared obligation binds each duty-bearers to its own share. For example, when states X and Y are bound to the obligation not to torture individuals in a detention centre over which they both exercise effective control, each of them is bound to do its own share only. The structure of performance of a divisible shared obligation is divisible, which means that it is possible for one duty-bearer to be released from the obligation by doing its share while another duty-bearer at the same time breaches the obligation by failing to do its share. A divisible shared obligation gives rise to multiple bilateral legal relations, and in each of these legal relations the obligation is held by one duty-bearer.

Qualifying a shared obligation as divisible or indivisible essentially comes down to a question of interpretation of the content of that obligation: what does the obligation ask of its bearers? Are all of them bound to achieve a common performance, or is each of them bound only to its own share? This determination can be facilitated by several categorizations of obligations that are commonly employed in international law: the distinction between positive and negative obligations and the distinction between obligations of conduct and result. An indivisible shared obligation always constitutes a positive obligation of result, whereas a divisible shared obligation can consist of a positive obligation of conduct, a negative obligation of result or a positive obligation of result.

Chapter 5 Breaches of shared obligations and the determination of shared responsibility

The implications of breaches of shared obligations for the determination of shared responsibility differ depending on whether the shared obligation breached is divisible or indivisible. Hence, in the process of determining responsibility for breaches of shared obligations, the distinction between divisible and indivisible shared obligations can be relied upon as an important tool.

There is an automatic relationship between breaches of indivisible shared obligations and shared responsibility for one IWA. First, due to its indivisible structure of performance, a breach of an indivisible shared obligation always constitutes a breach by all of its bearers. Second, the conduct in breach of an indivisible shared obligation can always be attributed to all bearers of the obligation. The conduct in breach of an indivisible shared obligation consists of a failure to achieve the common result required by the obligation, and this joint failure is simultaneously attributable to all duty-bearers that were bound to achieve that common result on the basis of article 4 ASR and 6 ARIO. Thus, an automatic relationship exists between a breach of an indivisible shared obligation and attribution of conduct to all duty-bearers, which indicates that a breach of an indivisible shared obligation always gives rise to shared responsibility for one IWA.

There is no such automatic relationship between breaches of divisible shared obligations and shared responsibility for one IWA (or shared responsibility for several IWAs). Breaches of divisible shared obligations can result in three potential outcomes in terms of international responsibility: shared responsibility for one IWA, shared responsibility for multiple IWAs, or the responsibility of only one duty-bearer for an IWA (which is *not* shared responsibility). However, it should be pointed out that breaches of divisible shared obligations of a *positive* character cannot give rise to shared responsibility for one IWA.

Whether or not a breach of a divisible shared obligation gives rise to shared responsibility for one or several IWAs mainly depends of the factual circumstances of the situation in which the obligation is breached, which means that the outcome of a breach of a divisible shared obligation is dependent on extra-legal factors. First, a breach of a divisible shared obligation does not necessarily constitute a breach by all of its bearers. Due to its divisible structure of performance, it is possible for only one or some of its bearers to breach the obligation while others fulfil the obligation. Second, whether or not conduct in breach of a divisible shared obligation can be attributed to one, some or all bearers of the obligation depends on the factual circumstances that are specific to each case of a breach.

Chapter 6 Breaches of shared obligations and the content of shared responsibility

The implications of breaches of shared obligations for the content of shared responsibility depends, to a large extent, on whether the states and/or IOs involved are responsible for one IWA or for several IWAs.

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

The *divisible* nature of a shared obligation does not have automatic implications for the content of shared responsibility. When a divisible shared obligation is breached, the nature of the secondary obligations of cessation and reparation depends primarily on whether shared responsibility arises for one IWA or for several IWAs. If a breach of a divisible shared obligation gives rise to shared responsibility for one IWA (which is only possible if the obligation in question is of a negative character), any secondary obligation that arises is indivisible (much like the nature of secondary obligations that arise as a result of breaches of indivisible shared obligations).

However, if a breach of a divisible shared obligation gives rise to shared responsibility for several IWAs, matters become more complex. With regard to the obligation of cessation, it must be determined for each wrongful act whether it is of a continuing character. If so, all responsible states and/or IOs become bound to a divisible shared obligation of cessation that requires each of them to cease its own wrongful act only. With regard to the obligation of reparation, such an obligation arises for all responsible states only if a causal link can be established between each wrongful act and the damage.

This leaves the question of the nature of the obligation of reparation: are responsible states and/or IOs bound to provide full reparation or is each of them bound to

provide only a share of reparation? The positive law of international responsibility provides guidance only if each wrongful act can be causally linked to a specific part of the injury, in which case each responsible state or IO is bound to repair only that part of the damage that was caused by its own wrongful act. In many cases, however, it is not possible to identify in causal terms the precise part of the injury caused by each wrongful act, which means that the nature of the obligation of reparation remains unclear.

Chapter 7 Main findings and concluding remarks

This concluding chapter sets out the main findings of the study. The prime value of the present study's conceptualization of shared obligations lies in its introduction and analysis of the distinction between divisible and indivisible shared obligations, which up until now has not been elaborated in international legal scholarship. The chapter ends with some brief concluding remarks pertaining to the distinction between these two types of shared obligation.

