1

Setting the Scene

Sharing International Obligations

The performance of an international obligation is not always up to one state or international organization only. In practice there are various situations in which *multiple* states 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 (EU) and its member states, together with Iceland, to achieve a 20 per cent reduction of their aggregate greenhouse gas emissions by 2020;[1] the obligation of states parties to the Nuclear Non-Proliferation Treaty (NPT) to pursue negotiations on a treaty on nuclear disarmament;[2] 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 (EEZ);[3] 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 under the effective control of both states.[4]

In all of these examples, multiple states or international organizations are connected in the performance of an international obligation: one way

[1] Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, 'Report on Its Seventh Session' (2011), UN Doc. FCCC/KP/CMP/2011/10/Add.1, 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.

[2] Article VI Treaty on the Non-Proliferation of Nuclear Weapons, Washington, Moscow and London, 1 July 1968, in force 5 March 1970, 729 UNTS 161 (NPT).

[3] Article 63 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (UNCLOS).

[4] Committee Against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' (23 December 2014), UN Doc. CAT/C/AUS/co/4–5, para. 17.

or another, the obligations of multiple duty-bearers overlap. This can for instance be due to the fact that they have committed themselves to jointly work towards or achieve a common goal (think of the obligation of multiple states to pursue negotiations on a nuclear disarmament treaty) or because all of them are factually linked to the same situation (think of the obligation of two states to prevent the inhuman treatment of asylum seekers over which they both exercise effective control). Such situations raise questions regarding the performance of obligations (who is bound to do what) and international responsibility in case of a breach (who can be held responsible for what). This book puts forward a concept of shared obligations that captures the practical phenomenon of sharing international obligations and enables scholars and practitioners to tackle these questions.

In its conceptualization of shared obligations, this work engages in positive law-based categorization and systematization, which is combined with examples drawn from practice. Ultimately, it is contended that the sharing of obligations has relevant legal implications: it can influence the content and performance of obligations as well as the responsibility relations that arise in case of a breach. Depending on whether a particular shared obligation can be categorized as 'divisible' or 'indivisible', a breach of a shared obligation may even automatically give rise to the shared responsibility of all states or international organizations that bear the obligation. The content of such shared responsibility may itself consist of shared obligations of cessation and reparation.

Before elaborating on the structure and approach of the book (see Section 1.5), this chapter clarifies some key terms and situates the phenomenon of sharing international obligations within the current body of international legal doctrine. The conceptualization of shared obligations takes place in the context of the international law of obligations, and Section 1.1 describes what is meant when reference is made to this body of law. Section 1.2 subsequently focuses on the concept of shared responsibility in international law, briefly discussing the current state of affairs and offering some preliminary reflections on how the concept of shared obligations contributes to the ongoing discussion on problems of shared responsibility in legal doctrine (though the relevance of the concept is not limited to problems of shared responsibility).

Section 1.3 shows that the idea of sharing international obligations has been recognized in international legal literature and proceedings before international courts and posits that this reflects an (at times implicit) assumption that the sharing of international obligations has relevant legal implications. Nevertheless, the notion of shared obligations remains

conceptually underdeveloped, and there has been no comprehensive attempt in legal doctrine to define what it means to speak of shared obligations in international law. Section 1.4 briefly sets out how this lack of conceptualization of shared obligations is not a result of the notion's irrelevance but may be explained – at least in part – by a few fundamental choices that have been made during the International Law Commission (ILC)'s project of codification and progressive development of the international law of obligations. It is contended that these choices have contributed to an apparent tendency to avoid systematically engaging with the idea of obligations in international law. By developing a concept of shared obligations in international law and analysing the legal implications of sharing obligations, this book intends to demonstrate that this tendency has been unwarranted and there is much to gain from a more systematic approach to international obligations.

1.1 The International Law of Obligations

The analysis in this monograph is not limited to international obligations that arise from a particular substantive area of international law, such as international environmental law, international trade law or international human rights law. Rather, the conceptualization of shared obligations takes place in the general context of the international law of obligations, of which the law of international responsibility and the law of treaties are considered to be subsets.

While the law of obligations is not a term that is commonly employed in the context of international law,[5] many domestic legal systems are familiar with the notion.[6] In the municipal context 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 *not* that it provides an overview of (the content of) existing obligations, but rather that it provides for general rules regarding legal obligations and legal relations. Accordingly, general

[5] This is true at least if one focuses on literature in the English language.

[6] 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* (Cheltenham: Edward Elgar Publishing, 2010); Simon Whittaker, 'The Law of Obligations' in John Bell, Sophie Boyron and Simon Whittaker (eds.) *Principles of French Law* (Oxford: Oxford University Press, 2008); David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 2001); Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996).

topics covered by the law of obligations include the creation of obligations and corresponding rights (arising from contract, tort or unjust enrichment); the performance of obligations;[7] consequences of non-performance;[8] interpretation of contracts;[9] conditions of liability for damage;[10] and plurality of parties to an obligation or right.[11]

In a similar vein, one will find a body of general rules pertaining to international obligations and legal relations in the international legal system: an international law of obligations, with the law of treaties and the law of international responsibility[12] as its two main branches. In general, the law of treaties is concerned with 'whether there is a treaty obligation, what is its content, and who are the parties to the obligation',[13] whereas the law of international responsibility is concerned with the general question of (non-)performance of international obligations, regardless of whether those obligations arise from a treaty or from another source.[14] All in all,

[7] See e.g. articles 7:101–7:112 of the Principles of European Contract Law (PECL) in The Commission on European Contract Law, *Principles of European Contract Law: Parts I and II* (Ole Lando and Hugh Beale eds., The Hague/London/Boston: Kluwer Law International, 2000)

[8] See e.g. articles 8:101–8:109 PECL (on non-performance and remedies in general) and 9:101–9:510 PECL (on particular remedies for non-performance).

[9] See e.g. articles 5:101–5:107 PECL.

[10] See e.g. articles 2:101–3:201 of the Principles of European Tort Law (PETL) in European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Wien/New York: Springer, 2005).

[11] See e.g. articles 10:101–10:111 PECL (on plurality of debtors) and articles 10:201–10:205 PECL (on plurality of creditors) in The Commission on European Contract Law, *Principles of European Contract Law: Part III* (Ole Lando and others eds., The Hague/London/Boston: Kluwer Law International 2003). Various private legal systems distinguish between different categories of obligations in the case of a plurality of duty-bearers, and each category has different implications for (non-)performance. Indeed, '[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) 16 *Uniform Law Review* 549.

[12] See, generally, Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (London: Longmans, Green, 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* (Cambridge: Cambridge University Press, 2013) 99, where it is noted that the law of international responsibility is part of the international law of obligations.

[13] James Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 310.

[14] Crawford, 'Responsibility to the International Community', 310. See also article 12 ASR: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character* (emphasis added)'. The commentaries to article 12 ASR reiterate that 'the

the international law of obligations is not concerned with providing a comprehensive overview of the specific substance of each and every international obligation but provides a general legal framework for assessing the existence and content of obligations as well as the implications of their non-performance. The conceptualization of shared obligations in international law in this book is intended to be a contribution to this general legal framework.

1.2 Shared Responsibility in International Law

The concept of shared responsibility covers situations where two or more states or international organizations contribute to a single harm.[15] This may for instance include multiple states contributing to the pollution of an international watercourse or the killing of civilians in the context of a collaborative military operation carried out by multiple states and international organizations. In such situations, the main challenge faced by international lawyers is how to determine who can be held responsible for what under international law. The existing rules of international responsibility do not always provide clear-cut answers, though they form the starting point for anyone wishing to take on this challenge.

The rules on the law of international responsibility contain 'the general conditions under international law for the State [or international organization] to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.[16] The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on the Responsibility of International Organizations (ARIO) – while they lack formal status – codify and progressively develop these rules. The ASR are habitually relied upon by both

articles are of general application. They apply to all international obligations of States, whatever their origin may be'. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc. A/56/10 (2001), 55, para 3 (ASR with commentaries).

[15] André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 376. See also the Guiding Principles on Shared Responsibility in International Law, which adopts a more specific working definition of shared responsibility that focuses on contributions to an indivisible injury. André Nollkaemper and others, 'The Guiding Principles on Shared Responsibility in International Law' (2020) 31 *European Journal of International Law* 15.

[16] ASR with commentaries, 31, para. 1.

international and domestic courts and tribunals[17] and to a large extent are considered to be an authoritative reflection of customary international law[18] (though it should be noted that certain provisions appear to be more of a reflection of progressive development; at least at the time of their adoption).[19] The ARIO have been referred to by the European Court of Human Rights (ECtHR) and domestic courts on several occasions,[20] but do not enjoy the same level of authority as the ASR.[21] Nonetheless, there seems to be no equally or more authoritative starting point for any analysis that involves the international responsibility of international organizations.[22]

[17] See e.g. Responsibility of International Organizations. Compilation of Decisions of International Courts and Tribunals. Report of the Secretary-General. UN Doc. A/72/81 (2017); Responsibility of International Organizations. Compilation of Decisions of International Courts and Tribunals. Report of the Secretary-General UN Doc. A/75/80 (2020); Responsibility of States for Internationally Wrongful Acts. Compilation of Decisions of International Courts, Tribunals and Other Bodies. Report of the Secretary-General, UN Doc. A/62/62 (2007); Responsibility of States for Internationally Wrongful Acts. Compilation of Decisions of International Courts, Tribunals and Other Bodies. Report of the Secretary-General', UN Doc. A/74/83 (2019); Simon Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26 *Leiden Journal of International Law* 615.

[18] Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 *International and Comparative Law Quarterly* 535; David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *AJIL* 866.

[19] Caron, 'ILC Articles on State Responsibility'. Provisions that are often cited as examples of progressive development include article 41 and article 48 ASR, e.g. Annie Bird, 'Third State Responsibility for Human Rights Violations' (2010) 21 *EJIL* 883.

[20] Responsibility of International Organizations. Compilation of Decisions of International Courts and Tribunals. Report of the Secretary-General. UN Doc. A/72/81 (2017); Responsibility of International Organizations. Compilation of Decisions of International Courts and Tribunals. Report of the Secretary-General UN Doc. A/75/80 (2020).

[21] In its commentaries to the ARIO, the ILC notes that '[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility'. International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries*, UN Doc. A/66/10 (2010), 2–3, para. 5 (ARIO with commentaries).

[22] André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2014) 1, 3.

Both sets of articles reflect the basic principle of responsibility of a state or international organization for its own internationally wrongful act.[23] Responsibility for an internationally wrongful act is contingent on the presence of two elements.[24] First, conduct consisting of an act or omission should constitute a breach of an international obligation binding on a state or international organization, indicating that international obligations are central to the determination of responsibility. Second, the conduct in contravention of a legal obligation should be attributable to the state or international organization in question. It is not specified how these elements operate in cases where multiple states or international organizations are involved.

The commission of an internationally wrongful act brings with it particular legal consequences that together form the *content* of international responsibility. Amongst others, it follows from the ASR and ARIO that the state or international organization responsible for the internationally wrongful act is under an obligation to cease that act, as long as it is continuing,[25] and that it is under an obligation to make full reparation for the injury caused by the internationally wrongful act.[26] Again, these articles offer little guidance on the content of such obligations in situations where multiple states or international organizations share international responsibility.

The commentaries to the ASR emphasize that the principle that 'State responsibility is specific to the State concerned' – also referred to as 'the principle of independent responsibility' – underlies the articles as a whole.[27] This principle has been linked by some to the principle of exclusive responsibility, which is taken to mean that conduct is commonly attributed to one actor only.[28] Due to the influential role afforded

[23] This basic principle is affirmed in article 1 ASR, which provides that '[e]very internationally wrongful act of a State entails the international responsibility of that State'. See also Crawford, *State Responsibility: The General Part*, 51. However, it must be noted that the ARIO have opted for a broader opening article. Article 1 ARIO stipulates that the Articles apply to 'the international responsibility of an international organization for *an* internationally wrongful act' (rather than solely to the responsibility of an international organization for its *own* wrongful acts). See Nataša Nedeski and André Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"' (2012) 9 *International Organizations Law Review* 33, 42–43.

[24] Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 193.

[25] Article 30(a) ASR and Article 30(a) ARIO.

[26] Article 31 ASR and Article 31 ARIO.

[27] ASR with commentaries, 64, para 1.

[28] Nollkaemper and Jacobs, 'Shared Responsibility', 383.

to this principle, the ASR and ARIO appear particularly suited to provide guidance on questions of international responsibility in situations where one state or international organization is exclusively responsible for its own internationally wrongful act, which independently produces a particular harm. Granted, in a concrete case there may be difficulties in establishing, for instance, whether that one state or international organization has actually breached its international obligation; whether a particular threshold for attribution of conduct has been met or whether its wrongful act has actually caused a specific injury. Nonetheless, to a large extent one may find guidance for answering these questions in the ASR and ARIO.

This same framework of international responsibility offers considerably less guidance when it comes to questions of shared responsibility; a point that has been repeatedly underlined in legal literature.[29] It should be emphasized that the basic principle of responsibility of a state or international organization for its own internationally wrongful act does not preclude a finding of shared responsibility.[30] After all, multiple states or international organizations may very well contribute to a single harm through their own internationally wrongful acts. However, the potential involvement of multiple actors adds a layer of complexity to questions of international responsibility that cannot easily be untangled on the basis of the ASR and ARIO alone.

The ASR and ARIO each contain precisely one provision in which the possibility of shared responsibility is explicitly acknowledged. Article 47 ASR and article 48 ARIO provide that 'where several [States or international organizations] are responsible for the same internationally wrongful act, the responsibility of each State [or international organization] may be invoked in relation to that act'. Additionally, in its commentaries, the ILC recognizes that 'situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage'.[31]

[29] John Noyes and Brian Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale Journal of International Law* 225; Roger Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 *Pepperdine Law Review* 233, 240; Nollkaemper, 'Introduction', 13 *et seq*.

[30] André Nollkaemper and Ilias Plakokefalos, 'Conclusions: Beyond the ILC Legacy' in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2014) 341, 343 *et seq*.

[31] ASR with commentaries, 125, para 8. On the distinction between shared responsibility for a single wrongful act and shared responsibility for multiple wrongful acts, see Section 5.1.

Despite this explicit acknowledgement of shared responsibility, various questions raised by situations of shared responsibility are either only superficially addressed in the ILC's work on international responsibility, or not at all. How does one arrive at the determination that multiple states or international organizations share responsibility under international law? What are the consequences of such a determination for the content of their international responsibility, in particular the obligations of cessation and reparation, and what can injured parties claim from whom? And in the case that only one of the responsible parties provides full reparation, does it have a right of recourse against others that were co-responsible?

In recent years an expanding body of legal scholarship has set out to tackle these (and other) questions of shared responsibility in international law. Interestingly, in their analysis many scholars have focused primarily on the application of the element of attribution of conduct in situations of shared responsibility, by exploring the possibility of dual or multiple attribution of conduct.[32] Other contributions to the literature on shared responsibility focus on the issue of responsibility 'in connection with' the acts of others,[33] such as responsibility for aid or

[32] Tom Dannenbaum, 'Dual Attribution in the Context of Military Operations' in Ana Sofia Barros, Cedric Ryngaert and Jan Wouters (eds.), *International Organizations and Member State Responsibility* (Leiden: Brill–Nijhoff, 2016) 114; Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2014) 60; Enzo Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart, 2013) 295; Paolo Palchetti, 'The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations' (2013) 95 *International Review of the Red Cross* 727; Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 281.

[33] See articles 16–18 ASR, articles 14–17 ARIO and articles 58–61 ARIO. With the exception of aid or assistance, these provisions are often said to provide for 'the attribution of responsibility', which some argue provides for a separate ground for responsibility that is distinct from the basic principle of responsibility of a state or international organizations for its own wrongful act, as it is not based on wrongfulness as such. See James Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2014) 98, 104. For a critique of this position, see Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *International*

assistance.[34] However, the relationship between the sharing of international obligations and the shared nature of international responsibility remains undertheorized.

This book aims to fill this gap in legal scholarship. While it is not claimed that the concept of shared obligations is the solution to all problems of shared responsibility, it will be demonstrated that a more systematic approach to the nature of obligations considerably contributes to a better understanding of various problems of shared responsibility.

The first contribution of approaching questions of shared responsibility through the lens of the concept of shared obligations will be to the question of determining *when* multiple states or international organizations share responsibility. It will be shown that a breach of a shared obligation may automatically result in shared responsibility, depending on its categorization as 'divisible' or 'indivisible'. The second contribution will be to the question of determining what is the *content* of shared responsibility. Conceiving of the content of shared responsibility as consisting of shared obligations incumbent on all responsible actors offers guidance for determining which of the responsible states or international organizations is bound to do what in terms of cessation and reparation. The third contribution will be to procedural questions that may arise in the context of shared responsibility: what can injured parties claim from whom when the obligation that has been breached is shared by multiple states or international organizations, and can they sue only one of the responsible parties or must they sue all of them together?

Finally, it should be underlined that the relevance of the shared obligations discussion is not limited to problems of shared responsibility. It is also important for answering questions of (non-)performance: which bearer of a shared obligation is bound to do what? This is a question that arises *before* arriving at the stage of (shared) responsibility. By performing the obligations that they share, states and international organizations could effectively make sure that they do not arrive at that stage.

Organizations Law Review 15, 25. A different approach is adopted in Nollkaemper and others, 'Guiding Principles on Shared Responsibility', 37.

[34] Miles Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015); Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Oxford: Hart, 2016).