

Nedeski, Nataša: Shared Obligations in International Law. Cambridge UK: Cambridge University Press 2022. ISBN 978-1-108-84135-1 (hardback). xiv, 229 pp. £85.00

In international law, there are various situations where ‘multiple States or international organizations are connected in the performance of an international obligation’ (p. 1). There, a concept of shared obligations comes into play. Nataša Nedeski’s monograph, *Shared Obligations in International Law*, aims to analyse this concept and its legal implications in international law (pp. 1-3). In the introduction, Nedeski gives a few examples of shared obligations: ‘the obligation of the European Union (EU) and its member states, together with Iceland, to achieve a 20 percent reduction of their aggregate greenhouse gas emissions by 2020; the obligation of states parties to the Nuclear Non-Proliferation Treaty (NPT) to pursue negotiations on a treaty on nuclear disarmament; 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); 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’ (footnote omitted, p. 1).

To examine the legal implications of shared obligations, there is a need to consider the consequences of a breach of a shared obligation as well. Hence the book also examines a concept of shared responsibility. Indeed, Chapters 5 and 6 are allocated to the issue of shared responsibility. Overall, despite the title, the book deals with both shared obligations and shared responsibility. Given that the concept of shared obligations and that of shared responsibility are closely linked, Nedeski’s approach would be relevant. While some important previous studies exist with regard to shared responsibility,¹ studies of shared obligations in international law have been underdeveloped. A distinctive feature of Nedeski’s book consists in the author’s approach that examines the concept of shared responsibility through the lens of shared obligations.

The book, which is based on the author’s PhD dissertation at the Amsterdam Center for International Law, consists of seven chapters. Following the introduction (Chapter 1), in Chapter 2, Nedeski clarifies the concept of shared obligations in international law. In this regard, Nedeski argues that a shared obligation is characterised by three elements: (1) the existence of

¹ See in particular, André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press 2014); André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press 2017).

multiple duty-bearers, (2) bound to a similar international obligation, and (3) pertaining to the same constellation of facts. The conceptualisation of a shared obligation only constitutes the first step in addressing various questions regarding (non-)performance of that obligation. Here, Nedeski implies that two different types of shared obligations, that is, indivisible and divisible shared obligations, will be the key in deciphering the implications of the shared international obligations (p. 52).

Before an examination of the two types of shared obligations, however, Nedeski reviews the development of the international law of obligations beyond bilateralism in Chapter 3. In this chapter, Nedeski confirms that the law of treaties and the law of international responsibility have moved away from traditional bilateralism (p. 79 and p. 93). Nedeski then analyses a correlation between obligations and rights in legal relationships. According to Nedeski, ‘each legal relation – whether bilateral or multilateral – consists of two legal positions: an obligation and a correlative right’ (p. 66). In this regard, Nedeski shows three figures that visualise (1) a bilateral legal relationship, (2) a multilateral legal relationship with a plurality of duty-bearers, (3) a multilateral legal relationship with a plurality of right-holders, respectively. The figures are helpful to understand the correlation between obligations and rights. In this regard, the concept of a correlative right may need further consideration. For instance, ‘States have the obligation to protect and preserve the marine environment’ under Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS).² As some commentators suggest, arguably the obligation to protect and preserve the marine environment is regarded as an obligation *erga omnes*.³ Here, it might have been useful if the author could examine the content of the correlative right corresponding to the obligation *erga omnes*.

In Chapter 4, Nedeski considers the distinction between indivisible and divisible shared obligations in international law. According to Nedeski, ‘[a]n indivisible shared obligation binds multiple states or international organizations to achieve a common performance’ (p. 98). By contrast, ‘[w]hen multiple states or international organizations are bound to a divisible shared obligation, each is bound only to its own “share”’ (p. 102). In addition to this, Nedeski introduces sub-categories of shared obligations, that is, a shared obligation as a positive or negative obligation and as an obligation of conduct

² United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

³ James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford: Oxford University Press 2017), 24–25; Yoshifumi Tanaka, ‘The Legal Consequences of Obligations *Erga Omnes* in International Law’, NILR 68 (2021), 5.

or result. In summary, the categorisation above mentioned provides indicators to determine ‘whether the bearers of a shared obligation are bound to achieve a common performance or whether they are each bound to their own share’ (p. 127). In the author’s view, ‘[w]hen a shared obligation is a positive obligation of conduct or a negative obligation of result, it is inherently of a divisible nature’ (p. 141). However, ‘a shared obligation can only be indivisible if it is a positive obligation that obliges its bearers to achieve a common result’ (pp. 141–142). Related to this, Nedeski notes that ‘indivisible shared obligations are *always* positive obligations of result’ (emphasis original, p. 126). By applying the indicators, Nedeski considers that an obligation of multiple States to reduce *their combined* amount of greenhouse gas emissions by 25 percent by the year 2020 constitutes an *indivisible* shared obligation. By contrast, an obligation of multiple States to each reduce *their own* greenhouse gas emissions by 25 percent by the year 2020 constitutes a *divisible* shared obligation. According to Nedeski, an obligation of multiple coastal States to seek to agree upon the measures necessary to ensure the conservation of shared fish stocks and an obligation of States X and Y not to torture individuals in a detention centre over which they both exercise effective control also constitute a divisible shared obligation (p. 124). To a certain extent at least, Nedeski’s argument, which is summarised in Table 4.1 (p. 124), contributes to clarifying the nature of shared obligations. As the author accepts, however, the distinction between obligations of result and conduct is not always apparent (p. 117). Accordingly, the practical application of the indicators may not be free from challenges.

The following chapters deal with shared responsibility. In Chapter 5, Nedeski addresses the determination of shared responsibility. In the case of a breach of an indivisible shared obligation, the failure to fulfil the obligation is attributable to all duty-bearers (p. 157). Consequently, as Nedeski rightly argues, ‘a breach of an indivisible shared obligation can only result in one possible outcome – shared responsibility for one wrongful act’ (p. 165). By contrast, a breach of a divisible shared obligation results in three possible outcomes, that is, (1) shared responsibility for a single wrongful act, (2) shared responsibility for multiple wrongful acts, or (3) the responsibility of only one of the States or international organizations that bear the obligation (p. 178, p. 222). Following Nedeski’s view, cases (2) and (3) can be dealt with by ordinary rules of independent responsibility. It would seem to follow that shared responsibility of duty-bearers creates particular legal issues in the cases of a breach of an indivisible shared obligation and a breach of divisible shared obligations of case (1) only. Apart from the two situations, a breach of a shared obligation can be attributable to each duty-bearer separately and independently. Specifically, Nedeski examines the (in)divisible nature of a

shared obligation in eight cases: (1) the shared obligation to rehabilitate Nauru's worked-out phosphate lands, (2) the shared obligation to take appropriate steps to maintain security and public order in and around the Coquelles Terminal, (3) the shared obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in Iraq, (4) the shared obligation to provide 12,000 million ECU in financial assistance to the ACP States, (5) the shared obligation to strictly limit pollution from land-based sources in Lake Étang de Berre, (6) the shared obligation to achieve a 20 percent reduction of aggregate greenhouse gas emissions, (7) the shared obligation to take all measures within one's power to prevent the Srebrenia Genocide, and (8) the shared obligation to ensure that activities in the Area are carried out in accordance with Part XI UNCLOS (pp. 165-178). The case-study seems to suggest that in cases (2), (3), (7), (8), and possibly (5), a failure to fulfil a shared obligation can be attributable to each duty-bearer separately.⁴

In Chapter 6, Nedeski examines cessation and reparation for breaches of shared obligations. What is of particular interest is the application of the notion of joint and several liability to a breach of a shared obligation (pp. 192 ff.). In this regard, Nedeski argues that '[i]n the case that the injury is not divisible on a factual basis, the contributing tortfeasors are each liable for the full amount of compensation due' (footnote omitted, p. 201) and that 'this outcome amounts to an indivisible shared obligation of reparation that is in large part reminiscent of the notion of joint and several liability in domestic legal systems' (p. 201). Generally, the tone of Nedeski's argument seems to support the notion of joint and several liability in a particular context of shared responsibility for a single wrongful act. The question is: from where does the notion of joint and several liability derive in international law? No serious legal issue arises when joint and several liability are provided in a treaty.⁵ An issue is whether or not the notion of joint and several liability exists as a rule of customary international law. There, it might be relevant to examine the question of whether there is a general practice that is accepted as

⁴ The obligation to strictly limit pollution from land-based sources in Lake Étang de Berre can, according to the author, be interpreted as a divisible or indivisible obligation. If the obligation compels its bearers to take 'appropriate measures' without having to achieve the result of a strict limitation of pollution, the obligation can be divisible. If the obligation requires its bearers to achieve the result of a strict limitation of pollution, however, the shared obligation is to be qualified as indivisible (pp. 172-174). While the shared obligation to achieve a 20 percent reduction of aggregate greenhouse gas emissions is considered as an indivisible obligation, according to Nedeski, 'such a result would have been precluded by the *lex specialis* on international responsibility enshrined in the Kyoto Protocol' (p. 175).

⁵ E.g. Art. 139(2) UNCLOS; Art. IV of the Convention on the International Liability for Damage Caused by Space Objects, 29 March 1971, 961 UNTS 187.

law (*opinio juris*) on this matter.⁶ Related to this, Nedeski argues that '[i]n many domestic legal systems, joint and several liability is the accepted standard in cases of indivisible damage' (footnote omitted, p. 194). If so, one wonders if it is possible to consider the notion of joint and several liability as a 'general principle[...] of law recognized by civilised nations' under Article 38(1)(c) of the Statute of the International Court of Justice.⁷ It might have been helpful if the author had discussed this issue as well. Another undiscussed issue in this context concerns parties that are entitled to claim reparation. It is beyond question that injured parties are entitled to claim full reparation. The question is whether or not parties other than injured parties can claim reparation in a context of shared responsibility. Actually the question can arise, for instance, when considering shared obligations and responsibility in the protection of the environment of the high seas. Readers might wish to know Nedeski's view on this matter.

Another interesting issue in this chapter concerns the application of the indispensable third-party rule or the *Monetary Gold* rule. There, Nedeski identifies two interpretations of the *Monetary Gold* rule. One is the broad interpretation. According to this interpretation, whenever the determination of one state's responsibility would simultaneously amount to a decision of responsibility of non-parties, an adjudicative body should decline to rule on the matter. The other is the restrictive interpretation. According to this interpretation, the application of the *Monetary Gold* rule is limited to the situation where determining a non-party's responsibility is required as a logical prerequisite. Nedeski is supportive of the restrictive interpretation (pp. 215–218). As Nedeski argues, 'the determination of a breach of a shared obligation will amount to the simultaneous determination of the responsibility of another' (p. 217). If the broad interpretation were applied, the determination of shared responsibility by an adjudicative body will be significantly hindered. Hence Nedeski's view seems to be reasonable with a view to facilitating the determination of responsibility of bearers of shared obligations in international adjudication.

Finally, in Chapter 7, Nedeski succinctly summarises the arguments of the book. There, Nedeski highlights that 'there are in fact strong arguments for a more systematic approach to international obligations, notably when obligations are shared by a plurality of states or international organizations' (p. 219).

⁶ International Law Commission, Draft Conclusions on Identification of Customary International Law (2018), Conclusion 2, available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf>.

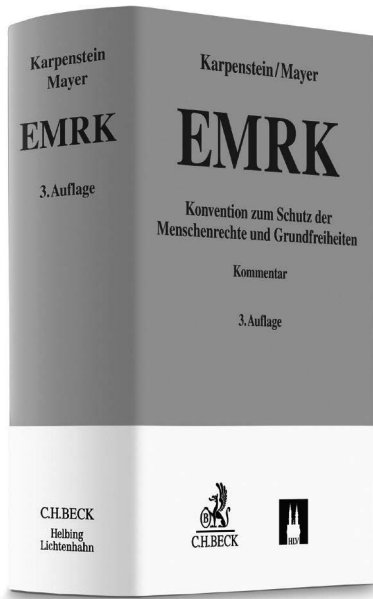
⁷ Statute of the International Court of Justice, 26 June 1945, available at <<https://www.icj-cij.org/en/statute>>. On this issue, see Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in: Nollkaemper and Plakokefalos, *Principles* (note 1), 244–249.

Overall it may be said that Nedeski adequately clarifies the legal structure of shared obligations in international law. In particular, the introduction of two types of shared obligations, that is, indivisible and divisible shared obligations, is noteworthy. Nedeski's book also contributes to clarifying the legal relationship between breaches of indivisible/divisible shared obligations and the determination of shared responsibility. Nedeski's contribution further enriches academic studies regarding obligations in international law.

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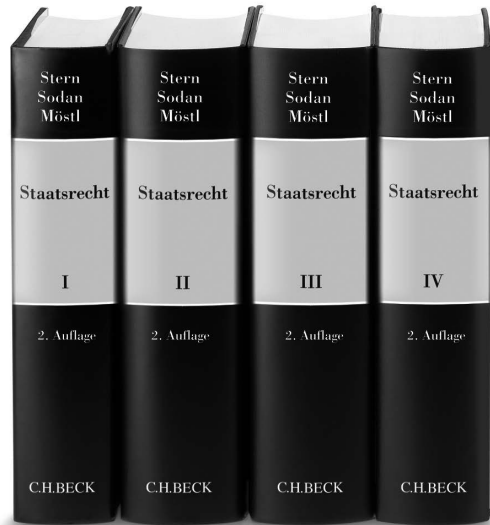
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