1. Setting the scene

1. AIM OF THE BOOK

Since the Second World War, international organizations have proliferated1 around the world. There are currently 600 international organizations which represent more than threefold the number of States.2 These international organizations respond to an institutional need for inter-State cooperation in order to face global and regional matters.

The expansion of international organizations may be noted in a wide array of activities: they may intervene in peacekeeping operations and military actions; they may sometimes exercise governmental administrative powers over territories; they may regulate worldwide economic governance; they may promote human rights, etc. In general, international organizations are increasingly involved in international policy-making and standard-setting. Some of them are taking over important parts of governmental power and even act as substitutes for States in specific instances.

Hence, an efficient accountability system is needed to review the decisions taken by these organizations and to sanction any misconduct, similarly to the checks and balances established to control democratic governments. As observed by Thomas Hammarberg, a former Council of Europe (CoE) Commissioner for Human Rights, ‘an international accountability deficit is no good for anyone, least of all the local population. No-one, especially an international organisation, is above the law’.3

In cases where the rights of individuals may be threatened or violated by international organizations, the aggrieved individual may seek to...

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3 Thomas Hammarberg, Former Council of Europe Commissioner for Human Rights, ‘International Organisations acting as quasi-governments should be held accountable’, 8 June 2009, also available on the Commissioner’s website at http://www.coe.int/en/web/commissioner/. 

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obtain a remedy from the international organization. However, this entails two necessary conditions: first, this presupposes the existence of a legal regime governing the responsibility of international organizations towards individuals; second, there has to be an accountability mechanism where individuals can claim such responsibility and consequently ask for redress.

Nowadays, it is clear that both foundations are to a large extent shaky or even inexistent. In relation to the former, the main body of rules governing the responsibility of international organizations is constituted by the Articles on the Responsibility of International Organizations (ARIO) adopted by the International Law Commission in 2011. In addition to the severe criticisms raised regarding these Articles and to the fact that they have not yet been consecrated in an international agreement, it is important to note that these ARIO do not cover responsibility to any person or entity other than a State or an international organization. As to the latter condition, one may deplore that, in the vast majority of cases, there is no dispute settlement mechanism available for individuals to bring cases against international organizations, neither at the global international level nor at the level of the international organizations themselves. Except for a few dispute settlement mechanisms established in specific fields by international organizations – mainly in relation to their employment-related disputes – the only option that remains available to individuals is at the national level and in domestic courts, where international organizations generally enjoy immunity from jurisdiction and immunity from enforcement. Hence, individuals aggrieved by acts of international organizations are frequently left in the cold.

An eloquent contextualization of this problem is provided by one of the most tragic events of the end of the last century, namely the genocide in Srebrenica. In June 1995, some 7,600 male Muslim civilian inhabitants of the enclave of Srebrenica in Bosnia were murdered by Bosnian Serb forces. A small and lightly armed Dutch peacekeeping

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4 The United Nations General Assembly took note of the ARIO, annexed their text to Resolution 66/100 and commended the ARIO to the attention of national governments and international organizations.

5 This expression stems from Armin von Bogdandy and Mateja Steinbrück Platise, ‘ARIO and Human Rights Protection: Leaving the Individual in the Cold’ (2012) 9 IOLR 67.

force – part of the United Nations Protection Force (UNPROFOR) – had been deployed to guard the enclave as a ‘safe area’. However, it did not manage to prevent the massacre. Extensive debates on the question of responsibility took place both in the Netherlands and at the UN level. The question was raised whether the UN had failed in its mission by allowing the Dutch to send a small military contingent and refusing airstrikes against the Bosnian Serb forces. In 2007, the ‘Mothers of Srebrenica’ Foundation (Stichting) – representing some 6,000 relatives of the victims of the massacre – started judicial proceedings before Dutch jurisdictions to condemn both the UN and the Dutch State for their failure to prevent the massacre and to claim financial compensation. In addition, individual Srebrenica survivors and victims’ families filed claims for compensation against the Dutch Government. These cases will be extensively discussed in this book. In short, the domestic jurisdictions rejected the claims as far as the UN’s responsibility was concerned because of the latter’s absolute immunity before national jurisdictions. This case and other situations in which individuals were deprived of their right of access to justice have led certain scholars to question whether the immunity of international organizations should not be equated with impunity.7

It is not the aim of this book to comprehensively discuss all aspects of the responsibility of international organizations towards individuals. Even if the ARIO and the different types of relationships between international organizations and individuals are examined in this first part, the general approach adopted within this book largely focuses on the second aspect discussed above: the existence and the quality of dispute settlement mechanisms for individuals, where this responsibility can be discussed.

Further, this book does not aim to cover all types of individual rights that can be threatened or violated by international organizations, but rather focuses on human rights violations. There is no specific limitation in the scope of this book as to the nature or type of human rights violations taken into consideration. Nevertheless, it should be noted that the regime of UN Security Council sanctions will not be studied in this book. There are three main reasons justifying this exclusion: first, this constitutes a very specific field – it is limited to sanctions exclusively adopted by Resolutions of the UN Security Council in its fight against terrorism – which runs counter to the general approach adopted in this book; second, this topic has already

been carefully scrutinized by other authors, including the excellent doctoral thesis of Antonios Tzanakopoulos; third, the present book is based on a PhD that was part of an inter-university research project on the accountability for human rights violations by international organizations, and it has been agreed among the different researchers that the topic of the accountability of the UN Security Council for human rights violations would be examined in another PhD project than the present one.

At first sight, the focus on human rights violations might seem far-fetched. *Prima facie*, one may consider that it is part of the DNA of international organizations to contribute to the global or regional public good and to protect and/or promote human rights. Numerous international organizations have indeed been set up with this specific aim among their primary or accessory goals, such as the UN, the African Union (AU), the CoE, the European Union (EU) and the Organization of American States (OAS). This does not prevent human rights violations by international organizations from occurring in practice though. ‘Together with an increasing impact of the activities of international organisations on the lives of people around the world, inevitably situations multiply in which individual human rights (political, civil, but also economic, cultural and social) may be threatened or violated through the actions, operations or policies of such organisations.’

Another misleading temptation may be to localize such human rights violations exclusively in the field of peacekeeping operations led by international organizations, such as the UN, the North Atlantic Treaty Organization (NATO), the EU, the AU and the OAS. The most striking examples that come to mind in this regard are the Srebrenica massacre and the cholera outbreak in Haiti. Yet, there are – regrettably – numerous examples of human rights violations attributable to international organizations in other fields of activities, such as international territorial administration and economic governance, as well as in their relations with their own staff.

This book examines the right of access to justice of individual victims of human rights violations by international organizations. A central position is occupied by the right of access to justice. It is not only a

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human right in itself, but also operates ‘as a mechanism for ensuring the observance of other human rights’. As recently held by the Italian Court of Cassation,

It would be arduous to identify what would be left of a right if it could not be vindicated before a court in order to obtain effective protection [...]. The right to a judge and to effective judicial protection of inviolable rights is certainly among the grand principles of legal civilization of any democratic systems of our times.

This book seeks to establish a list of institutional and procedural requirements of the right of access to justice, and applies these requirements to international organizations’ dispute settlement mechanisms and more generally to the available dispute settlement mechanisms for individuals confronted with human rights violations by international organizations. In this view, it is necessary to scrutinize the dispute settlement mechanisms established by international organizations to handle individual complaints. Moreover, global mechanisms such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), regional human rights jurisdictions, UN human rights treaty monitoring bodies and the creation of a World Court of Human Rights are also taken into consideration to assess whether these mechanisms may be envisaged as dispute settlement mechanisms for individual victims of human rights violations by international organizations.

Furthermore, the right of access to justice constitutes one of the leading issues raised by individual victims in the face of international organizations’ immunity from jurisdiction or execution before national jurisdictions. This book proposes a thorough examination of these contradictory principles and of the case-law adopted by international and national jurisdictions in this area. One of the most debated issues consists in the question of whether individuals’ right of access to justice should permit national courts to reject the immunity of international organizations, except where they have established an adequate alternative dispute settlement mechanism.

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11 Court of Cassation, Simoncioni and Others v. Germany and President of the Council of Ministers, 29 October 2014, No. 238/2014, ILDC 2237 (Italy).
It is essential to note that the case-law analysed in Chapter 5 (section 8) is not limited to cases concerning human rights violations by international organizations but covers all types of disputes between international organizations and individuals handled by national jurisdictions. Section 8 of Chapter 5 is subdivided following the type of relations between individuals and international organizations – contractual relations, staff relations and third parties, which is itself subdivided, following the type of activities of international organizations into peace and security operations, international territorial administration and economic governance. Limiting the case-law analysed in this book to human rights violations would deprive the analysis of valuable and interesting material for the assessment of the conflict between the right of access to justice of individuals and international organizations' immunities. The ultimate goal of this empirical review of national case-law is the identification of general trends in national case-law for each of the different categories of relationships and/or activities. Nonetheless, despite this holistic approach of national case-law, human rights remain the fil rouge of the analysis, and references and/or comparisons to human rights will be highlighted as much as possible in this section. Furthermore, the specific question of whether human rights violations may constitute exceptions to these general trends will be assessed whenever such a question proves to be relevant.

The general aim of this book is to suggest an effective articulation of the right of access to justice for individuals facing human rights violations by international organizations. This outcome is presented in the final chapter of this book, which consists of general conclusions drawn on the basis of the empirical analysis conducted in the book and a set of normative suggestions vis-à-vis international organizations, their Member States, and national judges confronted with cases involving individuals' claims for human rights violations by international organizations. The purpose of the research is thus ultimately practical.

This book adopts a transversal approach, which is why it is not limited to one or several international organizations but instead seeks to define a general system applicable to all international organizations. Nevertheless, some parts of the research require a descriptive analysis of international organizations, for instance regarding their relations with individuals or the dispute settlement mechanisms established to handle private law complaints. These features may certainly vary from one organization to another. However, it seems unrealistic to announce an exhaustive overview of all systems established by international organizations. Consequently, a deliberate choice has been made to analyse these systems.
from a general perspective and to highlight specific systems only when these are particularly relevant in order to resolve the questions raised in this book.

As to its structure, the book starts with a discussion of a few preliminary concepts, including the responsibility of international organizations, the attribution of acts to international organizations, the responsibility of Member States in relation to human rights, and the categorization of relations between international organizations and individuals, which constitutes a necessary preliminary to any determination of the accountability of international organizations.\textsuperscript{12} The second chapter explores the human rights obligations of international organizations. It is also the occasion to present a number of illustrations of human rights violations by international organizations in different fields of activity. Despite its numerous legal bases in both international and national legal texts, access to justice as a human right remains problematic in international law.\textsuperscript{13} The third chapter examines this concept, its sources as well as its institutional and procedural requirements, in order to set the stage for the next part, focusing on dispute settlement mechanisms established by international organizations. Chapter 4 of this book inspects the existing international dispute settlement mechanisms where individuals can bring their claims against international organizations. After an introductory section, this chapter is subdivided firstly into a section exploring global mechanisms, including the contentious and advisory competences of the ICJ, the PCA and the competences of regional human rights jurisdictions. In addition, the relevance of non-judicial accountability is assessed with a focus on the UN human rights treaty monitoring bodies. Finally, this section also evaluates the opportunity and the feasibility of the creation of a World Court on Human Rights. The second main section of this chapter scrutinizes dispute settlement mechanisms established by international organizations mainly following categories of relations with individuals: contractual relationships, employment relations and third parties. Given the lack of global mechanisms and the inadequacy of most dispute settlement mechanisms established by international organizations to concretize the right of access to justice of individual victims of human rights violations by international organizations, attention is focused on the national level. At this level,
international organizations generally invoke their immunity from jurisdiction or their immunity from enforcement. Yet, the case-law is not always consistent in this regard and recent decisions demonstrate that some judges may be inclined to set aside these immunities in favor of the right of access to justice of individuals. Chapter 5 focuses on the regime of immunities of international organizations, which includes their legal basis, their scope, plus the waivers and their exceptions, together with the case-law rendered by both the ECtHR and national jurisdictions in this area. Finally, a number of general conclusions are made in Chapter 6 on the basis of the empirical analysis conducted in the book. Moreover, a set of normative proposals is suggested, both vis-à-vis international organizations and vis-à-vis national judges confronted with cases involving individuals’ claims regarding human rights violations by international organizations.

2. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

While academic debates have focused on the international legal personality of international organizations for most of the second half of the 20th century, their responsibility and/or accountability have only been taken into consideration lately. It was indeed only in the 1990s that international lawyers became aware of the increasing importance of international organizations and consequently raised the question of their responsibility and/or accountability in case of wrongful acts attributable to these organizations.

The principle of liability as a corollary of the powers and rights of international organizations is generally approved, even by international organizations themselves.\(^\text{14}\) For instance, the UN Secretary-General stated in 1996 that ‘[t]he international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal

\[^{14}\text{See Philippe Sands and Pierre Klein, Bowett’s Law of International Institutions (6th edn, Sweet & Maxwell 2009) 518 and references quoted in footnote 255.}\]
personality and its capacity to bear international rights and obligations’. This view was confirmed by the ICJ in the Cumaraswamy advisory opinion.

The concepts of accountability and responsibility have progressively gained the attention of international associations and agencies, such as the Institut de droit international (IDI), the International Law Association (ILA) and the International Law Commission (ILC). While both the IDI and the ILA concentrated their analysis on the concept of the ‘accountability’ of international organizations, the ILC studied the ‘international responsibility’ of these organizations. Although these terms have often been equated, it is important to clearly distinguish between them.

2.1 Concept of Responsibility under International, National and Internal Law

As observed by the Permanent Court of International Justice (PCIJ) in the Chorzów Factory case in 1928, ‘it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation’. It is one of the most settled principles of international law, that a violation of international law entails responsibility.


16 In an obiter dictum, the ICJ stated that ‘[t]he United Nations may be required to bear responsibility for the damage arising from [acts performed by the United Nations or by its agents in their official capacity]’, ICJ, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Rep. (1999) 62, para. 66.
19 The ILC included the topic of the responsibility of international organizations in its work in 2000; ILC, Report on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August 2000, UN Doc. A/55/10, 131.
20 PCIJ, Case Concerning the Factory at Chorzów, 13 September 1928, Publications of the PCJI Series A No. 17, 29.
According to Article 1, '[e]very internationally wrongful act of a State entails the international responsibility of that State'. In its comments to the Draft Articles, the ILC noted that the notion of responsibility for wrongful conduct may be considered as a ‘basic element in the possession of international legal personality’, but also added that ‘special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles’.

The transposition of this principle of responsibility to international organizations is not self-evident because of the specific nature of international organizations. They are creations by Member States to institutionalize their cooperation. Hence, any discussion on the responsibility of international organizations first requires examining the attribution of conducts between the international organization and its Member States, which may imply lifting the organization’s ‘institutional veil’. The issue is further complicated by the fact that most constituent charters do not contain any responsibility clauses.

In the 1990s, the topic of responsibility of international organizations progressively gained the attention of legal scholars, associations and international agencies. In 1995, the IDI adopted a Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties. Although this Resolution primarily focused on the Member States’

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23 Ibid., comments to Draft Article 1.
26 Klabbers (n. 21) 272.
28 IDI, Resolution on the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties (n. 17) 445.
Setting the scene

concurrent or subsidiary liability, it contained interesting statements on international organizations, such as the recognition that they could have obligations under both international law and the law of a particular State. As a corollary, the IDI acknowledged that the responsibility of international organizations could arise under both domestic and international law.

Later developments on the topic of the responsibility of international organizations mainly addressed the international aspect of responsibility. Indeed, the ILC focused its work exclusively on the international aspect of the responsibility of international organizations, and many academics followed a similar path, defining ‘responsibility’ as referring to ‘the legal consequences of noncompliance with an international obligation by conduct that is attributable to the organization’.32

Nevertheless, the relevance of responsibility under national law should not be undermined. International organizations have to comply with the national legislation of the country in which they carry out their activities.

In addition to the responsibility under international and national law, the responsibility of international organizations may flow from a breach of their own internal rules. Indeed, the internal law of certain international organizations creates a regime of responsibility for damages caused by organs or agents in the performance of their functions, such as Article 340 of the Treaty on the Functioning of the European Union (TFEU). According to Article 268 TFEU, the Court of Justice of the European Union (ECJ) has jurisdiction on matters of non-contractual liability. A similar system has been organized by Article 22 of Annex III

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30 IDI, Resolution on the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties (n. 17) Article 4, 466.

31 See for instance Klabbers (n. 21) 272.

32 Wellens, Holder and Hafner (n. 27) 236.


34 OJ C 85 (30 March 2010).
Access to justice and international organizations

of the UN Convention on the Law of the Sea (UNCLOS). Yet, such regimes remain rather exceptional.

2.2 International Law Commission’s Work on the Responsibility of International Organizations

The ILC decided to include this topic in its work programme in 2000. Two years later, it established a Working Group and appointed a Special Rapporteur, Professor Giorgio Gaja. From its fifty-fifth (2003) to its sixty-third (2011) sessions, the ILC received eight reports from the Special Rapporteur and composed a set of 67 Articles. It adopted these Draft Articles in 2011 and submitted them to the General Assembly, which took note of these articles in Resolution 66/100, adopted by consensus on 9 December 2011.

As stated in Article 1 of the ARIO, these articles apply to the international responsibility of an international organization for an internationally wrongful act. This confirms that, as opposed to the approach followed by the IDI, the ILC merely scrutinizes the international law aspect of the responsibility.

The aim of these ARIO is to codify the rules applicable to the international responsibility of all international organizations. The core principles are mentioned in Articles 3 and 4, according to which, respectively, ‘[e]very internationally wrongful act of an international organization entails the international responsibility of that organization’ and ‘[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that international organization’.

A central element of the responsibility of international organizations concerns the question of the attribution of conduct. This constitutes an intricate issue, notably in cases where an organ of a State is placed at the disposal of an international organization, as often occurs in peacekeeping

35 This Article states that the International Sea-Bed Authority ‘shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions […]’.
36 Sands and Klein (n. 14) 520.
37 ILC, UN Doc. A/55/10 (n. 19) 135 ff.
38 ILC, Report on the work of its fifty-fourth session, 29 April to 7 June and 22 July to 16 August 2002, UN Doc. A/57/10, 228 ff.
operations. Articles 6 to 9 regulate the attribution of conduct to the international organization. Article 6 establishes the general rule that the conduct of such organ or agent performing its functions shall be considered as an act of the organization under international law, whatever position the organ or agent holds in respect of the organization. Article 7 focuses on the attribution of conduct for organs of a State or organs/agents of an international organization placed at the disposal of another organization. In these cases, the notion of effective control permits determining to which entity the conduct may be attributed. Article 8 examines the case of *ultra vires* acts. The fact that the organ/agent acted in his/her official capacity is a determinant in concluding whether this act may be attributed to the international organization.

In addition to these general provisions governing the attribution of conduct, the ILC ARIO envisage cases of responsibility of an international organization in connection with the act of a State or another international organization, and cases of responsibility of States in connection with the acts of an international organization.

In relation to international obligations in particular, Articles 10 and 11 state that any such obligation must be pre-existing to the act or the omission of the international organization, ‘regardless of its origin and character’ and may arise under the rules of the organization. The question of whether human rights may be included in these obligations will be analysed below.

As stated above, these ARIO aim to codify the practice and consequently clarify the substantial rules applicable to the international responsibility of international organizations. Yet, as noted by Jan Wouters and Jed Odermatt, one may question whether the subject of the international responsibility of international organizations was sufficiently ripe for such codification. It is mentioned in the ILC’s Statute that only

40 ILC, *Report of its sixty-first session, 4 May to 5 June and 6 July to 7 August 2009*, UN Doc. A/64/10, Part II, Chapter IV.
41 Ibid., Part V.
those topics which are ‘necessary and desirable’\textsuperscript{44} should be considered by the ILC. The ILC itself added other criteria, including that the topic should ‘be sufficiently advanced in stage in terms of State practice to permit progressive development and codification’.\textsuperscript{45} However, this sufficient State practice is lacking in the area of the responsibility of international organizations.\textsuperscript{46} The ILC itself recognizes that ‘[o]ne of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice’.\textsuperscript{47} As an exception, the field in which most practice may be observed is the one of multinational peace-support operations.\textsuperscript{48} As noted by a former UN legal counsel, Ambassador Hans Corell, it is ‘in connection with peacekeeping operations where principles of international responsibility […] have for the most part been developed in a fifty-year practice of the Organisation’.\textsuperscript{49} Yet, in general, the work of the ILC has been severely criticized by scholars due to this lack of international practice.\textsuperscript{50}

As to its desirability, one may regret that these ARIO do not solve the real issues concerning the responsibility of international organizations.


\textsuperscript{45} ILC, UN Doc. A/55/10 (n. 19).

\textsuperscript{46} Contra: Alain Pellet considered the State practice as ‘quite abundant’ but did not provide for accurate examples of such State practice. ILC, UN Doc. A/55/10 (n. 19) 136.

\textsuperscript{47} ILC, General Commentary (5) to the Draft Articles on the Responsibility of International Organizations, 2.


namely the lack of accountability mechanisms. These Articles contain secondary rules on responsibility but they do not answer the real obstacle preventing legal actors from taking legal actions against international organizations, namely the lack of judicial fora at the international level where international organizations could be sued, and the immunity of international organizations before domestic courts.51

In general, one may also deplore that the scope of the ARIO is limited to the responsibility of international organizations towards injured States or other international organizations and does not include the responsibility towards any person or entity other than a State or an international organization. For instance, in part three of the ARIO on the content of the international responsibility of international organizations, Article 31 states that the responsible international organization is obliged to make full reparation for the injury – including any damage, whether material or moral – caused by the internationally wrongful act. Yet, Article 33 further specifies that these obligations are owed to States or international organizations.Similarly, part four on the implementation of the international responsibility of international organizations merely addresses this issue to the extent that the responsibility is invoked by an injured State or another injured international organization.

Another criticism that may be raised against the ILC ARIO is that, in drafting these articles, the ILC did not sufficiently take into consideration both the special nature of international organizations as opposed to States and the great variety of international organizations.52 Indeed, unlike States, international organizations are diverse legal entities with their own specificities. The ILC decided to adopt a broad approach in defining rules applicable to all international organizations, irrespective of their type and their activities. Several international organizations, including the EU, deplored this approach. In its comments and observations sent to the ILC in 2007, ‘[t]he European Commission expresse[d] some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which the European Community is itself

51 Wouters and Odermatt (n. 43).
an example’. These criticisms notably related to the complex rules of attribution between the EU and its Member States.

This being said, the ARIO contain certain references to the ‘rules of the organization’ and a specific rule on lex specialis, Article 64. This lex specialis opens the door to specific regimes of responsibility organized by the international organizations themselves. An interesting example is provided by Resolution 52/247 on the temporal and financial limitations of the UN’s responsibility, adopted by the General Assembly. Notwithstanding this lex specialis principle, the EU maintained its criticisms towards the ILC ARIO.

Given all these criticisms and the fact that the Articles have not yet been consecrated in an international agreement between national governments and international organizations, their applicability remains uncertain. Yet, they constitute an interesting attempt to elaborate rules on the basis of scarce practice to regulate the international responsibility of international organizations. It seems that these Articles should be considered as a basis for further discussions rather than a so-called final regime of international responsibility. However, several jurisdictions have


54 For further information, see Frank Hoffmeister, ‘Litigating against the European Union and its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’ (2010) 21(3) EJIL 723.


56 The EU considered that ‘the draft articles do not sufficiently address the special characteristics of the European Union as a regional integration organisation’. EU Statement – United Nations 6th Committee: Report of the International Law Commission on Responsibility of International Organisations, Statement on behalf of the European Union by Lucio Gussetti, Director, Principal Legal Adviser, European Commission, at the UN General Assembly 6th Committee (Legal) 66th Session. ILC, UN Doc. A/66/10 (n. 26).

57 Contra: Kristina Daugirdas, ‘Reputation and the Responsibility of International Organizations’ (2014) 25(4) EJIL 991. Mrs Daugirdas considers that ‘the IO Responsibility Articles are neither premature nor feckless.’

58 This view was defended by certain delegations in the discussions of the Sixth Committee of the General Assembly on these Draft Articles. For a summary of these discussions, see ILC, UN Doc. A/66/10 (n. 39) and Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat, UN Doc. A/CN.4/650/Add.1.
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referred to these ARIO as the relevant law to assess the international responsibility of international organizations. This was notably acknowledged by the ECtHR in the *Behrami and Saramati* decision in 2007, and more recently in the 2013 decision in the case brought by the *Mothers of Srebrenica and Others against the Netherlands*. It should be noted that the ILA also established a Study Group on the responsibility of international organizations in 2005, in addition to the Committee examining the accountability of international organizations. In its final report published in 2012, the Study Group explicitly mentioned that its intention was 'to contribute to this future developmental process by highlighting continuously problematic aspects in the DARIO [Draft Articles on the Responsibility of International Organizations] and by making suggestions for their possible resolution'. The Study Group issued a number of interesting recommendations but it did not specifically discuss the relations between international organizations and individuals nor the accountability mechanisms, which is why this report will not be further examined in the framework of this book.

2.3 The ILA Committee on the Accountability of International Organizations

As to the notion of the accountability of international organizations, a specific ILA Committee was set up on that topic in 1996. The ILA Committee took a broader approach than the one taken by the ILC, since the ‘recommended rules and practices’ of the ILA Committee cover the accountability of an international organization towards its Member States but also ‘victims or wrongdoers’ who are not members of the international organization, such as States, other international organizations, and individuals or legal persons, including private entities. Moreover, the ILA Committee examined the accountability of international organizations, which is a broader concept than that of their responsibility. In its

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60 ECtHR, Stichting *Mothers of Srebrenica and Others v. the Netherlands*, App. No. 65542/12, 11 June 2013.
Final Report published in 2004 the Committee started from the observation that ‘[p]ower entails accountability, that is the duty to account for its exercise’. It considered that:

Accountability of [international organizations] is a multifaceted phenomenon. The form under which accountability will arise will be determined by the particular circumstances surrounding the acts or omissions of an IO, its member States or third parties. These forms may be legal, political, administrative or financial. A combination of the four forms provides the best chances of achieving the necessary degree of accountability.

One may be tempted to associate the terms ‘legal accountability’ and ‘international responsibility’ in the sense of ILC’s ARIO. Yet, the concept of ‘international responsibility’ – in the meaning of the work of the ILC – does not necessarily require a court or a quasi-judicial arena to be implemented. Moreover, as observed above, ILC’s ‘international responsibility’ is mainly limited to the responsibility towards injured States or other international organizations, while the ‘legal accountability’ in the work of the ILA has a much broader meaning and includes the accountability towards staff members and third parties. In general, one may note that the notion of ‘legal accountability’ covers a larger range of situations than the ‘international responsibility’, since it includes the respect of rules or standards of behavior that do not necessarily correspond to international legal rules and may be implemented through a vast variety of mechanisms, such as ombudsmen, inspection panels and mediation. Such mechanisms can be useful tools for international organizations. As noted by the UN Department of Peacekeeping Operations in its report on the lessons learned from the UN Operation in Somalia (UNOSOM):

For the United Nations to successfully promote respect for human rights and good governance in collapsed states, as well as gain some measure of credibility, it must demonstrate a commitment to the principles of accountability and transparency in its own work. In UNOSOM, no independent

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63 ILA, **Accountability of International Organizations – Final Report** (n. 12) 5.
64 Ibid., 5.
65 Tzanakopoulos (n. 8) 6.
66 ILA, **Accountability of International Organizations – Final Report** (n. 12) 20 and 27.
oversight existed which could serve as an ombudsman to consider grievances registered by the local populations against the United Nations. Without such a mechanism, the United Nations was perceived by many in Somalia to be ‘above the law’, which undercut its efforts to promote human rights.68

Yet, whether such mechanisms offer sufficient guarantees for individuals to efficiently exercise their right of access to justice constitutes another question that will be further analysed in Chapters 3 and 4 of this book.

3. ATTRIBUTION OF CONDUCT TO INTERNATIONAL ORGANIZATIONS

3.1 General Rules of Attribution of Conduct in the ILC ARIO

Attribution of conduct to the international organizations is one of the two conditions set up by Article 4 of the ARIO for an internationally wrongful act, together with the breach of an obligation. The question of whether international organizations bear human rights obligations is examined in the following chapter of this book. The attribution of conducts is regulated in Chapter II of the ILC ARIO.

Except for specific cases,69 the international responsibility of international organizations requires that the internationally wrongful act is attributable to the international organization. Article 6 of the ILC ARIO states the general rule, following which it is the conduct of an organ or agent in the performance of his/her functions that entails an act of the organization. In the Reparation for injuries suffered in the service of the United Nations case, the ICJ defined the word ‘agent’ in the most liberal sense as: ‘any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts’.70

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69 In specific cases, an international organization may also be held responsible when the conduct is not attributable to it. Chapter IV of the Articles on the responsibility of international organizations enumerates cases of responsibility of an international organization in connection with the act of a State or another international organization.
70 ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Rep. (1949) 174. See also Article 2, paragraph d of the ARIO, which defines ‘agent of an international organization’.
Furthermore, Article 7 of the ARIO focuses on the attribution of conduct for organs of a State or organs/agents of an international organization placed at the disposal of another organization. This configuration frequently occurs when international organizations are conducting peacekeeping operations with military contingents placed at their disposal by one of their Member States. According to Article 7, such conduct shall be attributed to the organization if it exercises effective control over this conduct. The ILC commentaries add that this concept of ‘effective control’ has to be examined in the ‘full factual circumstances and particular context’.71

3.2 Controversies in Both International Practice and Case-law

This criterion of effective control has been subject to diverse interpretations and intense debates. Prima facie, it may be noted that the official position of the UN rejects the application of this criterion in relation to UN peacekeeping operations, as opposed to joint operations. In the former, the UN considers that an act of a peacekeeping force is an act of a subsidiary organ of the UN and is ‘in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation’.72 This position is further reflected in the ‘model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States’, following which ‘the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as “loss, damage, death or injury [arising] from gross negligence or willful misconduct of the personnel provided by the Government”’.73 However, such agreement may not be opposed to a third party – it only governs the relationship between the contributing State or organization and the receiving organization – and may consequently not deprive such third party of any rights.

With regard to joint operations, the UN official view differs since the Secretary-General considers that the international responsibility lies with

71 This comment was originally made by the United Kingdom (A/C.6/64/ SR.16, para. 23) and reproduced in the Commentaries to the ARIO adopted by the ILC at its sixty-third session in 2011, UN Doc. A/66/10 (n. 39).
72 Letter by the United Nations Legal Counsel to the Director of the Codification Division, 3 February 2004, A/CN.4/545, sect. II.G.
73 Article 9 of the model contribution agreement (A/50/995, annex; A/51/ 967, annex).
the operational command and control, which are arranged in the modal-
ities of cooperation between the State(s) and the UN or determined
according to the degree of effective control exercised in the conduct of
the operation.\textsuperscript{74}

The ILC disagrees with this distinction. It adds in its commentaries
that

What has been held with regard to joint operations [...] should also apply to
peacekeeping operations, insofar as it is possible to distinguish in their regard
areas of effective control respectively pertaining to the United Nations and the
contributing State. While it is understandable that, for the sake of efficiency
of military operations, the United Nations insists on claiming exclusive com-
mand and control over peacekeeping forces, attribution of conduct should also
in this regard be based on a factual criterion.

The intricacies of the attribution of conduct have occupied a central
position in numerous rulings of both international and national juris-
dictions. However, most cases do not concern peacekeeping operations
\emph{per se}. For instance, the \textit{Behrami and Behrami v. France} and \textit{Saramati v.
France, Germany, and Norway} cases\textsuperscript{75} concerned both the UN Interim
Administration Mission in Kosovo (UNMIK), which is an example of
international territorial administration by an international organization,
and the Kosovo Force (KFOR), which is a peace enforcement force. In
relation to KFOR, the ECtHR considered that the criterion of effective
control applied to this case consisted in the question of whether ‘the
United Nations Security Council retained ultimate authority and control
so that operational command only was delegated’.\textsuperscript{76} Given that the
KFOR presence in Kosovo resulted from a Security Council Resolution,
the ‘KFOR was exercising lawfully delegated Chapter VII powers of the
[UN Security Council] so that the impugned action was, in principle,
“attributable” to the UN within the meaning of the word outlined [in
Article 4 of the Draft Articles on the responsibility of international
organizations].’\textsuperscript{77} As to the UNMIK, the Court referred to its status as a
subsidiary organ of the UN to explain that its acts were exclusively
attributable to the UN.\textsuperscript{78} This interpretation of effective control as the
ultimate authority and control has been criticized by scholars denouncing

\textsuperscript{74} Report of the UN Secretary-General A/51/389 (n. 15) paras 17–18, 6.
\textsuperscript{75} ECtHR, \textit{Joined Cases Behrami and Saramati} (n. 59).
\textsuperscript{76} \textit{Ibid.}, para. 133.
\textsuperscript{77} \textit{Ibid.}, para. 141.
\textsuperscript{78} \textit{Ibid.}, para. 143.
inter alia the fact that Member States escape any responsibility and that victims’ right to a remedy are largely reduced. 79

In the Al-Jedda case, the House of Lords had to decide upon the attribution of conduct for the detention of a person by British troops in Iraq. The presence of multinational forces had been authorized by UN Security Resolution 1546 (2004). The House of Lords referred to the Behrami and Saramati case-law of the ECtHR but distinguished the facts, considering that British troops were not acting under UN control when they detained the appellant. 80 This view was confirmed by the ECtHR, which unanimously concluded that ‘the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations’. 81

The attribution of conduct was also one of the core issues discussed in the Srebrenica cases, where the plaintiffs sought remedy both against the UN and against the Netherlands. Among the numerous decisions rendered both by Dutch national jurisdictions and by the ECtHR, it is interesting to highlight two judgments rendered by the Supreme Court of the Netherlands on 6 September 2013 in the Nuhanović v. the State of the Netherlands and Mustafić v. the State of the Netherlands cases because they directly concern peacekeeping operations and attribution of conduct. These cases were filed by Mr Nuhanović and the family members of Mr Mustafić, who did not survive the Srebrenica massacre – nor did the parents and the brother of Mr Nuhanović. The latter had worked as an interpreter employed by the UN, while Mr Mustafić had worked as an electrician for the Dutchbat (Dutch battalion) without being directly employed by the UN. Mr Nuhanović’s family and Mr Mustafić were


81 ECtHR, Al-Jedda v. the United Kingdom, App. No. 27021/08, 7 July 2011, para. 84.
unable to stay within the UN compound as they were not UN employees and were subsequently killed. In both judgments, the Dutch Supreme Court referred to the ILC ARIO as the current state of law, applied the ‘effective control’ test and concluded that the Netherlands disposed of factual control over the Dutchbat’s disputed conduct.\(^{82}\)

Another interesting element in these two decisions is that the Dutch Supreme Court implied that the conduct could also be attributed to the UN. It noted that even if the UN had effective control over the Dutchbat’s conduct, this did not necessarily entail exclusive responsibility for the UN. This justified its further investigation as to the effective control of the Dutch State over the Dutchbat’s conduct. It based this finding on Article 48 of the ARIO which states that ‘[w]here an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.’ Hence, the Court implied that both the UN and the Netherlands could be responsible for the same internationally wrongful act.

This being said, in these two decisions, there may be one single harmful consequence for each of the victims but there are two different conduct at stake: for the Netherlands, it is the eviction of Mr Mustaﬁć and Mr Nuhanović’s family members by the Dutchbat; while for the UN, it is its failure to protect the refugees including Mr Mustaﬁć and Mr Nuhanović’s family members.\(^{83}\) This is also the view of Advocate General (AG) Vlas in his Opinion, who noted that both the UN and the Netherlands were responsible for their own conduct by exercising parallel control.\(^{84}\) Hence, these cases correspond more to a parallel attribution in


\(^{83}\) Ryngaert (ibid.) 444.

\(^{84}\) See *State of the Netherlands v. Nuhanović*, BZ9225, Opinion of AG Vlas, 5 March 2013, paragraph 5.14 (footnotes omitted).
view of a shared responsibility\textsuperscript{85} for different conducts, rather than a dual
attribution of the same conduct.

On 16 July 2014, another important decision was rendered by the
District Court in The Hague against the Dutch State in a case launched
by the Mothers of Srebrenica – while the same Court had rejected the
claim brought against the UN in a judgment of 10 July 2008.\textsuperscript{86} In this
case, the Mothers of Srebrenica accused the Dutch State of having
refused to save Bosnian Muslims within the so-called ‘mini safe area’,
which in their eyes constituted a wrongful act attributable to the Dutch
State. In its 2014 judgment, the District Court extensively examined the
facts in light of the effective control test as the ‘factual control’ exercised
by the Dutch State over the Dutchbat’s actions. It concluded that
command and control had been transferred from the Dutch State to the
UN, but that the Dutch State was responsible for the deaths of 300
Bosnian Muslims because these victims were considered as being under
the effective control of the Netherlands. However, the remaining victims
– some 7,000 people who allegedly fled into the woods – were not under
the Dutch State’s effective control.\textsuperscript{87}

Similar discussions took place before Belgian jurisdictions in a case
brought \textit{inter alia} against the Belgian State for its responsibility in the
evacuation of the Official Technical School based in Kigali (Rwanda) on
11 April 1994 by the Belgian United Nations Assistance Mission in
Rwanda (UNAMIR) soldiers. Given that no measure had been taken to
protect the Rwandan refugees hidden in the school, shortly after the
departure of the soldiers, Interahamwe militias entered the school and
killed the refugees. Eight survivors and relatives brought a case before
the Brussels Court of First Instance against both the Belgian State and
Belgian commanders – but not the UN. In its decision of 8 December
2010, which was still an interim decision, the Court held that the decision
to evacuate the school had been taken by Belgian authorities and that the
Belgian UNAMIR peacekeepers were \textit{de facto} under the Belgian State’s
control. In this case, the Court applied a standard of factual operational
control – as opposed to the ultimate control – noting that there had been

\textsuperscript{85} André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in Inter-

\textsuperscript{86} District Court in The Hague, \textit{Stichting Mothers of Srebrenica v. The State
of the Netherlands and the UN (Incidental Proceedings)}, 295247/H/A ZA
07-2973, 10 July 2008 (the Netherlands).

\textsuperscript{87} District Court in The Hague, \textit{Stichting Mothers of Srebrenica v. the State
of the Netherlands and the UN}, C/09/295247/H/A ZA 07-2973, 16 July 2014 (the
Netherlands).
no discussion between the UN and Belgian commanders as to the evacuation and that this decision was taken by Belgian authorities regardless of the consultations with UNAMIR. One may deplore that the Court did not refer to Article 7 of the ARIO nor apply the effective control test in this case.

### 3.3 Effective Control and Human Rights Violations in Peacekeeping Operations

In 2010, an innovative view was advocated by Tom Dannenbaum in a paper entitled ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member State Troop Contingents serving as United Nations Peacekeepers’. In this paper, the author suggested interpreting the concept of ‘effective control’ as the control ‘held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question’. This aimed to ensure ‘that the actor held responsible is the actor most capable of preventing the human rights abuse’. Based on this assumption, he suggested a five-category liability scheme that better realizes the basic principle of ‘effective control’ attribution while also expanding the access of victims to juridical recourse and proper remedy. Under this scheme the human rights abuses of peacekeepers are either: (1) committed ultra vires, that is, without authorization from U.N. central command; (2) committed within the authorized sphere of discretion granted by the U.N. central command, but not pursuant to a U.N. order; (3) committed pursuant to an order from U.N. central command where the human rights abuse in question is also a war crime; (4) committed pursuant to an order from U.N. central command where the human rights abuse in question is not also a war crime; or (5) committed as a ‘forced omission’ where the troops were not given the adequate support or resources to avoid the wrongful omission. Based on a revised understanding of the prevalent conception of ‘effective control’ [...] category (1) abuses fall under the sole legal liability of the troop-contributing state(s) in question; categories (2) and (3) abuses fall under the joint and several liability of the United Nations and the troop-contributing state; and categories (4) and (5) fall under the sole legal liability of the United Nations.

This scheme presents interesting normative proposals which permit reinforcing the right of access to justice and the right to a remedy for

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88 Brussels Court of First Instance, Mukeshimana-Ngulinzira and others v. Belgium and others, RG No 04/4807/A and 07/15547/A, 8 December 2010, ILDC 1604 (BE 2010) (Belgium).
victims. As recognized by Dannenbaum, this view seeks to minimize the obstacles that victims may face ‘wherever doing so is compatible with the overarching principle of “effective control”’. Despite its attractiveness from a human rights perspective, it is however unlikely that this view may engender new developments in this field for numerous reasons. First of all, it subordinates the ‘effective control’ test to the protection of the right of access to justice. Yet, there is neither practice supporting such subordination nor any sign to indicate a future development in this direction. Second, it runs counter to the current rules of attribution of conduct to international organizations, as detailed in this chapter. Even if the acceptance and the application of the ILC ARIO remain unclear in practice, one may observe that international and national jurisdictions are increasingly considering these Articles as the state of law. Hence, it seems hardly conceivable that a jurisdiction would depart so drastically from the ARIO to guarantee the right of access to justice of individuals. For instance, for the first category of acts that are committed ultra vires, Dannenbaum considers that the troop-contributing State should be responsible because it has the competences to prevent such abuses, as opposed to the UN. Moreover, peacekeepers are immune from civil process when they act in their official capacity. This view reinforces the rights of victims since it offers a legal claim against States before national jurisdictions and circumvents both the lack of international dispute settlement mechanisms where individuals may file claims against the UN, and the UN’s immunity before national jurisdictions. However, it does not correspond to the official UN position considering peacekeepers as subsidiary organs. Moreover, it presupposes that the national jurisdiction accepts attributing the conduct to the State rather than to the international organization, which runs counter to Article 8 of the ARIO.

Even if these normative proposals may be considered as an interesting source of inspiration for future developments, one has to admit that the current practice in the field of attribution of conduct does not pave the way to any concrete application in the near future.

4. RESPONSIBILITY OF MEMBER STATES IN RELATION TO HUMAN RIGHTS

4.1 General

International organizations have a specific nature as creations by Member States to institutionalize their cooperation. Next to the responsibility of international organizations, the question frequently arises whether Member States are or remain responsible for internationally wrongful acts attributed to the international organization of which they are a Member State.

Part five of the ARIO regulates the responsibility of a State in connection with the conduct of an international organization. As mentioned in its commentaries, the ILC considers that ‘membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act’. Nevertheless, part five of the ARIO comprises Articles 58 to 63, which set out specific cases in which the responsibility of Member States may be taken into consideration. These provisions concern the aid or assistance (58), the direction and control (59), the coercion (60), the circumvention of an international obligation (61) and the acceptance by a State (62).

It is beyond the scope of this book to scrutinize all these different cases. For this reason, the choice has been made to focus on the responsibility of Member States in relation to human rights.

4.2 Consequences of the Transfer of Competences on Human Rights Protection

In this regard, one provision deserves particular attention: Article 61 of the ARIO on the circumvention of international obligations of a Member State of an international organization. This provision may be read together with the case-law developed by the ECtHR, which affirms that the Contracting Parties to the ECHR may be held responsible if they fail

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90 See in the same sense Article 6(1) of the IDI, Resolution on the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties (n. 17) 445. Yet, Article 5 mentions exceptions to this principle.

91 One may also refer to the case-law of the German Constitutional Court in a case concerning the EC institutions’ compliance with fundamental rights. The German Court considered that it could exercise fundamental rights review over EC acts ‘as long as’ they had not established their own internal system of control.
to ensure compliance with their ECHR obligations after having transferred competences to an international organization. In the *Matthews* case, the ECtHR indicated that the Contracting States were responsible for securing the ECHR rights even after they transferred competences to an international organization. The Court found the United Kingdom (UK) responsible for failing to secure the rights enshrined in Article 3 of Protocol No. 1 in respect to elections of the European Parliament in Gibraltar after having entered into treaty commitments, namely the Maastricht Treaty, taken together with obligations following the Council Decision and the 1976 Act.92

This case-law is particularly interesting with regard to Member States’ responsibility for the structural lacunae in the international organization’s internal dispute settlement procedures. In *Waite and Kennedy v. Germany*, the Court examined whether the right of access to justice of individuals had been annihilated by the grant of immunity to the European Space Agency (ESA) by German jurisdictions in employment-related disputes. The ECtHR noted that:

> Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.93

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This view was confirmed in the *Bosphorus* case, which concerned the impounding of an aircraft by Ireland according to an obligation based on a European Community (EC) Council Regulation, which was itself implementing a UN Security Council Resolution. The ECtHR added that:

State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides […]. By ‘equivalent’ the Court means ‘comparable’; any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international cooperation pursued […] 95

This ‘equivalent protection’ criterion was similarly employed by the ECtHR in the *Gasparini v. Italy and Belgium* case. The facts of this case related to an employment dispute between NATO and an employee who alleged that his human rights had been violated because the NATO Appeals Board had not held its session in public. Mr Gasparini brought the case directly to the ECtHR after the exhaustion of internal NATO remedies. The ECtHR confirmed that Member States are responsible for the structural lacunae of international organizations’ internal procedures. Yet, it concluded that the internal procedure was not tainted with ‘manifest insufficiency’. 96

It is interesting to note that none of the aforementioned cases involving international organizations concerned peacekeeping operations. In principle, the responsibility of the troop-contributing Member States could derive from their transfer of competences to international organizations such as the UN or NATO, which do not provide for an equivalent protection of human rights. In the *Behrami and Saramati* decisions, the ECtHR did not apply this case-law to the transfer of powers. It observed that nine – including the two Respondent States – out of the 12 original signatory parties to the ECHR had been members of the UN since 1945, that most of the Contracting Parties had joined the UN before joining the

95 Ibid., paras. 155–156 (citations omitted).
ECHRR, and that all Contracting Parties were members of the UN.\textsuperscript{97} Moreover, it differentiated these cases from the \textit{Bosphorus} case-law,\textsuperscript{98} since the impugned acts and omissions of KFOR and UNMIK could not be attributed to the respondent States and did not take place on the territory of these States or by virtue of a decision of their authorities.

As observed by Heike Krieger, this reasoning is not entirely convincing.\textsuperscript{99} In the previous cases examined in this section, it was the transfer of powers to an international organization that was constitutive of infringement for Member States rather than a question of attribution. It seems that the actual justification for this differentiation of case-law should be found in the reference to ‘the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the [UN Security Council] under Chapter VII to fulfil that aim’. Indeed, the ECtHR noted that the operations established by UN Security Council Resolutions are fundamental to the mission of the UN to secure international peace and security and rely on the support from Member States, which is why the acts and omissions of these States cannot be subject to the scrutiny of the Court. ‘To do so would be to interfere with the fulfilment of the UN’s key mission in this field including, as argued by certain parties, with the effective conduct of its operations.’\textsuperscript{100}

This deference of the ECtHR with regard to the imperative nature and principle aim of the UN may also be noted in its 2013 decision in the case concerning the Mothers of Srebrenica.\textsuperscript{101} This position will be further discussed in the following chapters of this book, especially in Chapter 5.

4.3 Human Rights Violations as Consequences of Member States’ Conduct within an International Organization

Next to the consequences of the transfer of powers by States to international organizations regarding human rights protection, there are other situations in which Member States hide behind an organization and eventually seek to evade their obligations in abusing the international

\textsuperscript{97} ECtHR, \textit{Joined Cases Behrami and Saramati} (n. 59) para. 147.
\textsuperscript{98} ECtHR, \textit{Bosphorus} (n. 94).
\textsuperscript{99} Krieger (n. 79) 175.
\textsuperscript{100} ECtHR, \textit{Joined Cases Behrami and Saramati} (n. 59) para. 149.
\textsuperscript{101} ECtHR, \textit{Stichting Mothers of Srebrenica and Others v. the Netherlands} (n. 60).
legal personality of the organization. The may also be cases in which Member States exercise their prerogatives in the internal decision-making process in the international organization which leads to an internationally wrongful act by the international organization. All these cases may require a ‘piercing of the veil’ of the international organization in order to identify the responsible Member States. Decisions of international organizations may be initiated or supported by some of their Member States, which should not be shielded from culpability.

Once such a case enters into one of the aforementioned categories of part five of the ILC ARIO on the responsibility of a State in connection with the conduct of an international organization, the State may be considered as responsible pursuant to the ARIO. As mentioned in Article 63, this responsibility is without prejudice to the international responsibility of the international organization committing the act in question or any other State or international organization.

An interesting illustration of this type of responsibility of Member States in connection with the conduct of an international organization may be found with international financial institutions (IFIs), such as the World Bank and the International Monetary Fund (IMF). These organizations are member-driven organizations in which Member States have voting powers directly dependent on their economic size and their financial contribution. Many decisions of the World Bank or the IMF may be initiated or supported by some of its members only, especially those who control the organization. In cases of human rights violations by these international organizations, victims may seek to obtain judicial review of the decisions taken by the State organ which directs the vote within the organ of the international organization. Indeed, Member States should not be shielded from culpability in cases of human-rights-violating acts or omissions.

For instance, the construction of the Pueblo Viejo-Quial Hydroelectric Project (Chixoy Dam) in Guatemala was a project funded by the World

103 Brölmann (n. 25) 262.
Bank. This project led to forced evictions and displacements of numerous communities, without warning or compensation, and the massacres of the Río Negro community.\footnote{106} Several attempts were made to obtain a remedy for this massacre. Acting on behalf of the survivors of the Río Negro community and other similar communities in Guatemala, an international human rights non-governmental organization (NGO) – the Centre on Housing Rights and Evictions – submitted a petition to the Inter-American Commission on Human Rights (IAComHR) in 2004 against \textit{inter alia} the Inter-American Development Bank (IDB), the International Bank for Reconstruction and Development (IBRD) and their Member States, which are also members of the OAS, and the United States of America (US) Government for both its direct support to the Guatemalan Government and its role as principal decision-maker in the World Bank and the IDB with regard to the Chixoy Dam project. This case was rejected by the IAComHR on 12 June 2009 for ostensible failure to meet the admissibility requirements.

An appeal was submitted against this decision on 27 September 2011. In a petition submitted to support this appeal, several NGOs and associations\footnote{107} held that the Government of the United States as the principal decision-maker in the two Banks had been ‘instrumental in securing funding of the Chixoy Dam project’.\footnote{108}

In parallel, another case was filed before the IAComHR on 19 July 2005 by another association representing the interests of the survivors in seeking remedies and prosecution of the responsible actors\footnote{109} against Guatemala, mainly for five massacres perpetrated against the members of the Río Negro community by the Guatemalan Army, the persecution and elimination of its members, and the human rights violations committed against the survivors. In 2010, a reparation agreement was concluded with the Guatemalan Government, although it was not executed in practice. On 30 November 2010, the IAComHR submitted the case to the Inter-American Court of Human Rights (IACtHR). On 4 September

\footnote{106} http://www.witnessforpeace.org/apd.html.  
\footnote{107} The Global Initiative for Economic, Social and Cultural Rights, Rights Action and the International Human Rights Clinic at Western New England University School of Law, on behalf of the Survivors of the Río Negro community and similar Chixoy Dam harmed communities in the Chixoy river basin, Guatemala.  
\footnote{108} This petition is available at http://209.240.139.114/wp-content/uploads/2012/01/120119ChixoyPetition.pdf (footnotes omitted).  
\footnote{109} The Association for the Integral Development of the Victims of the Violence of the Verapaces.
2012, a decision was rendered in the case of the *Río Negro Massacres v. Guatemala* in which the IACtHR considered that Guatemala was responsible for numerous violations of human rights. It notably found that ‘the surviving victims of the Río Negro massacres experience deep suffering and pain […] which fell within a state policy of “scorched earth” intended to fully destroy the community’.

On 14 October 2014, a legally-binding commitment was made by the Government of Guatemala to pay an amount of $155 million over 15 years to local indigenous communities to repair the human rights damages related to the forced displacement, violence and abuses associated with the construction and operation of the Chixoy Hydroelectric Dam.\(^{110}\) It is reported that the United States pressured the Guatemalan Government to implement the reparation agreement by placing conditions on new loans.\(^{111}\) To date, neither the IDB nor the IBRD has accepted that it should pay compensation to the victims. Even if the case brought against the IDB, the IBRD and their Member States, which are also members of the OAS, and more specifically the United States, has been rejected for lack of admissibility by the IACtHR, this case constitutes an interesting illustration of the attempt to tackle the responsibility of Member States in international organizations, especially from a human rights point of view.

Jean d’Aspremont has argued in favor of the concurrent or joint responsibility of Member States having an *effective* and *overwhelming* control over the decision-making process of the organizations in cases where such acts would constitute a breach of their international obligations if they were committed by themselves and where the international personality of the organization has been abused by these Member States.\(^{112}\)

Such mechanisms would certainly increase the oversight of the World Bank’s and the IMF’s operations. Moreover, they would undeniably be more efficacious if national or regional dispute settlement mechanisms could be taken into consideration to establish improper behavior.\(^{113}\)

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\(^{111}\) Ibid.

\(^{112}\) d’Aspremont (n. 104).

Some Member States of the IFIs have adopted national human rights legislation imposing certain obligations on the executive directors representing them. For instance, the UK Human Rights Act obliges all UK Government departments to pursue respect of human rights in their work. As a public authority, the Department for International Development (DFID) is bound by the Human Rights Act. It issued a Guidance Note on the Human Rights Act in 2005, which stated that if an act or a failure to act is incompatible with the ECHR, a ‘human rights claim’ can be brought against the Secretary of State.114

In the United States, the US Code, Chapter 7, Section 262d entitled Human rights and United States assistance policies with international financial institutions states that the United States government, in connection with its voice and vote in the IMF, shall advance the cause of human rights and refrain from channelling assistance to countries whose governments engage in a pattern of gross violations of internationally recognized human rights.115 However, human rights groups have criticized the selective application of this provision by the United States,116 which has added to the general suspicion of IMF circles in the matter of human rights.117

5. CATEGORIZATION OF THE RELATIONSHIPS BETWEEN INDIVIDUALS AND INTERNATIONAL ORGANIZATIONS AND APPLICABLE LAW

The different relationships between individuals and international organizations have to be distinguished in order to identify the set of legal rules applicable to each of them. Moreover, the dispute settlement mechanisms established by international organizations, which will be analysed in

117 Andrew Clapham, Human Rights Obligations of Non-State Actors (OUP 2006) 141. For further information, see Schmitt (n. 105).
Chapter 4 of this book, are typically designed to espouse this categorization of relations.

The largest category consists of employment relations. Staff members have a contractual relationship with the organization and are in a special position under the internal law of the international organization. Other individuals may be in a contractual relationship with the organization. Their contract constitutes the main source of applicable law governing the relationship between these individuals and the international organization. The residual category consists of individuals that may be considered as third parties with respect to the international organization. They may have a tort claim against the organization, as in the case of visitors to the headquarters premises who are injured or individuals who are victims of accidents involving vehicles operated by the international organization’s personnel, etc. Finally, the individuals may also be third parties whose relations with the international organization may have a public law character, such as criminal law or human rights law.

5.1 Staff Members

Staff relations constitute the most important category of relations between individuals and international organizations. It may be interesting to note that, as of 30 June 2015, the UN Secretariat employed 41,081 staff members around the world.¹¹⁸ In a similar vein, there are approximately 40,000 members working as staff of the EU institutions.¹¹⁹

The rules regulating the behavior of international civil servants have several sources, including employment contracts, internal rules of the international organization, international agreements and rules of general international law.¹²⁰ In addition, the administrative practice, the case-law of international administrative tribunals (IATs), general principles of international law, domestic laws (criminal law, labor law, etc.) and ethical principles also play an important role in the determination of the rights and obligations of staff members towards international organizations.¹²¹

¹¹⁸ Composition of the Secretariat: Staff Demographics, Report of the UN Secretary-General, A/70/605 (2015).
¹²⁰ ILA, Accountability of International Organizations – Final Report (n. 12)
¹²¹ See Benedict Kingsbury and Richard B. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of
A distinction may be drawn between the contractual and the statutory rules governing staff relations. As declared in the Kaplan judgment by the former United Nations Administrative Tribunal (UNAT), ‘all matters being contractual which affect the personal status of each member – e.g., nature of his contract, salary, grade’ while ‘all matters […] which affect in general the organization of the international civil service, and the need for its proper functioning – e.g., general rules that have no personal reference’ are statutory. The former require the agreement of both parties to be modified, while the latter can be changed by regulations of the General Assembly.\(^\text{122}\)

Apart from the specific employment contract between the international organization and its staff member, the most important source of applicable law consists in the staff rules and regulations established by the organization.\(^\text{123}\) Staff members must adhere to these staff regulations. These generally contain a loyalty clause, according to which they must ‘act with the interest of the organisation always in mind’.\(^\text{124}\) At the UN for instance, the conditions of service and the basic rights, duties and obligations of the entire UN staff are contained in the Staff Regulations of the United Nations. These Regulations derive their authority from Article 101 of the UN Charter. According to these regulations, staff members are international civil servants,\(^\text{125}\) they are accountable to the Secretary-General and are required to uphold the ‘highest standards of efficiency, competence and integrity’.\(^\text{126}\)

Moreover, international organizations have issued documents containing ethical standards, such as mission statements, codes of conduct or charters of values. For instance, as far as the UN is concerned, the International Civil Service Commission adopted in 2013 a renewed

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\(^{122}\) UNAT, Kaplan v. UN Secretary-General, Judgment No. 19 (1953) para. 3.


\(^{125}\) Staff Rules – Staff Regulations of the United Nations and Provisional Staff Rules, UN Secretary-General Bulletin, ST/SGB/2009/7 (2009). Staff Regulation 1.1.

\(^{126}\) Ibid., Staff Regulation 1.3.
version of the Standards of Conduct for the International Civil Service,\textsuperscript{127} which was approved by the General Assembly in Resolution 67/257.\textsuperscript{128} Although these standards do not have the force of law, they help the staff to understand their role as international civil servants. Other examples are the EU Code of Conduct for Commissioners,\textsuperscript{129} the World Bank Code of Conduct for Board Officials\textsuperscript{130} or the above-mentioned UN Standards of Conduct for the International Civil Service.

The scope and the status of these codes of conduct vary from one organization to another. In some of them, the code is to be used as guidance and has no legal value \textit{per se}, such as the UN Standards of Conduct for the International Civil Service and the IMF Code of Conduct for Staff.\textsuperscript{131} It must be pointed out however that failure to respect the code may constitute misconduct giving rise to disciplinary or other types of consequences. In other organizations, the code is integrated into the employment contract or is part of the general labor regulations. For instance, the Code of Good Administrative Behavior is binding on the European Commission Staff.\textsuperscript{132} Such a code can be judicially enforced.

In addition to the staff regulations and documents containing ethical standards, staff relations may also be governed by other sources. At the UN, these additional sources include specific contracts, the UN Charter, the Headquarter Agreements, the General Assembly Resolutions, the Administrative Instructions and the Information Circulars of the Secretary-General, the judgments of the Dispute Tribunal and the Appeals Tribunal, the rules of general international law, etc.

Although staff regulations and staff rules generally contain the most important rules applicable to staff relations, the International Labor Organization Administrative Tribunal (ILOAT) has considered that they may be superseded by ‘general principles of law in so far as they may apply to the international civil service’.\textsuperscript{133} As observed by August

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{127}] International Civil Service Commission, ‘Standards of Conduct for the International Civil Service’, July 2013.
\item[\textsuperscript{129}] European Commission, ‘Code of conduct for Commissioners’, C (2011) 2904.
\item[\textsuperscript{130}] World Bank, ‘Code of conduct for Board Officials’, 1 November 2007.
\item[\textsuperscript{131}] IMF, Code of Conduct for Staff, 31 July 1998.
\item[\textsuperscript{133}] ILOAT, Breuckmann v. European Organisation for the Safety of Air Navigation (Eurocontrol) No. 2, Judgment No. 322 (1977) para. 2. For further information see Chittharanjan F. Amerasinghe, ‘Accountability of International
\end{itemize}
\end{footnotesize}
Reinisch, this application ‘has sometimes led to the inclusion of principles found in human rights instruments and usually in corresponding fundamental rights catalogues of the national law of member states’. The ILOAT, for instance, held that ‘[a] firm line of precedent says that rights under a contract of employment may be express or implied, and include any that flow from general principles of international civil service or human rights […]’.

In addition to this multitude of sources governing the staff relations, one may question whether national legislation may be invoked by staff members in their relation with international organizations. IATs have generally refrained from applying national legislations to staff disputes. Such an exclusion is sometimes explicitly mentioned in the statutes of these tribunals or taken from the tribunals’ case-law. Yet, exceptionally, IATs recognized that national legislation may be taken into consideration as a secondary source of general principles of employment law.

Moreover, in some cases, staff members have invoked national law before domestic jurisdictions. Such application of national law may be explicitly excluded by the headquarters agreement with the host State, such as the UN-US Headquarters Agreement, which considers that all UN Rules and Regulations override the application of any US federal or State laws concerning the internal regulation of the organization. In the absence of such an exclusion imposed by international law, the question of whether the staff member may invoke national law before national jurisdictions remains unclear. Since very few courts have ever lifted the immunity of an international organization, there is scant precedent as regards the question of which law to apply in case the immunity is lifted. One such example may be found with a decision rendered on 21 December 2009 by the Belgian Court of Cassation, which rejected the

Organisations for Violations of the Human Rights of Staff’, in Wouters, Brems, Smis and Schmitt (n. 9) 527, 530.

136 For a detailed analysis, see Reinisch (n. 134).
137 Article VI(2) of the Statute of the Inter-American Development Bank Administrative Tribunal (IADBAT).
139 See for instance ILOAT, Breuckmann (n. 133) para. 2.
immunity of the Western European Union (WEU) and applied the internal rules of the international organization as opposed to Belgian legislation in relation to the indemnity allowance.\footnote{Court of Cassation, \textit{Western European Union v. Siedler}, 21 December 2009, No. S.04.0129.F, \textit{Pasicrisie Belge} (2009) 3143, ILDC 1625 (BE 2009) (Belgium). See also Jan Wouters, Cedric Ryngaert and Pierre Schmitt, ‘Case-Note to Belgian Court of Cassation, Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.’ (2011) 105(3) \textit{AJIL} 560.}

In the literature, it has been noted that host state (domestic) law should apply as the default position in such cases.\footnote{Klabbers (n. 21) 137 also citing Reinisch (n. 134).} Yet, if the rules of the international organization regulate a specific situation, these rules should prevail. This holds all the more true in the case where the internal rules of the organization regulate the situation in detail and in an exhaustive manner, as in the case brought before the Belgian Court of Cassation: the WEU Staff Rules determined the mode of calculating the indemnity allowance in the case of breach of contract with a high degree of precision.

\section*{5.2 Contracting Parties}

In order to fulfill their functions, international organizations may need to enter into numerous and diverse contracts with individuals other than staff members.\footnote{Nicolas Valticos, ‘Les contrats conclus par les organisations internationales avec des personnes privées, Rapport provisoire et projet de résolution’ (1977) 57 \textit{IDI} 1, 17.} Such contracts generally concern ordinary commercial transactions, such as sales, lease contracts, the provisions of services, the renting of an office, the acquisition of technical equipment, logistic support, etc. They may also be concluded with private companies.

The broad variety of contracts makes it sometimes difficult to identify the applicable law for each particular relationship. At the UN for instance, more than 60,000 people are working as consultants and individual contractors.\footnote{\textit{Administration of Justice at the United Nations}, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/65/557 (2010) para. 53.} Disputes on contractual matters between the

\begin{footnotesize}
\footnotetext[2]{Klabbers (n. 21) 137 also citing Reinisch (n. 134).}
\footnotetext[3]{Nicolas Valticos, ‘Les contrats conclus par les organisations internationales avec des personnes privées, Rapport provisoire et projet de résolution’ (1977) 57 \textit{IDI} 1, 17.}
\end{footnotesize}
UN and individuals are generally subject to the conciliation and arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).  

In 1977, the IDI issued the Oslo Resolution on the ‘Contracts Concluded by International Organizations with Private Persons’. It asserted that both national and international law may constitute the proper law of the contract and that the parties should expressly specify the source from which the proper law of the contract is to be derived.

The principle following which a contract between an international organization and an individual can be governed by national legislation is generally accepted. This may be the consequence of the absence of a specific contractual regime established by the international organization, such as the EU system.

In general, international organizations submit their contracts to one or several systems of national laws. This choice of applicable law is usually expressed in the contract itself. In the absence of such explicit choice, the implied intention of the parties has to be identified. As a consequence, it is ultimately the decision of national courts or arbitrators. Yet, ‘due to the limited case law and an equally limited number of arbitral awards, it is very difficult to ascertain the real practice of international organizations with regard to the law applied to contracts with private parties’. This quasi-absence of case-law is a corollary of the immunity generally granted to international organizations before national jurisdictions. As to the limited number of arbitral awards, this

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147 Sands and Klein (n. 14) 466; Goran Lysen, The Non-contractual and Contractual Liability of the European Communities (Almqvist and Wiksell International 1976) 155.

148 See Article 340, paragraph 1 TFEU.

149 Ibid. See also Amerasinghe (n. 2) 388 ; Jean-Pierre Colin and Marcel Sinkondo, ‘Les relations contractuelles des organisations internationales avec les personnes privées’ (1992) 69 Revue de droit international et de droit comparé 7.

150 Reinisch (n. 134) 130.
may be explained by the fact that the parties may decide to keep both the procedure and the award secret.\footnote{151}{For further information on the arbitral procedure, see Chapter 4, section 2.4.}

In 1996, the Steering Committee of the PCA established Optional Rules for Arbitration between International Organizations and Private Parties.\footnote{152}{These Optional Rules are available at http://www.pca-cpa.org/showfile.asp?fil_id=201.} Even if the parties to a dispute can modify these Optional Rules in writing in their agreement to submit their claims to the PCA, these Rules provide an interesting source of information in relation to the applicable law. Pursuant to Article 33:

the arbitral tribunal shall have regard both to the rules of the organization concerned and to the law applicable to the agreement or relationship out of or in relation to which the dispute arises and, where appropriate, to the general principles governing the law of international organizations and to the rules of general international law.

So far, one arbitral award has been published on the PCA website in a case involving an international organization – the International Fund for Agricultural Development (IFAD) – and a private party – an Italian company named Polis Fondi Immobiliari di Banche Popolare S.G.R.p.A.\footnote{153}{The award is available at http://www.pcacases.com/web/sendAttach/495.} In this award issued on 17 December 2010, the Arbitral Tribunal observed that the parties largely agreed that their relationship was governed by the lease agreement interpreted according to the Headquarters Agreement between IFAD and the Italian Government and the recognized principles of international commercial law. However, except for specific references, Italian laws on leasing were excluded from the legal sources of the contractual relationship. This example demonstrates that notwithstanding the various suggestions of applicable law expressed in literature and adopted by international bodies, the will of the parties remains determinant in the identification of the applicable law in contractual relations.

### 5.3 Third Parties having a Tort Claim

Next to the contractual liability, international organizations may also engage their liability towards third parties if their activities cause harm to these third parties. For instance, visitors to the headquarters premises may be injured, individuals may be victims of accidents involving

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\footnote{151}{For further information on the arbitral procedure, see Chapter 4, section 2.4.}
\footnote{152}{These Optional Rules are available at http://www.pca-cpa.org/showfile.asp?fil_id=201.}
\footnote{153}{The award is available at http://www.pcacases.com/web/sendAttach/495.}
vehicles operated by the international organization personnel, they may be victims of violations of property rights or other types of accidents, etc.

In general, non-contractual liability claims are regulated by the national law of the host State or the State in which the damage occurs. The normal rules of international private law will identify the applicable law, which will generally consist of the rules of the State in which the damage occurred – *lex loci delicti commissi*.

Some international organizations are subject to specific regimes of non-contractual liability, such as the EU. Article 268 TFEU confers the exclusive jurisdiction in such disputes on the ECJ. The latter adopted a restrictive approach to this provision in order to safeguard the effective exercise of the normative power and to not hinder the European integration process. Furthermore, it should be noted that the ECJ has no jurisdiction over cases involving the area of common foreign and security policy (CFSP) according to Articles 24, paragraph 2 Treaty on the European Union (TEU) and 275 TFEU.

Within the UN, specific regimes have been established in relation to peacekeeping operations. While some of these rules concern the combat-related activities of UN forces and will consequently be discussed in the following section on public law relations including human rights violations, other rules determine the scope of UN liability for ordinary

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155 See for instance the case in the Supreme Court of New York, *Wencak v. United States*, Special Term, 18 January 1956, (1956) 22 ILR 509 (United States). In this case, the plaintiff argued that the UN Relief and Rehabilitation Administration was responsible for an accident on 1 December 1945.


157 Sands and Klein (n. 14) 470; Amerasinghe (n. 2) 389.

158 See Article 340, para. 2 TFEU.


160 Sands and Klein (n. 14) 519.
operational activities of UN Forces. The types of damage most commonly encountered in such ordinary operational activities are the non-consensual use and occupancy of premises, personal injury and property loss or damage arising from the ordinary operation of the force. Moreover, the UN has fixed certain temporal and financial limitations on its tortuous liability for damage caused in the ordinary operational activities of the force. These limitations, ‘though justified on economic, financial and policy grounds, constitute an exception to the general principle that when tortious liability is engaged compensation should be paid with a view to redressing the situation and restoring it to what it had been prior to the occurrence of the damage’. These limitations were consecrated by a General Assembly Resolution 52/247 of 22 June 1998.

5.4 Third Parties involved in Relations of Public Law

International organizations are public authorities. Their field of activities is constantly expanding, which inevitably creates situations in which their exercise of public authority may constrain individuals’ rights and freedoms. In addition to the three categories of relations examined above, the relations between international organizations may exceptionally have a public law character. For instance, it can be argued that disputes between an international organization and an individual may exceptionally have a public law character in relation to ‘human rights

161 Report of the UN Secretary-General A/51/389 (n. 15) 4.
163 See G.A. Res. 52/247 (n. 55) 2.
164 These limitations differ according to the categories of injury or loss, with certain maximum ceiling amounts. For a detailed enumeration of these financial limitations, see ibid., 2–3.
168 von Bogdandy and Steinbrück Platise (n. 5) 67.
violations committed in the course of a peace operation conducted by the organization’.  

The distinction between private and public law is not always easy to determine. As observed by Hans Kelsen in 1947, ‘the differentiation between public and private law is highly problematical and justified only in so far as based on positive provisions of a legal order’. The UN legal order provides for an interesting illustration of this issue, since there is no precise definition of what constitutes a dispute of private law, but it nevertheless determines the material scope of dispute settlement mechanisms. Indeed, Article VIII, Section 29 of the General Convention states that ‘[t]he United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’.

While in its peacekeeping missions the UN has developed a practice of settling private law claims by negotiation or arbitration, it usually concludes a Status of Forces Agreement (SOFA) with the host State in which the operation is conducted. Such SOFAs generally provide that all claims of a private character shall be settled by a standing claims commission to be established by the UN. Yet, no such standing claims commission has ever been set up in practice.

In order to better visualize the consequences of these observations in practice, it may be relevant to illustrate these discussions by referring to the example of the UN’s responsibility in relation the cholera outbreak in Haiti. The exact facts of this case will be discussed below in Chapter 5 (section 8.4.1.2). At this stage, it is sufficient to note that it is generally admitted that this cholera outbreak was most plausibly introduced into Haiti by Nepalese soldiers who were part of the United Nations Stabilization Mission in Haiti (MINUSTAH). The victims accuse the UN mainly of tortious conduct in waste disposal and for not having tested for cholera the Nepalese soldiers deployed as part of the mission. Following


the cholera outbreak, the Bureau des Avocats Internationaux (BAI) and the Institute for Justice and Democracy in Haiti (IJDH) filed a request for relief and reparation with the chief of the claims unit of MINUSTAH on behalf of 5,000 victims in November 2011. The petitioners were mainly individuals suffering from cholera or family members of people who had died from the disease. They alleged sickness and death attributable to the UN, as well as negligence, gross negligence/recklessness, wrongful death, negligent and intentional infliction of emotional distress, and public and private nuisance. They considered that the UN had jurisdiction to settle the claim pursuant to paragraphs 54 and 55 of the SOFA between the UN and Haiti. These paragraphs required the UN to establish a standing claims commission to handle third-party claims for property loss or damage, personal injury, and illness or death arising from or directly attributed to MINUSTAH along the lines of Article VIII, Section 29 of the General Convention. Since the UN refrained from establishing a standing claims commission, the petitioners filed their claim with the chief of the claims unit of MINUSTAH.

However, the UN considered that these claims were not receivable under Article VIII, Section 29 of the General Convention. In a letter dated 19 February 2015, the UN Secretary-General held that:

As the claims in question raised broad issues of policy that arose out of the functions of the United Nations as an international organization, they could not form the basis of a claim of a private law character and, consequently, the claims did not fall within the scope of Section 29(a) of the General Convention. For the same reason, it was determined that these claims were not of the type for which a claims commission is provided under the SOFA, since the relevant provision of the SOFA also relates to claims of a private law character.

In the meanwhile, the victims have filed several claims before American jurisdictions against the UN to obtain compensation. One of the arguments raised by the plaintiffs consists in the alleged violation of the UN’s obligation to establish claims commissions. It is interesting to note in this regard that the brief statement of the UN Secretary-General justifying the non-admissibility runs counter to the vast majority of opinions expressed

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176 This letter was sent in response to several letters issued in 2014 by Members of the US Congress to the UN.
by legal scholars on the subject, who concur to support that these claims are private law claims. Indeed, the claims alleged by the victims are classic tort claims that are brought by non-governmental parties. Numerous European legal scholars recently submitted a Memorandum of Law as *amici curiae* before the US District Court for the Southern District of New York in one of the cases brought by individual victims against the UN for its responsibility in the cholera outbreak in Haiti before American jurisdictions. In their Memorandum of Law in support of the victims, the European scholars held that:

[a] public law claim would likely involve a government complainant against the UN […] or private individuals’ claims that the UN wrongly exercised its strategic or policy-making discretion in a manner that led to the individuals suffering harm. Not surprisingly, international law scholars who have reviewed Plaintiffs’ claims have concluded unequivocally that they are private law in nature.177

Furthermore, the qualification of such claims as public law claims also contradicts a prior report issued by the former UN Secretary-General, who considered in 1995 that ‘claims for compensation submitted by third parties for personal injury or death […] incurred as a result of acts committed by members of a UN peace-keeping operation within the “mission area” concerned’ have a ‘private law’ character.178

Hence, one can only agree with the response of the IJDH to the letter of the UN Secretary-General, stating that his view is ‘untenable as a

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matter of law and of logic’. 179 Yet, it has devastating consequences for the victims who have no other option than to sue the UN before national jurisdictions, where their claims will probably be barred from adjudication because of the immunity of international organizations, as demonstrated by the first Order rendered on 9 January 2015 in one of these cases. 180

Interestingly, one may wonder whether the express invocation of human rights violations by the victims of the cholera outbreak in Haiti may have influenced the qualification of this case as public law by the UN. A priori, human rights are indeed part of public law, both at the national and the international levels. It is commonly accepted that human rights are primarily enforceable against States, which bear the key obligations in relation to the protection of individuals’ human rights. Moreover, the scope of their obligations largely exceeds the scope of individuals’ obligations, since the States are not only expected to respect these rights but also to protect them or even to promote them. A similar type of reasoning is applicable to international organizations, subject to the discussions presented in Chapter 2 of this book.

Yet, the fact that human rights violations have been committed does not automatically deprive a claim of its private law character. 181 One may note that it is frequently problematic to differentiate human rights claims from tort claims. For instance, the US Alien Tort Statute (28 U.S.C. § 1350), also called the Alien Tort Claims Act, indicates that ‘district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. Since the 1980s, this provision has been interpreted by national jurisdictions as allowing foreign citizens to seek remedy in US courts for human rights violations deriving from a conduct committed outside of the territory of the United States. 182


In general, it is undeniable that human rights norms interact with the tort liability of public bodies, sometimes even in an overlapping manner.\(^{183}\) This trend seems particularly true in cases exacerbating the damage caused to individuals rather than the violation of a public order.\(^{184}\) The permeability of the distinction between human rights and torts has given rise to situations in practice where individuals have sought to use private law channels to defend their human rights. In cases where the violations are attributable to international organizations, this practice may be explained by the absence of competent human rights bodies to handle human rights violations attributable to international organizations – except for rare exceptions such as the Human Rights Advisory Panel (HRAP).\(^{185}\) As observed by Frédéric Mégret, one may consider that such an ‘option should perhaps be privileged from a pragmatic perspective with a view to obtaining reparation from the United Nations because it would undoubtedly be more “neutral” and more susceptible to an amicable settlement’.\(^{186}\)

Within this book, it is thus important to specify that human rights violations are not confined to ‘public law’ relations between international organizations and individuals as third parties, but that they may also occur in staff relations and contractual relations with individuals, as will be further demonstrated in Chapter 2, section 2 of this book.

A similar difficulty of differentiation may arise with the distinction between human rights law and criminal law. For instance, a UN Transitional Administration in East Timor (UNTAET) Regulation No. 2001/10 of 13 July 2001 on the establishment of a commission for reception, truth and reconciliation in East Timor, defines human rights violations as: ‘(i) violations of international human rights standards; (ii) violations of international humanitarian law; and (iii) criminal acts; committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999’.\(^{187}\) Hence, this Regulation

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\(^{184}\) Mégret (n. 181) 176.

\(^{185}\) This body will be examined in Chapter 4 of this book.

\(^{186}\) Ibid. This quote represents my translation into English of the original French version.

\(^{187}\) UNTAET, Regulation No. 2001/10 on the establishment of a commission for reception, truth and reconciliation in East Timor, 13 July 2001 (italics in original).
includes those criminal acts committed in the specific context of political conflicts in East Timor in this period as human rights violations.

Another example of a relationship between international organizations and individuals being governed by public law may be found in the international territorial administration by an international organization exercising administrative and public authority over individuals. For instance, claims were brought against the UN for damage to health in internally displaced person camps in Kosovo, where people had been contaminated by lead. The UN replied that such claims ‘amount to a review of the performance of UNMIK’s mandate as the interim administration in Kosovo’. Hence, they are not receivable under Section 29.188 The fact that the UN is exercising temporary governmental authority in such a situation may indeed justify that its actions address political or policy matters, as opposed to the Haiti example.189

Besides, the relations between international organizations and individuals may be governed by other rules, such as criminal law. International organizations do not have their own system of criminal law. Consequently, an application of the criminal law of the host State within the headquarters permits protecting the organization against criminal acts perpetuated against it. For some international organizations, the headquarters agreements expressly refer to the criminal law applicable in these headquarters.190

It is generally acknowledged that criminal law applies not only within the headquarters of an international organization, but also that the personnel of international organizations must respect the national legislation of the host State. Yet, its enforcement requires the cooperation of the international organization, since most staff members enjoy immunity from prosecution before domestic courts. This being said, most immunity regimes only grant privileges and immunities as necessary for the fulfillment of the organizations’ purposes. This limited immunity rests upon the functional necessity doctrine. The conduct of criminal activities may never be considered as part of the official duties of international organizations’ personnel. Hence, the criminal conducts of international


189 Rashkow (ibid.) 345.

organization’s staff members should be investigated and judged by national jurisdictions. However, practice has shown that international organizations have adopted broad interpretations of the immunities and have been rather reluctant to waive these immunities. Given that these cases rarely result in court decisions, there is only limited documentary evidence available on this issue.

An interesting example is provided by the recent case concerning the Managing Director of the IMF, Mr Strauss-Kahn, who was forced to resign when he was arrested in May 2011 and charged with the sexual assault and attempted rape of Ms Diallo in New York. In this case, the applicability of US criminal law was not denied by Mr Strauss-Kahn. Nevertheless, the criminal charges were dropped because the prosecutors lost faith in the credibility of Ms Diallo. The civil case was pursued and Mr Strauss-Kahn surprisingly filed a motion in September 2011 arguing that as Managing Director of the IMF, he enjoyed absolute immunity from civil suit. The parties settled this civil lawsuit for an undisclosed sum in December 2012.

The criminal responsibility of staff members of international organizations is often first dealt with through the hierarchical path and disciplinary actions. Yet, such a system based on the hierarchy of international civil servants may entail problems once confronted with heads of administrations. At the UN for instance, senior levels of international civil servants have long been considered to be to a large extent immune from any accountability.

The awkward and opaque functioning of internal accountability channels with regard to high officials is illustrated by the case of the former UN High Commissioner for Refugees, Ruud Lubbers, who was accused in 2004 of sexual harassment against one of the members of the staff of the High Commissariat. The UN’s Office of Internal Oversight Services (OIOS) had unambiguously concluded as to the culpability of Mr Lubbers, but the Secretary-General initially dismissed the case without much justification. It was only after the OIOS report was leaked to the press that Mr Lubbers was forced to step down. Within the UN, the

191 See Chapter 5, section 6.
establishment of the Management Performance Board in 2005 should contribute to avoiding such situations and ensuring that senior officials will be held accountable in the future.\textsuperscript{194}

The criminal liability of international organizations’ personnel plays a crucial role in the field of peacekeeping operations. In such operations, international organizations usually conclude a SOFA with the host State in which the operation is conducted. This SOFA governs the legal status of the peacekeeping operation. According to the UN Model Status of Forces Agreement\textsuperscript{195} (UN Model SOFA), different types of immunities are granted to the various categories of individuals intervening in such operations. These different regimes will be further detailed in Chapter 5 of this book, but one may say that, in general, officials and experts on missions enjoy similar immunities to those defined in the General Convention.\textsuperscript{196} Hence, engaging in criminal activities outside of the scope of their official duties may be subject to criminal proceedings in the host State. Individual contractors or consultants are subject to local laws and do not enjoy any immunity except potentially if they are considered as experts on mission. As to the military members from troop-contributing countries, these countries retain exclusive criminal jurisdiction over the conduct of their military members.\textsuperscript{197}

A Resolution was adopted by the UN General Assembly on 16 December 2013 on the criminal accountability of UN officials and experts on mission. This Resolution notably

\textit{Strongly urges} States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process.\textsuperscript{198}

\textsuperscript{194} For further information, see United Nations, Department of Management, ‘Management Reform at the United Nations’, December 2010.

\textsuperscript{195} UN Doc. A/45/594 (n. 173) chapter VI.

\textsuperscript{196} General Convention (n. 171).


These cases of criminal responsibility concern the staff members of international organizations, and not the organization \textit{per se}. Indeed, an international organization is currently not capable of criminal responsibility.\textsuperscript{199}

\textsuperscript{199} Amerasinghe (n. 2) 389. \textit{Contra}: August Reinisch considers that '[a]lthough, this is mainly a question of whether criminal law is applied within the seat or headquarters district of an international organization, it may also be considered to remain applicable to international organizations, in so far as national law recognizes criminal liability for entities other than individuals', Reinisch (n. 134) 145.