THE PLIGHT OF VICTIMS OF WRONGFUL ACTS COMMITTED BY INTERNATIONAL ORGANISATIONS: A LIGHT AT THE END OF THE TUNNEL?

ETHEL TILLY LIKOMWA,

LKMETH001

LLM (PUBLIC INTERNATIONAL LAW)

WORD COUNT: 24402

SUPERVISOR: SALONA LUTCHMAN

Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the degree of Masters of Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of degree of Masters of Law dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

_E. T. LIKOMWA **10 FEBRUARY, 2020**

DEDICATION

To my Lord for always being there.

To Christopher and Margaret, your sacrifices were not in vain.

ACKNOWLEDGEMENTS

I would like to thank my Lord and Savior, this journey would not have been possible without you Lord.

I sincerely thank my supervisor, Mrs. Salona Lutchman for shaping my ideas, for the helpful insights, for the encouragement to keep going and above all for being so patient. Accept my deep gratitude.

To Chris, for the immense support rendered throughout this journey, sometimes at great cost, for all the sacrifices, nothing is taken for granted. I will forever be grateful.

To my mother, Margaret Longwe for sacrificing one year of your life, taking care of the kids while I studied, turning my little apartment into, a home. No words can express my deep gratitude. To my father Dixon Kahinja Longwe, for enduring that whole year without mom and for your constant encouragement, I am profoundly grateful.

To Lambiro and Tefillah-Joy, for making life interesting while I was pursuing my studies, you motivated me to work even harder.

To Tshepo, Walhalha and Jenala, for all the exploits and adventures, Cape Town was certainly exciting with you all.

Table of Contents

ABBREVIATIONS AND ACRONYMS

CPIUN	Convention on the Privileges and Immunities of the United Nations
DARIO	Draft Articles on the Responsibility of International Organisations
DASR	Draft Articles on State Responsibility
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IOs	International Organisations
KFOR	Kosovo Force
MINUSTAH	United Nations Stabilisation Mission in Haiti
MNB	Multi-National Brigade
MNF	Multi-National Force
NATO	North Atlantic Treaty Organisation
PCA	Permanent Court of Arbitration
SFOR	Stabilisation Force in Bosnia and Herzegovina
UN	United Nations
UNAT	United Nations Appeals Tribunal
UNICEF	United Nations Children's Fund
UNDT	United Nations Dispute Tribunal

UNMIK	United Nations Mission in Kosovo
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
TCNs	Troop Contributing Nations
WBIP	World Bank Inspection Panel

CHAPTER ONE

I INTRODUCTION

International Organizations ('IOs') have been in existence for a long time dating to as far back as 1875 when the Universal Postal Union was set up.[1] Over the years various aspects of their existence and role in international law have come under scrutiny. A defining moment in the existence of IOs perhaps came with the Advisory Opinion of the International Court of Justice (ICJ) in *Reparation for Injuries Suffered in the Service of the United Nations*[2] in which the Court pronounced on the international legal personality status of IOs.

The case concerned an agent of the United Nations (UN) who had died on duty. The question before the Court was whether the UN could bring an international claim on behalf its agent where that agent dies or is injured in the line of duty. This was in essence a question of whether the UN had the requisite legal personality to bring such a claim. The Court stated that the UN could not effectively discharge its duties or mandate as intended by its founders without the possession of an international legal personality.[3] The Court therefore concluded that the UN is an international person[4] with the capacity to bring the relevant claims as and when required to aid the performance of its functions.[5] The possession of legal personality is now included in the Draft Articles on the Responsibility of International Organizations (DARIO).[6]

The *Reparations Case*[7] thus opened the door way to the possession and exercise of the various rights of IOs at international law. The reverse is also true however, in that IOs can also be held legally responsible for wrongful acts or omissions. It is, after all, a basic principle of law that the possession of legal personality entails not only the capacity to bring claims but also the capacity to handle claims brought against the concerned entity.

---

[1] Antonio Cassesse *International Law* 2 ed (2005) at p. 136.
[2] [1949] ICJ Reports, 174.
[3] *Reparations* supra note 2 p.179.
[4] Ibid.
[5] Supra note 2 p. 180.
[6] *Yearbook of the International Law Commission*, 2011, Vol II, Part 2, para 2 (a).
[7] Supra, note 2.

At international law, the principle is well settled that the commission of an internationally wrongful act, attracts responsibility.[8] In reality however, the matter concerning responsibility for internationally wrongful acts is complicated and continues to be the subject of debate.[9] While this is true for both State Responsibility and the Responsibility of IOs, the question becomes more complicated when dealing with the latter. This is because of the various problematic factors which must be considered in any attempts to hold IOs responsible for their wrongful actions. Such problematic factors include the lack of appropriate forums in which disputes concerning IOs can be resolved, immunities of IOs and the sometimes complex task of determining whether wrongful conduct should be attributed to an IO or to the IOs member states.[10]

One major consequence of these problems concerning the responsibility of IOs is that it is often difficult for individuals who have suffered harm at the instance of an IO, to seek redress. Indeed in its quest and perhaps haste, to deal with the question of responsibility, international law often overlooks the plight of those who have suffered at the behest of actions perpetrated by IOs. The International law approach on the question of responsibility is often from the perspective of the IOs and not from the victims or prospective victims of wrongful acts. For instance, while the DARIO acknowledge that IOs can commit wrongful acts, there is a complete lack of acknowledgement that such acts can be committed against individuals.[11]

---

[8] This principle was stated as early as 1927 in the *Chorzow Factory Case* (Claim for Indemnity) {1927} Publ. PCIJ, Series A, Judgment No 8, p.21. Both Article 1 of the Draft Articles on State Responsibility and Article 3 of the DARIO provide for this principle.

[9] For some discussions on State Responsibility see TW Bennet & J. Strug *Introduction to International Law* (2013) 265, James Crawford 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *AM. J. Int'l L.* 874, Antonio Cassese, 'The Nicaragua and Tadic Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia' *(2007)* 18(4) *European Journal of International Law* 649 and Richard J. Goldstone & Rebecca J. Hamilton (2008), 'Bosnia v Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', (2008) 21(1) *Leiden Journal of International Law* pp 91-112. For Discussions on the responsibility of International Organizations see Kristina Daurgidas 'Reputation and the Responsibility of International Organizations' (2015) 25(4) *European Journal of International Law, 991,* Nikolaos Vulgaris 'Rethinking Indirect Responsibility: A study of Article 17 of the Draft Articles of International Organizations' (2014) 11 *International Organizations Law Review, 5-52,* Christiane Ahlborn 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review* 397-482.

[10] For an overview of some of these factors see generally Jose E. Alavarez 'International Organizations and the Rule of Law'(2016) *14 NZJPIL 3,* Niels Blokker, 'Member State Responsibility for Wrongdoings of International Organizations'(2015) *12 International Organizations Law Review* 319 and Cedric Ryngaert and Holly Buchanan, 'Member State Responsibility for Acts of International Organizations' (2011) *Utrecht Law Review 7.*

[11] See generally Armin von Bogdandy and Mateja Steinbruck Platise, 'ARIO and Human Rights Protection: Leaving Victims in the Cold' (2012) *International Organisations Law Review,* 67.

The problem with the IO centered approach is that it often glosses over and sidesteps the difficult questions concerning seeking redress against IOs, especially for victims of wrongful acts. The result is that victims trying to seek redress for wrongful acts committed by IOs often leave empty handed.

By way of illustration, in *Behrami and Behrami v France*[12] the applicants in this case were left with no remedy after the European Court of Human Rights attributed to the United Nations the internationally wrongful acts suffered. The case concerned the death of the son to the first Applicant and the serious injury of the second applicant due to the detonation of a cluster bomb unit left behind after the North Atlantic Treaty Organisation's (NATO) airstrikes in Kosovo in 1999. The UN could not however be held responsible for the impugned actions because it is not a party to the European Convention of Human Rights (ECHR). Neither NATO nor France (the other concerned parties in the events in Kosovo) accepted responsibility. Similarly in the now famous case of *Georges v United Nations,*[13] the Court dismissed claims against the UN for the cholera outbreak in Haiti on the basis of the absolute immunity of the UN. The Court of first instance's decision was upheld on appeal.[14] This was despite the fact that there is credible evidence linking the cholera outbreak to the conduct of UN peace keeping forces.[15] These and other cases will be analysed in detail in Chapter 3 of this thesis.

It is ironic that International Law has endeavoured to develop elaborate rules of trying to apportion or attribute responsibility, however these rules have more or less ignored those who are supposed to benefit from them in the first place. In this thesis therefore, the question of the responsibility of IOs is approached from the perspective of the victims of the wrongful conduct of IOs. The call for greater effectiveness in holding IOs to account is made through an illustration of the difficulties faced by those attempting to seek redress for wrongs committed by IOs. The prevailing argument throughout this thesis is that the effective redress of wrongful acts committed

---

[12] (2007) 45 EHRR 85.

[13] *Georges v United Nations* 84 F Supp 3d 246 (SD NY 2015*).* See also *Femi Falana v African Union* AfCHPR, App No. 001/2011, available at *http://www.african-court-.org/en/index.php/55-finalised-case-details/833-app-no-001-2011-femi-falana-v-african-union-details* and *Efoua Mbozo'o Samuel v Pan African Parliament* AfCHPR App No. 010/2011 available at *http://www.african-court-.org/en/index.php/55-finalised-case-details/842-app-no-010-2011-efoua-mbozo-o-samuel-v-pan-african-parliament-details.*

[14] See *Georges v United Nations* No. 15-455(2d Cir 2016) available at *https://law.justia.com/cases/federal/appellate-courts/ca2/15-455/15-455-2016-08-18.html* accessed on 7 February, 2020.

[15] See Infra notes 238-240 and accompanying texts.

by IOs is significantly undermined by the numerous problems encountered when victims are seeking justice. It is further argued that international law does not adequately address the plight of victims of the wrongful conduct of IOs.

Additionally, the role of domestic systems and institutions as possible solutions to the difficult question of holding IOs accountable or responsible for their actions will be examined. This analysis is necessary in light of the recent increasing trend of domestic courts piercing the immunity veil in order to preside over disputes concerning IOs.[16] In this regard an examination of whether domestic courts represent the light at the end of the tunnel for individuals who have been wronged by IOs will be conducted.

II PROBLEM STATEMENT

The theory is well settled: violation of international law will attract responsibility and an obligation to make the necessary reparations.[17] Practically speaking however it is problematic to hold IOs liable for their actions and this fact has been acknowledged. The problem is that international law approaches the question of responsibility from the perspective of IOs. There is less emphasis on the plight of victims of wrongful acts or omissions committed by IOs or the difficulties they encounter in order to seek redress. In this regard the following research questions are asked:

1. How accessible is justice for victims of wrongful acts committed by IOs?
2. What are the obstacles which individuals face in seeking redress for wrongful acts committed by IOs?
3. Do domestics systems and institutions have a role to play in assisting individuals to obtain relief from IOs for wrongful conduct?

[16] See generally Cedric Ryngaert, 'The Immunity of International Organisations before Domestic Courts: Recent Trends,' (2010) 7 *International Organisations Law Review* 121.
[17] Supra, note 8.

III LITERATURE REVIEW

The *Reparations Case*[18] established the important principle of international legal personality which as Hennie Strydom[19] notes is critical not only to the functions of an International Organization but also to the determination of its rights and responsibilities. In the aftermath of the *Reparations Case* however, the emphasis was on the rights of IOs. There was less emphasis on the question of the responsibility of IOs.[20] The increased influence and impact of IOs however, has necessitated a shift from the rights of IOs to their duties, especially in matters of accountability.[21]

The starting point in any consideration on or analysis of the responsibility of IOs is that IOs will incur responsibility if they violate international law. As Jan Klabbers puts it 'there is nothing exotic about holding International Organizations responsible…'[22] This is perhaps the natural consequence of being an international legal person who has rights as well as obligations in the international legal system. In as much as IOs have the right to bring claims on the basis that their legal status allows them to do so per the *Reparations Case*,[23] international law will or should also hold IOs responsible for any violations by virtue of the same status. C.F. Amerasinghe puts it this way:

> …(i) international organizations as legal persons are subjects of and subjects to international law; and (ii) the breach of international law by an international person, whether by commission or omission, produces responsibility. Thus, international responsibility of or to international organizations depends on the violation of international law and the non-observance of international obligations.[24]

The theory is thus very clear, IOs will bear responsibility for any (international law) violations. The reality however is very different. Holding IOs responsible for wrongful acts is not a straightforward issue. Among the reasons for this difficulty is the very nature of international law. Nigel White notes that, legal accountability (which includes responsibility for purposes of

---

[18] Supra, note 2.
[19] Hennie Strydom (ed) *International Law*, (2016) 150.
[20] See a discussion on this point by Jan Klabbers *Introduction to International Institutional Law* 2ed (2009) p. 272.
[21] See for instance Noelle Quenivet 'Binding the United Nations to Human Rights Norms by way of the Laws of Treaties' (2010) 42 *George Washington International Law Review* 587 arguing for the need to make the UN more accountable.
[22] Klabbers op-cit note 20 at p. 279.
[23] Supra note 2.
[24] C.F. Amerasinghe *Principles of the Institutional Law of International Organizations,* 2ed (2005) p. 386.

this thesis)[25] in the international legal system is limited, even for States which are considered the traditional subjects of international law.[26] States have at their disposal the ICJ which is a permanent structure or forum within which disputes can be resolved and more importantly State responsibility determined. Although this is the case however, States have to consent to the jurisdiction of the ICJ.[27] If there is no consent from the disputing parties, the Court will not preside over the dispute in question. This perhaps lends credence to the theory that international law is consent based.[28]

Unlike States however, IOs do not have a right of audience before this primary international Court as only States may be parties to disputes before the ICJ.[29] Disputes concerning IOs are resolved in fora such as administrative tribunals, Claims Commissions or through *ad hoc* arbitration and negotiations among other less permanent avenues. Herein lies one of the major problems in the responsibility regime of IOs. In commenting on the existence of the DARIO, Niels Blokker states that while there are 'rules' determining the responsibility of IOs, there is a glaring absence of a 'responsibility institution'.[30] This institution would ideally be tasked with the responsibility of determining whether an IO has committed an internationally wrongfully act and also determining the necessary remedial measures.[31] Phillipe Sands and Pierre Klein however argue that the ad hoc fora are quite useful in determining the responsibility of International Organizations.[32] It can indeed be argued that the ad hoc fora perform the necessary and important function of filling a gap which the absence of a more permanent structure creates. The question however is, how effective are these ad hoc fora and do they afford the necessary protection to victims of wrongful acts committed by IOs? This is one of the issues that this thesis will be addressing.

---

[25] It has been suggested that the word 'accountability' is broader and covers liability and responsibility but also to the extent to which IOs are subject to internal and external scrutiny. See Henry G. Schemers and Niels M. Blokker *International Institutional Law*, (2003) at p. 1005.
[26] Nigel White, *The Law of International Organizations*, 2ed (2005), p. 206.
[27] Article 36(1), (2) and (5) of the Statute of the International Court of Justice.
[28] See for instance Samantha Besson, 'State Consent and Disagreement in International Law-making. Dissolving the Paradox.' (2016) *Leiden Journal of International Law.*289 at pp 305-309 where the author argues for and justifies the role of consent in international law.
[29] Article 34(1) of the Statute of the ICJ United Nations, 18 April 1946, available at: *https://www.refworld.org/docid/3deb4b9c0.html* [accessed 7 February 2020].
[30] Niels Blokker op.cit note 10 at p. 330.
[31] Ibid.
[32] Phillippe Sands Q.C. and Pierre Klein, *Bowett's Law of International Institutions'* 6ed (2009) pp 522-523.

The other issue which constantly comes up is the role of the member states of an IO in as far as matters of responsibility for wrongful conduct are concerned. In this thesis, the focus is on IOs which have legal personality and therefore have rights and obligations at international law. In this regard therefore, the assumption is that it should be a straight forward matter that an IO with its own legal personality separate from its member States should be responsible for its own actions or omissions. Unfortunately the matter is not so straightforward. As Jan Klabbers notes, IOs are a creation of States and sometimes it is not always easy to separate the organization from its member states: '[B]ehind the "organizational veil" the contours of the organization's member states can be discerned."[33]

Weighing in on this matter, Schemers and Blokker note how the NATO veil had been lifted in the case concerning the responsibility over military actions carried out against Yugoslavia in 1999.[34] The authors note that despite the fact that NATO is a legal person, when this matter was adjudicated upon, both before the European Court of Human Rights (ECtHR) and the ICJ, it was the member states and not NATO itself that had been summoned.[35] Further, the authors note that there were hardly[36] any protests from the concerned member states concerning the fact that the correct legal person was not before the Court.[37] Both Courts did not make any pronouncements on this specific issue. The authors make the following noteworthy observations:

> 'This is a legal vacuum. NATO has both the capacity (as it is a legal person) and the power….to carry out military action but cannot itself be held responsible for such action. This implies the need for member states to closely stay involved in all relevant decision-making in the organization, as they may later be held (co) responsible for its action…'[38]

This relationship between IOs and their Member States in as far as responsibility is concerned is sometimes confusing and begs the questions of who is responsible for the wrongs committed by IOs? One can only speculate as to what the Court would have stated if the concerned States had decided to argue that it was NATO which carried out the military actions and therefore

[33] Klabbers, Op. cit note 20.
[34]Schemers and Blokker Op.cit note 25 at p. 1010.
[35] Ibid.
[36] With the exception of Canada and France. See the case of *Bankovic and Others v Belgium and Others,* Application No. 5227/99 at para31, 32 and 83 for the arguments made by France.
[37] Schemers and Blokker, op cit note 25 at p.1010.
[38] Ibid.

NATO should be the one appearing before the Court. There is a possibility that the victims in this case would have been left empty handed with no way of seeking redress because NATO is not a party both to the ICJ statute and to the European Convention on Human Rights (ECHR) and could not therefore be a party to these proceedings.

In addition to the obstacles as espoused above, the various immunities enjoyed by IOs present an even bigger problem in the area of the law concerning the responsibility of IOs.[39] Various reasons have been put forth to justify these immunities including the fact that they aid in the independent functioning of IOs.[40] While this may be true, immunities also operate to prevent individuals from seeking relief before Courts. Recently, however domestic and regional courts have begun setting aside the immunity of IOs in an attempt to uphold the rights of those who have been wronged by these IOs.[41] This has been especially justified in instances where an IO has not provided alternative mechanisms for settling disputes.[42] However, other IOs such as the UN, enjoy absolute immunity and have therefore not been affected by this trend of piercing the immunity veil.[43] Additionally, in a large majority of cases the immunities of IOs are upheld and therefore, victims of wrongful acts committed by these IOs remain without a remedy.

The above literature shows that there is a general appreciation that the area of the law concerning the responsibility of IOs is far from settled. Indeed, all this literature brings to light critical issues concerning the responsibility of IOs. However, in most of this literature the issue of the responsibility of IOs is approached from the perspective of IOs. In this thesis, I demonstrate the need for greater accountability of IOs by focusing on the plight of those who have been harmed by these IOs and the difficulties they face when attempting to seek relief for the wrongful conduct. A victim centered approach to IO responsibility can serve as a catalyst to increased efforts for finding effective ways of holding IOs accountable.

---

[39] See Greta L. Rios and Edward P. Flaherty, 'International Organisation Reform of Impunity? Immunity is the Problem' (2010) 16 (2*) ILSA Journal of International and Comparative Law* 432.
[40] Bruce C. Rashkow, 'Immunity of the United Nations: Practices and Challenges,' (2014) *International Organisation Law Review*, 332.
[41] See Ryngaert, op cit note 16.
[42] Farhana Choudhury, 'The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability' (2016) 104 (725) *Georgetown Law Journal* 725 at 728.
[43] *Georges v UN* supra note 13.

IV RESEARCH METHODOLOGY

This study is primarily based on desktop research. Recourse is had to primary sources of law such Treaties, Conventions, other international Instruments, legislation and case law from diverse jurisdictions. Recourse will also be had to other sources of the law such as, books, journal articles and credible online sources.

V SYNOPSIS OF THE CHAPTERS

Chapter one introduces the topic and gives a brief overview of the thesis, addressing such issues as the problem statement, methodology and related matters.

An act is said to be wrongful if there has been a breach of a primary norm or obligation. Before looking at the question of responsibility it is therefore important to first of all ascertain the primary norms or obligations which are said to have been breached. Identifying the source of obligations of IOs is also in some instances a problematic issue. Therefore, the issue of the source of obligations of IOs will be discussed in Chapter two. Additionally, the issue of whether IOs are bound by human rights obligations will be explored. Finally, the secondary rules of the responsibility of IOs will also be discussed.

In Chapter three the current inadequacies of international law regarding the responsibility of IOs will be explored. In this regard an in depth analysis of the legal difficulties faced by individuals in seeking redress for wrongs committed by IOs will be conducted. Additionally, several cases will be discussed at length in order to clearly demonstrate the short comings of international law in the area of the responsibility of IOs.

In Chapter four, the focus will be on whether in spite of the challenges of immunity (of IOs), domestic systems and institutions (particularly the courts) may actually assist in holding IOs accountable and thereby assist the individual to obtain relief for wrongful acts.

Finally, in chapter five a summary of the key findings will be provided. In this Chapter I also offer conclusions and recommendations.

CHAPTER TWO

BACK TO BASICS: AN OVERVIEW OF THE PRIMARY AND SECONDARY RULES

I INTRODUCTION

It has been clearly stressed in the previous Chapter that an IO will be responsible for its internationally wrongful acts. In accordance with the DARIO, there is an internationally wrongful act when the conduct of an IO amounts to a breach of an international obligation and further when such conduct can be is attributed to the IO.[44] The breach of obligations and the attribution of wrongful conduct, therefore form the bedrock of the responsibility of IOs at international law.[45]

It must be stated at this point that the DARIO were developed by the International Law Commission (ILC) for the purpose of addressing the question of the responsibility of IOs for internationally wrongful acts. However unlike the Draft Articles on State Responsibility (DASR)[46] which have been considered a restatement of customary law,[47] the DARIO have not been so warmly received. Among the many criticisms of the DARIO is the fact that they are based on insufficient practice and that it is pointless to develop secondary rules of responsibility when the primary rules are unclear.[48]

A discussion on the difficulties of seeking redress for wrongs committed by IOs would be incomplete without an appreciation of both the secondary rules of responsibility and the primary norms consisting the obligations of IOs. It must be stated that primary and secondary norms are vast areas of the law in their own right. It is therefore not the intention of this author to conduct an

---

[44] Article 4 (a) and (b) of the DARIO.

[45]There must of course also be a lack of any of the justifications for the wrongful conduct as provided for in Articles 20-25 of the DARIO.

[46] *Yearbook of the International Law Commission,* 2001, Vol II, Part 2.

[47] The ICJ gave its nod to the use of the DASR, stating the provisions as reflective of customary law in the *Genocide Case (Bosnia-Herzegovina v Serbia and Montenegro* (2007) ICJ Reports 43. Additionally, provisions of the DASR have been referred to widely in various judicial forums. See for instance *Armed activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (2005) ICJ Reports 168 para 160, *Prosecutor v Tadic,* (1999) 38 ILM 1518 para 145, *Lozidou v Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, available at *https://www.refworld.org/cases,ECHR,402a07c94.html* [accessed 7 February 2020]. See also TW Bennet & J. Strug and James Crawford, Supra note 8.

[48] See for instance Jose E. Alavares ' Book Review of International Organizations and their Exercise f Sovereign Powers by Dan Sarooshi' (2007) 3 *American Journal of International Law*, 674 at p. 676-677.

exhaustive discussion on these two areas of the law for such a feat would be outside the scope of this thesis. The intention rather, is to conduct an overview of the source of obligations for IOs and the secondary rules of responsibility in order to aid a better appreciation of the difficulties of seeking redress for wrongful acts committed by these IOs.

The prevailing argument throughout this Chapter is that some of the problems in seeking redress can be traced to the lack of clarity of the primary norms and some problematic issues associated with the secondary norms. In section II therefore, the general principles of responsibility of IOs with a particular focus on the DARIO will be discussed. Additionally, problematic issues concerning these secondary rules will be examined. The lack of clarity on the source of obligations of IOs poses quite a significant problem in the responsibility of IOs.[49] Admittedly, it is quite a difficult task to hold an IO responsible for an alleged wrongful act when it is not clear whether that wrongful act constitutes breach of an obligation which is binding on an IO. In section III therefore the complex subject of the source of obligations binding IOs will be examined. Further, an examination of whether IOs are bound by human rights obligations will be conducted. Section IV will conclude this chapter.

II GENERAL PRINCIPLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

The DARIO are an almost compulsory starting point on any discussion concerning the responsibility of IOs. The DARIO were adopted by the ILC at its 63rd session in 2011.[50]Generally, reception towards the DARIO has been mixed. As was alluded to in the introduction, the lack of sufficient practice seems to be a major issue.[51] Commenting on specific Articles, one author observed as follows:

[49] For instance see Kristina Daurgidas, 'How and Why International Law Binds International Organisations' (2016) 57 (2) *Harvard International Law Journal* 325 at p. 326 -327 where the author observes the lack of certainty and the significant disagreement which exists on the international law norms binding on IOs.
[50] Supra note 6. The actual work of drafting the DARIO commenced in 2001.
[51]See Daphne Shraga, 'The ILC Draft Articles on Responsibility of International Organizations: The Interplay between the Practice and the Role*' (2011) 105 American Society of International Law Proceedings, 351* at p. 353.

> 'Article 8...Article 14…and Article 15… have one thing in common. None of them is supported by Practice, nor is it likely, for reasons inherent in the institutional structure and political nature of the UN, that practice will emerge in support of the rule.'[52]

Briefly, Article 8 of the DARIO provides that an IO is bound by the actions of its organ or agent even if those actions are *ultra vires* or contrary to instructions. Article 14 makes provision for the liability of an IO if it aids a State or another IO in the commission of an internationally wrongful act. Similarly, in accordance with Article 15, an IO will be responsible for an internationally wrongful act if it controls or directs a State or another IO to commit such a wrongful act.

Despite these criticisms[53] however, other authors contend that all is not lost. For instance Daurgidas states:

> '…the IO Responsibility Articles are neither premature nor feckless. On the contrary, the IO Responsibility Articles can help clarify the primary norms that bind IOs. There are reasons to think that the IO Responsibility Articles will spur IOs and their member states to prevent violations and to address violations promptly if they occur.'[54]

It is debatable whether nine years after being adopted by the ILC, the DARIO have actually assisted in clarifying the primary norms binding IOs. It is true however that the DARIO have filled a gap created by the lack of formal rules regulating the responsibility of IOs. Therefore, in the absence of any other rules regulating the responsibility of IOs, resort may be had to the DARIO.

Additionally, several judicial bodies have made decisions based on these Articles. Notable cases include the *The State v Hasan Nuhanovic*[55] in which the Dutch Supreme Court relied on Articles 7 and 48 of the DARIO to confirm the Appellate Court finding of attributing wrongful conduct to the UN (in principle) and to the Netherlands government.[56] Similarly in *The State of*

---

[52] Ibid, p. 352.
[53] See Ahlborn op cit note 9 at pp 398-403 in which the author criticizes the indecisive and inconsistent use of the phrase "Rules of the Organisation," and Allain Pellet 'International Organizations are Definitely not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations in Maurizio Ragazzi(ed) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013).
[54] Kristina Daurgidas 'Reputation and the Responsibility of International Organizations' (2015) 25(4) *European Journal of International Law, 991 at p. 993.*
[55] Case No 12/03324 (6 Sept, 2013).
[56] See paras 3.9.2-3.9.4 and para 3.11.2.

Netherlands v Mothers of Srebrenica[57] and *Al-Jeddah v United Kingdom*[58] similar references to the DARIO were made. There is some evidence therefore of the growing influence of DARIO, although this has been at a rather slow pace. This section will discuss the major aspects of the secondary rules of responsibility of international organizations.

(a) Legal Personality

Article 2(a) of DARIO defines an IO as '…an organ established by a treaty or other instrument governed by international law and possessing its own international legal personality….' The possession of an international legal personality is critical not only in the discharge of duties of an IO but also in the organisation's effective participation in the international legal order. The possession of an international legal personality means an IO is capable of '…bearing rights and duties and capable of maintaining and enforcing its rights...'[59] in the same manner as other subjects of international law such as States. An IO is of course not a State and therefore its rights may be limited in some aspects. In the *Reparations Case*,[60] the Court observed as follows:

> '….whereas a State possesses the totality of international rights…the rights and duties of an entity such as the organization must depend upon the purpose and functions as specified or implied in its constituent documents and developed in practice.'[61]

This difference between States and International Organizations was further emphasized by the ICJ as follows:

> 'International Organizations are subjects of international law which do not, unlike States, possess a general competence. International Organizations are governed by the "principle of speciality', that is to say, they are invested, by the States which create them, with powers, the limits of which are a function of the common interests whose promotion those States entrust to them"[62]

[57] Case Number 17/04567 (19 July, 2019) at paras 11.2 and 15.2.
[58] ECtHR, Application Number 27021//08 at para 56 and 84.
[59] *Reparations Case* supra note 2.
[60] Ibid.
[61] Ibid. p. 180.
[62] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion.* [1996] ICJ Reports, 66 at pp78-79, para 25.

Another criticism of the DARIO, is the fact that these Articles do not give sufficient effect to the principle of speciality.[63] In other words the DARIO treat IOs almost the same as States in that the regime of responsibility for IOs is strikingly similar to that of States. This perhaps results from the fact that the DARIO are almost entirely based on the DASR.[64]

For purposes of this thesis however, the possession of legal personality is an important first step in triggering the responsibility of an IO. Victims of wrongful acts have an opportunity to seek and demand redress from the IO as a subject of international law in its own right. IOs which do not have international legal personality are in a different category. Liability for their wrongful acts remains the responsibility of the Member States constituting such Organisations.[65] As previously indicated, in this thesis, the focus is on IOs possessing legal personality.

The constitutive documents of an IO will have express provisions indicating the IO's legal status. However, for those that do not have such provisions, recourse will be had to the responsibilities and duties of such an organisation. If the performance of these duties cannot be successfully done without the possession of legal personality, then by implication, the intention of the Member States must have been that the IO should have legal personality.[66] Additionally, this international legal personality status can be claimed against non-member States of the IO if the IO has a universal character such as the UN.[67] However for those organizations which do not possess this universal character, this international legal personality status is only as regards its member states or to those states which have explicitly or implicitly recognized them.[68]

(b) The Principle of Attribution

As noted earlier, there is an internationally wrongful act of an IO if there is breach of an international obligation and this breach can be attributed to the IO. The topic concerning obligations of IOs will be considered in Section III below. This section will consider the critical

[63] Allan Pellet op cit note 53 at p. 46.
[64] See sentiments expressed by Hennie Strydom (ed) *International Law* (2016) at p. 150.
[65] White op cit note 26 p. 220.
[66] *Reparations Case* Supra note 2 *at p.179.*
[67] Ibid.
[68] Schermers & Blokker op cit note 27 at pp 990-991.

component of attributing a wrongful act to an IO. As Antonio Tzanakopoulos notes, States and IOs are fictional beings which cannot act in the physical world.[69] The conduct of these fictional beings is always through natural persons. In this sense, attribution plays the role of a bridge, connecting the actions of the natural person to an international law subject.[70]

Chapter II of the DARIO deals with the subject of attribution. In accordance with Article 6, an IO is responsible for the conduct of its organs or agents, irrespective of the position of the agent or organ in the organisation. Additionally an IO will be responsible for the wrongful conduct of a State or another IO if it exercises effective control over that State or the IO.[71] Furthermore an IO will be responsible for the conduct of its agents even if that conduct is *ultra vires.*[72] Finally, an IO will be responsible for conduct which it adopts and acknowledges as its own even if such conduct is not attributable to an IO under Articles 6-8.[73]

(i) The Effective Control Test

In general terms, Articles 6, 8 and 9 of the DARIO have not been very contentious.[74] Controversy has however arisen concerning Article 7. This is especially so with regard to peace keeping operations or military operations. Berenice Boutin describes military operations as 'operations involving the use of military force, undertaken by the armed forces of more than one State under the lead of an IO.'[75] Much of the controversy of Article 7 concerns the 'effective control' test for attributing conduct to an IO. This effective control test is not to be confused with the effective control test for attributing the conduct of paramilitary organizations to a State under the DASR.[76]

---

[69] Antonious Tzanakopolous 'Attibution of Conduct to International Organizations in Peace Keeping Operations' available at *http://ejiltalk.org/attribution-of-conduct-to-international-organisations-in peacekeeping-operations/* accessed on 10/09/2019.
[70] Ibid.
[71] Article 7.
[72] Article 8.
[73] Article 9. See for instance the case of *Prosecutor v Dragan Nikolic* ICTY Trial Chamber II Case Number IT-94-2-S (18 December, 2003) where the Court attributed the treatment and arrest of the accused person to the Stabilisation Force in Bosnia and Herzegovina (SFOR) because SFORs conduct displayed that it had approved and adopted the acts.
[74] Although see Shraga op-cit note 51 and 52 for criticisms on Article 8 of the DARIO.
[75] Berenice Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control' (2017) 18 *Melbourne Journal of International Law* 153 at *p. 157.*
[76] See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v USA) (1986) ICJ Rep14, para 115-116 for a description of this test in the realm of State Responsibility. See also Commentary to Article 7 of DARIO.

The effective control test for attributing conduct to an IO has generally been accepted. The continued application of this test by several judicial forums is evidence of this acceptance.[77] Despite this general acceptance however, several issues need to be highlighted. Firstly, as regarding peace-keeping and other military operations, it must be stated that it is sometimes not easy to determine who is exercising effective control over peace keeping troops and operations. The multiple stakeholders involved and therefore the complex scenario presented in the facts of the joined cases of *Behrami and Saramati*[78] is a perfect illustration of this problem. There is often a shifting of blame between Member States and IOs (particularly the UN) as to who is responsible for wrongful acts committed in the process of peace keeping and military operations, to the detriment of those trying to seek redress for these wrongful acts[79]

More importantly however, the effective control test's actual outline and modalities are not very clear. This has resulted in different thoughts and opinions on how the test should be applied and interpreted.[80] Notably, as will be discussed shortly, there have also been variations in the manner in which the test has been interpreted and applied judicially. It must be stated that these different interpretations and approaches have had and will continue having a bearing on the rights of those seeking redress for wrongful acts in peacekeeping and similar operations. For instance in the *Nuhanovic*[81] case, the District Court used the Presumptive interpretation to find that Netherlands was not responsible for the massacre at Srebrenica.[82] The Presumptive interpretation approach is to the effect that if forces in a peacekeeping operation are under the control of the UN, the presumption is that their conduct will be attributable to the UN.[83] This presumption is rebutted

[77] See for instance *Al Jeddah* supra note 58 (para 84) the Court used the effective control test and so have the Dutch Courts in *Mothers of Srebrenica and Nuhanovic* (Appellate Court) (para 5.9).
[78] Joined cases of *Behrami v France* and *Saramati v France, Germany and Norway*, supra note 12. See also the *Al-Jeddah Case* supra note 58.
[79] See detailed discussions in Chapter 3 on how the relationship between IOs and their Member States affects the question of responsibility and prejudices victims.
[80] See generally Yohei Okada ' Effective Control Test at the Interface between the Law of International Responsibility and the Law of International Organizations: Managing Concerns over the Attribution of UN Peacekeepers' Conduct to Troop Contributing Nations' (2019) 13 (2) *Leiden Journal of International Law* 1.
[81] Judgment of the District Court, Case Number 265615/HA ZA, paras. 4.14.1-4.14.5. See also the Belgian Case of *Mukeshimana-Ngulinzira v. Belgian State*, Judgment of the Court of First Instance, Case Numbers 04/4807/A and 07/15547/A.
[82] *Nuhanovic* supra note 81 at paras 4.14.1-4.14.5.
[83] See Okada, op cit note 80 at p.2.

however, where it can be demonstrated that troops were actually acting under the direct control of their home State.[84]

On the other hand, others argue for a 'preventive' interpretation of the effective control test.[85] According to this approach, effective control should mean "control most likely to be effective in preventing the wrong in question." [86] A greater leeway should be allowed for attributing the conduct of peacekeepers to Troop Contributing Nations (TCNs) as this would be most effective in preventing violations. This approach is also aimed at enabling victims to avoid the hurdle of UN immunity before domestic courts and thus aids the obtaining of remedies from TCNs.[87] The preventive approach was used by the appellate court in *Nuhanovic*[88] and also by the District Court in the *Srebrenica Case.*[89]

While the preventive approach would certainly be applauded by victims of wrongful acts, it has been criticised for unfairly allocating responsibility. Okada notes that '…manipulating the effective control test as a tool exclusively for remedies with no regard to its institutional aspect seems unjustifiable.'[90] It has also been argued that putting too much responsibility on TCNs would serve to destabilize the peace keeping regime in two ways: TCNs would either choose not to send troops or would seek to have greater control over peace keeping operations in order to minimize liability.[91] Viewed from this angle, the presumptive interpretation would seem a fair way of interpreting the effective control test. The UN should be responsible for violations occurring under its control and TCNs should be responsible for violations occurring under their control. It would seem unfair to disproportionally put all the responsibility of wrongs committed on the TCNs.

However as is common knowledge, the UN cannot be compelled to accept liability either by a domestic or international court or tribunal because of the various immunities it enjoys.

---

[84] Ibid.
[85] Tom Dannenbaum '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 Peace keepers. (2010) 51 (1) *Harvard International Law Journal* 113.
[86] Ibid, p.114.
[87] Ibid.
[88] Case Number 200.020.174/01, para 5.8.
[89] District Court of the Netherlands, Case No. 295247 HA ZA 07-2973, para 4.46. See also, para 4.57-4.58.
[90] Okada op cit note 80 p.2.
[91] Cedric Ryngaert, "Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after Behrami' (2012) 45 *Israel Law Review* 151, at 164.

Therefore even if certain wrongful actions are attributed to the UN, victims cannot seek reparation unless the UN of its own volition accepts liability and makes the necessary reparations.[92] Therefore while fairly allocating responsibility, the presumptive interpretation does not adequately address the problem of jurisdictional immunity of the UN. Victims are left at the mercy of the UN's determinations on whether or not to accept responsibility when wrongful acts have been attributed to it. Where the UN does not accept responsibility, the victim is left empty handed.

In this regard, although the preventive approach lets the UN abscond its responsibilities for wrongful conduct, a victim centered approach would clearly favour this interpretation. Perhaps its application would indeed minimize violations. Perhaps the fact that TCNs become reluctant to send troops for fear of liability would be the necessary catalyst for serious thoughts and considerations on effective ways of addressing wrongful acts committed in peace keeping and similar operations.

As noted earlier, attribution is only one element of an internationally wrongful act. The other important aspect is that there should breach of an international obligation. What is the source of the obligations of IOs?

III AN OVERVIEW OF THE PRIMARY NORMS

While the secondary rules of responsibility address the matter of responsibility for wrongful acts, primary rules of international law address the question of which conduct is or is not wrongful in the first place.[93] The international law arena is primarily designed for states and therefore as Schemers and Blokker note, the majority of primary rules of international law do not apply to IOs.[94]

Article 11 of the DARIO states that an act of an IO will only constitute a breach of an international obligation if the organisation was bound by that obligation. This begs the fundamental question of which obligations bind IOs? The need for clarity on the primary norms

[92] See Chapter 3 for a detailed discussion on Dispute Settlement mechanisms and immunities of IOs concerning International Organisations.
[93] See DASR, Commentaries, General Commentary, para 1.
[94] Schemers and Blokker op cit note 25 para 1572.

binding IOs has become greater with the growing influence of these bodies and their impact on the lives of individuals. Lack of clarity on primary norms affects the question of responsibility since it is not clear whether alleged international wrongs constitute a breach of an obligation binding on an IO.[95] This section therefore critically examines the obligations which bind IOs, including the important question of whether IOs are bound by human rights.

(a) Obligations of International Organizations

The following observations by the ICJ provide a great starting point in considering the source of obligations binding IOs:

> 'International Organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'[96]

It is perhaps fairly obvious that an IO would be bound by obligations arising from its constitution or constitutive documents. Additionally by virtue of being international legal persons, IOs have the ability and capacity to enter into agreements whether at the international or domestic level. Obligations arising from these agreements would also therefore be binding on an IO. The 1986 Vienna Convention on the Law of Treaties between States and International Organisations and Between International Organisations[97] provides rules which regulate international agreements concerning IOs. This Treaty is however not yet in force.[98] It must be noted that most Treaties in existence currently, do not allow for IOs to become parties.

---

[95] See Andre Nollkaemper and Dov Jacobs, 'Shared Responsibilty in International Law: A Conceptual Framework' (2013) 34 (2) *Michigan Journal of International Law* 359 at pp 408-412 for discussions on not only the lack of clarity on primary norms but the sometimes problematic distinction between primary and secondary norms. This lack of clarity also affects state responsibility, see also James Crawford 'The ILC's Articles for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal on International Law* 874 at pp 876-877.

[96] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* [1980] ICJ Reports 73 at pp 89-90.

[97]Convention on the Law of Treaties between States and International Organizations or between International Organizations., 16 December 1982, A/RES/37/112, available at: *https://www.refworld.org/docid/3b00f0158.html* [accessed 8 February 2020].

[98] Currently 33 of the required 35 States have ratified the Convention. See *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en* accessed on 3/2/2020.

Article 38 (1) (c) of the Statute of the ICJ[99] identifies the 'general principles of international law' as a source of law. It may be argued that by virtue of being subjects of international law, IOs are bound by general principles of international law in the same manner as States would be bound. In this regard, it has been argued that IOs are bound by the provisions of 'law-making treaties'-by virtue of the universality of the application of such treaties.[100] The following observations have been made:

> 'The legal foundation of this obligation lies not in its character as an international treaty but rather in its character as a general principle of law codified by treaty. Whether a particular Treaty contains such a general principle may be indicated in its mode of establishment. The number of States which participated in its drafting is important, and also whether the text has been unanimously –or almost unanimously-adopted.[101]

Other factors to consider in ascertaining whether a particular treaty codifies general principles of law include the length of time in which the treaty has remained open for ratification and the number of ratifications collected.[102] Schemers and Blokker are suggesting here that IOs can be bound by provisions of a Treaty even when they are not parties to those treaties. The African Court on Human and Peoples Rights (AfCHPR) disagrees. In *Femi Falana v African Union,*[103] the AfCHPR stated that obligations emanating from a treaty cannot be forced on an IO which is not a party to that treaty. The Court therefore dismissed the case for want of jurisdiction since the AU did not consent to being bound by the Protocol to the African Charter on Human and People's Rights.[104]

It has further been argued that, IOs are bound by the same general principles of law which bind the States which created them.[105] For instance regional organisations may be bound by general principles of law as apply within that specific region. The understanding here is that different

---

[99] United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: *https://www.refworld.org/docid/3deb4b9c0.html* [accessed 8 February 2020].
[100] Schemers and Bokker op cit not 25 para 1577
[101] Ibid.
[102] Ibid. Using this argument the Covenant on the Rights of the Child would be considered such a treaty. It achieved near universal ratification in…….other notable treaties would be the ICCPR and Conv on Disabilities…….
[103] *Femi Falana v African Union* AfCHPR,, App No. 001/2011
[104] Ibid paras 69-75. The Protocol was adopted by the Organisation of African Unity on 10 June, 1998 and can be is available at: *https://www.refworld.org/docid/3f4b19c14.html* [accessed 10 February 2020]. *See also Behrami and Behrami, supra note 12.*
[105] Blokker and Schemers op-cit note 25 para 1575-1576.

regions have general principles of law applicable and peculiar to that particular region. In making this argument it must be considered however that in such regional organisations as the African Union, a mixture of the lingering effects of colonisation and various cultures across the continent has resulted into vastly different legal systems. In this context legal systems of Sub-regional Organisations would probably have more similarities. However grounding the obligations of IOs in general principles of international law encounters some problems as discussed below.[106]

(b) Are International Organisations Bound by Human Rights Obligations?

The main bone of contention concerning the primary norms is the question whether and to what extent are IOs bound by human rights. The growing influence and activities of IOs have also translated into a greater impact on the human rights of individuals. Examples of human rights violations perpetrated by IOs abound to such an extent that some IOs are considered a risk to fundamental rights.[107] For instance reference has been made to the sanctions regime of the Security Council and its impact on the human rights of individuals.[108] Additionally reports of human rights violations in peace keeping and other operations have been well documented.[109] The UN itself is acutely aware of the various violations which occur in peacekeeping operations.[110] These reported human rights violations by the UN are quite concerning, when regard is had to the fact that the

[106] See notes 117 -119 and accompanying text.
[107] Bogdandy op cit note 11 at p. 68.
[108] See a thorough discussion on this topic in: Clemens Feinangle, 'The UN Security Council and Taliban Sanctions: Emerging Principles of International Institutional Law for the Protection of Individuals' (2008) 9 (11) *German Law Journal* 1513.
[109]Rosa Freedman 'UNaccountable: A New Approach to Peacekeepers and Sexual Abuse' (2018) 29(3) European Journal of International Law 961. See also Rosa Freedman and Lemay-Herbert "Jistis ak reparation pour tout victim kolera MINUSTAH": The United Nations and the Right to Health in Haiti' (2015) 28 (3) *Leiden Journal of International Law* 507. See also the finding by the Human Rights Advisory Panel in *N.M and Others v UNMIK* Case No. 26/08 (Feb, 2016) pp 77-78. The Panel found that the United Nations Mission to Kosovo (UNMIK) failed to comply with applicable human rights standards in relation to adverse health caused by lead poisoning. The lead poisoning was caused by a zinc and lead mining and smelting complex which at the time was under UNMIK's administration. The report is available at *http://www.unmikonline.org/hrap/Eng/Cases%20Eng/26-08%20NM%20etal%20Opinion%20FINAL%2026feb16.pdf* accessed on 8 February, 2020.
[110] See for instance Report of the Secretary General on *Special Measures for Protection from Sexual Exploitation and Abuse,* United Nations General Assembly Doc A/73/744. (Feb, 2019).

promotion and protection of human rights is among the fundamental principles of the UN Charter.[111]

However while IOs are capable of violating human rights just as much States, it is easier to hold States accountable for human rights violations than it is to hold IOs accountable. A major part of this problem is the fact that unlike States, IOs are not parties to human rights treaties. These treaties are a major source of the primary rules or norms concerning human rights. Therefore, the basis upon which IOs are bound by human rights obligations has to be identified elsewhere, outside these human rights treaties.

Several arguments for binding IOs to human rights obligations outside treaty law have been made. For instance it has been argued that some human rights have acquired the status of customary international law and that therefore by virtue of being subjects of international law, IOs are bound by these customary law status human rights.[112] However grounding human rights in customary international law faces some problems. To begin with it cannot be definitively argued that all the existing human rights have attained the status of customary law. In order to successfully establish a norm of customary law, it must be shown that there is consistent State practice coupled with a belief that the State practice is obligatory.[113] As Olivier De Schutter notes, in practice States tend to favour some human rights over others and that therefore in this regard there is lack of uniformity both in State practice and in perceptions about human rights.[114]

De Schutter suggests instead that it would be safer to ground human rights in general principles of law.[115] This approach seems to have the nod of the ICJ as per the sentiments expressed in the *WHO and Egypt Agreement*.[116] However other commentators are not so certain that this

---

[111] See Articles 1(3), 55 and 56 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: *https://www.refworld.org/docid/3ae6b3930.htm*l [accessed 8 February 2020]
[112] For recent arguments on the customary law status of human rights see David Boucher, 'The Recognition Theory of Rights, Customary International Law and Human Rights' (2011) 59 *Political Studies* 753. However also see Gabriel M. Wilner, 'Reflections on Regional Human Rights Law,' (1995) 25 (1&2) *Georgia Journal of International and Comparative Law* 407.
[113] See Article 38 1(b) of the ICJ Statute and the *North Sea Continental Shelf Cases* [1969] ICJ 44 para 77.
[114] Olivier De Schutter 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility' in Jan Wouters et al (eds) *Accountability for Human Rights Violations by International Organizations* (2010) pp 51-128 at p. 70.
[115] Ibid pp 71-73
[116] Supra note 96. See also the Court's pronouncements in the *Corfu Chanel Case*, [1949] ICJ 4 at p. 22 and *United States Diplomatic and Consular Staff in Tehran* [1980] 7 at p. 42.

pronouncement by the ICJ puts this matter to rest.[117] For instance Klabbers has stated that despite the sentiments by the ICJ, it is not clear which particular principles of international law and why those principles would bind IOs.[118] Daurgidas concurs and observes that:

> *WHO-EGYPT…*fails to resolve which international law rule binds IOs, and the question remains unsettled. But even if there were agreement about which rules bind IOs, scholars have disagreed whether those rules are mandatory or default rules.[119]

In the final analysis therefore the theory that the human rights obligations of IOs are grounded in general principles of international law is far from settled.

Noelle Quenivet on the other hand suggests other ways in which organisations such as the UN can be bound by human rights obligations.[120] These suggestions may equally apply to other IOs. It is suggested that the UN could formally declare that it is bound by specified human rights treaties or secondly that some of its bodies could be subjected to treaty implementing and monitoring mechanisms.[121] The first suggestion is based in part on the fact that the internal law of the UN (Codes of Conduct, Staff Regulations and UN Reports among others) has professed adherence to human rights standards.[122] As regards the second suggestion, Quenivet cites an instance where the United Nations Administration Mission in Kosovo (UNMIK) submitted reports to the Human Rights Committee on the status of human rights in Kosovo.[123]

Both of these suggestions require the UN or the relevant IOs to voluntarily take steps to be bound by human rights standards as specified in treaties. It is of course doubtful whether organisations such as the UN would voluntarily take these steps. Until such a time as decisive steps are taken to meaningfully hold IOs to human rights standards, victims will continue to bear the brunt of the uncertainty caused by a lack of clarity on the primary rules binding on IOs. As others have rightly observed, the problem is compounded by a lack of an appropriate forum which could

---

[117] Daurgidas Op cit note 49 at pp 331-335.
[118] Jan Klabbers, 'The Paradox of International Law' (2008) *International Organisations Law Review 151 at p. 165.*
[119] Daurgidas op cit note 49 at p. 334.
[120] Quenivent note 21 pp 608-621.
[121] Ibid.
[122] See *Staff Regulations*, UN Doc ST/SGB/2003/5 and UN Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for all' UN DOC. A/59/2005 p.113.
[123] Quenivent note 21 at p.614. See Report on the Human Rights Situation in Kosovo since 1999, United Nations Document CCPR/C/UNK/1 (Mar, 2006) and see note 105 for the findings of the Human Rights Committee on this report.

decisively make a pronouncement on the question of whether IOs are bound by human rights obligations.[124]

The following thoughts would seem a fitting conclusion to this matter:

> '…the lack of clearly identified sources of international law works to the detriment of legal certainty and individuals whose rights have been violated. In an era where a victim-centered approach is cherished, it cannot be accepted that an entity, especially as powerful as the United Nations, can simply be freed of any human rights obligations. Indeed, as a result of the current legal position, victims may not even find a forum that can readily address human rights violations they have suffered at the hands of the United Nations, since it is impossible to point to the sources of such human rights obligations.'[125]

IV CONCLUSION

The uncertainty which persists in certain aspects of secondary rules and generally in the primary rules is perhaps a characteristic feature of international law. These uncertainties do not help the cause of those who are trying to seek redress for wrongful acts committed by IOs. While the development of the DARIO gives some guidance as to the secondary rules of responsibility, there is still a long way to go. The path of the person who seeks redress for wrongful acts committed by IOs is a difficult one with hurdles at every turn. It seems rather ironic that some of these IOs are in the forefront of promoting human rights and yet are themselves not effectively held accountable for breaching the same human rights which they promote.

In addition to the problems discussed in this chapter, there are other obstacles which those seeking redress for the wrongful conduct of IOs face. These are discussed in the succeeding chapter.

---

[124] See Joana Abriesketa Uriarte 'The Responsibility of International Organisations and International and European Courts and Tribunals: Judicial Review of Security Council Resolutions (2011) *Remedies and Responsibility for the Actions of International Organisations* 321 at p. 322.
[125] Quenivent, note 21 at p. 621.

CHAPTER 3

THE DIFFICULTIES OF SEEKING REDRESS FOR WRONGFUL ACTS COMMITED BY INTERNATIONAL ORGANISATIONS

I INTRODUCTION

Beyond the problems associated with the primary and secondary rules as discussed in the preceding chapter, individuals seeking redress for wrongful IO conduct face various other hurdles. Some of the major obstacles include lack of appropriate dispute resolution mechanisms and the immunities enjoyed by IOs.[126]

A further issue worth pointing out is how the relationship between an IO and its member states affects the question of responsibility over wrongful acts. In some instances it becomes unclear who (between the IO and its Member States) is responsible or should bear responsibility for wrongful acts.[127] This is particularly true in situations such as peacekeeping or military operations.

In this Chapter the further inadequacies of international law in the area of IO responsibility will be discussed. To begin with, section II, explores how the relationship of an IO and the IO's member states affects the question of responsibility. The focus in this section is on how the uncertainties which exist in particular instances, on who bears responsibility for wrongful conduct, prejudices the victims of that wrongful conduct.

The importance of the availability and effectiveness of dispute handling mechanisms concerning complaints against IOs cannot be overemphasised. Therefore, in section III, an assessment of the currently available dispute settlement mechanisms for complaints against IOs is

---

[126] See generally Pierre Schmitt, *Access to Justice and International Organisations: The Case of Individual Victims of Human Rights Violations* (2017).

[127] Niels Blokker, op cit note 10, Cedric Ryngaert & Holly Buchanan, op cit note 10, Andre Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24(5) *Contemporary Politics* 524 and Tom Dannebaum '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 Peace keepers. (2010) 51 (1) *Harvard International Law Journal* 113.

conducted. Additionally, this section also explores other problems concerning dispute settlement in the law of international organisations generally.

The various immunities which IOs enjoy are important for the proper functioning of these organisations. However these immunities also present a significant challenge for individuals seeking redress for IO wrongful conduct. Section IV therefore focuses on how IO immunity affects the question of responsibility and also examines the conflict between immunity and access to justice.

II INTERNATIONAL ORGANISATIONS AND THEIR MEMBER STATES: A CASE OF SHIFTING BLAME?

The relationship between an IO and its Member States is an important one. Blokker refers to it as an 'existential one.'[128] IOs come into existence at the behest of States and can therefore cease to exist if the Member States so decide; as the disbanding of the League of Nations ably demonstrates.[129] On the other hand, IOs help States to achieve goals and purposes which would otherwise be difficult to achieve if States were acting singularly. Such purposes include peace keeping missions, efforts in combating terrorism and the work carried out by the World Health Organisation in the management of plagues and other health issues of global concern, among others.

The possession of an international legal personality aids the activities and functions of IOs both on their own behalf and on behalf of States. In the realm of responsibility, this legal personality also pre-supposes that IOs will be responsible for their own wrongful acts. After all Article 3 of the DARIO is very clear: 'Every internationally wrongful act of an International Organisation entails the international responsibility of that organization." It is not only logical, it

[128] Blokker op-cit note 10 at p 322.
[129] The League of Nations was created in 1919 see Covenant of the League of Nations, 28 April 1919, available at: *https://www.refworld.org/docid/3dd8b9854.html [accessed 8 February 2020]*. This Organisation was eventually replaced by the UN and its assets transferred over to the UN see UN General Assembly, Transfer of the Assets of the League of Nations, 7 December 1946, A/RES/79, available at: *https://www.refworld.org/docid/3b00f1ec0.html [accessed 8 February 2020]*

is also a legal principle that an entity which possesses a legal personality should be responsible for its own wrongful acts.

Despite the provisions of Article 3 however, in some instances the relationship between Member States and IOs affects the question of responsibility. In fact the allocation of responsibility for wrongful conduct between an IO and the IOs member states is considered one of the most difficult areas in the law of IOs.[130]

Opinions and thoughts on the responsibility of States for wrongful acts committed by IOs are varied. There are those who believe that IOs should be responsible for their own wrongful acts.[131] The argument is that, allowing States to be responsible for the wrongdoings of IOs undermines and therefore defeats the whole purpose of the separate legal personality of IOs.[132] It is further argued that allowing States to be responsible for wrongful acts committed by IOs would result in those States seeking to have greater control over the affairs of the IO and therefore serve to undermine the organisation's independence.[133]

On the other hand, there are those who believe that since seeking redress from an IO is usually complicated, redress for wrongful acts should instead be obtained from the Member States of the IO.[134] Proponents of this view argue that, sometimes States hide behind an organisation which they have created in a bid to avoid responsibility for actions which are purportedly committed by the organisation but which are in essence acts of the Member States.[135]In this case therefore, holding Member States responsible for the wrongdoings of IOs in specified circumstances is not only desirable, it is lawful.[136]

---

[130] Ryngaert op cit note 91 at p.151

[131] Blokker, op cit note 10 at p. 327 contrast with Andrew. Stumer, 'Liability of Member States for Acts of International Organisations. Reconsidering the Policy Objections' (2007) 48 *Harvard International Law Journal*, 553 at p 580 where the author states that considerations for the separate personality and independent functioning of IOs are not solid grounds for denying (secondary) member state responsibility

[132]Blokker op cit note 10 at p.327.

[133] Ibid.

[134] Dannenbaum op cit note 85 at p. 114.

[135] For instance see Thomas Grant, 'International Responsibility and the Admission of States to the United Nations', (2009) 30 *Michigan Journal of International Law* p. 1095 at p. 1136. s

[136] Ryngaert & Buchanan op-cit note 10 at p. 132. See also Jean d'Aspremont 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) *International Organizations Law Review 91* at pp 92-93 where the author makes the argument that Member States can no longer use the shield of the international legal personality of IOs to escape responsibility.

Finally, some argue that responsibility for wrongful acts especially in peacekeeping operations should be shared between the IO and the concerned Member States in accordance with the entity exercising effective control over the perpetrators of the wrongful act.[137] Proponents of this view argue that, each entity should bear responsibility for its own wrongful conduct and that effective modes of dispute settlement for IOs (UN specifically) should be developed instead of punishing TCNs with responsibility over wrongful acts committed by IOs. [138]

The intricate details of the complex relationship between an IO and its Member States and therefore how responsibility should be apportioned were discussed to some extent in Chapter 2. Building on those discussions, this Chapter aims at highlighting the fact that the uncertainty of where to apportion blame and therefore responsibility, when an IO has committed wrongful acts is prejudicial to those trying to seek relief for wrongful acts. In some instances this uncertainty and blame shifting between an IO and its Member States results in leaving victims empty handed.

(a) An Illustration of the Problem

The merged cases of *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*[139] are a perfect illustration of the plight of victims when both IOs and Member States shift blame and refuse to accept responsibility. In *Behrami,* the case concerned a child who had been killed and his brother who had been seriously injured, when an undetonated cluster bomb they had been playing with exploded.[140] The bomb had been dropped during the NATO air strikes in Kosovo in 1999.

The area in which the bomb exploded was at that time under the control of a multi-national Brigade (MNB) led by France. However, France refused to accept responsibility for the incident on the basis that at the time of the explosion de-mining processes had been taken over by the Kosovo Force (KFOR) pursuant to UNSC Resolution 1244.[141] For its part, the United Nations,

[137] Okada. Op cit note 78 p.6
[138] Okada op cit note 78 p. 12.
[139] Supra note 12
[140] *Behrami* supra note 12 para 5.
[141] ibid para 7. See Resolution S/R/1244 (10 June 1999) which authorised the deployment of military and civilian personnel to assist in resolving the conflict in Kosovo.

also refused to accept responsibility, pushing the blame to another entity.[142] Interestingly, the IO (NATO) which had been responsible for dropping these bombs in the first place did not feature anywhere in this case and was never held responsible or accountable for its actions. This can perhaps be attributed to the difficulties of bringing a complaint against NATO. In which possible forum would a claim against NATO be brought?[143]

In the final analysis, the Court found that the de mining processes were the responsibility of UNMIK, a subsidiary organ of the UN.[144] In essence therefore, the wrongful acts were attributable to the UN.[145] The Applicant however was left empty handed because the UN is not a party to the European Convention on Human Rights (ECHR) and therefore could not be held liable under that Convention.[146]

The finding of the Court in the *Behrami case* also applied to the *Saramati case.* In the latter case the applicant had been arrested by UNMIK police in an area controlled by an MNB led by Germany.[147] Additionally Mr. Saramati's further detention had been ordered (at different times) by Norwegian and French Commanding Officers. The detention was however adjudged unlawful and Mr. Saramati was released from custody.[148] The Court found that in arresting and ordering the further detention of the Applicant, the concerned officials had been exercising 'lawfully delegated Chapter VII powers of the UNSC'.[149] The unlawful detention therefore could be attributed to the UN.[150] Similarly, Mr. Saramati was left empty handed.

The joined cases of *Behrami and Saramati* have of course been criticized for several reasons,[151] including the fact that the Court failed to recognize that States can also be responsible

[142] Behrami Supra note 12 paras 118-120.
[143] There has been legal action concerning NATO's activities in Kosovo, however this mostly concerned suits between States in the ICJ, for instance see *Legality of the Use of Force (Yugoslavia V Belgium) Provisional Measures* [1991] ICJ Rep, 124.
[144] *Behrami* supra note 12 para 127.
[145] Ibid para 143.
[146] Ibid para 152.
[147] *Behrami and Saramati, supra note 12 para 8-17.*
[148] Ibid.
[149] Ibid para 141.
[150] Ibid.
[151] Paolo Palchetti, 'The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations' (2013) 95 (891/893) *International Review of the Red Cross* 727 at pp 736-738 where the authors frowns upon the Court's use of the 'ultimate control' test in attributing responsibility to the UN.

for the wrongful conduct of their troops.[152] From the perspective of the victims however, the fact remains that the Applicants had suffered harm but they could not seek redress as a result of a decision or perhaps lack of appropriate decision on who was responsible for that harm. There were of course other factors at play in both cases, however the decision of where to apportion blame remains a significant issue.

On the other hand in *Al-Jeddah v. United Kingdom,*[153] the applicant had been arrested and held in detention at a facility which was under the control of the British Army in Iraq.[154] The basis of the arrest was that the Applicant had been involved in terrorist activities and was therefore a security threat.[155] At the time of the Applicant's arrest, there was a Multi-National Force (MNF) in Iraq which had not been created by a UNSC resolution but was all the same authorized, by a UNSC resolution,[156] to carry out various activities related to the maintenance of security in Iraq. The United Kingdom (UK) was part of this MNF. Distinguishing the facts of this case from the facts in *Behrami* (rather unconvincingly), the ECtHR held that the unlawful detention of the Applicant was attributable to the United Kingdom and not to the UN.[157]

The positive aspect of *Al-Jeddah* is that the wronged individual in this case did not leave empty handed as the Court did order the UK to compensate the Applicant for the unlawful detention.[158] However lingering questions remain as to the role and therefore the responsibility of the UN in this case. Although the finding of the Court is supported under the ECHR in accordance with obligations of States under that Convention,[159] one gets the sense that the Court was trying to undo the perceived injustice occasioned in *Behrami.* Indeed it can reasonably be argued that the inherent difficulties of holding the UN responsible for the impugned act and therefore what this

[152]See for instance Marco Milanovic & Tatjana Papic, 'As Bad As It Gets: The European Court of Human Rights's *Berhami and Saramati* Decision and General International Law,' (2009) 58 (2) *International and Comparative Law Quarterly* 267.
[153]Supra note 58.
[154] Ibid paras 10-11.
[155] Ibid.
[156] UN Security Council, *Security Council Resolution 1511 (2003) [on authorizing a multi-national force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq]*, 16 October, 2003, S/Res/1511 (2003), available at: *https://www,refworld.org/docid/3fa524dd4,html* (accessed 9 January, 2020).
[157] Paras 109-110.
[158]Para 114.
[159] Article 5 of the ECHR.

would mean for the victim, were at the back of the Court's mind. The UK, it seems was an easier entity to hold responsible for the unlawful detention of the Applicant.

Finally, the Supreme Court of the Netherlands decision[160] pertaining to the well-known events at Srebrenica, delivered on 19 July, 2019 brings to a close one of the most extensively litigated cases concerning the question of responsibility in peace keeping operations. In the final analysis, the Court held that, Netherlands was only liable for ten percent of the damage suffered by the relatives of those massacred at the hands of the Bosnian Serbs in KOSOVO.[161] The responsibility of Netherlands stemmed from the fact that the Dutch Battalion did not offer the male refugees in the compound at Srebrenica a choice to stay within the compound and so possibly escape from the Bosnian Serbs.[162] The Court did not explicitly state that a large aspect of the wrongful deaths was attributable to the UN but the inference is clear when the Court states that Netherlands cannot be held responsible for acts carried out 'under the command and control of the UN'.[163] It has been argued that holding TCNs liable for wrongful conduct in peace keeping operations as was the case in *Mothers of Srebrenica*, especially in the Supreme Court, is the exception rather than the norm.[164] In this particular case, holding Netherlands responsible was only possible because of the presence of exceptional circumstances, specifically the role played by the Dutch Battalion in not offering the male refugees the choice to stay within the compound.

These cases are illustrative of how the interplay between IOs and their Member States affects the question of responsibility. Above all, the cases illustrate the plight of victims, when courts are faced with the sometimes difficult task of deciding where responsibility should fall. IOs and mostly the UN are not held responsible for the wrongful acts and omissions instigated under their control, sometimes leaving their Member States to bear the brunt of their wrongful actions.

---

[160] *The State of Netherlands (Ministry of General Affairs, Ministry of Defense and Ministry of Foreign Affairs) v Stichting Mothers of Srebrenica, Number 17/04567* available at *https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:1284.*

[161] *Srebrenica* supra note 160.

[162] Ibid.

[163] The Supreme Court had previously ruled in this case that the UN had immunity from Jurisdiction and therefore could not be a party to this case, see *Supreme Court,* 13 April, 2012, ECLI:NL:HR:2012:BW 1999. See further ECtHR, 11 JUNE, 2013, No. 65542/12 (*Mothers of Srebrenica)* in which the Court stated that UN Immunity does not offend provisions of the ECHR, particularly Article 6.

[164] Cedric Ryngaert and Otto Spijkers, 'The End of the Road: State Liability for Acts of UN Peace Keeping Contingents After the Dutch Supreme Court's Judgment of Srebrenica (2019) 66 *Netherlands International Law Review* 537 at 552.

In some cases such as *Behrami,* even the Member States are not held accountable for the impugned actions or inactions, leaving the victims with no recourse for redress.

Although in this era of human rights, the international arena has opened up to allow individuals to participate, the stage is still firmly set for the participation of States. This is demonstrated, among others, by challenges concerning the availability of and access to dispute handling mechanisms as will be discussed below. Resolution of disputes concerning subjects of international law other than States, is an area of international law that is still developing.

III DISPUTE SETTLEMENT MECHANISMS FOR COMPLAINTS AGAINST INTERNATIONAL ORGANISATIONS

Dispute settlement mechanisms on the international scene largely depend on who the complainant is and against whom the complaint is being made. Generally disputes between States have a better chance of being resolved because there exists in the international legal order various mechanisms and systems for resolving such disputes. This is perhaps due to the fact that as has been noted repeatedly, the international legal system was primarily designed for States. However in the current human rights dispensation, individuals are increasingly finding their voice in disputes concerning States.[165]

On the other hand, complaints concerning IOs are resolved in a variety of ways depending on the organisation concerned and the entity making the complaint. It is a well-known fact that IOs, individuals and other entities do not have access to the ICJ, the main international forum for resolving disputes.[166] This forum is exclusively reserved for States.[167] In accordance with the Convention on the Privileges and Immunities of the United Nations (CPIUN),[168] the ICJ may only provide advisory opinions on question relating to the immunities of the UN.

---

[165] In accordance with international and regional human rights systems and institutions. See generally, Frans Viljoen, 'International Protection of Human Rights' in Hennie Strydom (ed) *International Law,* (2016)
[166] Article 34 of the ICJ Statute.
[167] Ibid.
[168] UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, available at: https://www.refworld.org/docid/3ae6b3902.html [accessed 8 February 2020]. See Article VIII, Section 30.

It is rather amusing to note that despite the recognition by the ICJ that the UN has the capability of bringing international claims against States and other entities,[169] such claims cannot be brought before the ICJ.[170] Additionally, IOs normally have immunity before domestic courts. In this regard, disputes are normally resolved through the IO's own internal mechanisms such as administrative tribunals, negotiations and *ad hoc* arbitration among others. The availability and effectiveness of these dispute settlements mechanisms will now be examined.

(a) Internal Dispute Settlement Mechanisms

(1) Employees and Other Categories of Staff Members

Most internal dispute settlement mechanisms in IOs are for handling employee related disputes.[171] As will be discussed later in this thesis, immunities of IOs typically prevent employees from seeking redress at the domestic level. Considering the impact of these immunities on the rights of employees, particularly the right to access a Court, it is now widely recognized that IOs have a duty to provide alternative means of handling employment disputes.[172]

The CPIUN obliges the UN to provide settlement mechanisms for 'disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.'[173] The ICJ has stated that section 29 of the CPIUN, places an obligation on the UN to make available dispute settlement mechanisms to entities which would otherwise have no means of seeking legal redress due to UN immunities.[174] Non-compliance with section 29 does not however invalidate

---

[169] *Reparations Case*, supra note 2.
[170] See further discussion on this point in Hersch Lauterpacht, 'The Revision of the Statute of the International Court of Justice' (2002) 1 *The Law and Practice of International Courts and Tribunals* 55 at p. 57.
[171] See generally, Yaraslau Kryvoi, 'The Law Applied by International Administrative Tribunals: From Autonomy to Hierarchy' (2015) 47 *George Washington International Law Review* 267.
[172] See infra Section IV. See also *Waite and Kennedy v. Germany* 13 Eur. Crt. H. R. 121, (1999), *General Secretariat of the ACP Group v Lutchmaya*, Final Appeal Judgment , Cass Nr 03 0328 F, ILDC 1573 (BE 2009), Court of Cassation, Belgium. See generally Joshua M. Javits, 'Internal Conflict Resolution of International Organisations' (2013) 28 (2) *ABA Journal of Labour and Employment Law,* 223.
[173] Article V11, Section 29(a).
[174] *Difference relating to Immunity from Legal Proceedings of a Special Rapporteur of the Commission on Human Rights,* [1999] ICJ Reports 62 at para 66.

UN immunity.[175] A question therefore arises whether provisions such as section 29, serve any purpose at all.

However there exists within the UN, dispute settlement mechanisms aimed at handling employment related disputes. Such mechanisms include the United Nations Dispute Tribunal (UNDT)[176] and the United Nations Appeals Tribunal (UNAT).[177] Both of these tribunals are judicial organs vested with the power to make binding decisions and to order remedies.[178] Further, there exists the office of the Ombudsman for the UN Secretariat, Funds and Programs.[179] Among other functions, the Office of the Ombudsman provides formal mediation facilities through its Mediation Division.[180]

The creation of these dispute settlement mechanisms is commendable. However some problems still exist. In accordance with their relevant statutes, the UNDT and the UNAT are only available to Members of Staff of the UN and not to other categories such as non-staff personnel.[181] In this regard, persons on individual contracts and individuals on special service agreements do not have access to these tribunals.[182] The only available option for seeking redress using the internal mechanism for this category of employees is the UN Ombudsman.[183] If the dispute cannot be resolved at this level, the only other option is arbitration. [184] However, as will be discussed in detail below, generally arbitration is not a very practical option for individuals due to the associated

---

[175] See for instance *Bisson v The United Nations, the World Food Programme and the ABC Organisation*, 2007 WL 2154181, at II, Slip Op., US District Court, Southern District of New York. The Court in this case held that UN immunity remained constant whether or not a remedy had been provided in light of section 29. See also a discussion on this by Anthony Miller 'The Privileges and Immunities of the United Nations' (2009) 6 *International Organisations Law Review*, 7 at p. 98.

[176] Through GA/Res/63/253 (24 December, 2008). The Statute has gone through several amendments, the latest one being though GA/Res/73/276 (22 December, 2018), see *https://www.un.org/en/internaljustice/undt/undt-statute.shtml*

[177] Through GA/Res/63/253 (24 December, 2008), the Statute has similarly undergone several amendments, the latest one being through GA/Res/71/266. See *https://www.un.org/en/internaljustice/unat/unat-statute.shtml*

[178] See Report of the Secretary General: Administration of Justice in the United Nations, Doc A/622/782, 3 April, 2008, para 19.

[179] Ibid para 12.

[180] For an excellent discussion on UN's internal dispute resolution mechanisms see Rishi Gulati, 'The Internal Dispute Resolution Regime of the United Nations' (2011) 15 *Max Planck UNYB 489.*

[181] See Article 3(1) of UNDT Statute and Article 2(9*)(a*) and *(b)* of UNAT

[182] Ibid.

[183] Secretary General Report, op cit note 179. Para 12.

[184] Ibid para 14.

exorbitant costs.[185] Additionally, arbitration is best suited for commercial cases rather than employment cases, a fact which the UN itself is perfectly aware of.[186]

With these prohibitive factors, it is highly unlikely that non-staff members aggrieved by the decisions and actions of the UN would opt for Arbitration as a dispute settlement mechanism. Resultantly it can be concluded that this category of employees does not have access to effective remedies for their grievances against the UN. Thus suggestions to amend the UNDT statute to allow access to non-staff members are very welcome.[187]

(ii) Third Parties

Blokker makes the observation that it is important for IOs to have 'their own specific tailor made remedies' to carter for situations where their activities cause harm.[188] While progress has been made in the provision of dispute settlement mechanisms concerning employment related disputes, there has not been similar progress concerning mechanisms for handling complaints by third parties. This is a category of individuals who do not have any relationship (for instance through employment, commercial or other contracts) with an IO. Only a handful of IOs have mechanisms for considering complaints of third parties.

The World Bank Inspection Panel (hereafter the 'WBIP') is an example of such an internal mechanism. Established in 1993 the WBIP is a mechanism for holding the bank accountable to those affected by its operations and in the projects which it finances.[189] The WBIP is historic for being the first institutional complaint handling mechanism accessible to individuals outside an

[185] See Miller, op cit note 175 at pp 97-98 on the matters relating to arbitration from the UN's perspective.
[186] See Report of the Secretary General: Administration of Justice Report, UN Doc A/65/373, 16 September, 2010, para 179.
[187] Gulati, op-cit note 180 at p.525. See also the sentiments on Arbitration by the General Assembly in Sixth Committee, Summary Record of the 4th Meeting, 25 October, 2010, UN Doc. A/c.6/65/SR.4 paras 77-78.
[188] Blokker, op-cit note 10 at p. 330.
[189] See The World Bank Inspection Panel 12, IBRD No. 93-10, and IDA No. 95-6. (Sept 22 1993).

IO.[190] A group of two or more persons affected or likely to be affected by a World Bank-funded project may make a written request for the carrying out of an inspection by the WBIP.[191]

It must be noted however, that these requests for an inspection are not based on the general violation of human rights but on the Bank's failure to follow its own policies and procedures with respect to a particular project or operation.[192] Here again we see the problematic issue of the source of obligations of IOs discussed in Chapter 2, coming to the fore. In seeking to address the question of responsibility for alleged wrongful acts, the Bank relies on its own policies and procedures and not on general human rights norms and standards. It follows therefore that even if a complainant alleges violation of human rights, if those particular human rights are not recognized in its policies and procedures, the Bank will not take any action let alone accept responsibility.

The inevitable question which arises is to what extent does the Bank's policies and procedures incorporate human rights norms and standards? A study conducted by Meghan Natenson on the World Bank's internal procedures and policies found that these procedures and policies do not incorporate the full range of human rights norms and standards.[193] Thus the study concluded that the Bank's accountability mechanisms 'cannot address all human rights violations and are not fully human rights-compatible.'[194] An earlier study found that:

> Unresolved legal obligations are the principle barriers to implementing a comprehensive human rights approach at the World Bank Group, from which all other barriers and gaps emanate…under international law, the WBG itself has not directly assumed any human rights obligations.[195]

With such unresolved legal obligations, it is unsurprising that the Bank's accountability mechanisms are not fully human rights compliant. All these factors notwithstanding however, the

---

[190] See historical background and further discussion on the WBIP by Alexander Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organisations' (2005) 2 *International Organization Law Review* 57 and Eisuke Suzuki and Suresh Nanwani, 'Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Banks' (2005) 27 Michigan Journal of International Law, 177.

[191] World Bank op cit note 189 at para 12 and Board of Directors of the IBRD and IDA 'Clarification of the Board's Second Review of the Inspection Panel (1999), para 9a.

[192] World Bank op cit note 189 para 12.

[193] Meghan Natenson, 'The World Bank Group Human Rights Obligations under the United Nations Guiding Principles on Business and Human Rights.' (2015) 33 (20 *Berkely Journal of International Law*, 489.

[194] Ibid at pp 522-523. See also a report by Human Rights Watch, 'Abuse-free Development: How the World Bank Should Safeguard against Human Rights Violations available at *http://hrw.org/sites/default/files/reports/worldbank0713-Forupload.pdf.*

[195] Kirk Herbertson, Kim Thompson and Robert Goodland, 'A Roadmap for Integrating Human Rights into the World Bank Group. (2010) *World Resources Institute* at p.30.

World Bank can at least be applauded for endeavouring to make provision for mechanisms aimed at addressing complaints and resolving disputes with third parties.[196] The same cannot be said for many other IOs which do not have similar mechanisms. Resultantly victims and complainants are forced to look elsewhere in order to seek relief as will be discussed below.

(b) External Mechanisms

It is a generally recognized factor that there is no general international forum in which victims of wrongful acts by IOs can lodge complaints. This glaring gap particularly affects third parties who do not have access to effective dispute settlement mechanisms. Sands and Klein rightly observe that, '…private third parties continue to have a marginal role; even where they are granted access to adjudicatory bodies, as in the EU, it is under strict and limited conditions…'[197] Employees in most IOs at least have recourse to some form of dispute settlement mechanism as has been discussed above. Third parties on the other hand resort to *ad hoc* arbitration in order to settle disputes which they may have with IOs.[198] The question therefore arises as to the effectiveness of *ad hoc* arbitration as a dispute settlement mechanism with special regard to third parties, particularly individuals.

As alluded to earlier on, one of the biggest concerns when it comes to arbitration is the associated cost. In disputes of a commercial nature, *ad hoc* arbitration (as opposed to institutional arbitration) is said to be preferred because of the absence of administrative fees.[199] However in the case of individuals who only wish to seek relief for wrongful acts, arbitration fees and other costs related to arbitration may still be considered to be prohibitively high, despite the absence of administrative fees. Additionally, although *ad hoc* arbitration is said to be flexible in that the

[196] Depending upon one's perspective, there is some evidence of the positive impact of the WBIP, see Guy Fiti Sinclair 'Beyond Accountability? Human Rights, Global Governance, and the World Bank Inspection Panel, (May 21, 2019), Available at SSRN: https:// ssrn.com/abstract+3391646 and also Kirsten Schmalenbach, 'Dispute Settlement' in Jan Klabbers and Asa Wallendahl (eds) *Research Handbok on the Law of International Organisations. (2011)* p. 251.
[197] Phillipe Sands and Pierre Klein, op cit note 32 at p. 350.
[198] Blokker op cit note 10 at p.330.
[199] See an analysis conducted on *https://www.pinsentmasons.com/out-law/guides/institutional-vs-ad-hoc-arbitration, [accessed on 10 Feb, 2020]*.

parties can decide the terms of arbitration, the process of coming up with these terms can be time consuming resulting in more expenses and inconvenience for the victims.[200]

These problems associated with *ad hoc* arbitration have resulted in calls for a 'centralised system of arbitration for responsibility disputes between claimants and IOs.'[201] Blokker suggests that claimants against IOs can utilize the forum provided by the Permanent Court of Arbitration (PCA).[202] In accordance with the applicable arbitration rules currently, the PCA can preside over claims concerning States, IOs and even private entities.[203] However in accordance with Article 2 of the 2012 PCA rules, an agreement by an IO to arbitrate constitutes a waiver of immunity from jurisdiction. IOs are typically reluctant to waive their immunities. This is perhaps why IOs in general and the UN specifically do not habitually utilize the PCA forum and opt instead to settle disputes by negotiation and *ad hoc* arbitration. The settlement of disputes in this manner (negotiation and *ad hoc* arbitration) is largely done at the discretion of the IOs concerned. For instance the payment of damages by UN is largely based on moral considerations rather than on any legal obligations.[204] Resultantly if the UN opts not to settle or negotiate as has happened in many instances, there is little that a concerned victim can do.

The reality therefore is that in disputes between an IO and individuals, particularly third parties, the latter's position is precarious. While the situation is not hopeless, in that some dispute settlement mechanisms exist, IOs are however firmly in control of most dispute settlement processes.

---

[200] Ibid. See also August Reinisch, 'UN Immunity and Access to Dispute Settlement' available at *https://eur-int-comp-law.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/waelde_sinigoj.pdf*, [accessed on 10 Feb, 2020].

[201] Blokker. Op cit note 10 p. 331

[202] Ibid.

[203] Article 1 of the PCA 2012 Arbitration Rules, available at *https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf*. The PCA has heard cases concerning a variety of parties including States, Corporations IOs and individuals among others. See for instance *Mrs Ge Ga and Others v The International Criminal Police Organisation (INTERPOL) [*2019-19], *A v UN Organisation* [2019-04] and *Gunvor SA (Switzerland) v The Republic of Zambia*[2017-19] all available at *https://pca-cpa.org/en/cases/*

[204] See an analysis done by Anastasia Teletsky, 'Binding the United Nations:Compulsory Review of Disputes Involving UN International Responsibility before the International Court of Justice.' (2012) 21 *Minnesota Journal of International Law*. 75.

While the lack of effective dispute settlement mechanisms is a significant obstacle to an individual's quest to seek redress, the various immunities and privileges which most IOs enjoy represent an even bigger obstacle as will be discussed below.

IV INTERNATIONAL ORGANISATIONS' IMMUNITY OR IMPUNITY?[205]

The immunities and privileges of IOs and the lack of effective dispute settlement mechanisms are two sides of the same coin in all discussions concerning the difficulties of seeking redress for wrongful acts committed by IOs. It has been clearly demonstrated above that although there is a requirement for the provision of alternative dispute settlement mechanisms to counterpoise its 'absolute immunity', the UN has not adequately provided these alternative mechanisms with the exception of its two administrative tribunals. Additionally, many IOs do not have provisions similar to section 29 of CPIUN and so although they enjoy immunities, only a handful of these organizations actually make provision for alternative dispute settlement mechanisms thereby violating rights on access to a court and a remedy.[206]

Considering the significance and impact of the immunities of IOs on the subject of the responsibility of IOs, it is rather surprising that the DARIO are completely silent on this issue. In this section, I discuss the concept of immunity as it applies to IOs, the realities of IO immunities as they relate to the rights of individuals and finally whether the rise in the promotion and protection of human rights has had an effect or impact on IO immunity.

(a) The Immunities and Privileges of International Organizations: Conceptual Background

The doctrine of immunity, especially when made in reference to States, has been in existence for a long time. Previously, immunity was thought to be absolute. Organs of State and government officials were completely immune from the jurisdiction of foreign governments.[207] States have however moved away from this traditional approach to immunity and have since adopted the

[205] Rosa Freedman, 'UN Immunity or Impunity? A human Rights Based Challenge' (2014) 25 (1) *European Journal of International Law.* 241.
[206] See Matthew Parish, 'An Essay on the Accountability of International Organizations' (2010) 7 *International Organisations Law Review,* 277.
[207] See Bennet & Strug, op cit note 9 at pp 152-163 for a brief overview on State Immunity.

'restrictive' approach.[208] Restrictive immunity differentiates between acts performed in an official or sovereign capacity (*jure imperii*) and acts performed in a non-official or private capacity (*jure gestionis).*[209] Thus States may be taken to Court for non-sovereign acts such as commercial transactions but may not be taken to Court for all acts performed in an official capacity.[210]

On the other hand, IO immunity is derived from treaties, constitutive documents of the organisations and domestic legislation to a certain extent.[211] It would seem that, in the absence of relevant treaties, IO immunity is not recognised in most jurisdictions.[212] Although IOs are increasingly performing State-like functions, they are not States.[213] At best they can be regarded as 'quasi-States.'[214] However they are in some instances granted absolute immunity as is the case with the UN rather than the restrictive immunity currently applying to States.[215]

The original framing of the UN's immunity in Article 105(1) of the UN Charter[216] was thought to be for the performance of specific functions and not for the provision of absolute immunity.[217] Article 105(1) states that 'the Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.' It has been suggested that Article 105(1) should be read together with Articles 1(3), 55 and 56 of the Charter and that therefore the UN's immunity is limited by its human rights obligations.[218] Articles 1(3), 55 and 56 make various references to the promotion and protection of human rights by the UN and its Member States.

Looked at from this angle it can reasonably be argued that the violation of human rights is not in tandem with the fulfilment of its purposes and therefore, the UN should not enjoy immunity

---

[208] Ibid. See for instance the Foreign States Immunities Act 87 of 1981 (South Africa), State Immunity Act 1978 (UK) and Foreign Sovereign Immunities Act, 1976 (USA).
[209] See a discussion in *Trendtex Trading Corp vCentral Bank of Nigeria* [1977] QB 529 and *Banco de Mocambique v Inter Science Research and Development Services.1982 (3) SA 330 (T).*
[210] Ibid.
[211] For instance see the International Organisation Immunities Act of 1945 (USA), the Immunities and Privileges Act (Malawi).
[212] See an analysis done by Cedric Ryngaert, 'The Immunity of International Organisations before Domestic Courts: Recent Trends,' (2010) 7 *International Organisations Law Review* 121.
[213] *Reparations Case* Supra 2. p 179.
[214] Freedman op cit note 205 p 242.
[215] See for instance an assessment on the status of IOs in the United States by Aaron Young, 'Deconstructing International Organisations Immunity,' (2012) 44 *Georgetown Journal of International Law* 311.
[216] Supra note 111.
[217] See Jordan Paust, 'The UN is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity,' (2010) 51 *Harvard International Law Journal* 1 at p. 9.
[218] Freedman op cit note 205 at p. 243.

in relation to these human rights violations. However any doubts as to the (absolute) immunity status of the UN were dissipated by CPIUN whose section 2 provides that

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.

The approach in domestic and regional Courts therefore is that the UN enjoys absolute immunity.[219] Several justifications have been given for IO immunity. The most important justification is that privileges and immunities aid the independent functioning of IOs by preventing interference from States in which the IOs are operating.[220] Further justifications include the prevention of fragmentation in the jurisprudence of IOs since different domestic courts would interpret issues differently.[221] Further, it has been argued that allowing litigation in domestic courts would be tantamount to opening a Pandora's Box of all manner of litigation against IOs.[222]

Previously, it was even argued that domestic courts are not suitable forums for handling complaints concerning international organisations.[223] This is debatable and thankfully does not represent the current practice of domestic courts and their capacity to handle disputes concerning IOs as evidenced by recent jurisprudence.[224] This aspect of whether domestic systems and institutions can provide solutions to some of the problematic issues of seeking redress for wrongful acts committed by IOs will be explored in detail in Chapter 4.

(b) Immunity and Access to Justice

It is clear from the discussions above that the immunity from jurisdiction of IOs have an impact on the individual's right to access justice. Such individuals may include employees, providers of

---

[219] Supra note 175.
[220] Eric De Brabandere, 'Immunity of International Organisations in Post-Conflict Administrations,' (2010) 7 *International Organisation Law Review*, 81.PAGE See also Marcello Di Fillipo, 'Immunity from Suit of International Organisations Versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law,' in Daniel Pavon Piscitello, *International Law of Human Rights: Manifestations, Developments, Violations and Current Answers.* (2014).
[221] August Reinsich, 'The Immunity of International Organisations and the Jurisdiction of their Administrative Tribunals,' (2008) 7 *Chinese Journal of International Law* 285 at p. 286.
[222] Phillippe Sands & Pierre Klein, *Bowett's Law of International Institutions'* 5 ed (2001) 491.
[223] M.B. Akehurst, *The Law Governing Employment in International Organisations* (1967) p 12, cited by Freedman op cit note 207at p. 242.
[224] Supra note 172.

goods and services and other third parties who have in one way or another been negatively affected by the acts or omissions[225] of IOs. It has been observed that

> The application of a rather strict system of immunities for International Organisations, and their officials, has led to a perception of impunity for violations of international law, and has on occasion left private law disputes unsettled.[226]

However the growing emphasis on the promotion and protection of human rights in general and the right to access to justice in particular has had an impact on IO immunity. Ryngaert observes that domestic Courts (particularly in Europe) are increasingly adopting a human rights approach to immunity.[227] As per this approach, IO immunity will only be upheld if the victim of a wrongful act has access to alternative means of redress provided by the IO.[228] Some commentators perceive that the provision of such alternative dispute settlement mechanism is actually mandatory:

> …the setting up of alternative means of redress, even when not foreseen in treaty provisions, is deemed to be compulsory for any entity claiming immunity from jurisdiction of domestic courts. Second, if such duty is not complied with, immunity cannot be complied with.[229]

Though a majority of domestic Courts advocating for the human rights approach to IO immunity are in Europe, instances can be found where domestic Courts in other regions adopted a similar approach. In fact as far back as 1983, the Constitutional Court of Argentina held that the recognition of IO immunity without any alternative dispute settlement mechanism was incompatible with the Constitution.[230] The Court further stated that the individual's right to access justice is mandatory and that therefore any treaty giving effect to immunity without providing for a dispute settlement mechanism is void.[231] The legal basis for this supposition is of course debatable. Is the implication that the right to access justice is a peremptory norm? Di Fillipo states that perhaps the Court's stance should be understood from the tendency of Latin American jurisdictions of 'identifying more and more provisions of human rights as peremptory rules'[232]

---

[225] For a discussion on liability for omissions see Jan Klabbers, 'Reflections on Role Responsibility: the Responsibility of International Organisations for Failing to Act' (2018) 28 (4) *European Journal of International Law* 1133.
[226] De Brabandere, op-cit note 220 at p. 79.
[227] Ryngaert op-cit note 212 p. 122-123.
[228] ibid.
[229] De Brabandere, op-cit note 220 at p. 214.
[230] See *Corte Suprema (Argentina), Judgement 5.12.1983, Cabrera, Washington J.E. c. Commission Tecnica Mixta de Salto Grande, (Technical Mixed Commission on the Salto Grande)* cited in Di Fillipo op cit note 222 at p 212.
[231] *Cabrera*, supra, note 230.
[232] Di Fillipo, op-cit note 220 p. 212.

It is noteworthy however, that after this 1983 case, the respondent (Technical Mixed Commission on the Salte Grande) established an Arbitral Tribunal catering for all manner of complaints including those from employees and other third parties. As noted by Di Fillipo, in subsequent pronouncements since the establishment of the Arbitral Tribunal, the respondent's immunity was recognized and given effect since an alternative dispute settlement mechanism had been provided.[233]

Similarly in the African region, instances can be found where domestic Courts overlooked immunity and proceeded to hear complaints against IOs. In *Tononoka Steels Ltd v. The Eastern and Southern African Trade and Development Bank,*[234] the Court of Appeal in Kenya held that although the respondent enjoyed various immunities and privileges by virtue of being an IO, it was not immune from suits arising as a result of commercial transactions. In setting aside a High Court order which had dismissed the application on the basis of the respondent's immunity, the Presiding Justice of Appeal stated that he was unaware of any

> …country which would allow banking and financial services with absolute immunity from suits and legal process and with absolutely no protection for its hapless customers.[235]

Similar sentiments were expressed in *International Committee of the Red Cross v. Sibanda and Ngangura,*[236] where the Supreme Court of Zimbabwe upheld the finding of the High Court that the Appellant was not immune to labour related claims brought against it.[237] The Respondents had commenced action in the High Court in order to compel the Appellant IO to comply with the applicable retrenchment regulations at the termination of the Respondents' contracts.

In both *Tononoka* and *Sibanda,* the Courts did not directly refer to the right of access to justice, it is obvious however that welfare of the individuals involved were on the mind of the Court since upholding immunity claims by the IO would have denied these individuals any recourse to a remedy.

---

[233] Ibid at p.214. See also judgment *1.4.1997* Fibraca *Constructora Sca. c. Comision Tecnica Mixta de Salto Grande, qtd.; and judgment 7.7.1993 Ghiorzo Juan Jose c Comision Techica Mixta de Salto Grande*.
[234] Civil Appeal No. 255 of 1998 (Judgement of 13.8.1998) available at *http://kenyalaw.org/caselaw/cases/view/530/*
[235] Ibid at p. 4 of Justice Kwach's Opinion.
[236] (47/02) [2004] ZWSC 115 (12 Jan, 2004) available at *https://zimlii.org/node/1324* [accessed on 10 Feb 2020].
[237] Ibid. page and paragraph numbers not provided on the online source.

This encouraging trend has sadly not yet significantly dented the UN's absolute immunity as the widely known events in Haiti demonstrate. In October, 2010 Cholera broke out in Haiti. The outbreak was attributed to Nepalese UN peacekeepers[238] who were part of a UN Stabilisation Mission in Haiti (MINUSTAH). An investigation carried out by a UN panel of experts found that the cholera outbreak had been as a result of improper management of 'human faecal waste' in the MINUSTAH camp.[239] At the time of the investigation, nearly 4, 900 people had died and almost 155,000 people had been hospitalized.[240] Although things have significantly improved, Cholera remains a problem in present day Haiti.[241]

Claims lodged with the UN in November 2011, on behalf of the victims of the outbreak, were deemed 'not receivable by reason of the absolute immunity of the UN.'[242] Additionally, the UN has not set up any alternative dispute resolution mechanisms to handle claims arising out of this tragic event. The UN has thus breached section 29 of CPIUN. In terms of Peace-Keeping Operations, the UN's 'Model Status of Forces Agreement for Peace-Keeping Operations' (hereafter 'the Model SOFA') has provisions for appropriate structures and systems for resolving disputes.[243] In accordance with Article 51 of the Model SOFA, the UN is to set up a Claims Commission to handle any private law disputes. In the Haiti Cholera incident, no such Commission has been created. Further efforts to seek redress through the US courts have so far not yielded any fruits since three different Courts have upheld the UN's immunity.[244] Resultantly the victims of this wrongful act at the instance of the UN remain without a remedy.

---

[238] Ralph Frerichs, Robert Barrais and Renaud Piarroux, 'Nepalese Origin of Cholera Epidemic in Haiti' (2012) 18 *Clinical Microbiology and Infection* 158, see also Renaud Piarroux, 'Understanding the Cholera Epidemic, Haiti,' (2011) 17 *Emerging Infectious Diseases 161*.

[239] Alejando Cravioto et al., 'Final Report of the Independent Panel of Experts on the Cholera Outbreak In Haiti' (2011) at p 23, available at *https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_525.pdf*

[240] Ibid p. 8.

[241] See monthly reports by the European Centre for Disease Prevention and Control available at *https://www.ecdc.europa.eu/en/all-topics-z/cholera/surveillance-and-disease-data/cholera-monthly,* [last accessed on 10 February, 2020].

[242] UN Doc SG/SM/14828 (21 Feb, 2013).

[243] UN Doc A/45/594/, (1990), Art 51-54.

[244] *Georges*, supra, note 12. The Victims have however petitioned the US Supreme Court to hear the matter and grant them justice: *https://www.theguardian.com/world/2019/oct/01/haiti-cholera-2010-un-us-supreme-court.*

It remains to be seen whether the door which is 'ajar for a human rights-based challenge to the UN's immunity'[245] will be widely opened so that victims of wrongful acts as is the instance in Haiti will have a chance of seeking redress.

V CONCLUSION

It has been argued that although there are some IOs whose activities impinge on the rights of individuals, a majority of the IOs do not cause any harm. Blokker notes that:

> '…there are currently hundreds of international organisations, of which only a limited number carry out activities themselves that may result in harm. The impression is sometimes given…. That activities of international organisations in general cause…harm, that they often deny responsibility if claims are brought against them and subsequently claim immunity before a national Court.'[246]

Blokker's assertion may be true. However, even if only a limited number of organisations are actually causing harm, there is still need for systems and mechanisms enabling victims to seek redress for wrongs committed by those IOs. Additionally, as observed by Wellens, such systems must be effective and adequate.[247] In the current state of affairs at international law, those with some form of a relationship with IOs have a better chance of having their disputes resolved because of the internal mechanisms such as administrative tribunals of most IOs. Third parties however are in a difficult position because most IOs do not have mechanisms for resolving disputes with third parties.

The prevailing argument throughout this dissertation is that seeking redress for wrongful acts committed by an IO is an uphill task. However, despite the many difficulties encountered by victims of wrongful acts committed by IOs, the human rights approach to IO immunity represents a silver lining in the clouds. Jurisprudence is developing to the effect that immunity from jurisdiction will only be upheld if an IO has provided alternative dispute settlement mechanisms. Further, in some jurisdictions, Courts view IO immunity to be restrictive rather than absolute. In

---

[245] Freedman op-cit note 205 at p.253.
[246] Bloker,op cit note 10 at p. 329.
[247] Karel Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organisations: The Role of the Judiciary in Closing the Gap,' (2004) 25(4) *Michigan Journal of International Law.* 1159 at p. 1161.

this regard, it is clearly obvious that domestic Courts have a very important role in upholding the right of access to justice for victims of wrongful acts committed by IOs as will be elaborated in the next chapter.

CHAPTER FOUR

CLOSING THE ACCOUNTABILTY GAP: DOES THE ANSWER LIE WITH DOMESTIC COURTS?

I INTRODUCTION

Chapter three discussed in detail the difficult path of individuals who try to seek redress for wrongful acts committed by IOs. The difficulties highlighted included the complex interplay between IOs and their member States, uncertainties concerning dispute settlement mechanisms and the most difficult hurdle of all which concerns the immunities and privileges of IOs. It was also highlighted however that the human rights approach to immunity which both domestic and regional Courts are increasingly adopting, provides a beacon of hope to those wronged by IOs.

Building on the in-roads which a human rights approach to IO immunity seems to have made, this Chapter explores the role of domestic courts in disputes concerning IOs. Specifically, the chapter examines the extent to which domestic systems and particularly judicial institutions can help keep IOs accountable for their actions and therefore aid the individual's quest to seek redress for wrongful acts committed by IOs. In this regard, section II examines the phenomenon of IOs appearing before domestic courts and discusses such issues as the suitability of domestic courts as a forum for resolving disputes concerning IOs. Section III pays closer attention to organisations such as the UN (whose immunity is yet to be affected by the human rights approach)[248] and questions whether domestic systems have any role to play in keeping these particular IOs accountable. Finally, section IV finally offers conclusions to this discussion.

II INTERNATIONAL ORGANISATIONS BEFORE DOMESTIC COURTS: OPPORTUNITIES AND CHALLENGES

The phenomenon of IOs appearing before domestic courts seems rather a contradiction in terms when regard is had to the fact that the major purpose of the various immunities which IOs enjoy is to prevent this very phenomenon from happening in the first place. Yet more and more IOs find

[248] As exemplified by *Georges v UN*, supra not 12.

themselves being dragged before domestic or regional Courts.[249] Although a majority of these cases are in Europe, there is some evidence of similar occurrences in other parts of the world as alluded to in Chapter 3.[250] Immunities from legal process, derived from a variety of sources[251] play an important role in ensuring the independent functioning of IOs.[252] At the same time however, when wrongs have been committed by these IO, it is these same immunities which prevent victims from accessing justice and thereby creating an accountability gap,[253] as discussed in Chapter 3. As more and more IOs appear before domestic courts, several issues arise as will be discussed below.

(a) Are Domestic Courts the Right Forum?

In the phenomenon of domestic courts presiding over IO related disputes, the inevitable question which arises is whether such courts are a suitable forum.[254] This question often relates to the capacity of domestic Courts to handle such disputes and other procedural issues such as whether these IOs would be accorded a fair trial.[255]

On the question concerning the capacity of domestic or even regional courts to handle disputes concerning IOs, it must be stated that most of these disputes pertain to contracts, employment, tort and related matters. These same type of cases are routinely handled by domestic courts almost on a daily basis. As Reinisch notes, it would be rather unreasonable to argue that domestic courts do not have the expertise to handle such cases.[256] They therefore undoubtedly have the expertise and capacity to handle these cases. The several cases cited herein clearly demonstrate domestic Courts ably handling disputes concerning IOs.[257]

---

[249] See for instance *Jam v International Finance Corporation,* 139 S. Ct. 759 *(2019), Western European Union v Sidler, Belgium Court of Cassation [Cass.] No.S.04. 0129.F (December 21, 2009), General Secretariat of the ACP Group v. Lutchmaya Belgium Court of Cassation* supra note 172*, Atkinson v Inter-American Bank 156 F.3d 1335 (D.C. Cir. 1998), Drago v International Plant Genetic Resources Institute, Corte de Cassazione (Italy), Judgment No. 3718/2007, ILDC 827 (IT 2007)* among many others.
[250] See section IV (b) See also Di Fillipo, op.cit note 220.
[251] Treaties, domestic legislation, constitutive documents. For a discussion on whether Customary Law is a source of IO immunity see Michael Wood, 'Do International Organisations Enjoy Immunity under Customary International Law?' (2014) 10 *International Organisations Law Review* 287.
[252] For indepth discussions concerning Immunities of IOs on the domestic scene see generally August Reinisch, *The Privileges and Immunities of International Organisations in Domestic Courts (2013).*
[253] As Reinisch calls it. See August Reinisch, 'To what Extent Can and Should National Courts, "Fill the Accountability Gap"? (2014) 10(2) *International Organisation Law Review* 572.
[254] See notes 223 and 224 and the accompanying text.
[255] Reinisch op cit note 253 at pp 578-580.
[256] Ibid.
[257] Supra note 249.

Perhaps, more complicated disputes concerning such issues as the internal matters of IOs or an IO's dispute with its Member State would hardly be suitable for the forum of a domestic Court. To a large extent this would be due to the fact there are better avenues, forums and mechanisms for resolving those types of issues and not because domestic Courts lack the requisite capacity of handling complex international law questions.[258] Nollkaemper observes that many domestic Courts, have become familiar with engaging with international law principles and norms.[259] In any case, from the perspective of this thesis, rarely do such (complicated) matters directly impinge on an individual's human rights.

It has also been argued that disputes arising out of peace –keeping operations might not be suitable for domestic forums due to the political sensitivities involved.[260] To begin with, it must be stated that domestic courts have on several occasions ably handled disputes arising out of peacekeeping operations, although in most instances IO immunity was upheld.[261] Secondly, the UN itself sometimes makes a decision not to invoke the immunity of its officials in domestic Courts in relation to specific acts.[262] Finally, it is unclear which forum would then be suitable for resolving disputes arising out of peace-keeping operations, bearing in mind the lack of forums for lodging claims against IOs. The plight of individuals who have suffered harm in peacekeeping operations becomes more pertinent in cases such as the Haiti Cholera catastrophe where claims for reparation have been deemed 'non-receivable' and the UN has not set up alternative dispute settlement mechanisms.

Closely related to questions on the capacity of domestic courts are also concerns of whether due process would be followed and that there would not be any biases against an IO.[263] These are indeed valid concerns. It has been noted that the apprehension concerning bias and sometimes

---

[258] See Andre Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 (4) *American Journal of International Law* 760. He expounds on the role of domestic courts in dealing with complex international law issues.
[259] Ibid. The cases of *Sibanda* and *Tononoka* and many others cited in this paper illustrate domestic courts comfortably engaging and applying rules of international law.
[260]Reinisch, op cit note 253 at p 280.
[261] *Srebrenica* supra note 160 and *Georges supra note 13 and 14* (in the district Court and appellate court).
[262] These include traffic violations, sexual offences, see Report of the Secretary General, UN Document A/CN.4/L.383 and Add 1-3, Chapter 2, Section 8. See also Report of the Secretary General on *Special Measures for Protection from Sexual Exploitation and Abuse,* United Nations General Assembly Doc A/73/744. (Feb, 2019). Although in Brzak v UN, 551 F.SUPP.2D 313 (SDNY 2008), the immunity of UN officials was invoked despite the fact that the case had to do with allegations of sexual misconduct.
[263] Blokker, Niels 'International Organisations: The Untouchables' (2014) 10 *International Organisation Law Review* 259 at p 272.

questionable court procedures are among the key reasons for the insistence on IO immunity.[264] An IO just like any other person (natural or legal) appearing before a court has or should have a legitimate expectation of a fair trial. It must be stated however, that so far in the decided cases concerning disputes between IOs and individuals in domestic courts, allegations of bias and questionable court procedures have rarely been made. It can even be argued that if there were such allegations of bias, the IO has or would have several options at its disposal for dealing with the alleged unbecoming behaviour of one of the institutions of its Member State.[265]

From the perspective of the victim, a domestic court presiding over a dispute concerning an IO is beneficial in several ways. Bearing in mind the problems associated with the lack of appropriate dispute settlement mechanisms, including the lack of relevant forums, domestic courts provide the victim with a forum in which his or her complaint can be heard. Additionally the matter is heard at presumably lower costs compared to the quite significant costs associated with international litigation.[266] In some instances, domestic courts represent the only available option for individuals to access justice in their disputes with IOs.

It has been observed however that giving effect to the individual's need for accessing justice on the one hand and ensuring the independent functioning of IOs by upholding immunity on the other hand is a delicate balancing act.[267] In this regard, recourse to a domestic Court for disputes concerning IOs should be the exception rather than the norm.[268] The role of domestic courts should only be to preside over disputes concerning IOs where such IOs have not provided alternative means of dispute resolution.

(b) To Pierce or Not to Pierce the Immunity Veil: The 'Alternative Dispute Resolution Mechanism' Test

The emerging trend of only upholding IO immunity in domestic or regional courts if the concerned IO has provided alternative disputes settling mechanisms has been discussed in detail elsewhere

[264] Reinisch op-cit, note 253 p.579.
[265] For instance engaging with the Member State at the appropriate political level or in General Assemblies of the Organisation.
[266] For instance costs associated arbitration, see notes 199-200 and accompanying text.
[267] Reinisch op cit note 253 p. 578.
[268] Ibid 587.

in this thesis.[269] It must be stated that it is not the aim of this author to argue for the complete abolition of the various immunities and privileges which IOs enjoy. In any event such abolition is unlikely to happen. This is due to the sobering reality that although some domestic courts have pierced the immunity veil and presided over disputes concerning IOs, in the large majority of cases before domestic courts, IO immunity is upheld.[270]

Certainly, there is merit in maintaining and upholding the privileges and immunities of IOs. In *Waite and Kennedy v Germany,* the Court noted that:

> …the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations, free from unilateral interference by individual governments….The immunity from jurisdiction commonly accorded by states to international organisations….is a long standing practice established in the interest of the good workings of the organisations.[271]

The independent functioning of IOs is thus certainly dependent on these privileges and immunities. However with the increasing focus on the promotion and protection of human rights, it is no longer or rather it should no longer be acceptable for IOs to commit wrongs and then hide behind immunity. If the IO engaging in wrongful conduct has not provided any alternative means of resolving disputes, domestic courts are justified in their interventions to ensure that the hapless individual who would otherwise have no remedy can have access to justice.

The question which needs to be addressed however is what should that intervention look like? This question is important because both the independent functioning of the IO (without unnecessary intrusion into its affairs by the Forum State) and the human rights of the individual need to be taken into account. As previously stated, the balancing act is a delicate one.

Both Bradlow and Reinisch suggest that all disputes concerning IOs which have been filed in domestic courts should be subjected to the 'alternative dispute settlement mechanism' test.[272]

---

[269] See Chapter 3 (IV) (b).
[270] This is true concerning many IOs but especially true concerning the UN. See generally sentiments expressed in Nico Schrijver, 'Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations' (2014) 10(2) *International Organisations Law Review 588.*
[271] Supra note 172 at para 63. See also Daniel Bradlow, 'Using a Shield as a Sword: Are International Organisations Abusing their Immunity?' (2017) 31(1) *Temple International and Comparative Law Journal* 45 pp 45-46 the author states that: "Most IOs, unlike States, do not control territory or a population and so always operate within the jurisdiction of one of their member States. This makes them vulnerable to interference by these States".
[272] Bradlow op cit note 271 at p. 67 and Reinisch op-cit note 253 at p 587.

That is, domestic courts should ascertain whether the IO being complained against has in place alternative remedies or dispute resolution mechanisms which the complainant can access. If these mechanisms are available, the Court should proceed to uphold IO immunity and therefore dismiss the claim. In *Waite and Kennedy v Germany* the Court upheld the decision of the domestic court in upholding the immunity of an IO on the basis that the applicants had available to them alternative means of resolving disputes.[273]

Domestic courts should however not merely ascertain the existence of alternative settlement mechanisms, it should also check the quality of those mechanisms.[274] In upholding IO immunity, the Court in *Waite and Kennedy* did not only confirm the presence of alternative remedies, it had to satisfy itself of the availability to the applicants, '**reasonable** alternative means to **effectively** protect their rights under the Convention' (emphasis supplied).[275] The Court further discussed the several options or remedies available to the applicants, noting among others the independence of some of the agencies tasked with handling complaints against the IO in question.[276]

Where a domestic court cannot ascertain the availability of alternative dispute settlement mechanisms or where the mechanisms available do not provide effective protection of rights (under applicable domestic or international law), the court should preside over the matter and therefore pierce the veil of immunity. In *Western European Union v Siedler*[277] the Belgian Supreme Court refused to uphold the Appellant's immunity on the basis that although the Appellant had made provision for a dispute settlement mechanism, such mechanism did not provide effective protection of the rights of the respondent.[278] The Court was particularly concerned with the lack of independence of the dispute settlement mechanism provided by the Appellant.[279]

---

[273] Supra note 172, para 73.
[274] Bradlow op-cit note 271, Reinisch op-cit note 221.at p. 305 on the need for the scrutinizing the quality of protection afforded by Administrative tribunals.
[275] Supra note 172, para 68.
[276] Supra note 172, paras 69-70. See also *Osman v United Kingdom,* Application 23452/94, 101 ECtHR 40 (1998).
[277] Supra, note 249.
[278] See discussion and summary of the case by Jan Wouters, Cedric Ryngaert, and Pierre Schmitt (2011) 105 *American Journal of International Law* 560 at p.561.
[279] Ibid.

The 'alternative dispute settlement mechanism' test ensures that the rights of the individual are protected. This is done by affording the individual an opportunity to seek redress in a domestic court for an IO's wrongful acts, if the IO has not made alternative arrangements for resolving disputes. At the same time, if an IO has put in place appropriate dispute settling mechanisms, its immunity is respected and upheld. Thus to avoid any perceived 'tampering' with their immunities, IOs are incentivized to make provision for alternative dispute settlement mechanisms.[280]

It is evident therefore, that domestic or regional courts have an important role to play in upholding the rights of individuals who have been wronged by IOs. This seems certainly true in tort, contract, labour and other related matters. Do domestic Courts have a role to play when dealing with IOs possessing absolute immunity?

III DOMESTIC COURTS AND ABSOLUTE IMMUNITY: WILL THE ' UNTOUCHABLES'[281] REMAIN UNTOUCHED?

This wave of a human rights approach to immunity has not yet significantly affected UN immunity. Several challenges to the absolute immunity of the UN have been brought in domestic and regional courts and the result has been that the absolute immunity of the UN has been upheld.[282] The cases of *Brzak v United Nations*[283] and *Georges v United Nations*[284]are particularly significant in terms of their relevance to the discussion at hand. In *Brzak,* the case concerned the manner in which a complaint pertaining to sexual harassment had been handled within the UN's complaints handling mechanism. The Plaintiffs' arguments were to the effect that the alternative dispute settlement mechanisms made available by the UN were inadequate and that therefore UN immunity should be waived on this basis.[285] The case of *Georges* on the other hand concerned the fact that the UN did not make available to the victims of the cholera epidemic in Haiti, any alternative dispute

[280] Reinisch op-cit note 253 at p. 587 notes that in the trail of *Waite and Kennedy*, IOs have made some efforts towards making provision for alternative dispute settlement mechanisms.
[281] Blokker, op cit note 263.
[282] See for instance *Mothers of Srebrenica*, supra note 160 and *Georges v United Nations,* (in the District Court, 84F.Sup.3d 24b (S.D.N.Y 2015) (No. 13-cv-7146*)* and in the 2nd Circuit No.1:13-CV-07146(JPO)(S.D.N.Y, Feb, 12, 2015), *Brzak v United Nations,*supra note 262 and Abdi *Hosh Askir v Boutros Boutros-Ghali* 933 F. Supp 368(SDNY. 1996) among others.
[283] Supra, note 262.
[284] Supra note 282.
[285] Supra note 262, para 2-3.

settling mechanisms thereby violating their right to an effective remedy.[286] In both cases, UN immunity was upheld and the cases were dismissed.

As regards the UN and related IOs, should the conclusion therefore be that domestic courts have no role to play in the conflict between absolute immunity and the right to an effective remedy? While the options are indeed limited, it is argued that domestic courts are not completely helpless in the face of such 'untouchable' IOs as the UN.

(a) Influencing Human Rights Compliance through the Backdoor: Kadi v Council of the European Union

The *Kadi* cases[287] have generated significant amounts of academic literature.[288] The judgments have been analysed from a variety of perspectives including the interplay between different legal systems, particularly international law and EU law[289] and the protection of human rights[290] among others. In this section, the *Kadi* cases are discussed from the perspective of the role of domestic or regional courts in the provision of relief for wrongful acts of seemingly 'untouchable' IOs.

The *Kadi* case concerned the implementation of UNSC Resolutions requiring among others, the freezing of funds and other assets of persons who, allegedly, had ties to Osama bin Laden, Al Qaeda and the Taliban.[291] In order to implement these Resolutions, the EU adopted

---

[286] Supra note 284.

[287] Joined cases c-402 and C-415/05 P, Yasin Abdullah Kadi and Al Narakaat International Foundation v Council of the European Union and Commission of the European Communities.

[288] See Sara Poli and Maria Tzanou, 'The Kadi Rulings: A Survey of the Literature' (2009) 28 *Year Bok of European Law* 593 for an overview of the literature written before 2009. See also Juliane Kokott and Christoph Sobotta, 'The Kadi Case-Constitutional Core Values and International Law-Finding the Balance?' (2012) 23 (4) *European Journal of International Law* 1015 and Koen Lenarts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 (4) *SMU Law Review* 707.

[289] Krenzler and Landwehr, 'A new Legal Order of International Law: On the the Relationship between Public International Law and European Union Law after Kadi,' in U. Fastenrath (ed) *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (2011),* 1004.

[290] Enzo Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case,' (2009) 28 *Year Book of European* Law 593 and Daniel Helberstein and Eric Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order,' (2009) 46 *Common Market Law Review* 13.

[291] S/RES/1390 (2002) which condemned the Taliban and the Al Qaeda for various terrorist activities including the 11 September 2001 attacks in the United States. The Resolution required UN Member states to freeze assets of, impose travel and arms sales restrictions to members of the Taliban and Al-Qaeda and all associated persons and

Regulation 881/2002 which contained a list of the persons targeted by the sanctions. These people were however not informed of the reasons for their inclusion on the list and the subsequent freezing of their assets. Mr. Kadi was among the people appearing on that list and therefore had his assets frozen. He challenged regulation 881/2002 for infringing upon his right to be heard and his right to property among others.

Implementation of Regulation 881/2002 was upheld by the EU Commission. The matter went for appeal in the European Court of Justice (hereafter the 'ECJ'). The ECJ faulted Regulation 881/2002 for violating several of the appellants' rights. The Court held that the failure to inform the appellants of the reasons for being included on the sanctions list, led to the deprivation of the right to be heard and the right to effective judicial review. [292] In this regard, the limitation of the right to property, carried out through freezing of the appellant's assets lacked justification.[293] Regulation 881/2002, to the extent that it concerned the appellants, was therefore nullified.

If the appellants had directly dragged the UN to Court challenging their inclusion on the sanctions list and how this had violated several of their rights, the result would undoubtedly have been that the UN enjoys absolute immunity and its actions cannot be challenged in a domestic or regional court. By using their own domestic/regional law to challenge implementation of the sanctions, the appellants were able to sidestep the challenge of UN immunity.

More significant however, are the changes that have occurred within the UN concerning the management of the sanctions list in the aftermath of the *Kadi* cases.[294] To begin with in 2008, the UNSC created the concept of narrative summaries which provide information pertaining to reasons why particular individuals have been included on the sanctions list.[295] Persons appearing on the list are therefore not completely in the dark concerning grounds for such an appearance as was the case before *Kadi.* Secondly and more importantly, the UNSC established the office of the

entities (see para 2). Also S/RES/1373(2001) which called upon States to take a variety of measures in combating terrorism.

[292] Supra note 287, para 334-336.

[293] Ibid paras 369-370.

[294] See in-depth discussions on this by Kokott and Sobotta op-cit note 288. See also Francesco Giumelli and Fillipo Costa Buranelli, 'When States and Individuals Meet: The UN Ombudsperson as a 'Contact Point' between International and World Society,' (2019) 00(0) *International Relations* 1 at pp 12-15.

[295] This was done through SC Resolution 1822(2008) of 30 June, 2008. The narrative summaries can be found at *https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries,* (accessed on 17 January, 2020).

Ombudsperson in 2009.[296] This office was established for the main purpose of assisting the Sanctions Committee in processing delisting requests.[297] This office receives delisting requests, gathers the necessary information and makes recommendations to the Sanctions Committee. If the request for delisting has been rejected by the Sanctions Committee, the office of the Ombudsperson notifies the concerned person or organisation accordingly. The reasons for the rejection are included in the notification.[298]

The UNSC processes established in the aftermath of *Kadi*, have made the listing process more transparent than the situation was previously. While it might be difficult to state with any measure of certainty that these changes would not have occurred had Mr. Kadi not challenged Regulation 881/2002, the key role which the ruling of the ECJ played in setting into motion changes in the UNSC listing processes, cannot be denied. This regional court accomplished the extraordinary feat of indirectly challenging the wrongful acts of the UN and through the backdoor influenced some measure of respect for human rights in listing processes.

(b) Holding States Responsible for Wrongs Committed by International Organisations

Domestic Courts may also be of assistance by holding Member States liable for wrongs committed by IOs. This typically applies to situations where the immunity of the IO concerned has been upheld but the IO has not made available any alternative means of resolving the dispute. The rationale behind this approach is that the primary obligation to ensure access to court for the individuals within its territory, rests upon the State. The granting of immunity to an IO by the State restricts this right, therefore if an IO cannot be held responsible for its wrongful acts that responsibility should rest on the State.

Several Courts have upheld this line of thinking. For instance the case of *X v Deodato*[299] concerned the applicant's failure to collect rentals from a diplomat. The Spanish Court hearing the matter held that the applicant could claim damages suffered, from the government if the government insisted on upholding the immunity of the diplomat. Similarly in France, the Council

[296] Through SC Resolution SC Resolution 1904 (2009) of 17 December, 2009.
[297] Ibid, para 20. The Ombudsperson handles sanctions concerning persons associated with Al Quaeda and Islamic State (ISIL). Persons associated with the Taliban have their own separate regime created under SC Resolution 1989(2011) of 17 June, 2012.
[298] Op cit note 296, para 20. See also Annex II, paras 12-13.
[299] 28 September, 1995, 140/1955, Tribunal Constiticional (Spain), cited in August Reinisch, *International Organisations before National Courts* (2000) at pp 298-299.

of State (*Conseil d'Etat)* held that an applicant could claim compensation from the government for failing to access a Court to obtain relief against a UNICEF employee.[300] Further the Constitutional Court of Colombia held that the government was liable to compensate an individual who could not access the courts as a result of the immunity of an IO.[301]

It might seem unfair to hold the State responsible for the wrongs of an IO.[302] However from a victim centered perspective, this approach avoids a situation where individuals wronged by IOs are left empty handed due to the operation of immunities granted to IOs. As the court observed in *Waite and Kennedy*, the granting of immunities to IOs affects some fundamental rights, however States are not absolved from the responsibility of protecting and promoting those rights affected by such immunities.[303] If an individual cannot seek redress from an IO because of that IO's immunity, that individual should be able to seek redress from the State which granted that immunity.

IV CONCLUSION

Domestic Courts have an important role to play in upholding the rights of individuals who have been wronged by IOs. Immunities granted to IOs are important as they assist in the independent functioning of those IOs. However these immunities affect the rights of individuals concerning access to justice. In this regard, the role of domestic courts in ascertaining not only whether these IOs have provided for alternative dispute settlement mechanism but also the quality of those mechanisms provides a lifeline to wronged individuals. Where IOs have not provided for such dispute settlement mechanisms, it is only fair for domestic or regional courts to pierce the immunity veil and preside over the dispute. This approach acts as an incentive to IOs to provide for alternative dispute settlement mechanisms to avoid any interference with their immunity.

---

[300] *Ministre des Affaires etrangeeres v Dame Burgat et autres,* 29 October 1976, Conseil d'Etat in France, Recueil 453 (1977), also cited in Schrijver op-cit note 270 at p.595.
[301] See *Consejo de Estado (*Colombia*),* Judgement No. 11044 of 25.8.1998, case No. IJ-001, *Rojas Robles c. Ministerio de Relaciones Exteriores,at http://www.consejode-estado.gov.co*, cited in Di Fillipi op-cit note 220 at p. 211.
[302] See the sentiments expressed by Schrijver, op cit note 270 at p. 594-595.
[303] Supra note 172, para 67.

When dealing with more difficult IOs such as the UN, domestic or regional courts can attempt to circumvent the immunity hurdle by indirectly challenging the acts of the IO using the requirements of domestic or regional law. Additionally, domestic or regional courts may hold States responsible for the wrongdoings of IOs. Immunities are granted by States and if an individual fails to seek redress for the wrongful acts of an IO, due to the operation of these immunities, the State should be held responsible for the conduct of the IO. Perhaps, domestic courts represent a light at the end of the tunnel for individuals wronged by IOs. Whether this light is shining brightly or faintly is another question altogether.

CHAPTER FIVE

CONCLUSION: A FAINT LIGHT SHINES AT THE END OF THE TUNNEL

I INTRODUCTION

The question concerning responsibility for wrongful acts committed by IOs is a complex one, consisting of several dimensions. Indeed IO responsibility has been and continues to be a subject of significant interest in international law. While the theory is clear that IOs will be responsible for their wrongful acts, the reality is that it is not easy for an individual to seek redress for these wrongful acts. The major challenges include lack of clarity of the obligations binding IOs, some problematic issues concerning the primary norms, immunities and privileges of IOs, lack of effective dispute resolution mechanisms and the difficulties involved in apportioning responsibility between an IO and its member states in peace-keeping and similar operations.

In this thesis, the subject of IO responsibility was approached from the perspective of the victims of wrongful acts. The main research question was how accessible is justice for victims of wrongful acts committed by IOs? In this regard, a detailed analysis of the various obstacles and difficulties of seeking redress from IOs both on the international and domestic scene was conducted. Further, the role of domestic systems and judicial institutions in upholding the rights of those seeking redress from IOs was examined.

II THE ROOT OF THE PROBLEM

In order to understand the basis of IO responsibility in international law, an examination of the primary norms (consisting the source of obligations of IOs) and the secondary norms (regulating the responsibility of IOs for breaching the primary norms) had to be conducted. It was found that some of the difficulties of seeking redress for wrongful IO conduct can be traced to the lack of clarity of the primary norms and some problematic issues concerning the secondary norms.

Regarding the primary norms, it is clear that IOs are bound by obligations arising out of their constitution or constitutive documents, agreements which they have entered into and general principles of international law among others. However the bone of contention is whether IOs are

bound by human rights obligations and if so, on what basis. The question arises from the fact that generally, IOs are not signatories to human rights treaties, which treaties are the major source of human rights obligations. The difficulty therefore lies in identifying a basis for binding IOs to human rights obligations outside human rights treaties. This task has not been an easy one, resultantly most IOs do not consider themselves bound by human rights obligations or only consider themselves bound to some and not the full range of human rights obligations.

On the other hand, the attribution of responsibility where multiple stakeholders are involved was found to be the major problematic issue concerning the secondary norms. The problem stems from the application of the effective control test in order to determine responsibility. This is especially applicable in peace keeping operations which involve a variety of stakeholders including IOs and Troop Contributing Nations (TCNs). It was found that in such peace keeping operations, it is not always clear who has effective control over peace-keeping forces and operations. Apportioning blame and responsibility in these circumstances therefore becomes an uncertain and complicated task. Unfortunately those on the receiving end of this uncertainty are the individuals who have suffered harm arising from peacekeeping operations.

III FURTHER OBSTACLES AHEAD

Moving past the problems associated with the primary and secondary norms it was found that further problems awaited those seeking justice from IOs. It was found that the availability or lack thereof of dispute resolution mechanisms aimed at handling complaints against IOs was another obstacle. Generally, individuals who are in some form of a relationship with an IO stand a better chance of having their disputes resolved. This is due to the fact that mechanisms exist within the internal structures of some IOs for handling these disputes. Third parties who do not have any form of relationship or who do not have a clearly defined relationship with IOs are in a rather precarious position. This is because only a handful of IOs have mechanisms for handling disputes with third parties, often opting to settle disputes through negotiations and *ad hoc* arbitration. These methods of settling disputes are however engaged in at the sole discretion of the IO concerned. In other words if an IO is not willing to engage in negotiations or arbitration, there is very little a wronged

individual can do to compel the IO to resolve the matter. The lack of a general international forum for handling complaints against IOs compounds the problem.

Finally, on the problems associated with seeking redress for IOs' wrongful conduct, the immunities and privileges which IOs enjoy constitute the biggest obstacle. On one hand, immunities are important because they aid the independent functioning of IOs. On the other hand however, these immunities operate to prevent individuals from accessing justice in domestic and other courts. The emergence of a human rights approach to immunity however, provides a beacon of hope. This approach is to the effect that the immunity of an IO will only be upheld if the IO concerned has made provisions for alternative dispute resolution mechanisms.

IV THE ROLE OF DOMESTIC COURTS

The research conducted in this thesis clearly demonstrates the plight of those who have been harmed by the conduct of IOs. The need for effective ways of holding IOs accountable cannot therefore be overemphasised. Domestic Courts might not have all the solutions to the problems associated with seeking relief for wrongs committed by IOs. However they have a very key role to play in the accountability of IOs. In this regard, two major recommendations are made as follows:

(a) Firstly and most importantly, the role of domestic and regional courts in holding IOs accountable should be strengthened. This is important for various reasons as follows:

    (i) To begin with, there are no indications that a general international forum for resolving complaints against IOs will be established soon. In this regard therefore, domestic courts provide a forum for resolving complaints against IOs to individuals who would otherwise have no means of accessing justice. This is especially true for third parties who in most cases do not have access to internal dispute resolving mechanisms of an IO.

    (ii) Secondly domestic and regional courts have the ability to use their own laws and systems to influence respect for human rights as demonstrated by the case

of *Kadi*. This is especially true when wrongful acts have been committed by organisations such as the UN which enjoy absolute immunity. Additionally, domestic or regional Courts have the ability to hold states liable for the wrongful acts of IOs where the immunity veil of an IO cannot be pierced as has been explained in Chapter 4.

(iii) Finally, domestic courts can enforce the 'alternative mechanism test' when dealing with complaints against IOs. It has been demonstrated that applying this test ensures that the right of access to justice or access to a remedy is protected, while at the same time ensuring that the immunities of IOs are protected since IOs will be encouraged to provide alternative dispute resolution mechanisms in a bid to prevent any tampering with their immunities.

(b) In line with recommendation in (a) above, there is need for the DARIO or similar instruments to provide clear guidelines on the role of domestic courts in the resolution of disputes concerning IOs. It is clear that the human rights approach to IO immunity is gaining ground. It is also clear that this human rights approach affects the responsibility of IOs. There is therefore need for proper regulations on how both States and IO should conduct themselves.

V THE FAINT LIGHT AT THE END OF THE TUNNEL.

In the final analysis, justice for wrongs committed by IOs is not easily accessible especially for individuals. However recent developments heralded by increased attention on the promotion and protection of human rights offer hope and therefore represent a light at the end of the tunnel. However there is still lack of a general international forum tasked with handling IO related disputes and there are no indications that such a forum will be available in the near future. Additionally the human rights approach to immunity has not yet significantly dented the absolute immunity of the UN and allied IOs. Therefore, although the light is shining at the end of the tunnel, it is doing so faintly. With the increased and sustained pressure for the promotion and protection of human rights, and strengthening the role of domestic Courts, perhaps one day that light will shine brightly.

BIBLIOGRAPHY

Primary Sources

Domestic Legislation

South African:

Foreign States Immunities Act South Africa Act 87 of 1981.

Foreign:

Foreign Sovereigns Immunities Act 1976 (USA).

Immunities and Privileges Act [Cap 16:01] (Malawi).

International Organisation Immunities Act of 1945 (USA).

International Legislation

Charter of the United Nations.

Convention on the Privileges and Immunities of the United Nations.

Convention on the Rights of the Child.

Convention on the Rights of Persons with Disabilities.

Covenant of the League of Nations.

Draft Articles on Responsibility of States for Internationally Wrongful Acts.

Draft Articles on the Responsibility of International Organisations.

International Covenant on Civil and Political Rights.

Statute of the International Court of Justice.

Vienna Convention on Treaties between States and International Organisations or between International Organisations.

Cases

Domestic

South African:

Banco de Mocambique v Inter Science Research and Development Services 1982(3) SA 330 (T).

Foreign:

Abdi *Hosh Askir v Boutros Boutros-Ghali* 933 F. Supp 368(SDNY) (USA).

Bisson v The United Nations, the World Food Programme and the ABC Organisation, 2007 WL 2154181, at II, Slip Op., US District Court, Southern District of New York. (USA).

Brzak v United Nations, 597 F.3d 107, 112 (2d Cir 2010) (USA).

Corte Suprema (Argentina), Judgement 5.12.1983, Cabrera, Washington J.E. c. Commission Tecnica Mixta de Salto Grande, (Technical Mixed Commission on the Salto Grande) (Argentina*).*

Drago v International Plant Genetic Resources Institute, Corte de Cassazione, Judgment No. 3718/2007, ILDC 827 (IT 2007) (Italy).

Fibraca *Constructora Sca. c. Comision Tecnica Mixta de Salto Grande,* Judgment 1.4.1997 (Colombia).

General Secretariat of the ACP Group v Lutchmaya, Cass Nr 03 0328 F, ILDC 1573 (BE 2009), Court of Cassation, (Belgium).

Georges v United Nations 84 F Supp 3d 246 (SD NY 2016) (USA).

Ghiorzo Juan Jose c Comision Techica Mixta de Salto Grande Judgment 7.7.1993.

International Committee of the Red Cross v. Sibanda and Ngangura, (47/02) [2004] ZWSC 115 (12 Jan, 2004) (Zimbabwe).

Jam v International Finance Corporation, 139 S. Ct. 759 *(2019)* (USA)
Ministre des Affaires etrangeeres v Dame Burgat et autres, 29 October 1976, Conseil d'Etat in France, Recueil 453 (1977) (France).

Mukeshimana-Ngulinzira v. Belgian State, Judgment of the Court of First Instance, Case Numbers 04/4807/A and 07/15547/A. (Belgium).

*Rojas Robles c. Ministerio de Relaciones Exteriores, Consejo de Estado (*Colombia*)*, Judgement No. 11044 of 25.8.1998, Case No. IJ-001, (Colombia).

The State v Hasan Nuhanovic Case No 12/03324 (6 Sept, 2013) (Netherlands).

The State of Netherlands v Mothers of Srebrenica Case Number 17/04567 (19 July, 2019) (Netherlands).

Tononoka Steels Ltd v. The Eastern and Southern African Trade and Development Bank, Civil Appeal No. 255 of 1998 (Judgement of 13.8.1998) (Kenya).

Trendtex Trading Corp vCentral Bank of Nigeria [1977] QB 529 (UK).

Atkinson v Inter-American Bank 156 F.3d 1335 (D.C. Cir. 1998) (USA).

Western European Union v Sidler, Belgium Court of Cassation [Cass.] No.S.04. 0129.F (December 21, 2009) (Belgium).

X v Deodato 28 September, 1995, 140/1955, Tribunal Constiticional (Spain).

International

African Court of Human and Peoples Rights

Femi Falana v African Union AfCHPR, App No. 001/2011.

Efoua Mbozo'o Samuel v Pan Africa Parliament AfCHPR App No 010/2011.

European Court of Human Rights

Al-Jeddah v United Kingdom 2011) 53 E. H.R.R. 23.

Bankovic and Others v Belgium and Others, Application No. 5227/99.

Behrami and Behrami v France Application no. 71412/01.

Osman v United Kingdom, Application 23452/94, 101 ECtHR 40 (1998).

Yasin Abdullah Kadi and Al Narakaat International Foundation v Council of the European Union and Commission of the European Communities c-402 and C-415/05 P.

Waite and Kennedy v. Germany 13 Eur. Crt. H. R. 121, (1999).

International Court of Justice

Armed activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) ICJ Reports (2005).

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) (1986) ICJ Reports 1.

Chorzow Factory Case (Claim for Indemnity) [1927] Publ. PCIJ, Series A, Judgment No 8.

Corfu Chanel Case, [1949] ICJ 4.

Differences relating to Immunity from Legal Proceedings of a Special Rapporteur of the Commission on Human Rights, [1999] ICJ Reports 62.

Genocide Case (Bosnia-Herzegovina v Serbia and Montenegro) ICJ Reports (2007) 43.

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, [1980] ICJ Reports 73.

Legality of the Use of Force (Yugoslavia V Belgium) Provisional Measures [1991] ICJ Reports 124.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion. [1996] ICJ Reports, 66.

North Sea Continental Shelf Cases [1969] ICJ Reports 44.

Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Reports, 174.

United States Diplomatic and Consular Staff in Tehran [1980] ICJ Reports 7.

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Dragan Nikolic ICTY Trial Chamber II Case Number IT-94-2-S (18 December, 2003).

Permanent Court of Arbitration

A v UN Organisation [2019-04].

Gunvor SA (Switzerland) v The Republic of Zambia [2017-19].

*Mrs Ge Ga and Others v The International Criminal Police Organisation (INTERPOL) [*2019-19].

Secondary Sources

Books

Amerasinghe, C.F *Principles of the Institutional Law of International Organizations,* 2ed (2005) Cambridge University Press, Cambridge.

Bennet, TW & J. Strug *Introduction to International Law*, (2013) Juta and Co. Ltd, Cape Town.

Cassese, Antonio *International Law*, 2ed, (2005) Oxford University Press, New York.

De Schutter, Olivier 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility' in Jan Wouters et al (eds) *Accountability for Human Rights Violations by International Organizations* (2010) Intersentia Publishers, Antwerp-Oxford-Portland.

Di Fillipo, Marcello 'Immunity from Suit of International Organisations Versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law,' in Daniel Pavon Piscitello (ed), *International Law of Human Rights: Manifestations, Developments, Violations and Current Answers.* (2014) Universidad Catolica de Cordoba, Cordoba.

Klabbers, Jan *Introduction to International Institutional Law* 2ed, (2009) Cambridge University Press, New York.

Pellet, Allain 'International Organizations are Definitely not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations in Maurizio Ragazzi(ed) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) Martinus Nijhoff Publishers, Leiden and Boston.

Reinisch, August 9(ed), *The Privileges and Immunities of International Organisations in Domestic Courts* (2013) Oxford University Press, New York.

Sands, Phillippe Q.C. and Pierre Klein, *Bowett's Law of International Institutions'* 6ed (2009) Thomson Reuters (Legal) Limited, London.

Schemers, Henry G and Niels M. Blokker *International Institutional Law*, (2003) Brill Academic Publishers, Leiden.

Schmalenbach, Kirsten, 'Dispute Settlement' in Jan Klabbers and Asa Wallendahl (eds) *Research Handbook on the Law of International Organisations. (2011)* Edward Elgar, Cheltenham and Massachusetts.

Schmitt, Pierre *Access to Justice and International Organisations: The Case of Individual Victims of Human Rights Violations* (2017). Edward Elgar Publishing, Leuven.

Viljoen, Frans 'International Protection of Human Rights' in Hennie Strydom (ed) *International Law,* (2016) Oxford University Press, Oxford.

Strydom, Hennie (Ed) *International Law,* (2016) Oxford University Press, Oxford.

White, Nigel *The Law of International Organizations,* 2ed (2005) Manchester University Press, Manchester.

Journal Articles

Ahlborn, Christiane 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review* 397.

Alvarez, Jose E. 'Book Review of International Organizations and their Exercise f Sovereign Powers by Dan Sarooshi' (2007) 3 *American Journal of International Law*, 674.

Alvarez, Jose E. 'International Organizations and the Rule of Law' (2016) *14 NZJPIL 3.*

Besson, Samantha 'State Consent and Disagreement in International Law-making. Dissolving the Paradox.' (2016) *Leiden Journal of International Law.*289.

Blokker, Niels 'Member State Responsibility for Wrongdoings of International Organizations' (2015) *12 International Organizations Law Review* 319.

Blokker, Niels 'International Organisations: The Untouchables' (2014) 10 *International Organisation Law Review* 259.

Bogdandy, Armin von and Mateja Steinbruck P, 'ARIO and Human Rights Protection: Leaving Victims in the Cold' (2012) *International Organisations Law Review,* 67.

Boucher, David 'The Recognition Theory of Rights, Customary International Law and Human Rights' (2011) 59 *Political Studies* 753.

Boutin, Berenice 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control' (2017) 18 *Melbourne Journal of International Law* 153.

Bradlow, Daniel 'Using a Shield as a Sword: Are International Organisations Abusing their Immunity?' (2017) 31(1) *Temple International and Comparative Law Journal* 45.

Cannizzaro, Enzo 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case,' (2009) 28 *Year Book of European* Law 593.

Cassese, Antonio, 'The Nicaragua and Tadic Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia' *(2007)* 18(4) *European Journal of International Law* 649.

Choudhury, Farhana 'The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability' (2016) 104 (725) *Georgetown Law Journal* 725.

Crawford, James 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal of International Law*. 874.

d'Aspremont, Jean 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) *International Organizations Law Review 91*.

Dannebaum, Tom ‘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 Peace keepers. (2010) 51 (1) *Harvard International Law Journal* 113.

Daurgidas, Kristina ‘How and Why International Law Binds International Organisations’ (2016) 57 (2) *Harvard International Law Journal* 325.

Daurgidas, Kristina ‘Reputation and the Responsibility of International Organizations’ (2015) 25(4) *European Journal of International Law, 991.*

De Brabandere, Eric ‘Immunity of International Organisations in Post-Conflict Administrations,’ (2010) 7 *International Organisation Law Review,* 81.

Feinangle, Clemens ‘The UN Security Council and Taliban Sanctions: Emerging Principles of International Institutional Law for the Protection of Individuals’ (2008) 9 (11) *German Law Journal* 1513.

Freedman, Rosa ‘UNaccountable: A New Approach to Peacekeepers and Sexual Abuse’ (2018) 29(3) European Journal of International Law 961.

Freedman, Rosa ‘UN Immunity or Impunity? A human Rights Based Challenge’ (2014) 25 (1) *European Journal of International Law.* 241.

Freedman, Rosa and Lemay-Herbert “Jistis ak reparation pour tout victim kolera MINUSTAH”: The United Nations and the Right to Health in Haiti’ (2015) 28 (3) *Leiden Journal of International Law* 507.

Frerichs, Ralph R.B and Renaud Piarroux, ‘Nepalese Origin of Cholera Epidemic in Haiti’ (2012) 18 *Clinical Microbiology and Infection* 158.

Giumelli, Francesco and Fillipo Costa B, 'When States and Individuals Meet: The UN Ombudsperson as a 'Contact Point' between International and World Society,' (2019) 00(0) *International Relations* 1.

Goldstone, Richard J and Rebecca J. Hamilton (2008), 'Bosnia v Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', (2008) 21(1) *Leiden Journal of International Law* 91.

Grant, Thomas D. 'International Responsibility and the Admission of States to the United Nations', (2009) 30 *Michigan Journal of International Law* 1095.

Gulati, Rishi 'The Internal Dispute Resolution Regime of the United Nations' (2011) 15 *Max Planck UNYB 489.*

Helberstein, Daniel and Eric Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order,' (2009) 46 *Common Market Law Review* 13.

Javitz, Joshua M. 'Internal Conflict Resolution of International Organisations' (2013) 28 (2) *ABA Journal of Labour and Employment Law,* 223.

Klabbers, Jan 'Reflections on Role Responsibility: the Responsibility of International Organisations for Failing to Act' (2018) 28 (4) *European Journal of International Law* 1133.

Klabbers, Jan 'The Paradox of International Law' (2008) *International Organisations Law Review* 151.

Kokott, Julianne and Christoph Sobotta, 'The Kadi Case-Constitutional Core Values and International Law-Finding the Balance?' (2012) 23 (4) *European Journal of International Law* 1015.

Krenzler, Horst G and Oliver Landwehr, 'A New Legal Order of International Law: On the the Relationship between Public International Law and European Union Law after Kadi,' in U. Fastenrath (ed) *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (2011),* 1004.

Kryvoi, Yaraslau 'The Law Applied by International Administrative Tribunals: From Autonomy to Hierarchy' (2015) 47 *George Washington International Law Review* 267.

Lauterpacht, Hersch 'The Revision of the Statute of the International Court of Justice' (2002) 1 *The Law and Practice of International Courts and Tribunals* 55.

Lenarts, Koen 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 (4) *SMU Law Review* 707.

Milanovic, Marco & Tatjana Papic, 'As Bad As It Gets: The European Court of Human Rights's *Berhami and Saramati* Decision and General International Law,' (2009) 58 (2) *International and Comparative Law Quarterly* 267.

Miller, Anthony 'The Privileges and Immunities of the United Nations' (2009) 6 *International Organisations Law Review, 7.*

Natenson, Meghan 'The World Bank Group Human Rights Obligations under the United Nations Guiding Principles on Business and Human Rights.' (2015) 33 (20) *Berkely Journal of International Law*, 489.

Nollkaemper, Andre 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 (4) *American Journal of International Law* 760.

Nollkaemper, Andre 'The Duality of Shared Responsibility' (2018) 24(5) *Contemporary Politics* 525.

Nollkaemper, Andre and Dove Jacobs, 'Shared Responsibilty in International Law: A Conceptual Framework' (2013) 34 (2) *Michigan Journal of International Law* 359.

Okada, Yohei 'Effective Control Test at the Interface between the Law of International Responsibility and the Law of International Organizations: Managing Concerns over the Attribution of UN Peacekeepers' Conduct to Troop Contributing Nations' (2019) 13 (2) *Leiden Journal of International Law* 275.

Orakhelashvili, Alexander 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organisations' (2005) 2 *International Organization Law Review* 57.

Palchetti, Paolo 'The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations' (2013) 95 (891/893) *International Review of the Red Cross* 727.

Parish, Matthew 'An Essay on the Accountability of International Organizations' (2010) 7 *International Organisations Law Review,* 277.

Paust, Jordan J 'The UN is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity,' (2010) 51 *Harvard International Law Journal* 1.

Piarroux, Renaud 'Understanding the Cholera Epidemic, Haiti,' (2011) 17 *Emerging Infectious Diseases 161.*

Poli Sara and Maria Tzanou, 'The Kadi Rulings: A Survey of the Literature' (2009) 28 *Year Bok of European Law* 593.

Quenivet, Noelle 'Binding the United Nations to Human Rights Norms by way of the Laws of Treaties' (2010) 42 *George Washington International Law Review, 587.*

Rashkow, Bruce C ‘Immunity of the United Nations: Practices and Challenges,’ (2014) *International Organisation Law Review,* 332.

Reinsich, August ‘The Immunity of International Organisations and the Jurisdiction of their Administrative Tribunals,’ (2008) 7 *Chinese Journal of International Law* 285.

Reinisch, August ‘To what Extent Can and Should National Courts, “Fill the Accountability Gap”? (2014) 10(2) *International Organisation Law Review* 572.

Rios, Greta L and Edward P. Flaherty, ‘International Organisation Reform of Impunity? Immunity is the Problem’ (2010) 16 (2*) ILSA Journal of International and Comparative Law* 432.

Ryngaert, Cedric "Apportioning Responsibility between the UN and Member States in UN Peace-support Operations: An Inquiry into the Application of the "Effective Control" Standard after Behrami' (2012) 45 *Israel Law Review* 151.

Ryngaert, Cedric ‘The Immunity of International Organisations before Domestic Courts: Recent Trends,’ (2010) 7 *International Organisations Law Review* 121.

Ryngaert, Cedric and Otto Spijkers, ‘The End of the Road: State Liability for Acts of UN Peace Keeping Contingents After the Dutch Supreme Court’s Judgment of Srebrenica (2019) 66 *Netherlands International Law Review* 537.

Ryngaert, Cedric and Holly Buchanan, ‘Member State Responsibility for Acts of International Organizations’ (2011) *Utrecht Law Review 7.*

Shraga, Daphne ‘The ILC Draft Articles on Responsibility of International Organizations: The Interplay between the Practice and the Role*’* (2011) 105 *American Society of International Law Proceedings,* 351.

Schrijver, Nico ‘Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations’ (2014) 10(2) *International Organisations Law Review 588.*

Suzuki, Eisuke and Suresh Nanwani, 'Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Banks' (2005) 27 *Michigan Journal of International Law*, 177.

Teletsky, Anastasia 'Binding the United Nations:Compulsory Review of Disputes Involving UN International Responsibility before the International Court of Justice.' (2012) 21 *Minnesota Journal of International Law*. 75.

Uriarte, Joana A 'The Responsibility of International Organisations and International and European Courts and Tribunals: Judicial Review of Security Council Resolutions (2011) *Remedies and Responsibility for the Actions of International Organisations* 321.

Vulgaris, Nikolaos 'Rethinking Indirect Responsibility: A study of Article 17 of the Draft Articles of International Organizations' (2014) 11 *International Organizations Law Review 5.*

Wellens, Karel 'Fragmentation of International Law and Establishing an Accountability Regime for International Organisations: The Role of the Judiciary in Closing the Gap,' (2004) 25(4) *Michigan Journal of International Law* 1159.

Wilner, Gabriel M 'Reflections on Regional Human Rights Law,' (1995) 25 (1&2) *Georgia Journal of International and Comparative Law* 407.

Wood, Michael 'Do International Organisations Enjoy Immunity under Customary International Law?' (2014) 10 *International Organisations Law Review* 287.

Young, Aaron 'Deconstructing International Organisations Immunity,' (2012) 44 *Georgetown Journal of International Law* 311.

Other Scholarly Articles

Herbertson, Kirk, Kim Thompson and Robert Goodland, 'A Roadmap for Integrating Human Rights into the World Bank Group. (2010) *World Resources Institute* 1.

Sinclair, Guy Fiti 'Beyond Accountability? Human Rights, Global Governance, and the World Bank Inspection Panel, (May 21, 2019), Available at SSRN: https:// ssrn.com/abstract+3391646.

Tzanakopolous, Antonious 'Attibution of Conduct to International Organizations in Peace Keeping Operations' available at *http://ejiltalk.org/attribution-of-conduct-to-international-organisations-in peacekeeping-operations/* accessed on 10/09/2019.

Reports

Cravioto, Alejando et al., 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (2011) at p 23, available at *https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_525.pdf.*

Human Rights Watch, 'Abuse-free Development: How the World Bank Should Safeguard against Human Rights Violations available at *http://hrw.org/sites/default/files/reports/worldbank0713-Forupload.pdf.*

Report of the Secretary General: Administration of Justice in the United Nations, Doc A/62/782, (April, 2008).

Report of the Secretary General: Administration of Justice Report, UN Doc A/65/373 (Sept, 2010).

Report of the Secretary General, UN Document A/CN.4/L.383.

Report of the Secretary General on *Special Measures for Protection from Sexual Exploitation and Abuse*, United Nations General Assembly Doc A/73/744. (Feb, 2019).

Report on the Human Rights Situation in Kosovo since 1999, United Nations Document CCPR/C/UNK/1 (Mar, 2006).

UN Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for all' UN DOC. A/59/2005 (Mar, 2005).

UN General Assembly Sixth Committee, Summary Record of the 4th Meeting, 25 October, 2010, UN Doc. A/c.6/65/SR.4.