REPARATION FOR VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW:

THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

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ABSTRACT

This thesis is concerned with reparation for human rights and international humanitarian law breaches committed by or attributed to international organizations. These breaches constitute internationally wrongful acts which according to the International Law Commission's Draft articles on the responsibility of international organizations, give rise to an obligation on the offending organization to afford reparation. However, in practice, the obligation to afford reparation is unimplemented. The thesis explores why this is. The thesis considers how the law of responsibility intersects with the specialised regimes of human rights and international humanitarian law and particularly, their application to remedies and reparation owed to individuals. It reviews the various gaps in the normative framework and the limitations of existing redress mechanisms. The thesis analyses the cogency of the arguments and rationales that have been used by international organisations to limit institutional liability and the scope and functioning of redress mechanisms, included by the resort to *lex specialis* principles. It is postulated that the standards of reparation must be drawn from the nature of the breach and the resulting harms and not by who is responsible for the breach. In this respect the thesis is an exercise in the progressive development of the law. Having determined that existing redress mechanisms cannot afford adequate or effective remedies and reparation, the thesis explores how to move towards a model that achieves greater compliance. Indeed, should it be accepted that international organizations must afford remedies and reparation for breaches of human rights and IHL that correspond to the standards that exist in those specialised fields then it is argued that there is a corresponding obligation on them to put in place the modalities for that to be achieved.

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TABLE OF ABBREVIATIONS

ACtHPR	African Court on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJHR	African Court of Justice and Human Rights
ANISOM	African Union Mission in Somalia
ARS	Articles on the Responsibility of States for Internationally Wrongful Acts
AU	African Union
CACJ	Central American Court of Justice
CARICOM	Caribbean Community
CATHB	Convention on Action against Trafficking in Human Beings
CCJ	Caribbean Court of Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFI	Court of First Instance of the European Communities
CIL	Customary International Law
CJAC	Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol)
CJEU	Court of Justice of the European Union
COE	Council of Europe
CPIUN	Convention on the Privileges and Immunities of the United Nations

CPPED	Convention for the Protection of All Persons from Enforced Disappearance
CPRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC Committee	Committee on the Rights of the Child
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CRPD	Convention on the Rights of Persons with Disabilities
DRC	Democratic Republic of the Congo
DARIO	Draft articles on the responsibility of international organizations
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECOWAS CCJ	ECOWAS Community Court of Justice
EU	European Union
EULEX	EU Rule of Law Mission in Kosovo
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GC	Grand Chamber
GC1 (-4)	Geneva Convention

HRAP	Human Rights Advisory Panel
HRRP	Human Rights Review Panel
IACtHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IGO	Inspector General's Office
IO	International Organisation
MONUC	UN Organization Mission in the Democratic Republic of the Congo
MONUSCO	UN Organization Stabilization Mission in the Democratic Republic of the Congo (took over from MONUC on 1 July 2010)
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OIOS	Office of Internal Oversight Services
PACE	Parliamentary Assembly of the Council of Europe
RCI	Rules relating to the Control of Information and Access to Interpol's Files
RIO	Regional integration organization
SADC	Southern African Development Community
SFOR	Stabilisation Force in Bosnia and Herzegovina
SOFA	Status of Forces Agreement

TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCC	United Nations Compensation Commission
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMIK	UN Interim Administration Mission in Kosovo
UNOSOM	United Nations Operation in Somalia
UNSC	United Nations Security Council
UNTAET	UN Transitional Administration in East Timor
VCLT	Vienna Convention on the Law of Treaties
VCLT 1986	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
WTO	World Trade Organization

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I. INTRODUCTION

I.1 The problem to be addressed

This thesis explores the challenges to obtain remedies and reparation for harm suffered in the context of violations of human rights and international humanitarian law (IHL) carried out by or attributed to international organizations (IOs) and the United Nations (UN) in particular. Increasingly, IOs take on State- or quasi- State-like functions in which they exercise control over individuals and societies, particularly in contexts of conflict and transition. However, disciplinary, oversight and judicial structures that exist in State administrations to promote accountability and forestall abuses have only partially been put into place for IOs. At the same time, individuals affected by IO conduct have had no, or only cursory recourse to domestic, regional and international courts and they have not been able to rely on their States of nationality to pursue claims on their behalf.

Historically, IOs operated in limited spheres. They were much more likely to afford assistance or coordinate the engagements of other actors than to engage directly and exert effective control in different locales. Over time, this has changed. As the roles and responsibilities of IOs have broadened, there are more situations in which IOs interact with, and in which their actions directly impact on, individuals. These all increase the risks that IO conduct may infringe human rights and IHL. IOs' engagement in peace operations has progressively widened, with mandates now regularly including the protection of civilian populations and in several new operations containing peace enforcement responsibilities with active combat duties. Other areas which may give rise to human rights infringements include: sanctions; humanitarian assistance and development; when IOs adopt State functions such as the administration of territory or more limited contexts such as detention, refugee status determination or repatriation programmes. Additionally, the circulation of international arrest warrants and the resort to international criminal courts and tribunals opens up the prospect that such actions violate the rights of suspects and possibly victims and witnesses. The rationales for IO immunities and other limits on IO responsibilities were conceived to ensure IOs' independence from State influences and their capacity to engage in often difficult circumstances. Many, if not all of these rationales remain relevant today. Nonetheless, there is a need to evaluate whether and if so how these principles which have been framed in absolute terms should be adapted to better take account of the variety of scenarios in which IOs are now engaged.

Normatively, there has been insufficient consideration of individuals' ability to obtain reparation from IOs. The ILC *Draft Articles on the Responsibility of International Organizations* (DARIO)[1] make clear that IOs are responsible for internationally wrongful acts attributable to them and are obliged to afford reparation for injuries caused. Yet, these Draft Articles only cover the invocation of responsibility by States or IOs; responsibility towards individuals harmed by a breach is not considered in the text. The failure to spell out clear rules on this issue mirrors to a large extent the gaps in international law. When considering whether IOs are obliged to afford reparation and to whom it is owed and what it entails, one is confronted with how the law of responsibility intersects with the specialised regimes of human rights and IHL and particularly, their application to individuals. The absence of clear standards for IOs makes it necessary to extrapolate standards from these other regimes as well as to imply standards from IOs' functions. Both these approaches necessarily require a shift from analyzing the law *de lege lata* to *de lege ferenda*.

[1] ILC, Draft articles on the responsibility of international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 [DARIO]

The normative gaps have led IOs to operate solely on the basis of internal rules which they have created in their self-interest. While some 1Os have paid lip-service to human rights and IHL protections by officially declaring their commitment to these principles, the internal structures of accountability that they have developed have not reflected the external and significantly wider human rights and IHL standards applicable to other actors such as States. While there may be good reasons for standards applicable to States to diverge from those applicable to IOs, the lack of standing for injured individuals to challenge IOs' understandings of the law, affords IOs a virtual monopoly over the framing of the law and its procedures, which can and has resulted in impunity. The incentives to afford claimants greater procedural safeguards and to extend to them adequate and effective reparation are low; there is no reciprocity because the power relationships between claimants and IOs are highly asymmetric. The victims have limited sway on IO procedures and limited influence on their governments to pursue claims on their behalf. As such, there are few consequences when IOs fail to meet these wider standards.

These gaps have meant that for the most part, individuals lack access to remedies and are unable to obtain reparation for the harm suffered. Many of these individuals come from protracted conflict zones and/or experience other forms of disadvantage and daily hardships including extreme forms of poverty, violence, vulnerability or marginalisation. Indeed it is often those characteristics of vulnerability which cause IOs to engage in particular countries or regions in the first place. But it is also those characteristics that underscore why reparation is so needed. At the same time their situation of powerlessness can make it more difficult for victims to assert and realise any rights they may have. As such the absence of adequate and effective reparation for the harms suffered as a result of IO abuses constitutes a significant and often immediate hardship on the victims. Much the same as in national contexts, the failure to acknowledge and account for the wrongful conduct can also reduce victims' and societies' faith in the rule of law and entrench vulnerabilities. From the perspective of the IO, the lack of accountability can produce a situation in which these organisations operate in a legal vacuum which can contribute to recurrence. It also produces the contradictory and unhelpful conundrum whereby the values the IOs seek to instil in others are ones that they do not espouse for themselves. This can have the result of de-legitimising the IOs and thereby impeding them from achieving the overall goals of their mandates.

I.2 The questions to be answered

The main research questions I address in this thesis are:

i) Do IOs have obligations under human rights and IHL?

ii) Is there a right to reparation for harm suffered in the context of violations of human rights and IHL perpetrated by or attributable to IOs, and if so what is its content?

iii) Do existing structures have the capacity to afford individuals adequate and effective reparation? If not, what steps can be taken to improve them?

iv) Is the ability to obtain adequate and effective reparation from the wrongdoer an essential component of the right to reparation? If so, what are the consequences for individuals who allege harm, when procedural obstacles impede their access to reparations against IOs? Are there concomitant obligations on IOs to ensure access to procedures whereby injured individuals may obtain redress?

I.3 Aims and objectives

The primary aim of this study is to deepen understanding about the intersections between the law of international organizations, the law of international responsibility, immunities, human rights and IHL. I seek to determine where there are gaps in the various legal frameworks, explore why these gaps exist and posit ways in which they might be filled. I argue that it is possible to derive IO obligations from an analysis of their functions and mandates and by extrapolating from the obligations of other actors, particularly States. This is necessarily a *de lege ferenda* analysis given the paucity of clear sources of law and limited practice concerning IOs specifically.

In the thesis I also seek to assess the availability and capacity of existing redress mechanisms to afford reparation to injured individuals, and the extent to which reparation afforded matches up with the obligations I postulate are relevant to IOs. One objective is therefore to determine the practical impact of available redress mechanisms on injured individuals.

Underpinning this analysis is my view that i) laws and procedures are meant to be practical and effective and should be capable of addressing wrongs; ii) the law is not a static edifice; it should be capable of progressive evolution to meet its underlying objectives. The thesis thus contributes to the ongoing debate about IO accountability and the practical implications of the DARIO framework and seeks to identify areas in which further clarity or exploration is warranted.

The counter-arguments stem mainly from the philosophical placement of the study. Is this simply a utopian exercise or is it a critical mapping of where the law *should* be, if law matched purpose? Some would argue that law does not and should not be made to approximate particular purposes, ideals or values; this is not law's function. Law is simply a reflection of States' (and presumably other actors') willingness to be bound. In the thesis I have sought to take an approach which Cassese refers to as 'avoid[ing] the extremes of both blind acquiescence to present conditions and the illusion of being able to revolutionize the fundamentals.'[2] This approach necessarily introduces contingency into a discipline which many understand as fundamentally objective. It is also a fine balancing act and there will be necessarily debate as to whether I have tipped the balance too far in favour of revolution, or not far enough. Furthermore, there is a natural tension within the study relating to the distinctions made between where the law *is* and where it *should* be. Thus, counter-arguments may also stem from where I have situated the law within this continuum. These arguments too, tend to stem from different perspectives of the placement and role of law. Within this thesis, I have understood and sought to use law not only as a descriptor, but also as a process of argumentation. Thus an important aspect of the thesis is determining the nature of the arguments that must be made in order to support particular propositions of where the law *is*, as well as where it *should be*.

I.4 Methodology

The main methodological approach has been to identify the law through laws and treaties, procedural frameworks, jurisprudence and declaratory texts and statements and to assess these against IOs' constituent agreements and related institutional practices. I have dealt with

[2] Antonio Cassese, 'Introduction' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) xvii

the inevitable gaps in the above by extrapolating and seeking to apply as appropriate, laws from other domains, particularly the law of State responsibility.

Given my emphasis on access to remedies and reparation, there is a heavy procedural component to the thesis. In this respect, I have devoted a significant amount of space to the analysis of accountability structures, both those internal to IOs and others operating at the domestic and regional or international level. Where possible, I have sought to consider how these structures currently address remedies and reparation for human rights and IHL violations attributable to IOs, as well as how they could do so better.

My focus on IOs is itself narrow. The reference to 'IOs' throughout this study entails the notion of a collectivity of States with a constitution and an international legal personality distinct from the Member States that establish them. In essence, I am focusing on intergovernmental organisations that have a recognised independence from their Member States that have the capacity to engage on the international plane. This would include organisations like the UN and regional organisations like the European Union, African Union and Organisation of American States. In certain contexts and for some purposes it might also include NATO or the OSCE, but these latter organisations tend to operate with less autonomy and thus are less relevant to my inquiry. I am not interested in this thesis in nongovernmental organisations.

Much of the available practice concerns the United Nations. However, the thesis is not limited to considering UN responsibility, but seeks to draw parallels with the conduct of other IOs which may also bear responsibility for human rights and IHL violations. To an extent, the United Nations has given most thought to redress mechanisms, and naturally the practice focuses on those mechanisms that have been established, predominantly by the UN and its subsidiary bodies. However, as appropriate, I have sought to note the differences between different types of IOs which may impact on the ability to attribute conduct to them. Nonetheless, to the extent that conduct is attributable, the resulting obligations are similar if not the same for all IOs albeit with some necessary modifications. I have also sought to analyse the approaches taken by regional courts, which while having limited subject matter and personal jurisdiction stemming from their narrow mandates, provide useful comparators for structures which could be established at the universal level.

There is a natural breadth to what the thesis covers. This is because the problem areas become most evident in relation to how the various elements canvassed in the study intersect. The choices of what to cover and what to leave out have been made with a view to being able to best analyse those intersections.

In consequence, a number of relevant but extraneous areas of analysis have been omitted from my inquiry. The first of these is other actors' responsibility. Naturally, it can be difficult to situate IOs' responsibility outside of and without considering the responsibility of other actors who may act in conjunction with them, or whose conduct may result in multiple or shared attribution of responsibility. Nevertheless, I have operated from the perspective that the existence of State or other actors' responsibility and the possibility to secure reparation for internationally wrongful acts stemming from those responsibilities does not negate the need to address IO responsibility and the consequences of that responsibility. An IO may have distinct obligations flowing from its particular mandate and taking into account its capacity to act or refrain from acting. Thus, a breach of an IO obligation is a separate and distinct matter requiring resolution, regardless of whether the breaches of other actors have been resolved independently. Thus my analysis focuses on the responsibility of the IO, and not on other actors' responsibility. However, the law of State responsibility has been canvassed as appropriate in order to extrapolate possible features for the responsibility of IOs, to the extent that the latter framework is deficient.

The second of these is the responsibility of individual officials. Much of the existing literature on IO responsibility places emphasis on the conduct of individual officials. This is because many of the IO redress mechanisms have focused on the failings of individual officials as opposed to those of the organisations themselves. Whilst there is a certain degree of overlap owing to the possibility that the acts of an official may implead the organisation, my analysis focuses on the responsibility of IOs as such. Similarly, I am not directly concerned in the thesis with the criminal accountability of IO officials, though the due diligence obligations of the IOs themselves to ensure that such criminal accountability structures are in place are canvassed.

I.5 The structure of the arguments

The thesis is divided into two main parts. Part I focuses on the responsibility of IOs for human rights and IHL violations. Here, I consider whether IOs may incur responsibility for breaches of human rights and IHL and analyse the contexts in which such responsibility may arise as well as when breaches may be attributed to the IO. I also consider the legal consequences of such breaches. Part II focuses on the implementation of the regime of responsibility, and canvasses the principal venues where claims against IOs may be adjudicated.

Part I contains three chapters. Chapter II assesses whether IOs have obligations to respect human rights and IHL. Aside from limited exceptions, IOs are not party to human rights or IHL treaties and therefore the determination of obligations to comply with the norms in such treaties depends, in large part, on a finding that the norms are binding by virtue of the organizations' direct and voluntary incorporation of them or by their recognition as customary international law binding on the organization irrespective of consent. This analysis is complicated by the limited practice involving IOs specifically. Chapter III analyses the circumstances in which IOs may breach their human rights or IHL obligations. I first consider principles of liability including the required degree of intentionality for acts and omissions, exceptions to liability as well as the relationship between positive duties to act and the capacity to do so. I also analyse the impact of *ultra vires* acts on the imputation of liability. I then consider the bases for determining whether the conduct can be attributed to the IO. I consider the contexts and limitations in which IOs operate and analyse how these impact on findings of effective control. Chapter IV surveys the obligation to afford reparation under general international law and its potential application to IOs. Given the absence of clear and objective standards applicable to IOs, the bulk of the Chapter constitutes a *de lege ferenda* analysis. The limitations regarding State-owed obligations also impact on what can be said about IOs' obligations. This is because of the near total absence of relevant practice concerning IOs specifically. One must use the practice and *opinio juris* emanating from State violations to draw parallels to possible standards for IOs, so unclear State obligations influence what can be said about IO obligations. I consider whether and the basis upon which any right which exists against States might also exist against IOs. I review the content of the right, both from the DARIO perspective which approaches reparations along the same lines as the Articles on the Responsibility of States and through the human rights lens which takes a broader approach both to the characterisation of forms of reparation and the recognition of procedural elements such as the obligation to afford effective access to a fair hearing. I argue that reparations should be guided by what is adequate and appropriate to redress the nature of the breach, and less so by the nature or status of the wrongdoer.

Part II contains three chapters. In Chapter V, I review the practice of IOs in establishing internal administrative mechanisms and review the extent to which these meet the international law standards on reparation, particularly as is required for human rights and IHL violations. I also outline the arguments and rationales that have been used by IOs to limit the scope and functioning of such mechanisms and analyse their cogency. Chapter VI considers the limited instances in which claims against IOs may be receivable before domestic courts. In this chapter, I outline the limited ways in which domestic courts have overcome the various jurisdictional and procedural barriers to entertain claims against IOs and in contrast, the avoidance techniques some courts have used to entrench those same barriers. I review preliminary considerations of jurisdiction as well as the application of immunities to IOs. I consider the sources of IO immunities and assess the approaches taken by national courts when deciding on them, including with respect to their nature and content and how these have been considered alongside other rights, such as the right to reparation and access to court. In Chapter VII, I consider the limited instances in which claims against IOs may be receivable before regional and international courts and associated bodies, and the related challenge for individuals to access such forums. I analyse the ways in which certain international courts have managed to assert jurisdiction, and the limitations of such approaches.

I.6 Particular issues and tensions

Several tensions repeat throughout. Overall there is the tension between the *lex lata* and *lex ferenda*. The starting point is the weak and inadequate legal framework, thus the bulk of the research focuses on why it is weak, why this is problematic and what are the necessary steps in argumentation to posit stronger assertions. In many respects I take on the weak case; there is a heavy history which goes against all that is posited. But even so, when one arrives at the conclusion, as I do, that IOs possess certain human rights and IHL obligations, that these may be breached and that in consequence there are obligations to afford reparations, this does not necessarily imply that one can transpose the entire framework from the law on State responsibility without a process of translation. There is a need to determine what may be relevant or applicable to the IO, taking into account the particularities of the IO, its functions and its capacities and limitations.

A second constant theme is the influence of classical international law as a system that regulates relations between States as a constraint on the recognition of the placement of other actors and in particular the rights of individuals. This tension is particularly evident in the area of reparation, where traditionally, individuals' rights were subsumed by their States of nationality who could choose to address internationally wrongful acts affecting their citizens through the law on injury to aliens and diplomatic protection. While certain inroads have been made in the area of human rights protection, the ability for individuals to lodge claims in respect of IHL breaches arguably remains circumscribed. It is also evident in respect of individuals' limited *locus standi* before international courts and certain regional ones.

This second theme also influences the development of the law of IOs. When the DARIO was being developed, the ARS[3] formed the basis for the text, with modifications introduced as required.[4] Whilst this sped up the drafting, the method has also been criticised for 'not taking sufficient account of the differences between States and international organizations, and of the diversity among different international organizations'.[5] This tension is evident throughout the text.

A third issue relates to the terminology used in relation to IOs' secondary obligations following the commission of an internationally wrongful act. I have tended to use the terms 'responsibility' and 'liability' as opposed to 'accountability'. This is because the latter term has a wide meaning, referring to the various aspects relevant to holding public officials and institutions to account including good governance, transparency and the like. While these aspects have a general relevance, my focus is much more narrowly construed on the legal consequences of a breach of an international obligation. An IO that is legally responsible and/or liable has the concomitant obligation to afford reparation. It is this relationship between the responsibility/liability of the IO and the obligation to afford reparation that is central to my inquiry.

I.7 What I conclude

I conclude that while there may be no general IO obligation to respect all human rights and IHL norms, there are indeed obligations which apply to IOs in particular contexts. These

[3] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 'Report of the International Law Commission on the work of its 53rd session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 [ARS]
[4] Though, the DARIO Official Commentary makes clear that there is no general presumption that the same principles in the ARS apply to it. DARIO (n 1) Official Commentary, General commentary, para 4
[5] Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations -An Appraisal of the "Copy-Paste Approach"' (2012) 9 Intl Org LR 1

must be assessed and determined on a case by case basis, and are aligned with IOs' purposes and capacities to act and react. At the least, these include the obligation to respect IHL when carrying out enforcement actions and the obligation to respect human rights when IOs exercise effective control over civilian populations. I also conclude that IOs must comply with peremptory norms of international law (which may include elements of human rights and IHL) that apply to all subjects under international law.

When these obligations are breached, there is an obligation to afford reparation. The DARIO is clear that the reparation owed must correspond to the harm. While this text does not deal with reparations owed to individuals, there is no clear justification to diverge from this standard when considering reparation owed to individuals as opposed to states or other IOs. The UN has argued that its abridged procedures and curtailed awards amount to an institutional *lex specialis*, yet it is not evident that this is the case. If anything, I argue that the UN's arguments underpin the Organization's general reluctance to engage seriously in these matters, made worse by the monopoly it holds on the framing of the law given the absence of independent judicial scrutiny.

The rationales given by the UN to refrain from seeking to negotiate special protocols or other means to accede to relevant treaties appear to stem more from their reluctance to be bound than by any formal difficulties associated with the accession process. This does not bode well for the legitimacy of the institution given its mandate and functions, which require it to promote and encourage others' compliance of such norms, which it can only do well if it complies with them itself. The UN in particular has demonstrated reluctance to be bound by human rights and IHL norms other than in very limited circumstances, and even in such cases, as will be demonstrated in later chapters, the structures to enforce these norms against the UN are often lacking.

Having determined that the existing mechanisms do not have the capacity to afford adequate or effective remedies and reparation, the question becomes how to move towards a model that achieves greater compliance. Indeed, should it be accepted that IOs must afford remedies and reparations for breaches of human rights and IHL that correspond to the standards that exist in those specialised fields, then there is a corresponding obligation for them to establish the framework for that to be achieved. This might include, for instance, strengthening the internal adjudicative framework, or making more transparent the process for waiving immunity.

II. THE UNITED NATIONS' OBLIGATIONS UNDER HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

II.1 Introduction

In this chapter I consider whether IOs have obligations under human rights and IHL. Aside from limited exceptions, IOs are not party to human rights or IHL treaties. Therefore, the nature and extent of their obligations to respect, protect and fulfil human rights and IHL will depend on other factors. I consider whether obligations can be imputed to IOs because they are necessary to fulfil the IOs' purposes. I also analyse whether obligations can be derived from other international sources such as treaties and custom. In this respect, I consider whether States and IOs themselves have recognised IOs to be bound by human rights and IHL in general or in particular contexts. This is made complicated by the dearth of practice of both States and IOs, and the vagary of statements by IOs of their intention to be bound.

I conclude that while there may be no general IO obligation to respect all human rights and IHL norms, there are indeed obligations which apply to IOs in particular contexts and these must be assessed and determined on a case by case basis. These are aligned with IOs' purposes and capacities to act and react. At the least, these include the obligation to respect IHL when carrying out enforcement actions and the obligation to respect human rights when IOs exercise effective control over civilian populations. I also conclude that IOs must comply with peremptory norms of international law (which may include elements of human rights and IHL) that apply to all subjects under international law.

II.2 The ability of IOs to bear international obligations and liability for breaches of international law

The ability for IOs to exist under international law, to bear international obligations and responsibility for breaches is a function of international legal personality.[6]

Traditionally, only States were understood to possess such personality,[7] which was recognised as 'the hallmark of sovereign powers'.[8] Neither the Covenant of the League of Nations,[9] nor the UN Charter expressly conferred international legal personality on the respective organisations, though Article 104 of the UN Charter set out that the UN 'shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'[10] Progressively, it has been recognised that non-State entities can possess such personality in limited circumstances or degree,[11] to the extent that specific rights and obligations are expressly set out in constituent agreements or can be implied from same. The position arguably remains in flux, though the starting point remains the State: non-State entities may acquire personality though this is contingent on States' will.[12]

[6] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179

[7] Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht,* vol II (Elihu Lauterpacht ed, CUP 1975) 489; David J Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 Va J Intl L 275, 334

[8] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (6th edn, Sweet & Maxwell 2009) 473

[9] *Covenant of the League of Nations* (adopted 29 April 1919, entered into force 10 January 1920) [1919] UKTS 4 (Cmd 153) art 7

[10] *Charter of the United Nations and Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 104. Henry G Schermers and Neils M Blokker, *International Institutional Law: Unity Within Diversity* (5th edn, Martinus Nijhoff 2011) 988.

[11] Bederman (n 7) 335

[12] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, [25]. Yet, some question whether the State-centric approach to personality sufficiently accounts for modern understandings of international society, which recognise a plethora of actors, including but not limited to the State. See, James E Hickey Jr, 'The Source of International Legal Personality in the 21st Century' (1997) 2

Aside from the constituent agreement, scholars appear to agree that the main criteria to determine whether IOs possess international legal personality are:

1) The nature of the organization; whether the entity is a ‘permanent association of States.’[13]
2) The decision-making structure: The entity should have a *volonté distincte*, in terms of legal powers and purposes, from its member States.[14]
3) The objectives must be lawful, and the functions and powers must be exercisable on the international plane, not solely within the national systems of one or more States,[15] e.g., whether the organization has the capacity to enter into relations with States and other organizations and to conclude treaties with them.[16]

On the basis of the above-mentioned criteria, international intergovernmental organisations like the UN would clearly possess international legal personality. Whether the same can be said of other IOs with more limited fields of application and/or operating only in certain regions has been the subject of some debate. The main consideration has been the extent to which other IOs possess a *volonté distincte* from their Member States.[17]

Hofstra L & Pol’y Symp 1, 14-17; Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law' (1993) 4 EJIL 447, 453

[13] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 678

[14] Ibid. See also, Nigel D White, *The Law of International Organisations* (Melland Schill Studies in International Law, 2nd edn, Manchester Univ Press 2005) 1. As Higgins explains: ‘An international association lacking legal personality and possessing no *volonté distincte* remains the creature of the States members who are thus liable for its acts’. Rosalyn Higgins, ‘The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties’ (1995) 66(1) YB Inst Intl L 252, 254

[15] Brownlie (n 13)

[16] Malcolm Shaw, *International Law* (5th edn, CUP 2003) 181, 241

[17] Philippe Gauthier, ‘The Reparation for Injuries Case Revisited: The Personality of the European Union’ (2000) 4 Max Planck YB UN L 331, 361 Gerhard Hafner, ‘The Legal Personality of International Organizations: The Political Context of International Law’ in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations – Liber Amicorum Hans Peter Neuhold* (Eleven 2007) 81, 96-99

Reparation for Injuries, and the International Court of Justice (ICJ)'s subsequent jurisprudence,[18] put to rest the view which understood personality to exist only if explicitly conferred in the constituent agreement.[19] In *Reparation for Injuries,* the ICJ was asked to assess whether the UN had the capacity to bring an international claim against a State to obtain reparation for the damage caused to the UN and the victim injured in the course of UN employment. The ICJ considered whether the UN possessed international legal personality as one route to determine if it was competent to present an international claim. It determined that the UN possessed 'a large measure of international personality,' which was implied from the functions the organization exercises and the rights it enjoys: 'it could not carry out the intentions of its founders if it was devoid of international personality. ... its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.'[20]

A functional analysis is consistent with the requirement of Article 31 of the *Vienna Convention on the Law of Treaties*[21] to give effect to interpretations that promote treaties' objects and purposes. The relevance of treaty interpretation to the analysis of constituent agreements was affirmed in the *WHO Nuclear Weapons Advisory Opinion*.[22] The ICJ recognised, however, that constituent instruments 'can raise specific problems of interpretation owing, *inter alia,* to their character which is conventional and at the same time institutional.'[23]

[18] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 12) [25]: '[T]the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.'
[19] Schermers and Blokker (n 10) 988-9
[20] *Reparation for Injuries* (n 6) 179
[21] *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT]
[22] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 12) [19]
[23] Ibid [19]

Both the ICJ and PCIJ have considered the nature and scope of organizations' purposes and functions, as part of their analyses of organizations' competencies to request Advisory Opinions on legal questions arising within the scope of their activities,[24] as well as in the substantive consideration of the questions put to them. The opinions differ in the relative emphasis placed on the consent of States as the basis for personality and the outline of its powers, but there are no finite or fixed separations. Some cases only recognise as legitimate those implied powers that are functionally necessary for carrying out express powers set out in the constituent agreement.[25] The *WHO Nuclear Weapons* Opinion refers to these as 'subsidiary powers'.[26] Most of the opinions in this category broadly construe functional necessity so long as the link to the constituent treaty is well evidenced.[27] Early PCIJ opinions interpreting organizations' competences take this approach.[28] Somewhat similarly, another line of cases recognise as legitimate, implied powers necessitated by the discharge of the organization's functions - if it is only possible for the organization to act with the power under consideration. Bekker, for instance, has indicated that an IO is 'entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfilment of its purposes.'[29] In *Reparation for Injuries*, the ICJ applied a wide approach to acts understood as 'necessary' wherein it reasoned that the acceptance of these powers is necessary 'to ensure efficient and independent performance of these missions and to afford effective support to its agents, the organization must provide them with adequate protection'.[30] Other jurisprudence has broadened what may be implied to include indirect

[24] UN Charter (n 10) art 96(2)
[25] *Reparation for Injuries* (n 6) (Hackworth dissent) 198
[26] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 12) [25]
[27] Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 EJIL 437, 446
[28] *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer* (Advisory Opinion) PCIJ Rep Series B No 73, 24
[29] Peter HE Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff 1994) 5
[30] *Reparation for Injuries* (n 6) 183

powers 'relating to' the purposes and functions specified in the constituent agreement.[31] In *Certain Expenses,*[32] where the ICJ established that the UN had capacity to establish a peacekeeping force, it did not analyse whether the establishment of the UN Emergency Force was necessary, instead it was sufficient that the powers to do so related to the general purposes of the UN.[33] Similarly, in the 1971 *Advisory Opinion on Namibia* where the ICJ considered Security Council resolutions not expressly covered by the wording of Chapters VI or VII of the UN Charter, it determined that the Council had, in addition to its specific powers, certain general powers under Art 24(1).[34]

II.3 Consequences of International Legal Personality

I argue that it is possible to derive human rights and IHL obligations from the conferral of international legal personality. This may be done by maintaining that some obligations are an inherent consequence of the personality bestowed on the IO. However, a more persuasive position is that these obligations exist by virtue of them being necessary or otherwise required to fulfil the IO's purposes.

II.3.1 Inherent consequences

Writers debate whether personality is merely declaratory or automatically engenders specific rights and obligations, irrespective of the functions of the organization. The ambiguity may stem from the language in *Reparation for Injuries*. The ICJ held that international legal personality means that the organization is a subject of international law and capable of

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[31] Hickey Jr (n 12) 6

[32] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151

[33] Ibid 168

[34] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, [52]

possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[35] Schermers and Blokker emphasise that 'to be an international person means only to be *capable* of bearing rights and duties', no actual rights or duties are automatically conferred.[36] Brownlie, similarly, has noted that 'the existence of international legal personality implies no automatic consequences',[37] that it is all derived from function. Some have gone so far as to refer to a 'functional personality of international organizations'.[38] *Reparation for Injuries* supports this conclusion when the ICJ holds that unlike a State, 'the rights and duties of an entity ... must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.'[39] The ICJ's later jurisprudence provides further support. In *Legality of the use by a State of Nuclear Weapons*, it held that IOs: '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.'[40]

Yet, it has been argued that to void international legal personality of actual content would make it 'merely a descriptive notion, lacking practical usefulness.'[41] Rama-Montaldo asserts that there are certainly rights which derive directly from the conferral of personality[42] and these should not be confused with those which arise from the precise functions and

[35] *Reparation for Injuries* (n 6) 178. See Manuel Rama-Montaldo 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 BYIL 111, 124, 129-30, 139-40
[36] Schermers and Blokker (n 10) 993
[37] Brownlie (n 13) 527. See also, Bekker, *The Legal Position of Intergovernmental Organisations* (n 29) 5
[38] Schermers and Blokker (n 10) 993; August Reinisch, *International Organizations before National Courts* (CUP 2000) 71
[39] *Reparation for Injuries* (n 6) 180
[40] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 12) [25]
[41] Rama-Montaldo (n 35) 113, referring to Edouardo Jiménez de Aréchaga, *Curso de Derecho International Público,* vol I (*Centro Estudiantes de Derecho* 1959) 276
[42] Seyersted shares this view, arguing that IOs have inherent powers, dependent on the international legal order. Constituent agreements may restrict such powers, yet they do not provide an exhaustive and constraining list of powers within which an organization must operate. Finn Seyersted, *Common Law of International Organizations* (The Hague, Martinus Nijhoff 2008) 53

characteristics of the organization.[43] However, there is indeed confusion, because one of the 'objective' considerations understood to determine the existence of personality is the organization's objectives and the functions and powers accorded to it to attain them. This requires a functional analysis, so this limits the dichotomy in the analyses. Indeed, Rama-Montaldo's argument is circular when paired down to its essentials: one only arrives at a functional analysis after satisfying the objective criteria for personality, the third of which requires a functional analysis.

Those that recognise inherent consequences to international legal personality have stuck to general principles,[44] given wide variations in organizations' size, scope and mandates. Rama-Montaldo lists among the automatic consequences: the ability to operate on an international plane corresponding to 'rights to bring a claim, to negotiate, to conclude a special agreement, protest, request for an inquiry, etc.'[45] Proponents of automatic consequences of personality would also recognise amongst the inherent content the ability of those against whom the IO has breached a duty, to bring claim against it. The entity is thus internationally responsible for the failure to observe obligations that are attributable to it.[46] This is a consequence of independent will and the power to produce by their acts, legal effects separable from the effects of acts of members.

My view is that the two approaches are not inconsistent; they illustrate two different points on the same continuum. Those who recognise no inherent characteristics proceed directly to a functional analysis to determine the IO's sphere of rights and obligations whereas those who do, consider the inherent content as a preliminary frame, proceeding next

[43] Rama-Montaldo (n 35)
[44] ibid 117-120, referring to what he terms the 'material approach'. See also Seyersted (n 42) 67-69
[45] Rama-Montaldo (n 35) 139
[46] DARIO (n 1) para 87 art 3

to a functional analysis to determine whether a particular right or obligation is properly within the organization's scope of activity. The detailed analysis is thus concentrated on the organization's functions, irrespective of the starting point.

The ICJ has held that as subjects of international law, IOs are bound by obligations arising under such law:[47] they 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.'[48] Yet, it remains difficult to argue persuasively that human rights and IHL obligations exist as an inherent consequence of the conferral of international legal personality on IOs. To arrive at such a conclusion, one would arguably need to accept the contested proposition that there is no automatic distinction between the consequences of personality for IOs and for States,[49] and then proceed to argue that such obligations have their basis in natural law, simply the consequence of the inalienable rights possessed by all persons and as a result are binding on all those having the capacity to ensure those rights. Yet, the consequences and impact of any natural law origins of such obligations is at best unclear. To the contrary, it is generally understood that binding human rights and IHL obligations derive from the accession to treaties or through the recognition of certain principles as having achieved the status of customary international law.

A more persuasive argument is that at least those obligations that have attained peremptory status[50] are binding on IOs by virtue of the fact that any act of an IO in conflict with a peremptory norm would necessarily be without effect. As argued by Orakhelashvili, the obligation to comply with peremptory norms would constitute 'an inherent limitation on

[47] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 12) [16]
[48] ibid
[49] See, Rama-Montaldo (n 35) 119-21, who criticizes Seyersted's approach on this point.
[50] VCLT (n 21) art 53

any organization's powers'.[51] The ILC commentary on the *jus cogens* provision of Article 53 of the *Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations, 1986,* comes to the same conclusion that peremptory norms of international law necessarily bind IOs, yet this is reasoned not as the necessary result of the conferral of ILP but by virtue of the incorporation of Member States' obligations: 'it can hardly be maintained that States can avoid compliance with peremptory norms by creating organizations.'[52] In this way, IOs will be bound by the progressive recognition of peremptory norms.[53]

II.3.2 Consequences that are implied because they are necessary to fulfil IOs' purposes

Under a second reasoning, the obligation to respect human rights and IHL is derived through the constituent agreement and implied by virtue of the obligations being essential or appropriate for the fulfilment of the IO's purposes. Here, one must consider the extent to which the obligations to respect human rights and IHL can be derived from the constituent agreement. Most of the ICJ cases have dealt with a potential expansion of powers not specifically conferred on the IO, and not, as here, whether the IO's actions are necessarily constrained by certain obligations that may be expressly conferred in the Charter or implied as a necessary or essential requirement for the fulfilment of its purposes.[54]

A preliminary consideration is whether this reversal impacts on the analysis, and if so, how. A negative frame would suggest that in the absence of a prohibitive rule, there would be

[51] Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59, 60
[52] ILC, 'Report of the International Law Commission on the Work of its 34th session' (3 May-23 July 1982) UN Doc A/37/10, Official Commentary art 53
[53] Orakhelashvili (n 51) 60
[54] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (n 47) 89

no direct constraint on action.[55] Yet, as Shaw has argued it cannot necessarily follow that what is not prohibited is permitted.[56] A further concern is that the approach does not transfer satisfactorily from States to IOs. Unlike States that have ultimate freedom of action in the absence of the clear expression of their consent to be bound, IOs' freedom to act stems from, and is necessarily constrained by, their constituent agreements and by implication, the functions they are mandated to carry out.

Using a positive frame, one would need to consider whether IOs are affirmatively obliged to respect human rights or IHL. The argument can be made most forcefully in respect of the UN, but even here there are challenges. There is debate about whether the UN Charter obliges the UN to abide by such standards; there are arguments about why it *should*, but it is harder to ground an argument about why it *must*.[57] The UN Charter makes numerous explicit references to human rights and international law but refrains from explicitly obliging the UN itself to uphold these principles. The Preamble affirms 'faith in fundamental human rights,' and 'promoting and encouraging respect for human rights and for fundamental freedoms for all' is listed as one of the purposes of the UN in Article 1(3). Assisting in the realisation of human rights is referred to in Article 13(1)(b) as a subject in which the General Assembly shall initiate studies and recommendations, and in Article 55(c), the UN is tasked with promoting human rights. Similarly in Article 62(2) the Economic and Social Council is able to make recommendations for the purpose of promoting respect for, and observance of, human rights, and is further tasked with setting up a commission for the promotion of human

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[55] *The Case of the S.S. Lotus (France v Turkey)* (Merits) PCIJ Rep Series A No 10. Yet, see *Anglo-Norwegian Fisheries case* (Merits) [1951] ICJ Rep 116 and *Nottebohm case* (Merits) [1955] ICJ Rep 4, which reach the opposite conclusions

[56] Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 658

[57] Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 HRQ 314, 334

rights in Article 68. Also, the UN Charter specifies that the fulfilment of the purposes of the UN must be carried out in conformity with 'the principles of justice and international law.'[58]

A predominant UN purpose is the maintenance of international peace and security.[59] Whilst there are no references in the Charter to the respect of IHL *per se*, either by States or by the UN, as indicated, actions must be undertaken 'in conformity with the principles of justice and international law', and Article 24(2), in relation to Security Council actions, affirms that '[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. While it is recognised that the Security Council is empowered to derogate temporarily from rules of both treaty and customary international law as long as it is acting under Chapter VII of the UN Charter to maintain or restore international peace and security, authors have recognised that the Security Council is not empowered to act in a way that would defeat the other purposes and principles of the UN.[60]

Human rights and the respect for international law arguably operate as a key lens through which the UN's work can be understood. The emphasis is on the *promotion* of such principles, arguably with an emphasis on garnering State compliance. This is in contrast to the Member States' obligations, who 'shall fulfil in good faith the obligations assumed by them'.[61] Yet, the UN is obliged to pursue and try to realise its own purposes which include

[58] UN Charter (n 10) preamble, arts 1(1), 2(3)
[59] UN Charter (n 10) arts 1(1), 1(3), 1(6), 11(1), 11(2), 11(3), 13, 14, 34, 26, 33(2)
[60] Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge Studies in International and Comparative Law, 2nd edn, CUP 2005) 186. This was also the position taken by the UN Committee on Economic and Social Rights in its General Comment 8 on the relationship between economic sanctions and respect for economic, social and cultural rights, UN Commission on Human Rights, 'Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev.7 para. 1, though the Committee arrives at this position largely on the basis of an extrapolation of Member States' conventional and customary international law obligations, not by virtue of any direct analysis of the institutional obligations of the UN by virtue of the Charter.
[61] UN Charter (n 10) arts 2(2), 2(3)

the promotion of human rights and IHL.[62] In order to do so, as a matter of its own legitimacy, if not also as a matter of law,[63] the UN must arguably refrain from violating these norms, even in the absence of a direct obligation.[64] Doing so is necessary for the independent and efficient performance of its functions, which arguably requires it to subscribe to the norms that it seeks to promote. Thus, the obligation to respect human rights and IHL can be implied from the functions that the organization is required to carry out.

Given that the UN was established to promote international law, including human rights and IHL, arguably it would be inappropriate to consider it as above such law.[65] Quenivet claims that the central role of the UN in fostering the adoption of human rights treaties provides a strong incentive for applying these treaties to it and its agencies.[66] The ICJ came to a similar view in its 1954 Advisory Opinion, in which it held that to leave one of the UN's own civil servants without access to a remedy would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim'.[67]

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[62] Yet, it could be argued that the UN's main purpose is to ensure peace and security, and certain Charter provisions give the Security Council the ability to override certain principles of international law in pursuit of this aim. However, the overwhelming practice has been to interpret Security Council resolutions as requiring compliance with human rights protections. See, Orakhelashvili (n 51) referring *inter alia* to the process of adopting UNSC Res 1483/2003 (22 May 2003)
[63] Nicole Quenivet, 'Binding The United Nations To Human Rights Norms By Way Of The Laws Of Treaties' (2010) 42 Geo Wash Intl L Rev 587, 596-7
[64] Mégret and Hoffmann (n 57)
[65] UN Office of the High Commissioner for Human Rights, 'Training Manual on Human Rights Monitoring' (Professional Training Series no 7, 2001), ch 22, paras 7, 9
[66] Quenivet (n 63) 595
[67] *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57

II.4 Treaties

II.4.1 Treaties and related texts which establish or recognise the human rights and IHL obligations of IOs

There is no treaty framework establishing the human rights or IHL obligations of IOs. The Articles on the Responsibility of States (ARS) adopted by the ILC in 2001 do not address 'the responsibility under international law of an international organization, or of any State for the conduct of an international organization'.[68] The DARIO provide no further guidance.[69] Article 4(b) provides that an internationally wrongful act of an IO is an act which constitutes a breach of an international obligation of that IO, yet the text does not consider which acts would constitute such a breach. The Official Commentary notes simply that an international obligation 'may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order', and is 'likely to arise from the rules of the organization, which are defined ... as meaning "in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization".'[70] A breach may stem 'either from a treaty binding the international organization or from any other source of international law applicable to the organization.'[71]

II.4.2 Accession to treaties

IOs may enter into treaties[72] and thereby become bound by their terms,[73] to the extent that it 'is necessary for the exercise of their functions and fulfilment of their purposes'.[74] They *may*

[68] ARS (n 3) Art 57
[69] DARIO (n 1)
[70] ibid, Official Commentary, arts 10, 31
[71] ibid art 54
[72] *Reparation for Injuries* (n 6) 178-9

enter into treaties, but there is no requirement that they do so, even if it could be said that treaty ratification would result in better fulfilment of their purposes.[75] Indeed, IOs have rarely ratified human rights or IHL treaties. The reasons for this are practical; ratification would normally require complicated adjustments to treaty frameworks designed mainly with States in mind. The reasons are also connected to IOs' self-interest; their vulnerability in light of the varied and complex circumstances of their operations; their wish to preserve the greatest possible flexibility and freedom of action, and/or avoid possible liability in case of breach.

Quenivet explains that treaties seldom provide for organizational membership.[76] She lists only three human rights treaties which allow for regional organization membership: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),[77] *Convention on the Rights of Persons with Disabilities* (CRPD)[78] and *Convention on Action against Trafficking in Human Beings* (CATHB).[79] To this list, one might add other Council of Europe Conventions: the *Convention on Preventing and Combating Violence against Women and Domestic Violence;*[80] the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*[81] and the *Convention on the Protection of Children against Sexual Exploitation and Sexual*

[73] *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (adopted on 21 March 1986, not yet in force) UN Doc A/CONF.129/15, 25 ILM 543 [VCLT 1986], art 11(2). According to art 6, the capacity of an international organization to conclude treaties is governed by the rules of that organization.
[74] ibid, preamble
[75] Note, however the exceptional obligation in the *Treaty of Lisbon*. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), 2008/C 115/01 (adopted 13 December 2007, entered into force 1 December 2009) Art 59(2), as amended by Protocol No. 14 to the Convention which entered into force on 1 June 2010
[76] Quenivet (n 63) 590-2
[77] (adopted 4 November 1950, entered into force 3 September 1953) [ECHR]
[78] CRPD (adopted on 13 December 2006, entered into force on 3 May 2008) 2515 UNTS 3
[79] CATHB (adopted on 16 May 2005, entered into force on 1 February 2008) CETS no 197
[80] (Adopted on 11 May 2011, entered into force on 1 August 2014) CETS no 210
[81] *Convention on Human Rights and Biomedicine* (adopted 4 April 1997, entered into force 1 December 1999) CETS no 164

Abuse;[82] all of which allow the European Union to join. To date, in the areas of human rights and/or IHL, the European Union has ratified only the CRPD.[83] No human rights treaty provides explicitly for UN membership.[84] Similarly, while most IHL treaties do not explicitly exclude entities other than States,[85] the treaty wording and official commentaries suggest that ratification is open to States only.[86]

The argument has been made that IOs cannot be bound by certain treaties by virtue of their inability to comply in totality with their terms.[87] However, strategies have been employed successfully to enable IOs to accede to human rights conventions include revising treaty terms and/or allowing IOs to make reservations at the time of accession to avoid taking on obligations that exceed their competences, provided that the reservations are not incompatible with the object and purpose of the treaty.[88] The challenges are not insignificant, as is attested by the difficulties associated with the EU's pending accession to the ECHR,[89] though they are not insurmountable.

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[82] (adopted 25 October 2007, entered into force 1 July 2010) CETS no 201

[83] The European signed the CRPD on 30 March 2007 and ratified the Convention on 23 December 2010.

[84] Quenivet (n 63) 591-2

[85] Marten Zwanenberg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) 136-8. See also, Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 YIHL 3, 16, n 42 (referring to the response of the Swiss Government to the deposit of purported instruments of accession by Palestine: 'due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine it was not in a position to decide whether this communication constituted an instrument of accession')

[86] See e.g., *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, which refers to the possibility for all 'Powers' to accede to the Convention, and the ICRC Commentary thereto, which clarifies that '[t]he invitation is addressed to all *States*, whether they are or are not parties to one of the earlier Conventions' (emphasis added). ICRC, 'Commentary to art 60: Accession', 1949 Conventions and Additional Protocols, and their Commentaries, <www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 31 July 2015

[87] According to Schermers and Blokker (n 10) 1001, the UN Office of Legal Affairs has indicated that the UN cannot adhere to the 1949 Geneva Conventions given its inability to discharge all the obligations contained therein. See also, Greenwood (n 85) 15

[88] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15. This was the argument made by the ICRC in relation to the UN's compliance with IHL. See, ICRC, 'Statement at the 47th Session of the GA' (13 November 1992)

[89] See Chapter VII

It has been suggested that the UN should bind itself to certain human rights and IHL treaties.[90] The *Institut de droit international* recommended that the UN 'state in an appropriate form that it considers itself bound by the 1949 Geneva Convention in all operations to which its Forces might be parties.'[91] This would seem relevant, at least in respect of situations in which they use offensive force, or when directly engaged in armed conflict. As is later discussed, the UN Secretary-General eventually did indicate its willingness to be bound to IHL principles in a limited way.[92] Other suggestions have been made to encourage the Parties to relevant treaties to agree a Protocol to enable the UN and other organizations as appropriate to join,[93] or for the General Assembly to adopt a resolution that the relevant Conventions apply to UN activities,[94] or a specific regulation or Convention determining the scope of application of such treaties to UN action.[95] As there are no reservation or derogation clauses in The Hague or Geneva Conventions or Additional Protocols, this possibility would need to be introduced by a specific amendment or separate protocol.[96]

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[90] Quenivet (n 63) 612-13

[91] IDI, 'Conditions of Application of Rules, other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces may be engaged' (Wiesbaden, 13 August 1975) Rec II

[92] UN Secretariat, 'Observance by United Nations forces of international humanitarian law' (6 August 1999) UN Doc ST/SGB/1999/13, Chap I, para 3

[93] Derek Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens & Sons 1964) 510. See also, Richard Baxter, 'Constitutional Forms and Some Legal Problems of International Military Command' (1952) 29 Brit YB Intl L 325, 354-9

[94] Bowett, ibid 511. See, *Convention on the Safety of United Nations and Associated Personnel* (adopted 9 December 994, entered into force 15 January 1999) 2051 UNTS 363, arts 2(2), 20

[95] Gerald Irving Draper, 'The Legal Limitations upon the Employment of Weapons by the United Nations Force in the Congo' (1963) 12 ICLQ 387, 412. See also, Nigel D White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations' in Nigel D White and Dirk Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester Univ Press 2005) 461, 465

[96] Finn Seyersted, *United Nations Forces in the Law of Peace and War* (AW Sijthoff 1966) 290-92 (arguing that an explicit derogation provision in a treaty binding U.N. Member States would be required to permit the United Nations to 'deviate from those parts of the laws of war which apply to all types of armed conflict,' and concluding that, with a few possible exceptions, 'the United Nations must be bound **by** the substantive aspects of the traditional laws of war in the humanitarian field')

II.4.3 Treaty Obligations that may bind IOs regardless of accession

While it is a general principle that treaties bind only those that consent to their terms,[97] there are instances in which entities that are not parties may nonetheless be considered to be bound. For example, the minimum protections and obligations in Article 3 common to the Geneva Conventions 1949 are applicable to all 'Parties to the conflict', which are not necessarily parties to the Conventions; indeed, they need not be States.[98] The typical non-State entity contemplated by Common Article 3 is an armed opposition group, though this is not explicitly stated and it is plausible that it could also refer to an IO with troops in the country, to the extent that on the facts, this organization can be considered to be a party to the conflict. While it may be difficult to conceive IO troops as a 'party' to a conflict when they act at the behest of the international community and undertake missions that are primarily humanitarian,[99] if any force is drawn into hostilities, then regardless of the reason for their presence, IHL may be said to apply,[100] though there is debate about whether the fact of an IO's involvement necessarily gives the conflict an international character.[101] Certainly, when peacekeepers are authorised to use force as part of offensive actions – as is the case of the Force Intervention Brigade of the UN Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), they would be considered combatants under IHL.[102] Article 1(1) of

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[97] VCLT 1986 (n 73) art 26

[98] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits) [1986] ICJ Rep 14, [219], in which the ICJ indicates that Common Article 3 is applicable to the Contras rebel group.

[99] Yet, the UN itself has recognised in its Bulletin that its troops may act in enforcement operations as combatants (s. 1 of the Bulletin, (n 92)). The Bulletin appears to say that when UN forces, for whatever reason, are required to resort to the use of force in armed conflict situations, then IHL will apply. The distinction between UN forces role in enforcement action and peacekeeping is also recognised in the Convention on the Safety of UN and Associated Personnel (n 94), which treats only the latter as falling within the purview of the Convention. See, Christiane Bourloyannis-Vrailas, 'The Convention on the Safety of UN and Associated Personnel' (1995) 44 ICLQ 560, 567

[100] Greenwood (n 85), 14, 23. In most instances, the UN has refrained from taking this approach and certain Security Council resolutions establishing peacekeeping operations specifically note that UN forces 'will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict'. See, e.g., UNSC, Res 146/1960 (9 August 1960) S/4405, relating to UN forces in Congo

[101] Greenwood, ibid 25-6

[102] UNSC, Res 2098/2013 (28 March 2013), authorising the Force Intervention Brigade to, inter alia, neutralise armed groups and 'reduce the threat posed by armed groups to state authority and civilian security in eastern DRC'. See also, in relation to Mali, UNSC, Res 2100/2013 (25 April 2013), 7. See, Magdalena Pacholska,

Protocol II[103] also applies to entities other than contracting parties though these are more narrowly described as 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' It is more difficult to conceive of an IO as a dissident force though it can be an organized armed group, and may well have control over parts of a territory on an explicit or *de facto* basis.

The direct applicability of human rights treaties to IOs is less clear. While certain provisions, such as Article 5(1) of the *International Covenant on Civil and Political Rights* (ICCPR),[104] refer to entities other than States Parties, it is negatively construed– nothing 'may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant', and even if an obligation could be implied there is no method within the Covenant or other international law instrument to enforce Art 5(1) against an entity other than a State. Similarly, the 2009 *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* cites as its objectives in Article 2 to '[p]rovide for the respective obligations, responsibilities and roles of armed groups, non-State actors and other relevant actors, including civil society organizations...', whereas Article 7 lists obligations that may be imposed on those actors, though it lists the obligations of individual members of armed groups and not those of the group itself.

'(Il)legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals' (2015) 13(1) J Intl Criminal Justice 43, 68-9

[103] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 [Protocol II]

[104] (Adopted 16 December 1966, entered into force 23 March 1976)

II.4.4 Direct Incorporation of Member States' Obligations

Given the centrality of the will of States in the creation of an IO, it has been argued that IOs can take on the obligations of the States that created them.[105] Reinisch has referred to this as 'something like a "functional" treaty succession by international organizations to the position of their Member States',[106] premised on the notion that States should not be able to avoid their international obligations by creating an IO to carry out work that States themselves would not be permitted to undertake.[107] When States transfer powers to an IO, these powers must necessarily be exercised in accordance with States' own obligations, a sort of 'equivalent protection',[108] or else States may be held responsible for any ensuing violations which would otherwise be attributable to the IO.[109]

Yet, unlike the principle of State succession which is based on the notion that the former and subsequent entities are one and the same, indivisible and undistinguishable, the premise of the personality of IOs is that the IOs have a distinct identity from founding States[110] which created a separate entity with its own distinct characteristics. Thus, it is insufficient to simply transfer State obligations to IOs, though State obligations are helpful when construing the intention of the founding States when establishing an IO – their intention could not have been to establish an IO which had as one of its aims, the violation of international law norms binding on States.

[105] Schermers and Blokker (n 10) 996
[106] August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131, 137
[107] ibid 137, 143
[108] *M & Co v Germany* (Decision on Admissibility) App no 13258/87 (ECommHR, 9 February 1990); *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February 1999)
[109] Mac Darrow and Louise Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations' (2009) 103 AJIL 446, 464
[110] Quenivet (n 63) 606-8

II.5 Customary International Law

IOs may also be bound by principles of international human rights law or IHL because such obligations constitute customary law for the organization. Customary international law as evidence of a general practice accepted by law[111] is traditionally understood to be comprised of State practice and *opinio juris*.[112]

Scholars and others have considered the extent to which particular elements of human rights and IHL constitute customary international law. For instance, it has been argued that the wide adoption and continuous affirmation of the fundamental human rights listed in the *Universal Declaration of Human Rights* have transformed many of the principles contained therein into customary international law.[113] The same arguments have been made in relation to many principles in the Geneva Conventions and Additional Protocols.[114] These considerations are beyond the scope of this chapter. What I consider is whether in principle, IOs may have the same customary law obligations as States, and whether there is any evidence of a general customary law rule that IOs in particular are bound by human rights and IHL.

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[111] Article 38(1)(b) of the Statute of the ICJ, Annexed to the UN Charter (n 10)

[112] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3, [75] – [78]; *The Case of the S.S. Lotus (France v Turkey)* (n 55) 18

[113] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995-1996) 25 Ga J Intl & Comp L 287, 322-25

[114] Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 AJIL 348; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Rules), (CUP 2005)

II.5.1 Are customary international law obligations binding on States directly transferrable to IOs?

A preliminary question is whether customary international law as a general principle is binding on IOs without any special practice or *opinio juris* that would be necessary to take it from the domain of 'customary law binding on States' to 'customary law binding on IOs'.

Different but related bases have been put forward to argue that customary international law binds the IO directly:

i) Not to do so would make customary international law norms meaningless. Clapham, for instance, has argued that '[t]he obligations arise because the international legal order considers these rights and obligations as generally applicable and binding on every entity that has the capacity to bear them.'[115] Clapham focuses on the nature of the rights and obligations as opposed to the degree to which particular entities have expressed consent to be bound. But many customary international norms have little relevance to IOs, and IOs are incapable of fulfilling all the obligations. A narrower approach is reflected, at least in respect of peremptory norms, in the ILC's DARIO which specify that '[n]othing ... precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.'[116] The Commentary proceeds, albeit with little analysis, to state that peremptory norms bind IOs just as they bind States.[117] Other commentators have taken a similar view that peremptory norms of customary international law bind IOs without a need for additional practice or *opinio juris* relating to IOs specifically. Orakhelashvili takes this approach, though he derives the IO obligation from States' inability to waive peremptory norms as opposed to any general obligation derived

[115] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 87
[116] DARIO (n 1) art 26
[117] ibid, Official Commentary to art 26, para 3

from the norms themselves.[118] But, in order to show that *jus cogens* norms bind the Security Council, he argues that 'the core values protected by *jus cogens* are not derogable or waivable in the sense of *jus dispositivum.*'[119] Even if this view is accepted, the lack of clarity with respect to the content of peremptory norms and in particular the breadth of what can be said to flow from such norms,[120] and indeed whether such norms necessarily entail State obligations to act or to refrain from acting, may lessen the impact of any automatic transfer of peremptory norms to the IO, as they will not necessarily engender obligations of sufficient specificity to require the IO to act or refrain from acting.

ii) States cannot avoid customary international law by creating an organization that opts out.[121] This argument, canvassed earlier in this chapter and taken up above by Orakhelashvili, focuses less on the rights or obligations but more so on the contractual nature of the development of customary international law and the primacy of States' will in the formation of the nature and character of international organizations. Again, aside from the special status of peremptory norms, the weakness of this argument lies in the nature of the international legal personality of IOs which necessarily requires an independence from the will of States.

Articles 25 and 40(1) of DARIO refer to peremptory norms of general international law, and in its consideration of 'countermeasures'. Article 52(1) clarifies that 'Countermeasures shall not affect: (*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) Obligations for the protection of fundamental human rights; (*c*) Obligations of a humanitarian character prohibiting reprisals;

[118] Orakhelashvili (n 51) 60
[119] ibid, 63
[120] See, Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' (2010) 21 EJIL 815, 833-838
[121] *Waite and Kennedy v Germany* (GC) App no 26083/94 (ECtHR, 18 February 1999) [67]

(*d*) Other obligations under peremptory norms of general international law'. This would suggest recognition by DARIO that IOs are always obligated to respect these norms. The content of the norms is not explained in the text, though the Official Commentary notes that 'peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.'[122]

iii) IOs have a due diligence obligation by virtue of being a subject of international law, not to undermine the obligations of other subjects under international law. Darrow and Arbour contend that IOs are obligated to ensure that their own 'policies, actions, or possible neglect do not undermine the human rights obligations of other subjects of international law.'[123] Yet, it would be difficult to imply a general due diligence obligation in relation to all acts of IOs even if they did constitute customary international law, irrespective of whether IOs have a recognised capacity to exercise due diligence to safeguard the norms in question.

Thus, aside from peremptory norms however defined, it would be difficult to maintain that customary international law binding on States automatically binds IOs. And, even in the case of peremptory norms, the sometimes vagueness of the State obligations that flow from such norms will transfer to IOs, rendering it difficult to rely on this basis to ground IO obligations to comply with human rights and IHL norms. It is therefore necessary to consider whether there is sufficient practice and *opinio juris* to bind IOs specifically.

[122] ibid 106
[123] Darrow and Arbour (n 109) 474

II.5.2 Practice and opinio juris providing specific evidence of IO obligations

Proving the existence of a norm of customary international law requires evidence of an identifiable State practice, however it has been recognised that the practice of other international subjects including IOs is relevant to the determination of international custom.[124] This is particularly the case where one is inquiring into custom binding on IOs. However, both State and institutional practice is extremely limited in regards to IOs.[125] There is debate about the relative importance of practice in the formation of custom. As set out by Roberts, modern conceptions of the formation of custom[126] focus more on *opinio juris* and in particular the importance of treaties and declarations, whereas traditional conceptions emphasise the importance of practice.[127] I treat each aspect with equal importance, though they are considered jointly given the difficulties to separate out *opinio juris* from practice in many instances.

(1) State Practice and Opinio Juris

Practice need not be universal but would have to be widespread, representative and consistent.[128] It may include actions and omissions of States acting singly or collectively, including the absence of contrary legal provisions. *Opinio juris* may be determined through what States say, both in a domestic or international context, and may include positions taken in relation to statements, resolutions and draft international instruments.

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[124] Maurice H. Mendelson, 'Formation of Customary International Law' (1988) 272 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 165, 188

[125] Rama-Montaldo (n 35)

[126] As illustrated in the approach of the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (n 98)

[127] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 759

[128] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 Am J Intl L 413, 434

There is some, though not extensive, direct evidence of States' practice of recognising that IOs possess certain international obligations, including human rights or IHL obligations.[129] Some of this practice relates to judicial decisions of national and regional courts which have attributed responsibility for violations of human rights and IHL to IOs,[130] though in the majority of these cases, judges have refrained from determining liability because courts have not had standing to adjudicate claims against IOs or by recognition of the privileges and immunities of IOs. While this practice is unlikely on its own to provide evidence of a customary rule, there is additionally, no practice of States explicitly denying that IOs have these obligations. Indeed, no State disputed the DARIO's general framework which outlines that IOs may be responsible for the breach of international obligations attributable to them, nor on the multiple references to IOs' responsibility for the violation of peremptory norms.[131] States' silence is normally understood as tacit acceptance or acquiescence to a rule, or that they view the rule as self-evident.

As indicated in earlier sections, States have rarely sought to include IOs in human rights and IHL treaties, though this is not necessarily evidence of their view of the lack of

[129] DARIO (n 1) Official Commentary. States have emphasised the importance for the UN to have efficient and effective systems to ensure that it is 'held accountable for [its] actions in accordance with relevant resolutions and regulations'. UNGA, 'Administration of Justice at the United Nations' (30 April 2007) GA res 61/261, UN Doc A/61/261, preamble. However, the system of administrative justice that the resolution establishes focuses on the resolution of employment disputes.

[130] E.g., *Behrami and Behrami v France*; *Saramati v France, Germany and Norway* (GC) App nos 71412/01, 78166/01 (ECtHR, 2 May 2007). Attribution is considered in further detail in Chapter 3.

[131] ILC, Responsibility of international organizations: Comments and observations received from Governments 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/547; ILC, Responsibility of international organizations: Comments and observations received from Governments and International Organizations Report of the International Law Commission on the Work of its 57th Session' (2 May-3 June and 11 July-5 August 2005) UN Doc A/CN.4/556; ILC, Responsibility of international organizations: Comments and observations received from Governments, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/CN.4/636, A/CN.4/636/Add.1. Note however the Czech Republic comment that the Articles' and Commentary's consideration of whether an IO can violate *jus cogens* and whether in such case the responsibility is incurred by the organization and/or its Member States failed to provide examples of serious breaches of obligations under peremptory norms of general international law committed by IOs [A/CN.4/636/Add.1, 16]

obligation; it could simply relate to the view that treaties specifying State obligations are not understood by States to be the best forum to outline IO obligations.

With respect to IHL, the 90 States Parties to the *Convention on the Safety of UN and Associated Personnel* recognised that the Convention does not apply to enforcement actions under Chapter VII, 'in which UN personnel are engaged as combatants to which the law of international armed conflicts applies'.[132] States have also regularly entered into agreements with IOs concerning the rights and obligations of the organization and of the host State, though these agreements rarely mention, or indeed set out a structure for the liability of IOs for violations of human rights or IHL. In the numerous status of forces agreements States have agreed with IOs, and indeed in the UN's own Model Status of Forces Agreement,[133] there is no reference to the institutional liability of the IO for breaches of human rights or IHL, though these breaches are not explicitly omitted. These agreements recognise the potential liability of employees and contractors of the IOs, and consistent with the *Convention on the Privileges and Immunities of the United Nations* (CPIUN), require the UN to establish mechanisms for the settlement of disputes of a private law character or involving officials who benefit from immunities.[134] This is consistent with the opinion of the ICJ, which has recognised that the UN may be required to compensate States for any damages incurred as a result of acts performed by the UN or by its agents acting in their official capacity.[135] In addition, the *Copenhagen Process Principles and Guidelines*[136] have sought to identify the

[132] (n 94) art 2(2)
[133] UNGA, 'Model Status-of-forces Agreement for Peace-Keeping Operations' (9 October 1990) UN Doc A/45/594 [Model SOFA]
[134] *Convention on the Privileges and Immunities of the UN* (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 [CPIUN] Art VIII, s 29; Model SOFA, ibid, para 51
[135] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, [88] – [89] [Cumaraswamy case]
[136] Danish Ministry of Foreign Affairs, 'The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guideline, and Chairman's Commentary' (Copenhagen, 19 October 2012) <http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf> accessed 18 March 2015

baseline of laws applicable to the taking, handling and transfer of civilian detainees in international military operations, particularly non-international armed conflicts, peace-keeping operations and law enforcement operations. The principles and guidelines that were eventually adopted by an array of States apply to 'detaining authorities',[137] which in the international military operation context can include IOs. The Principles and Guidelines are non-binding; the commentaries make clear that they do not create new obligations or commitments for detaining authorities nor are they understood to constitute restatements of customary international law or evidence of practice undertaken by states out of a sense of legal obligation.[138] Nonetheless, they do constitute evidence of practice recognising that IOs engaged in detention can possess legal obligations pertaining to detention, which at least as a matter of principle, can straddle human rights and IHL.

With respect to human rights law, state practice and *opinio juris* is more limited and even less capable of generalisation. The clearest state practice is at the regional level, with EU member states' various statements and agreements recognising the need for the EU to respect human rights law. This is most evident with the proclamation and later entry into force of the *Charter of Fundamental Rights of the European Union* and the planned accession of the EU to the ECHR, which Member States have formally supported through the Treaty of Lisbon.[139] There is no comparable practice in other regional systems.[140] Universal human

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[137] Ibid, principles 5, 9 and 11. Explicit reference to IO obligations are set out in principles 15 and 16, and is clarified further in the Commentary, para 4.3 of which provides that 'Detention in some international military operations may also be justified as a matter of law pursuant to authorizations by the UN, or on the basis of international law by other competent international organisations such as the NATO, AU or the EU, or arrangements between a host State and State contributing military forces or international organisations. In such operations both international humanitarian law and human rights law may be relevant, depending upon factual circumstances and any specific parameters provided in the particular authorisations.'

[138] Id, Commentary to Principle 16. See also, Bruce Oswald and Thomas Winkler, 'The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations' (2014) 83 Nordic J Intl L 128, 149, 164

[139] *Charter of Fundamental Rights of the European Union* (proclaimed 7 December 2000, entered into force 1 December 2009) 2010/C 83/02; *Treaty of Lisbon* (n 75) Art 59(2)

[140] See Chapter VII

rights texts have emphasised the responsibility of States, almost exclusively. This is because of the nature of human rights obligations, which have traditionally focused on state responsibility. But there does not appear to be state practice or any significant *opinio juris* which speaks to the lack of IO human rights obligations. Also there is some developing, albeit limited practice which underscores States' understanding that IO actions must comply with human rights standards. For instance, a number of General Assembly resolutions have underscored the importance of IO compliance with human rights standards. Thus, the General Assembly has called on 'the United Nations entities involved in supporting counterterrorism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms, as well as due process and the rule of law, while countering terrorism' and has recognised

> the need to continue ensuring that fair and clear procedures under the United Nations terrorism-related sanctions regime are strengthened in order to enhance their efficiency and transparency, and welcomes and encourages the ongoing efforts of the Security Council in support of these objectives, including by supporting the enhanced role of the office of the ombudsperson and continuing to review all the names of individuals and entities in the regime, while emphasizing the importance of these sanctions in countering terrorism.[141]

Also, the General Assembly, in its Declaration of the High-level Meeting on the Rule of Law at the National and International Levels, indicated that 'the rule of law applies to all states equally, and to international organisations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities.'[142] Further, the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights*

[141] UNGA, 'Protection of human rights and fundamental freedoms while countering terrorism' (28 January 2014) UNGA Res 68/178, UN Doc A/RES/68/178, paras 10, 11

[142] UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (19 September 2012) UN Doc A/67/L.1, para 2

and Fundamental Freedoms,[143] uses broad language to frame prohibitions[144] and refers to the duties of 'everyone'[145] and the responsibilities of 'individuals, groups, institutions and non-governmental organizations',[146] which arguably could extend to IOs.

(2) IO Practice and Opinio Juris

There is some IO practice and *opinio juris* in which IOs recognise, or at times consent to, obligations to comply with human rights and IHL. The main issue is whether the practice of IOs in consenting to particular obligations is in recognition of an obligation to be bound, or more so an *ad hoc* acceptance of certain principles for operational purposes or functional necessity in one-off situations. As indicated, IOs have typically refrained from entering into human rights and IHL treaties. The UN Charter does not set out explicit obligations on the UN to abide by human rights or IHL though as has been argued, to a certain extent, such an obligation can be implied from the Charter taking into account that such obligations are required for the proper functioning of the organization. On occasion, IOs have indicated that they accept to be bound by a particular norm and these instances are analysed below.

In order for a rule to be binding on the organization, the body agreeing to be bound must have sufficient authority to make the agreement. The UN Charter is silent on what bodies have the capacity to bind the organization and when. Article 108 specifies that any alterations to it require a two-thirds majority of the General Assembly. So, to the extent that positive obligations not already in the Charter are introduced, these would require 2/3 majority. If it can be said that the obligations flow from what is already implied in the

[143] UNGA, 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (8 March 1999) GA res 53/144, UN Doc A/RES/53/144
[144] ibid. Article 10 refers to 'no one', which arguably extends to non-State entities
[145] Id, Art 18(1)
[146] Id, Art 18(2), (3)

Charter, then the clarification of obligations which can already be inferred from the Charter would arguably not constitute an alteration.

The rule in question must also be sufficiently precise to ground an obligation. Many of the declarations to be bound that have been made by the UN are statements of principle. For example UN staff regulations require staff to uphold and respect the Charter's principles, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.[147] With somewhat more precision, human rights officers employed by the Office of the High Commissioner for Human Rights are 'mandated by the United Nations to monitor and encourage compliance with international human rights norms, [and thus] officers should in their own conduct exemplify those norms.'[148] One of the premises on which the Panel on UN Peace Operations based its report was the importance of '[a]dhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities,'[149] though this was a general interpretive assumption made by a body without the power to bind the organization. Similarly, the Secretary-General's statement in the report *In Larger Freedom* that 'United Nations peacekeepers and peacebuilders have a solemn responsibility to respect the law themselves, and especially to respect the rights of the people whom it is their mission to help'[150] while noble, remains vague and imprecise. His statement that the UN system 'should reaffirm its commitment to respect, adhere to and implement international law,

[147] UN Secretariat, 'Staff Regulations of the United Nations and provisional Staff Rules' (21 October 2009) UN Doc ST/SGB/2009/7, reg 1.2
[148] OHCHR, *Training Manual on Human Rights Monitoring,* (n 65), para 7
[149] UNGA, 'Report of the Panel on United Nations Peace Operations' (21 August 2000) UN Doc A/55/305–S/2000/809, para 6(e)
[150] UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc A/59/2005, para 113

fundamental human rights and the basic standards of due process'[151] is aspirational; not an indication of an obligation.

Usually, acceptance is limited to a particular factual context in which the organization or its subsidiary operates, as opposed to binding the organization as a whole. For instance, UNMIK was mandated to 'protect ... and promot[e] human rights',[152] and it clarified in internal regulations that it would itself respect human rights law obligations,[153] though no mechanisms existed to ensure its own compliance.[154] UNMIK also signed agreements with the Council of Europe to comply with the *Framework Convention for the Protection of National Minorities*[155] and the *European Convention for the Prevention of Torture*,[156] and responded to reporting requests of the UN Human Rights Committee.[157] Similarly, most agreements regarding the status of peacekeeping missions recognise, without prejudice to their international status, that the forces should conduct their operations in full respect for the principles and rules of IHL, and that the host governments would extend reciprocal protection.[158]

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[151] ibid
[152] UNSC, Res 1244/1999 (10 June 1999), art 11(j)
[153] UNMIK, 'Regulation 1999/24 on the Law Applicable in Kosovo' (12 December 1999), arts 1.3-1.5; UNMIK, 'Regulation 2001/28 on the Rights of Persons Arrested by Law Enforcement Authorities' (11 October 2001) ; and similarly, UNTAET, 'Regulation 1999/1 on the Authority of the Transitional Administration in East Timor' (27 November 1999) , s 2
[154] Though, this was rectified somewhat with the establishment of the Kosovo HRAP. See UNMIK, 'Regulation 2006/12 on the Establishment of the Human Rights Advisory Panel (23 March 2006)
[155] *Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities* (adopted and entered into force 30 June 2004) COE Doc CM/Del/Dec (2004) 890/2.lb/appendix2E
[156] *Agreement between UNMIK and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (adopted and entered into force 23 August 2004) COE Doc CM/Del/Dec(2004)890/2.lb/appendix3E (2004)
[157] UN Human Rights Committee, 'Report Submitted by UNMIK on the Human Rights Situation in Kosovo since June 1999' (2006) UN Doc CCPR/C/UNK//1, paras 123–124
[158]See, e.g., UNMIS, 'Agreement between the Government of Sudan and the UN concerning the Status of the UN Mission in Sudan' (28 December 2005) <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/sofa.pdf> accessed 31 July 2015, para 6. An identical provision appears in certain African Union agreements, e.g., the Status of Mission Agreement between the Transitional Federal Government of the Somali Republic and the African Union on the African Union Mission in Somalia (ANISOM), 6 March 2007, para 9

The rules governing most peacekeeping operations, include the UN Model Agreement, make reference to a need for forces to observe 'the general principles and spirit' of international conventions applicable to the conduct of military personnel, yet they typically refrain from entertaining any duty of compliance with the detailed provisions of the Conventions.[159] The 1999 Bulletin issued by the UN Secretary-General 'Observance by United Nations Forces of International Humanitarian Law'[160] provides further certainty, detailing a non-exhaustive list of rules of IHL binding on UN peacekeeping forces which apply to UN forces in combatant situations of armed conflict (enforcement operations) and in peacekeeping missions in self-defence situations.[161] This differs from the UNMIK case, where the internal structure promulgated regulations followed by an internal constitutional framework which demonstrated a stronger intention to be bound.

As indicated earlier, an intention to comply with IHL is evidenced by the Convention on the Safety of UN personnel, which specifies that UN enforcement operations are bound by IHL. This is confirmed by various statements of the Secretary-General, which have affirmed expressly, *inter alia* that '[t]he applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces.'[162] A review of UN Office of the Legal Advisor memoranda confirms the *opinio juris* of this obligation. For instance, when the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) troops in the Democratic Republic of the

[159] UNGA, 'Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peacekeeping operations' (23 May 1991) UN Doc A/46/185, Annex, para 28
[160] UN Secretariat, ST/SGB/1999/13 (n 92)
[161] ibid, s 1
[162] UNGA, 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters' (20 September 1996) UN Doc A/51/389, para 16

Congo (DRC) were considering joint operations with governmental forces, the UN legal advisor set out a number of detailed conditions to such joint operations, on the basis of the UN's obligations to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.'[163] The UN's due diligence policy, adopted in 2013, further clarifies the UN's *opinio juris*, that the Organisation recognises that all United Nations entities must take measures 'in order to ensure that any support that they may provide to non-United Nations forces is consistent with the purposes and principles as set out in the Charter of the United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law.'[164] The policy underscores that:

> Consistent with these obligations, United Nations support cannot be provided where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures. For the same reasons, if the United Nations receives reliable information that provides substantial grounds to believe that a recipient of United Nations support is committing grave violations of international humanitarian, human rights or refugee law, the United Nations entity providing such support must intercede with the relevant authorities with a view to bringing those violations to an end. If, despite such intercession, the situation persists, the United Nations must suspend support to the offending elements. Notwithstanding the present policy, existing obligations of human rights, humanitarian and refugee law continue to apply to all United Nations activities.[165]

A further issue is what IOs have done in the case of breaches. The ILC has noted, for example, that relatively few examples of 'assurances and guarantees of nonrepetition' have been given by IOs in response to internationally wrongful acts.[166] Yet in the circumstances of a 'persistent breach of a certain obligation, guarantees of non-repetition would hardly be out

[163] UN Office of Legal Affairs, 'Note to Mr. Le Roy', MONUC – Operation Kimia 2 (1 April 2009) <www.innercitypress.com/OLA2MONUC040109.pdf> accessed 31 July 2015, paras 10, 13, 14
[164] UNGA, 'Human rights due diligence policy on United Nations support to non-United Nations security forces' (5 March 2013) UN Doc A/67/775 S/2013/110, para 1
[165] ibid
[166] DARIO (n 1) Official Commentary to art 30, para 4

of place.'[167] On the question of reparations, the ILC notes that '[t]he fact that international organizations sometimes grant compensation *ex gratia* is not due to abundance of resources, but rather to a reluctance, which organizations share with States, to admit their own international responsibility.'[168]

II.6 Conclusions

It is concluded that IOs in general and the UN in particular, possess international legal personality which enables them to assert rights, negotiate and be held responsible for acts considered to be internationally wrongful. International legal personality may directly engender specific rights and obligations, though an analysis of the IO's functions is required to give them effect, a main consideration being whether the rights and obligations may be implied from what is set out in the constituent treaty. While there may be no general IO obligation to respect all human rights and IHL norms, there are indeed obligations to comply with peremptory norms of international law (which may include elements of human rights and IHL) that apply to all subjects under international law. There are also additional obligations which may apply to IOs in particular contexts and these must be assessed and determined on a case by case basis, and are aligned with IOs' purposes and their capacities to act and react in any given situation.

Even if there is no general rule of customary international law which recognises that IOs have human rights and IHL obligations, there is nonetheless sufficient basis, taking into account the wide ratification of the UN Safety Convention, the absence of contrary State practice and the UN's own statements and commitment to be bound, of the obligation for it to respect IHL when carrying out enforcement actions. The UN's due diligence policy goes

[167] ibid; On measures set up to prevent recurrence, see, UN Secretariat, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (9 October 2003) UN Doc ST/SGB/2003/13
[168] DARIO (n 1) Official Commentary to art 31, para 5

further, recognising the possibility of the UN’s responsibility for complicity in the acts of others which violate international humanitarian, human rights and refugee law, and the obligation for it to refrain from acts which support or facilitate such conduct. This underscores, and is consistent with the ad hoc recognition by the UN in particular, of its obligations to secure human rights in those instances when it exercises effective control over civilian populations.

The rationales given by the UN to refrain from seeking to negotiate special protocols or other means to accede to relevant treaties appear to stem more from their reluctance to be bound than by any formal difficulties associated with the accession process. This does not bode well for the legitimacy of the institution given its mandate and functions, which require it to promote and encourage others’ compliance of such norms, which it can only do well if it complies with them itself. The UN in particular has demonstrated reluctance to be bound by human rights and IHL norms other than in very limited circumstances, and even in such cases, as will be demonstrated in later chapters, the structures to enforce these norms against the UN are often lacking.

III. HUMAN RIGHTS AND IHL BREACHES ATTRIBUTABLE TO IOs

III.1 Introduction

In the previous chapter, I concluded that IOs are bound by those human rights and IHL norms which constitute peremptory norms and IHL applies to IO enforcement actions. Any additional obligations may be implied from IOs' functions: IOs must respect those aspects of human rights and IHL that are necessary for the fulfilment of their purposes. In this chapter, I consider the circumstances in which IOs may breach the human rights and IHL obligations that they are bound to respect and incur liability in the case of breach. I consider when the conduct is an act of the IO for the purposes of assigning responsibility.

The emphasis of this chapter, as throughout the thesis, is on secondary rules, which as provided by the ILC, 'consider the existence of a breach of an international obligation and its consequences for the responsible international organization'.[169] Article 4 of DARIO provides that '[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.' Having regard to the previous chapter's emphasis on which human rights and IHL obligations an IO is obliged to respect, this chapter outlines the contexts in which those acts or omissions may be attributable to the IO.

IOs' ability to successfully operate in fulfilment of their mandates will be contingent on the relationships they maintain with States, other IOs, corporations, entities and

[169] DARIO (n 1) Part Two, Introduction, para 3

individuals that assist them in various ways. In cases of breach, there is therefore a need to determine to whom among the different actors the conduct is attributable. Member States of an IO may also incur liability as a result of the acts of the organization,[170] and States and others that collaborate with IOs may incur responsibility for breaches in connection with conduct resulting from such collaboration.[171] These issues are tangential to my inquiry which focuses on the institutional responsibility of the IO. Thus, they are only considered to the extent that they shed light on this primary issue.

The classic context in which attribution of IO conduct arises is peacekeeping,[172] though it is not exclusive to that setting. As the roles and responsibilities of IOs have broadened, there are more situations in which IOs interact with, and in which their actions directly impact on, individuals. These all increase the risks that IO conduct may infringe human rights and IHL. For example, areas which may give rise to human rights infringements include: sanctions;[173] humanitarian assistance and development;[174] when IOs adopt State

[170] See generally, Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 Intl Org LR 91; Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2005-6) 12 ILSA J Intl & Comp L 395; Andrew Stumer, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' (2007) 48(2) Harv Intl LJ 553; Cedric Ryngaert and Holly Buchanan, 'Member State responsibility for the acts of international organizations' (2011) 7 Utrecht LR 131

[171] See generally, Gordon Christenson, 'Attributing Acts of Omission to the State' (1990-91) 12 Mich J Intl L 312; Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart 2008) 185-230

[172] See generally, Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19(3) EJIL 509; 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 Peacekeepers' (2010) 51 Harv Intl LJ 113; John Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12(3) EJIL 469; Frédéric Mégret, 'The Vicarious Responsibility of the United Nations for "Unintended Consequences" of Peacekeeping Operations' in Chiyuki Aoi, Cedric de Cooning and Ramesh Thakur (eds), *The "Unintended" Consequences of Peace Operations* (UN University Press 2007) 250-267

[173] UN Commission on Human Rights, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (21 June 2000) UN Doc E/CN.4/Sub.2/2000/33; August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95(4) AJIL 851; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi'* (2010) 51(1) Harv Intl LJ 1

functions such as the administration of territory[175] or more limited contexts such as detention[176] or refugee status determination.[177] Additionally, the circulation of international arrest warrants[178] and the resort to international criminal courts and tribunals[179] opens up the prospect that such actions violate the rights of suspects and possibly victims and witnesses.

Attribution requires an analysis of the IO's role *vis-a-vis* the internationally wrongful act. The IO will normally be operating in some relationship with other parties and therefore the conduct is not usually within the absolute control of the IO. Thus, the test which has been adopted by DARIO and many courts assesses whether there was 'effective control'. This involves an analysis of the legal assignation of control and the factual operating context. The context in which abuses occur can be made complicated by an unstable operating environment. This can raise issues of what might be an 'operational necessity' and how this characterisation impacts on attribution and liability. Equally relevant is whether the conduct was undertaken in the proper exercise of the IO's mandate.

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[174] UNGA, 'Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa' (11 October 2002) UN Doc A/57/465; Darrow and Arbour (n 109)

[175] Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP 2008); Carsten Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (CUP 2008)

[176] See generally, Bruce Oswald, 'Detention by United Nations Peacekeepers: Searching for Definition and Categorisation' (2011) 15 J Intl Peacekeeping 119; Elizabeth Abraham, 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo' (2002-3) 52 Am U LR 1291; Talmon (n 171); Simon Chesterman, 'UNaccountable - The United Nations, Emergency Powers, and the Rule of Law' (2009) 42 Vand J Transnatl L 1509

[177] Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 165-194

[178] Mario Savino, 'Global Administrative Law Meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices' (2010) 43 NYU J Intl L Pol 263; James Sheptycki, 'Accountability of Transnational Policing Institutions: The Strange Case of Interpol' (2004) 19 Can JL & Soc 107

[179] Guido Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations' (2007) 20(3) Leiden J Intl L 613; Jean d'Aspremont and Catherine Brölmann, 'Challenging International Criminal Tribunals Before Domestic Courts' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (OUP 2010) 111; Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 AJIL 510; *Prosecutor v Tadić* (Decision on Motion for Protective Measures) ICTY-94-1-T (ICTY, 10 August 1995) para 23; *Kostovski v The Netherlands* App no 11454/85 (ECtHR, 20 November 1989)

I argue that the DARIO should not have incorporated a functional exception to the attribution of *ultra vires* acts, as to do so ignores the operating power dynamics which exist between the IO and local populations, which are typically essential to the commission of the internationally wrongful act, regardless of whether those acts fell within the IO's functions. To say otherwise would open a wide space for impunity. I conclude that the unique vantage point of the IO within the operating context must be the starting point for determining whether conduct is attributable to it, instead of, or alongside any other actors.

III.2 Attribution of conduct to an IO

The attribution of conduct under international law developed in the context of State responsibility, in which a typical consideration is whether a State is responsible for the acts of its organs or non-State entities exercising governmental authority. It was understood as important to avoid attributing to the State conduct which was purely private or personal. The rule which developed recognised as acts of State the conduct of any organs of government, or of others who acted under the direction, instigation or control of those organs.[180] The ARS provide that '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.[181] The comparable provision in DARIO indicates that conduct of an 'organ or agent of an international organization ... whatever position the organ or agent holds in respect of the organization'[182] may constitute an act of the organization. By including 'agents' in this list,

[180] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 91, n 97
[181] ARS (n 3) Art 4(1)
[182] DARIO (n 1) Art 6

the scope for IO responsibility is widened, going beyond the principal and subsidiary bodies of the organization, beyond recruited staff, to contractors with different levels of relationships with the IO, including secondees.[183] Thus, the focus is on the link such persons or entities have with the IO, and less about their official status.[184]

The DARIO sets out several ways in which conduct can be attributed to IOs. Firstly, if it is carried out by the IO or one of its organs or agents, then it is an act of the organization.[185] This is so, as long as the organ or agent acts in an official capacity and within its overall functions, even if it exceeds its authority or instructions.[186] Secondly, if the conduct is carried out by other parties, it will only be attributed to the organization if the other parties are placed at the disposal of the organization and it had sufficient control over their conduct.[187] Finally, conduct will be attributable to the organization if it was adopted and acknowledged by the organization as its own.[188]

The DARIO clarify that attributable conduct includes both acts and omissions.[189] Active breaches of human rights or IHL are easily discernible, given that prohibited conduct is tangible and reasonably well spelt out in treaties and other applicable law. However, as is raised in Chapter 2, the conduct that is prohibitive to IOs specifically is less obvious. Also, omissions are more difficult to discern. They arise when the IO must take positive action and fails to do so, or where the actions undertaken are inconsistent with or fail to meet the level of the positive obligation.[190] As is later raised in relation to the relevance of IOs' capacity to

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[183] Ibid, Official Commentary, Art 6, para 6
[184] Zwanenburg, *Accountability of Peace Support Operations* (n 85) 71-72
[185] DARIO (n 1) Art 6
[186] ibid, Art 8
[187] id, Art 7
[188] id, Art 9
[189] id Arts 4, 9
[190] id Official Commentary, Art 9, para 2

prevent when determining effective control, IOs may be constrained from taking affirmative action, even if in the same factual context, they were able to refrain from acting. This underscores that attribution of conduct must reflect the factual context of the particular act or omission, instead of the overall operating context.

III.2.1 Conduct carried out by the IO or one of its organs or agents

(1) Ultra vires conduct may be attributable to the IO

According to DARIO, conduct carried out by the IO or one of its organs or agents constitutes an act of the organization, so long as the organ or agent acts in an official capacity and within its overall functions, even if the conduct is *ultra vires*, e.g., exceeds the authority or mandate of the organization or was carried out in contravention of instructions.[191] The 'rules of the organization' help determine and will normally frame the determination of what functions are properly within an IO's scope.[192] These rules comprise the IO's constituent agreement and any other decisions, resolutions or acts adopted by the IO pursuant to it as well as the established practice of the IO.[193]

Article 8 of DARIO developed from the corresponding ARS rule, which itself developed in recognition that 'many, if not most, injuries to aliens are caused by unauthorized acts of officials, and since States may limit the powers of their officials as they may deem appropriate, it is essential for protection of aliens that some measure of responsibility for *ultra vires* acts be admitted.'[194] The principle is reflected in human rights law, wherein 'a

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[191] id, Art 8
[192] id, Art 6(2). See generally, Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', Amsterdam Center for International Law Research Paper, 2011-03, SHARES Series, 26 April 2011
[193] DARIO (n 1) Art 2(b)
[194] Theodor Meron, 'International Responsibility of States for Unauthorized Acts of their Officials' (1957) 33 Brit YB Intl L 85, 88-89

State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.'[195] In IHL, the principle is given expression in Article 3 of the Fourth Hague Convention of 1907 and Article 91 of Protocol Additional to the Geneva Conventions of 1949, both of which indicate that a party to the conflict is responsible for *all* acts by persons forming part of its armed forces.[196] The reference to 'all' makes clear that attribution of conduct to the State includes *ultra vires* conduct, and beyond this also any other acts, regardless of whether they were carried out within the scope of apparent authority.

Unlike the DARIO provision, under the ARS, there is no requirement that *ultra vires* acts fit within the overall functions of the State for conduct to be attributed to that State. The only requirement is that the acts are committed within the scope of the actor's apparent authority. These are different but related tests. As is described in the next sub-section, the requirement to act in an official capacity or within the scope of apparent authority is directed at ensuring the exclusion from attribution of purely private acts. In contrast, the reference to functions suggests a constitutional principle connected to the powers conferred on the organization in its constituent agreement. Yet, *ultra vires* acts by their nature are acts which will necessarily or at least potentially exceed that mandate. Thus, the DARIO provision seems to negate the possibility of attribution to an IO for all but the most negligible of *ultra vires* acts. The DARIO commentaries are imprecise on the rationale for the reference to

[195] *Velásquez Rodriguez Case* (Compensatory Damages) Ser C no 4 (IACtHR, 21 July 1989) para 170
[196] *Hague Convention No IV Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910) 36 Stat 2227, TS No 539 art 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 [Protocol I]

functions, simply citing an outdated OLA memorandum which sets out the UN's own, restricted view as to what types of acts might be attributed to it.[197]

The initial draft of the current Article 8, put forward by Professor Gaja in his second report to the ILC, uses 'functions' in a different way.[198] Instead of limiting the circumstances in which *ultra vires* acts may constitute acts of the organization – they must be carried out 'within its overall functions' (the current text), the initial draft used 'functions' to explain to whom the exception applied; to '[t]he conduct of an organ, an official or another person entrusted with part of the organization's functions'. In his second report, Gaja notes that '[u]ltra vires conduct of an international organization could be either conduct beyond the powers conferred on the organization or conduct exceeding the powers of a specific organ'.[199] He referred to the ICJ's decision in the *Legality of the use by a State of nuclear weapons*[200] which underscores the principle of speciality whereby IOs have no general competence; their competence is circumscribed by their mandate. He noted that this 'does not imply that conduct which exceeds an international organization's function could never be attributed to that organization.'[201] However, somewhat confusedly, Professor Gaja also refers to this same outdated OLA memorandum. Notwithstanding, he does not derive a functional limitation from the memorandum, and merely notes that '[a]s with State organs, for responsibility to

[197] DARIO (n 1) Official Commentary, art 8, para 9, particularly n 141 and accompanying text
[198] ILC, Responsibility of International Organizations, Titles and texts of the draft articles 4, 5, 6, and 7 adopted by the Drafting Committee, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/L.648. Draft Article 6 provided: 'The conduct of an organ, an official or another person entrusted with part of the organization's functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions.'
[199] ILC, Second report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/541, para 51
[200] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 12) [25]
[201] *Second report on responsibility of international organizations* (n 199) para 51

arise there needs to be some connection between the entity's or person's official duties and the conduct in question'.[202]

Professor Gaja's understanding that the principle of speciality has little impact upon the capacity for IOs to be responsible for *ultra vires* acts is consistent with Hirsch, who argues that IOs 'will be responsible for unlawful conduct imputed to them, irrespective of whether the acts were committed within their competence or not.'[203] To say otherwise, would give credence to the view that an IO could not be liable for violating peremptory norms, because to violate peremptory norms is outwith the IOs' functions. Reinisch, referring to the treatment of this issue by domestic courts, has similarly underscored that '[b]y eliminating *ultra vires* acts from the scope of acts attributable to an international organization, a functional concept would thus protect – literally 'immunize' – an international organization in its dealings instead of limiting its immunity to certain functional fields.'[204] However, certain IOs have taken different approaches. ICPO-Interpol has maintained that the principle of speciality necessarily means that acts outside the mandate of the organization cannot ever be considered as acts of the organization and thus cannot attract responsibility,[205] and similarly, a joint submission by several IOs recommended the Rapporteur to take greater account of the principle of speciality in the framing of *ultra vires* acts capable of engendering responsibility.[206] Differently, the International Labor Organization recognised that an IO may

[202] ibid, para 55
[203] Moshe Hirsch, *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles* (Martinus Nijhoff 1995) 14-16. See also, Noemi Gal-Or and Cedric Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO)—The Responsibility of the WTO and the UN' (2012) 13(5) German LJ 511, 517, who note that acts of WTO organs that are *ultra vires* the WTO treaty 'may potentially have unlawful consequences and engage the organization's responsibility'
[204] August Reinisch, *International Organizations before National Courts* (n 38) 342
[205] It has concluded that 'international organizations cannot be held responsible for actions outside their area of competence, without any qualification'. See, ILC, Responsibility of international organizations*: Comments and observations received from Governments and international organizations,* A/CN.4/556 (n 131) 26
[206] ILC, Responsibility of international organizations, Comments and observations received from international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June

be held responsible for *ultra vires* conduct of its organs or officials, 'when such conduct exceeds the powers of a specific organ or official under the rules of the organization or, *a fortiori*, when the conduct goes beyond the powers conferred on the organization by its constituent instrument'.[207] However, in the latter scenario, it argued that third parties appear to require less protection. Presumably, though this is not made clear by its submission, States may need less protection as they would be familiar with the limits of an IO's mandate and would be able to take steps to avoid contracting with the IO if and when it acts outside its mandate. However, the same would not apply to third parties, particularly individuals and groups that may be vulnerable to human rights and IHL violations perpetrated by IOs.[208]

Aside from the obvious appeal to IOs of this narrow position from an internal institutional perspective, the functional approach arguably also draws from the ICJ's Advisory Opinion in *Certain Expenses*'.[209] That case concerned whether expenditure relating to UN operations in the Congo and the Middle East which had been authorised by the General Assembly, should properly be considered expenses of the Organization. The Court determined that acts which are within the Organization's functions, but are irregular or non-compliant with the Organization's internal structure are *ultra vires* but would nonetheless

and 4 July-12 August 2011) UN Doc A/CN.4/637, Joint submission on Draft Article 7, 24:'The rules applicable to ultra vires acts of an organ of a State in draft article 7 … cannot be transposed automatically to those of an agent or an organ of an international organization which can only be held responsible within the framework of the principle of speciality. At least, a better balance should be struck, on the one hand, between attribution of ultra vires acts and the protection of third parties who rely on the good faith of agents or organs acting beyond their mandate, and, on the other hand, on the principle of speciality and the fact that an agent or organ acting ultra vires operate beyond the mandate and functions entrusted to an international organization by its members.'

[207] ILC, Responsibility of international organizations: Comments and observations received from international organizations, Addendum, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/568/Add.1, submission on Draft Article 6

[208] The International Monetary Fund proposed a formulation which responded to such concerns. It indicated that 'While we agree with the principle that an international organization may be bound, as to innocent third parties, by an ultra vires act of an organ or official, we believe article 6 should take account of one key exception, drawn from municipal law, which excuses the attribution of an agent's ultra vires conduct to the principal in cases where the injured party was (i) on actual or constructive notice about the ultra vires nature of the conduct and (ii) participated in such conduct. We believe this principle should be considered to be an exception to the provisions of draft article 6.' [*Comments and observations received from Governments and international organizations* (n 131) 27] This type of exception is also proposed by Hirsch (n 203) 14-16

[209] *Certain Expenses of the United Nations* (n 32) 168

constitute acts of the Organization and thereby bind the Organization.[210] The opinion is limited given the narrowness of the facts. As explained by Seyersted, the Opinion 'gives the impression that the Court might be disposed to deny the external validity only of *procedural* provisions in the constitution, not of those defining the purposes of the Organization. However, the Court was not called upon to pronounce itself upon the latter question, since the expenses obviously had been incurred within the scope of the purposes specified in the Charter.'[211]

Also at issue is the character of the acts subject to attribution. According to Meron, 'States may be responsible for wilfully and maliciously motivated *ultra vires* acts of their officials acting within the scope of their general authority.'[212] While the wilfulness or maliciousness of conduct was generally not understood as a requirement for State responsibility and went more to the extent of damages,[213] there is no suggestion in the law on State responsibility of an exception to responsibility if conduct was understood to be wilful or malicious. This principle is imported into DARIO in article 39, which specifies that '[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought'.[214]

There is no obvious reason why such a principle is not the same for IOs, and thus, whether particular acts are wilful or malicious should not determine whether the acts may

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[210] ibid

[211] Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon the Conventions Establishing Them?' (1964) 34 Nordisk Tidsskrift Intl Ret 3, 34

[212] Meron 'International Responsibility of States for Unauthorized Acts of their Officials' (n 194) 95-96

[213] ILC, Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, 'Report of the International Law Commission on the Work of its 15th session' (6 May-2 July 1963) UN Doc A/CN.4/152

[214] DARIO (n 1) art 39

constitute acts of the organization. However, the UN Secretary-General has asserted the organization's responsibility for the *ultra vires* acts of peacekeepers, *except* when peacekeepers exhibit 'gross negligence or wilful misconduct,' in which case responsibility falls on the State.[215] This language is also set out in the model contribution agreement relating to military contingents placed at the disposal of the UN, wherein the UN is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as 'loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government'.[216] Along the UN's own reasoning, if the mission is UN mandated, as opposed to simply endorsed or authorized by the UN, then it would constitute a subsidiary body of the UN and any actions which occur in the course of the conduct of the mission would constitute acts of the organization. On the other hand, the statement in the Memorandum and model SOFA might simply be a rule about distributing responsibility (as opposed to attributing conduct). This is the position taken in the DARIO commentaries.[217] The UN has confirmed that this is the correct interpretation in its comments on Article 7 DARIO, underscoring that: 'Mindful of the realities of peacekeeping operations but keen to maintain the integrity of the UN operation vis-à-vis third parties, the United Nations has struck a balance, whereby it remains responsible vis-à-vis third parties, but reserves the right in cases of gross negligence or wilful misconduct to revert to the lending State'.[218]

[215] UN Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, UN Doc A/50/995, 9 July 1996, para 9
[216] UNGA 'Model Memorandum of Understanding between the United Nations and [participating State] Contributing Resources to [the United Nations peacekeeping operation]' (27 August 1997) UN Doc A/51/967, Annex; UNGA, 'Contribution Agreement between the United Nations and [Participating State] Contributing Resources to [the United Nations Peace-Keeping Operation]' (9 July 1996) UN Doc A/50/955, Annex, Art 9
[217] DARIO (n 1) Official Commentary, Art 7, para 3
[218] *Comments and observations received from international organizations* (n 38) 14

(2) The requirement that acts are 'official'

Ultra vires conduct will only be attributed to the IO if it was carried out in an official capacity.[219] This distinction between official and private acts is derived from the law on State responsibility,[220] and it recognises the independent will of individuals apart and separate from the State. Nonetheless, criticisms can and have been made, mainly on the basis that the distinction between public and private acts is ambiguous,[221] always shifting,[222] and prone to leave gaps of protection for those who suffer harm.[223]

The UN's position on what acts may constitute 'official acts' appears to be in flux. In 1986, the OLA issued a memorandum in which it took a broad reading of the 'off duty' (and thereby non-official) acts of peacekeepers, noting that 'a soldier may be considered "off duty" not only when he is "on leave" but also when he is not acting in an official or operational capacity while either inside or outside the area of operations'.[224] Its characterisation of *ultra vires* conduct that is 'on-duty' has been correspondingly narrow, and has focused on circumstances such as when peacekeepers open fire and kill civilians without any corresponding order to do so.[225] Under such readings, the private conduct exception might exempt attribution to the IO of conduct of persons working for IOs who perpetrate sexual assaults and exploitation,[226] human trafficking, bribery, smuggling or theft, as such

[219] DARIO (n 1) Art 6(1); Official Commentary, Art 6 para 7. See also, International Law Association, 'Accountability of International Organisations' (Final Report, Berlin Conference, 2004) <http://www.ila-hq.org/en/committees/index.cfm/cid/9> accessed 18 March 2015, which take a similar approach.
[220] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 153. See also, ARS (n 3) Official Commentary Art 7, paras 1, 2
[221] Meron 'International Responsibility of States for Unauthorized Acts of their Officials' (n 194) 105
[222] Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 EJIL 387, 389
[223] Meron 'International Responsibility of States for Unauthorized Acts of their Officials' (n 194) 105
[224] UN Office of Legal Affairs, Memorandum to the Director, Office for Field Operational and External Support Activities, 'Liability of the United Nations for Claims Involving Off-Duty Acts of Members of Peace-Keeping Forces — Determination of "Off-Duty" versus "On-Duty" Status' (23 July 1986) [1986] 24 UN Juridical Yearbook 300
[225] The UN has accepted responsibility for the *ultra vires* acts of peacekeepers in the UN Mission in Congo and the UN Emergency Force. See, Zwanenburg *Accountability of Peace Support Operations* (n 85) 106
[226] Claire Morris, 'Peacekeeping and the Sexual Exploitation of Women and Girls in Post-Conflict Societies: A Serious Enigma to Establishing the Rule of Law' (2010) 14 J Intl Peacekeeping 184, 192

acts would not fall under the OLA's reading of what would constitute 'official acts'.[227] Professor Gaja appears to have relied heavily on the 1986 Memorandum in the preparation of DARIO Article 8, as described above.[228] However in 2011 when the DARIO was being finalised, the OLA issued new comments in which it noted that 'the 1986 opinion … does not reflect the consistent practice of the Organization'.[229] It referred to its 1974 advice to the Field Operations Service in regards to the activities of the UN Emergency Force Claims Review Board, noting that off-duty actions of force members could engage the UN's responsibility in circumstances when the acts related to the functions of the Force member (i.e. the use of a government issued weapon).[230] On this basis, it encouraged the Rapporteur to modify Article 7 'so as to provide that attribution in any such case could exist only where an organ or agents "acts in an official capacity and within the overall functions of the organization".'[231]

This slight broadening in the OLA's understanding of what may constitute conduct undertaken in an official capacity is welcome,[232] but as has been noted, the circumstances that would qualify as official acts remain unclear and, as already raised, the reference to 'the overall functions of the organization' seems ill-placed. However, even if a particular act is not carried out pursuant to official functions, often the position of power *vis-à-vis* the local community engendered by the individual's participation in IO activities, particularly though

[227] See Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melb J Intl L 346, 351
[228] See earlier in sub-section III.2.1, *Ultra vires conduct may be attributable to the IO*
[229] *Comments and observations received from international organizations* (n 38) 15
[230] ibid
[231] ibid
[232] See, Comments of Mr Niehaus, ILC member, who criticised the position set out in the 1986 Memorandum as removing from the scope of the Organization's responsibility acts committed off duty, but appearing to be official [ILC, Summary Record of the 2802nd meeting of the ILC on the Responsibility of international organizations [Agenda item 2] (21 May 2004) 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/SR.2802, 83, para 14]. See also, Meron 'International Responsibility of States for Unauthorized Acts of their Officials' (n 194) 107-112, who cites a series of cases in support of the proposition that when officials' positions are used as the means to carry out the act, these become acts under the colour of their authority.

not exclusively in a peacekeeping context, and in certain instances, access to weapons, funds, equipment or other means put at the individual's disposal, might have made the commission of the unlawful act possible.[233] The 2011 OLA comments already specify that the use of a government issued weapon in the commission of acts which might otherwise be outside of the official functions of the actor, may suffice to engage the responsibility of the organization.[234] However, this is but one straightforward example of an abuse of power that should engage the organization's responsibility. The overall dynamic of power that IOs find themselves in, should arguably favour the broadest possible interpretation, regardless of whether guns or weapons are employed. This is consistent with codes of conduct issued by IOs, all of which make clear that proper comportment is not limited to particular contexts when an agent or employee is said to be 'on duty'.[235] As has been noted by Hampson in relation to the IO administration of territory, there are circumstances when the distinction makes no sense at all: 'The United Nations, however, does not appear to accept accountability for acts committed within the mandate. This poses particular difficulties in the case of PSOs where the United Nations is, in effect, the Government of the territory, or in the case of personnel other than military personnel.'[236]

In contrast to both the ASR and DARIO, Article 3 of the Fourth Hague Convention of 1907 provides no requirement for acts to be 'official'. The treaty provides that a belligerent party will be liable to pay compensation for '*all* acts committed by persons forming part of its

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[233] See the *Caire case*, set out in ARS (n 3) Official Commentary to Art 7, para 5 [*Caire case (France v Mexico)* [1929] 5 RIAA 516, 531]
[234] *Comments and observations received from international organizations* (n 38) 15
[235] See, in particular, ST/SGB/2003/13 (n 167) whose provisions apply at all times; UN Secretariat, 'Staff Regulations' (7 February 2003) UN Doc ST/SGB/2003/5, reg 1.2(f); UN DPKO, Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers (2003) UN Doc DPKO/CPD/DDCPO/2003/001 and DPKO/MD/03/00994, section 4
[236] UN Commission on Human Rights, Working paper on the accountability of international personnel taking part in peace support operations submitted by Françoise Hampson, (7 July 2005) UN Doc E/CN.4/Sub.2/2005/42, para 85

armed forces',[237] and thereby not exempting from attribution to the State acts committed by individuals in their private capacity. A similar provision is found in Article 91 of Protocol I.[238] Thus, at least in times of international armed conflict, it would appear that States are responsible for all acts of their military personnel, both private and official.[239] Noting the difference between these IHL provisions and the approach taken in the ARS, early ILC commentaries referred to the IHL provisions as a *lex specialis* - an exception to the general rule in relation to persons acting in their private capacity.[240] Kalshoven opined that the IHL *lex specialis* affords no private capacity exception

> because members of an armed force at war stand a greater chance than do other State organs of becoming entangled in ambiguous situations where it may be unclear whether they were acting in their capacity as an organ of the State. … putting the acts of an armed force to the test whether they were committed "in that capacity" may set an uncertain and certainly undesirable limit on the responsibility of the State. In other words, the wider scope of Article 3 is definitely to be preferred.[241]

He affirms that: '[t]he State should bear responsibility, not merely for (unlawful) acts of war properly so called, but equally for those acts of wantonness or savagery committed by members of its armed forces outside the sphere of duty but in violation of the law of armed

[237] Hague Convention (n 196) Art 3 (emphasis added)
[238] Protocol I (n 196)
[239] Note, however the lack of uniformity in State practice. See, in relation to US practice exempting the State from responsibility for the private acts of its armed forces, Henckaerts and Doswald-Beck (n 114), Rule 149, 533-4
[240] Rapporteur Ago notes that the existence of the rule 'naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case for instance, of the Convention IV respecting the laws and customs of war on land (The Hague, 1907), article 3 of which attributes to the State responsibility for "all acts committed by persons forming part of its armed forces" in violation of the Regulations annexed to the Convention, whether they acted as organs or as individuals. But in the absence of treaty provisions of this nature, States cannot be held responsible for such conduct.' See, ILC, 'Report of the International Law Commission on the Work of its 27th session' (5 May-25 July 1975) UN Doc A/CN.4/SER.A/1975/Add.l, 69 (para 26 on Draft Art 10). See also Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 846 Intl R Red Cross 401, 405-6
[241] Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond' (1991) 40 Intl & Comp LQ 827, 837-8

conflict. This applies to acts against civilians and enemy combatants alike'.[242] The final ASR commentaries provide no reference to this, however.

Article 63 of DARIO provides that DARIO provisions do not apply where and to the extent that the conditions and the content of international responsibility 'are governed by special rules of international law'. However, as indicated, the applicability of Article 3 of the Hague Convention and Article 91 of Protocol I to IOs is at best unclear (aside perhaps from the particular circumstances of enforcement actions),[243] and as such, it is difficult to sustain an argument that a special rule exists with respect to IOs. Thus, it is unlikely that the *lex specialis* referred to, has the same applicability for the attribution to the IO of *all* conduct committed by persons forming part of armed forces serving in UN missions. This issue is not taken up in DARIO. As was indicated, DARIO borrows extensively from the ASR, and neither the final ASR text nor its final commentaries, make reference to the IHL *lex specialis*. And, as is evidenced in the official statements of the UN, its view is that it is only responsible for acts which occur in an official capacity.[244] Zwanenberg's view is that the IHL *lex specialis* should not be applicable to peace support operations because the *lex specialis* is based on the structure of the armed forces, including the chain of command and the disciplinary power of the commander, which afford significant powers to prevent violations which are not reproduced in peace support operations because of the different command structures.[245] However, his approach seems to conflate the question of whether a particular act should be considered as 'official' with the separate question of which body has effective control, relevant to the separate circumstance of when an organ or agent is placed at the disposal of an IO.

[242] Ibid, 853
[243] See Chapter II
[244] *Comments and observations received from international organizations* (n 38) 15
[245] Zwanenberg *Accountability of Peace Support Operations* (n 85) 106-7

III.2.2 When an organ or agent is placed at the disposal of an IO

When an organ or agent is seconded to an IO, but still acts as an agent or organ of the body that seconded it, Article 7 of DARIO specifies that attribution of conduct is to be determined by who exercised 'effective control' over the organ or agent who carried out the act.

The criterion of 'effective control' for determining attribution, is similar though distinct[246] from the jurisdictional principle of 'effective control', which determines whether a State had the requisite amount of control over a territory and the persons within it for its obligations to be engaged.[247] Some courts have tied the scope of a State's jurisdiction to the level of their control over the particular situation giving rise to the international wrongful act. In *Al-Skeini*, it was recognised that European Convention rights can be 'divided and tailored' to secure the rights that are relevant to the situation of the individual concerned,[248] effectively overruling *Bankovic* on this point.[249] The same is arguably true for IOs: factually, the extent of their control will depend upon the operating context and may vary over time. Invariably, any control they may enjoy will not be absolute: they may have control over certain functions and/or they may share authority or control with a variety of actors, both local and international. The UN Human Rights Committee has specifically mentioned 'forces constituting a national contingent of a State Party assigned to an international peace-keeping

[246] See, Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8(1) Human Rights LR 151, 158-9, who criticises the European Court for failing to analyse whether the respondent States had jurisdiction, in advance of considering whether acts or omissions could be attributed to them.

[247] See *Banković and others v Belgium and others* (GC) App no 52207/99 (ECtHR, 12 December 2001) [46], [61]; *Loizidou v Turkey* (GC) App no 15318/89, (ECtHR, 28 July 1998); *Ilaşcu v Moldova and Russia* (GC) App no 48787/99 (ECtHR, 8 July 2004); IACommHR, 'Report on Terrorism and Human Rights', Doc no OEA/Ser.L/V/II.116, Doc 5 rev 1 corr, 22 October 2002

[248] *Al-Skeini v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) [137]

[249] *Bankovic v Belgium* (n 247) [75]

or peace-enforcement operation'[250] as capable of exercising such control. The same would arguably be true for the IO to whom the forces are assigned, depending on to whom conduct is attributed.[251]

The criterion of 'effective control' to attribute conduct also developed from the law of State responsibility; the ICJ jurisprudence consistently attributes unlawful acts to States said to have exercised effective control over the commission of the act.[252] A question arises as to how closely connected the operational aspects must be to the conduct. Certain cases dealing with State responsibility may shed light. In *Paramilitary Activities*, the ICJ, in deciding whether the conduct of Nicaraguan paramilitaries should be attributed to the United States, determined that the State must have 'effective control of the . . . operations in the course of which the alleged violations were committed.'[253] This approach was confirmed in the *Genocide* case.[254] For conduct to be imputed to the State, the ICJ has required that the State 'directed or enforced' it.[255] The European Court of Human Rights (ECtHR) approach differs in several cases, in which it has held that the test is less about 'effective control' and more about 'ultimate authority and control.'[256] However this test has largely been rejected by

[250] UN Human Rights Committee, 'General Comment 31' Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10
[251] Suggested by John Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations' (2006) 39 Vand J Transnatl L 1447, 1508-9
[252] See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (n 98); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43
[253] *Nicaragua case*, ibid
[254] *Bosnia Genocide case* (n 252), [403] – [404]. Note, however the *Tadić* appellate ruling which resurrected a test of overall control, however this was not followed by the ICJ in the *Genocide case*, para 403. See, *Prosecutor v Tadić* (Appeal Judgment) ICTY-94-1-T (ICTY, 15 July 1999) paras 120-144
[255] *Nicaragua case* (n 98) [115]
[256] *Behrami and Behrami v France*; *Saramati v France, Germany and Norway* (n 130) [133] – [144]. In the later *Al-Jedda case* (*Al-Jedda v United Kingdom* [GC] App no 27021/08 (ECtHR, 7 July 2011) [9] – [15], relating to an Iraqi man who was unlawfully detained by British troops in Iraq, the European Court of Human Rights referred to both the 'ultimate authority and control' and 'effective control' tests and indicated that under both tests, the UK has the requisite level of control. See, Mujezinović Larsen (n 172) 521, who refers to Sarooshi's analysis on delegation of powers which seems to have been persuasive for the Court. See Dan Sarooshi, *The United Nations and the Development of Collective Security* (OUP 1999) 163-5

scholars,[257] by Rapporteur Gaja[258] and in the judgments of certain domestic and international courts.[259]

The effective control standard has itself been criticised as artificial. Buchan has argued in relation to peacekeeping that use of the standard would divest the UN of responsibility even in those instances in which it 'played a crucial role in determining the objectives and tasks pursued by that military unit and, in addition, contributed substantially to the logistical support that this force needed in order to discharge the assigned tasks and realise the stipulated objectives.'[260] He sees more merit in the approach taken in *Tadić*,[261] wherein a test of 'overall control' was used.[262] He argues that unlawful acts committed by members of an organised group should be attributed to that group (which could be an IO) even when the organization did not specifically direct or enforce the commission of the unlawful acts.[263] Many judges and commentators have sought to distinguish the *Tadić* ruling from other cases involving attribution of conduct to States (or IOs), given that it concerned individual criminal responsibility and the determination on attribution was just a necessary precondition to finding an international armed conflict;[264] the Tribunal was not seeking to

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[257] See e.g., Mujezinović Larsen (n 172); Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability' (n 172)**;** Marko Milanović and Tatjana Papić, 'As Bad As It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267

[258] DARIO (n 1) Art 7 and commentaries thereto

[259] *Mustafić-Mujić v Netherlands*, Court of Appeal in The Hague, LJN: BR 5386, 5 July 2011; *Nuhanović v Netherlands*, Court of Appeal in The Hague, LJN: BR 5388, 5 July 2011. Both of these judgments were upheld by the Supreme Court of The Netherlands on 6 September 2013. See, *Netherlands* v *Nuhanović,* Supreme Court [HR] 12/03324, LZ/TT, 6 September 2013; *The Netherlands v Mustafić-Mujić*, Supreme Court [HR] 12/03329, LZ/TT, 6 September 2013. See also, *Mukeshimana-Ngulinzira* v *Belgium*, Brussels CFI, RG Nr 04 4807 A, 07 15547 A; ILDC 1604 (BE 2010), 8 December 2010; *Bosnia Genocide case* (n 252)

[260] Russell Buchan, 'UN Peacekeeping Operations: When Can Unlawful Acts Committed by Peacekeeping Forces be Attributed to the UN?' (2012) 32(2) Legal Studies 282, 298

[261] Prosecutor v *Tadić* (Appeal Judgment) (n 254)

[262] Buchan (n 260) 289

[263] ibid 299. See also, Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) EJIL 649, 661, who Buchan cites in support of his position. See also Milanović and Papić (n 258) 278, who also show support for the ICTY approach.

[264] This point is raised by the ICJ in the *Bosnia Genocide case* (n 252) [406]. It is also raised by Dannenbaum, 'Translating the Standard of Effective Control' (n 172) 155

determine State or institutional responsibility. Indeed, even Buchan limits its application to the specific context of organised groups; outside of this, his view is that the 'effective control' standard should triumph. However, the way in which he applies the 'overall control' test to leaders of organised groups is similar to the 'effective control' test. One of the factual contexts to consider as part of an overall assessment of the operating circumstances surrounding the conduct is the leadership structure. He seems to argue that for organised groups with a strong leadership structure, this would enable the organization with 'overall control' to prevent any act or appropriately forestall any omission. For the limited factual circumstances of organised groups, this would equate or significantly close the gap between the 'overall control' and 'effective control' standards. It is close to Dannenbaum's assessment of 'effective control' which focuses on the agent or organ's ability to prevent,[265] a test which was taken up by the Hague Court of Appeal in the 2011 *Mustafić-Mujić* and *Nuhanović* cases.[266]

For peacekeeping, there will be a continuum between the IO and the contributing State along which 'effective control' is situated. Understanding where the control lies will involve both formal and factual considerations.[267] Some have placed most emphasis on objective elements of control including the fact that the State will typically retain disciplinary powers and criminal jurisdiction over members of the national contingent[268] and other resolutions, agreements and protocols that may be in place.[269] Operations established under a UN mandate will differ from operations which are merely authorised or endorsed by the UN.

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[265] Dannenbaum, 'Translating the Standard of Effective Control' (n 172). See also, Tom Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61 ICLQ 713

[266] *Mustafić-Mujić v The Netherlands* (n 259); *Nuhanović v The Netherlands* (n 259)

[267] DARIO (n 1) Official Commentary, Art 7(4)

[268] See, the wording of the Model SOFA which specifies that troop-contributing countries retain exclusive criminal jurisdiction (n 133); See also, ILC, *Second Report on Responsibility of International* Organizations (n 199) para 40. However, as is noted in the DARIO commentaries, such agreements focus on distribution of responsibility and not the attribution of conduct. [DARIO (n 1) Official Commentary, Art 7, para 3]

[269] E.g., in the *Behrami case* (n 130), instead of focusing on the specifically challenged wrongful conduct, the court made a general application of its test to the entire operation, based upon UNSC Res 1244 (n 152)

In the former case, the UN considers such missions as subsidiary UN organs in which it has 'exclusive command and control' and thus accepts attribution to the UN of relevant conduct.[270] In the latter case, 'operational command and control is vested in the States conducting the operation, and so is international responsibility for the conduct of their troops.'[271] However the DARIO commentary sets out[272] and most commentators now agree[273] that the practical operational context is most relevant to the determination of control.

III.2.3 Conduct acknowledged and adopted by an IO as its own

Conduct can also be considered to be an act of an IO if the IO acknowledges and adopts the conduct as its own.[274] The same principle exists under the law of State responsibility.

In its comments to the ILC, the OLA noted that it was unaware of any case of acknowledgement or adoption, and that there was 'little likelihood that such admission would be made by an intergovernmental organ, or, if it were made, that it would be respected by the political organ having the budgetary authority to authorize the compensation.'[275] This suggests that OLA's view is that acts of acknowledgement and adoption must be express acts, incapable of being implied from the conduct of the IO, its organs or agents. But such an interpretation is out of keeping with the rest of DARIO which takes a broad approach to the persons or entities who might engage the responsibility of the organization.[276] As is suggested by the OLA comments, an express acknowledgement and adoption would require formal

[270] The UN sets out its own view on attribution in peacekeeping contexts in UNSG, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations* UN Doc A/51/389 (n 162)
[271] Daphna Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law' (1998) 5(2) Intl Peacekeeping 64, 71
[272] DARIO (n 1) Official Commentary to Art 7
[273] Dannenbaum, 'Killings at Srebrenica' (n 265); Leck (n 227); Mujezinović Larsen (n 172)
[274] DARIO (n 1) Art 9
[275] *Comments and observations received from international organizations* (n 38) Art 8, para 2
[276] DARIO (n 1) Art 6

approval by the official decision-making organs of the organization as a whole; however the operating contexts in certain field locales may militate against such a formal approach.

The ARS commentaries make clear that 'acknowledgement and adoption' are cumulative, and are to be distinguished from cases of mere support or endorsement, which would be insufficient for attribution to the State.[277] The ILC refers to the *Lighthouses* arbitration[278] and the *Iran Hostages Case*[279] to set out this principle. The *Lighthouses* arbitration concerned whether Greece was liable for breach of a concession agreement to operate lighthouses, which was initiated by Crete when it had been an autonomous territory of the Ottoman Empire. After its assumption of sovereignty over Crete, it was held that Greece 'endorsed' the breaches and thus became liable for them. Thus, a state can 'adopt' the conduct *ex post facto* as its own, thereby acquiring liability retroactively for that conduct. The *Hostages case* concerned the attack on the US Embassy in Iran and subsequent hostage-taking of embassy officials. Here, even though the initial attack and hostage-taking were carried out by non-State actors on their own initiative, the subsequent actions of Iran led the ICJ to hold that '[o]nce organs of the Iranian State had thus given approval to the acts complained of and decided to perpetuate them as a means of pressure on the United States, those acts were transformed into acts of the Iranian State: the militants became agents of that State, which itself became internationally responsible for their acts'.[280] The ARS commentaries also refer to the abduction by Israeli citizens in Argentina and subsequent trial, conviction and execution of Adolf Eichmann by Israel. Given the lack of clarity over Israel's role in the initial kidnapping, the commentaries are equivocal on whether the basis for attributing the conduct to Israel related to effective control or acknowledgement and

[277] ARS (n 3) Official Commentary, Art 11 paras 6, 9
[278] *Lighthouses Arbitration (France v Greece)* (1956) 12 RIAA 155, 198, discussed in ARS (n 3) Official Commentary, Art 11, para 3
[279] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3
[280] ibid

adoption.[281] Absent a clear finding that Article 8 (effective control) applied, the commentaries note that ‘these may be resolved by the subsequent adoption of the conduct in question by the State’.[282] The question of whether the illegality of the transfer vitiated the legality of the eventual trial was not addressed in the related UN Security Council resolution.[283]

The impact of arbitrary or illegal arrests has arisen before the *ad hoc* criminal tribunals and the International Criminal Court (ICC). It has been argued that the IO is responsible for the wrongful conduct of those effectuating the arrest because by proceeding with the criminal trial it has acknowledged and adopted the arrest as its own.[284] But, in *Nikolić,*[285] the Trial Chamber determined that the Stabilisation Force in Bosnia and Herzegovina (SFOR) did not acknowledge and adopt the unlawful arrest and abduction (effectuated by private individuals) when it took custody of the accused and transferred him to the Tribunal. It held that SFOR was a passive beneficiary of the ‘fortuitous (even irregular) rendition to Bosnia’, but this did not amount to an adoption and acknowledgement because once SFOR came into contact with the accused, it was bound, under other principles, to arrest and detain him.[286] The Trial Chamber’s ruling suggests that the very existence of the obligation to arrest/detain the accused once it came into contact with him negated the possibility for SFOR to have acknowledged and adopted the illegal conduct as its own; responsibility is negated on the ground that SFOR was enforcing its mandate. This imports into the test an exception: when the IO has a conflicting obligation, this can serve as a ground to deny attribution. However, arguably the execution of SFOR’s mandate should not have

[281] ARS (n 3) Official Commentary, Art 11, para 5
[282] ibid
[283] UNSC, Res 138/1960 (23 June 1960) S/4349
[284] Guido Acquaviva, ‘Human Rights Violations before International Tribunals’ (n 179) 20(3)
[285] *Prosecutor v Nikolić* (Decision on Challenge to Jurisdiction) ICTY-94-2-PT (ICTY, 9 October 2002) para 67
[286] ibid, para 67

impacted on the determination of acknowledgement and adoption. Instead, if relevant at all, it could have been considered as an exception to liability under circumstances precluding wrongfulness under which SFOR could have argued that it was necessarily obliged to act as it did.[287] Even if the Trial Chamber in *Nikolić* had correctly applied Article 9 DARIO, this would not have necessarily led to a different result, as the remedy for the wrongful act would not necessarily have resulted in the release of the accused.[288] Some of these issues were raised by the Defence on appeal, however the Appeals Chamber upheld the Trial Chamber's decision without addressing the finding on attribution.[289]

Acknowledgement and adoption has also arisen in relation to ICPO-Interpol activities. As it indicated in its comments to the ILC, when it 'processes information on a person and issues Red Notices for their arrest, ICPO-Interpol can become involved in situations that are not in conformity with international law'.[290] It mentioned the *Yerodia* case, in which the ICJ determined that Belgium committed an internationally wrongful act when it issued an international arrest warrant against an acting Foreign Minister, contrary to obligations to respect his immunity.[291] In that case, ICPO-Interpol had issued a Red Notice in response to Belgium's arrest warrant, thereby publishing and circulating information which the ICJ had later determined violated international law.

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[287] Note, however, the DARIO (n 1) Official Commentary to Art 25, para 4, which suggest a narrow reading of the principle of necessity when applied to the conduct of IOs. See also Robert Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447, who emphasises the exceptional character of necessity.

[288] The jurisprudence on this point is variable, with courts oscillating between *mala captus bene detentus* (courts will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured) and *ex injuria ius non oritur* (a legal right or entitlement cannot arise from an unlawful act or omission).The Appeals Chamber in *Nikolić* gave prominence to the *mala captus* maxim, placing significance on the heinousness of the crimes which the international community has a recognized interest in prosecuting). See, Robert J Currie, 'Abducted Fugitives Before the International Criminal Court: Problems and Prospects' (2007) 18 Crim L Forum 349, 370-73, who criticises the Appeals Chamber on its approach. See also, *Jean-Bosco Barayagwiza v Prosecutor* (Appeals Chamber Decision) ICTR-97-19-AR72 (ICTR, 3 November 1999) paras 73-77, which emphasises the abuse of process doctrine.

[289] *Prosecutor v Nikolić* (Interlocutory Appeal Concerning Legality of Arrest) ICTY-94-2-AR73 (ICTY, 5 June 2003)

[290] *Comments and observations received from Governments and international organizations* (n 131) 20

[291] *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (Merits) [2002] ICJ Rep 3

ICPO-Interpol publishes and circulates worldwide Red Notices to seek the location and arrest of wanted persons with a view to extradition or other lawful action. The notices are not legal instruments, but as Savino argues, they 'indicate to foreign police organizations that a national arrest warrant is pending on an individual. … albeit "soft" (non-binding warrants), they *de facto* impinge upon the fundamental right to personal freedom insofar as they are widely enforced by national police forces.'[292] An arrest warrant which is politically motivated, discriminatory and/or without proper legal foundation which is acted upon by Interpol can potentially lead to or encourage other States to act. In addition to falling foul of immunity principles, this may lead to the invasion of privacy, loss of liberty, ill-treatment, torture or persecution of the subject of the notice thus breaching human rights and related *refoulement* prohibitions.[293]

Having regard to Article 9 DARIO, does ICPO-Interpol acknowledge and adopt the arrest warrants as its own? It publishes and circulates notices which in turn, aids in effectuating arrests. ICPO-Interpol has an arguably limited role in the chain. Nevertheless, many States honour the Notices as a matter of course despite their non-binding status. ICPO-Interpol has knowledge of this practice which is a foreseeable consequence of issuing the Red Notice. As Savino notes in relation to the two time arrest of the former Kazakh Prime Minister following the issuance of a Red Notice, '[a]bsent such a captivating international wrapping, would Mr. Kazhegeldin have enjoyed a double stay in the Russian and Italian jails? Unlikely.'[294] After the *Yerodia* ruling, the ICPO-Interpol rules were changed to require the General Secretariat to verify that processed information complied with, *inter alia*,

[292] Mario Savino, 'Global Administrative Law Meets "Soft" Powers' (n 178) 269
[293] ibid
[294] ibid 292

international law.[295] Yet, there are insufficient control procedures to ensure, prior to the circulation of notices, that the information contained therein complies with such law.[296] It would arguably be administratively cumbersome, costly and politically sensitive for ICPO-Interpol to put in place adequate and effective measures which undoubtedly would require it to enquire into the foundations of arrest warrants it receives from States, prior to publishing and circulating them. Yet, the failure to do so and nevertheless to maintain the practice of publication and circulation, despite the seriousness of the risk, would arguably be sufficient to elevate ICPO-Interpol's actions to the level of acknowledgement and adoption. In the alternative, assuming that ICPO-Interpol has a positive obligation to ensure that information it publishes and circulates does not offend human rights and IHL prohibitions,[297] it could be argued that ICPO-Interpol failed to honour due diligence obligations by failing to take all reasonable steps within its power to avoid such results.

III.3 Responsibility of an IO in connection with the act of a State or another IO

An IO may be responsible for acts or omissions which are connected with the conduct of a State or another IO. Responsibility would reflect the degree of its causal contribution to the wrongful act.[298] This part of DARIO incorporates modes of accessorial liability, including aiding and assisting, directing and controlling, coercion and circumvention of an international obligation through decisions and authorizations addressed to members.[299] Attribution of conduct to the IO proceeds as described in Section III.2 above. However, the description of

[295] *Comments and observations received from Governments and international organizations* (n 131) 21
[296] There is a Commission for the Control of INTERPOL's Files, however most of its work is retrospective. See, Savino (n 178) 303-315, who reviews ICPO-Interpol's 'Ex Ante Scrutiny' and 'Ex Post Review'. While both systems exist, they, and particularly the ex ante scrutiny, are arguably too weak to prevent any abuse through the Red Notice system. See Chapter V of this thesis
[297] ICPO-Interpol seems to recognise this, through its revision of its internal procedures
[298] DARIO (n 1) Official Commentary, Chap IV, para 1
[299] DARIO (n 1) Arts 14-19

accessorial modes of liability makes clear that IOs also can be responsible for their role in the perpetration of internationally wrongful acts even if they are not the principal actors. The level of responsibility will reflect the level of their action or inaction and its impact on the internationally wrongful act.

There are many examples of when IOs' accessorial conduct may give rise to violations of human rights and IHL. IOs regularly provide aid and assistance to States emerging from conflict as part of their humanitarian and peace-building functions. They might contribute funds or equipment or second experts or personnel to States, which may go on to be instrumental in the perpetration of human rights or IHL abuses.[300] Also, IOs may adopt binding decisions that are mandatory for members, which result in the violation of human rights or IHL.[301] The adoption of sanctions on States, groups or individuals has arguably led to or constituted wrongful acts.[302] According to Hirsch, the crucial factor in determining the attribution of conduct in such circumstances is the extent of discretion the implementer had in determining whether and how to implement the IO decision.[303]

In order for the IO to incur liability, the conduct must have been carried out with knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by that organization. Thus, in principle if the IO is duped by a State

[300] See, for example, the example provided in DARIO (n 1) Official Commentary, Art 14, para 6, whereby the UN Legal Adviser provided advice to the UN Mission in the DRC (MONUC) regarding the risks associated with MONUC's assistance to the DRC army. Some of these potentialities are covered in the UN's due diligence policy (n 164)

[301] DARIO (n 1) Official Commentary, Art 15 para 4; Art 16 paras 4, 5

[302] See, e.g., *Nada v Switzerland* (GC) App no 10593/08 (ECtHR, 12 September 2012); Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission* [2008] ECR I-06351[Kadi 2008] . See, UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson' (26 September 2012) UN Doc A/67/396, para 48, in which he notes that the Office of the Ombudsperson on the 1267/1989 Al-Qaida sanctions regime has received and relied on intelligence obtained through torture, which 'involves complicity in the commission of an internationally wrongful act and is irreconcilable with the obligation *erga omnes* to cooperate in the eradication of torture.' See generally, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011)

[303] Hirsch (n 203) 83

who uses the IO's good offices in a way unintended by the IO, this would not result in IO liability.

III.4 Failure to prevent and/or respond to violations

A State may be responsible for omissions when it is under a duty to act. It may also be responsible for the effects of the conduct of private parties, if it failed to take adequate measures to prevent those effects.[304] However, this is only in a secondary sense. Private parties' conduct is not attributed to the State; the State is responsible for the failure to meet its own obligations to exercise due diligence. The issue arose in *British Claims in the Spanish Zone of Morocco,* where the arbitrator made clear that a State that failed to exercise due diligence in preventing or punishing the unlawful actions of armed groups could be held responsible for such failure.[305] It also arose in the *Hostages*[306] case wherein the ICJ determined that Iran failed to take adequate steps to protect the United States Embassy. The Court found that Iran was fully aware of the urgent need for action on its part, that that it had the means at its disposal to perform its obligations, but failed to do so.[307]

Both IHL[308] and human rights treaties[309] recognise the obligation to respect and ensure the rights contained therein, which in the latter case are understood to require States to

[304] ARS (n 3) Official Commentary, Chap. II, paras 3, 4. See also, *Velasquez Rodriguez Case* (Compensatory Damages) (n 195) para 172

[305] *Spanish Zone of Morocco case (Great Britain v Spain)* (1925) 2 ILR 157, (1949) II RIAA 615. See also, *Zafiro case (Great Britain v United States)* (1925) 6 RIAA 160, in which the United States was held responsible for looting committed ashore by a crew of a naval vessel, on the ground that the crew was permitted to go ashore uncontrolled in an evacuated area in circumstances in which looting might have been expected.

[306] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (n 279)

[307] ibid, [61] – [68]

[308] Common Article 1 of the 1949 Geneva Conventions stipulates that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'

[309] Art 2(1) *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR]; Art 1 ECHR (n 77), which uses the language 'shall secure' to everyone within their jurisdiction the rights defined in the Convention; Art 1(1) of the *American Convention on*

‘adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations’.[310] And, the even more robust ‘undertake to prevent and to punish’ frames the positive obligations in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.[311] The determination of whether there is an obligation to take positive action and the nature of that action will depend on the content of the primary rule. Courts recognise an obligation on States to take reasonable steps to prevent human rights violations and to use the means at their disposal to investigate violations committed within their jurisdiction, to identify those responsible, impose appropriate punishments and ensure the victim adequate compensation.[312] Central to a finding of a State’s failure to exercise due diligence is that the violations were foreseeable and that the State failed to take reasonable measures to prevent them, or having realized that the violations occurred, the State did not take adequate measures to protect victims, including by investigating, prosecuting and punishing those responsible and putting in place measures to guarantee non-recurrence. The reasonableness standard implies that the measures taken reflected the risks and were appropriate in light of the means available to the State. It is not an obligation of result.

Like States, IOs also have obligations to take positive action. The DARIO commentaries note that the obligation is context and fact-specific, contingent on the IO being in a position to prevent, which arguably would not always be the case,[313] even if in the same

Human Rights (ACHR, adopted 22 November 1969, entered into force 18 July 1978), whereby ‘[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms’

310 See, e.g., Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13 (n 250), para 7

311 Art 1, *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

312 *Velasquez Rodriguez Case* (Compensatory Damages) (n 195) para 174. See, further Chapter IV

313 In ILC, Third report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, ‘Report of the International Law Commission on the Work of its 57th Session’ (2 May-3 June and 11 July-5 August 2005) UN Doc A/CN.4/553, para 10, Professor Gaja considers that, under certain circumstances, the UN may be under a duty to prevent genocide. He comments: ‘Assuming that general international law requires

scenario, they may have been able to refrain from certain conduct. An IO may also be responsible for its failure to exercise due diligence in relation to the conduct of others, whether they are private individuals, company contractors or states, over which the IO exercises effective control, as is described above. Two examples are highlighted below to show the diversity of circumstances in which due diligence obligations may arise and the complexities involved in determining whether the responsibility of the organization is engaged.

III.4.1 Due diligence obligations to prevent and respond to wide scale criminality on mission

The first example relates to the UN's response to widespread or extreme criminality in missions in which it has effective control.[314] According to the UN Model Status of Forces Agreement (model SOFA),[315] sending States have the exclusive responsibility to discipline and criminally sanction their military contingents. Others, particularly civilian experts on mission and military and civilian police observers are immune from the jurisdiction of the host State for all acts performed by them in their official capacity.[316] Private acts would not be covered by this functional immunity. However as already described, the notion of 'official capacity' is ambiguous and has been widely construed by the UN. The UN may also waive functional immunity, however this is rarely done.[317] Thus, when there are allegations of serious misconduct amounting to crimes, the role of the UN is limited: it can repatriate the

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States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide, and that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations.'

[314] UNGA, 'Report by Prince Zeid Ra'ad Zeid Al-Hussein, A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations' (24 March 2005) UN Doc A/59/710; UNGA, 'Investigation by the OIOS into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the DRC' (5 January 2005) UN Doc A/59/661

[315] UN Model SOFA (n 133)

[316] The different categories and status of persons on missions is described in Hampson (n 236)

[317] See Chapter V

individuals concerned; issue recommendations to the sending State; ban the individual from future peacekeeping operations. The UN itself has no criminal jurisdiction and thus cannot undertake its own prosecutions.

This model results in impunity. If suspects are returned to the sending State, contingents can and should be subject to the sending State's criminal and disciplinary jurisdiction. However, as Hampson has noted, there will be practical difficulties to hold such trials including the difficulties to access evidence in the host State; local laws will not always allow for extraterritorial prosecutions, and there may be gaps or loopholes preventing certain categories of persons, or certain types of offences, from being prosecuted.[318] In cases in which the host State has jurisdiction, either because the UN waived immunity or because none of the categories of immunity apply to the suspects, prosecutions are either unlikely because of the weaknesses of the justice system associated with the post-conflict context, or potentially flawed, due to the lack of independence of the justice system or the notoriety and high visibility of the cases.

The UN has taken only piece-meal measures to deal with these challenges. These have mainly been taken in response to notorious incidents and focused on particular crimes. For example, it has instituted a zero-tolerance policy, which integrates a series of measures aimed at eradicating sexual exploitation and abuse on mission.[319] But even here, the policy places little emphasis on accountability.[320] When Professor Hampson wrote in 2005, she noted that

[318] Hampson (n 236) paras 39-45; 64
[319] See, UN Secretary-General's Bulletin, *Special measures for protection from sexual exploitation and sexual abuse,* (n 167)
[320] ibid

> [T]here is evidence of a lack of follow-up. Apparently at least 90 per cent of repatriated CIVPOL officers' cases are not followed up by the United Nations. Part of the problem is that there is no obligation on the sending State to supply information with regard to disciplinary/criminal proceedings against repatriated officers. Another possible difficulty is the administrative burden that might be imposed by effective follow-up.'[321]

Matters have somewhat improved since Hampson wrote in 2005. Sending States must now report to the UN on the outcome of misconduct investigations and prosecutions[322] and statistics are maintained on complaints and follow-up. The UN is now authorised to carry out preliminary fact-finding investigations in cases of serious misconduct, if necessary to preserve evidence and where the Government does not conduct fact-finding proceeding.[323] It is also authorised to initiate an 'administrative investigation', if the sending State is unwilling or unable to conduct such an investigation.[324] There is also an obligation of 'vetting candidates for national armies and security forces to ensure the exclusion of those associated with serious violations of international humanitarian and human rights law, including sexual violence.'[325]

Yet, such measures are insufficiently robust to meet the UN's due diligence obligations to ensure that serious and persistent crimes on mission are prosecuted. According to Benvenuti, the UN is obliged to ensure that the sending State exercises criminal jurisdiction in case of such infringements.[326] However, at least in terms of sexual abuse and exploitation, where the UN has placed most effort, Burke writes in 2012 that not much has changed. She notes that 'in 2009 alone 66 allegations, involving one or more victims, were

[321] Hampson (n 236) paras 65, 66
[322] See further, UNGA, 'Revised draft model memorandum of understanding' (11 June 2007) UN Doc A/61/19 (Part III) Annex, arts 7ter, 7quater, 7quinquiens, 7sexiens
[323] ibid, Art 7quater, para 2
[324] ibid, Art 7quater, para 3(a)
[325] UNSC, Res 1888/2009 (30 September 2009), para 3
[326] Paolo Benvenuti, 'Le respect du droit international humanitaire par les forces des Nations Unies: la circulaire du Secrétaire général' (2001) 105 *Revue général de droit international public* 355, 370

made against UN peacekeepers, involving non-consensual sex, a significant proportion of which involved minors. Despite numerous attempts by the UN to follow-up with troop-contributing countries [TCCs] on disciplinary or criminal action taken against their soldiers, responses remain low. Overall TCCs appear reluctant to hold perpetrators to account.'[327] Furthermore, very little has been done by other IOs such as the African Union conducting peacekeeping operations in which a similar spectre of abuse have come to light.[328]

The due diligence obligation is one of means, not of result. So, what matters is the reasonableness of the measures taken in light of the risks involved and the capacity of the actor. Given IOs' lack of competence over disciplinary and criminal matters, and the absence of an appropriate international criminal jurisdiction to prosecute such crimes,[329] promoting investigations and prosecutions in the sending State is an appropriate response. However, in light of the fact that there has only been very limited progress, it is possible to argue that the UN and arguably other IOs are now obliged to do more, to continue to meet the due diligence obligations.[330] For instance, further changes to the MOU beyond what was introduced in 2007 could have required sending states to positively demonstrate that their domestic laws and procedures are sufficient robust to investigate and prosecute on-mission crimes allegedly committed by any category of persons, prior to the UN accepting secondments from that State, beyond the general assurance they already provide that they will exercise jurisdiction.[331] Furthermore, the MOU could have introduced an extradite or prosecute option, to the extent that, where a UN investigation finds evidence of the commission of

[327] Roisin Burke, 'Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets' (2012) 16 J Intl Peacekeeping 1, 2

[328] Human Rights Watch, '"The Power These Men Have Over Us" Sexual Exploitation and Abuse by African Union Forces in Somalia' no 978-1-62313-1876 (2014) <www.hrw.org/sites/default/files/reports/somalia0914_ForUploadR.pdf> accessed 18 March 2015

[329] The ICC and/or some ad hoc tribunals may have jurisdiction over certain acts, however this will not be the norm.

[330] See Carla Ferstman, 'Criminalizing Sexual Exploitation and Abuse by Peacekeepers' United States Institute of Peace, Special Report 335, September 2013

[331] Revised Model MOU, A/61/19 (n 322) Arts 7quinquiens, para 1; 7sexiens

serious misconduct, and in the absence of a good faith showing on the part of the sending State that it will proceed with an investigation or prosecution, the UN may transfer the suspect to another State who has expressed the willingness to prosecute. Some of these issues remain under discussion but the problems and gaps remain unresolved.[332]

III.4.2 Due diligence obligations to safeguard the right to life and health

The second example relates to the allegations that Nepali peacekeepers operating under the guise of the UN Stabilization Mission in Haiti (MINUSTAH) caused the spread of cholera, resulting in wide scale deaths of Haitians and devastation of communities. Haiti had not seen a case of cholera in more than a century, until the outbreak in late 2010.

More than 7,500 people have since died from the epidemic. In 2011, a UN Panel of Experts report indicated that the 'most likely' source of the outbreak was a camp for recently-arrived UN soldiers from Nepal. It posited that inadequate sewage in the Nepalese camp could have leaked the cholera bacterium into the nearby river which flows into the country's main waterways.[333] In 2012, one of the members of the panel of experts reportedly indicated that new available data made the link to the Nepalese camp even stronger.[334] The victims'

[332] See, UNGA, 'Criminal accountability of United Nations officials and experts on mission' (31 July 2014) UN Doc A/69/210; UNGA, 'Special measures for protection from sexual exploitation and sexual abuse' (13 February 2015) UN Doc A/69/779. A 2013 expert report commissioned by the UN and critical of the steps taken by it to address sexual exploitation and abuse but which was never released publicly, was leaked in March 2015. See, Dr Thelma Awori, Dr Catherine Lutz and General Paban Thapa, 'Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO and UNMISS, 3 November 2013 < http://www.aidsfreeworld.org/Newsroom/Press-Releases/2015/~/media/Files/Peacekeeping/2013%20Expert%20Team%20Report%20FINAL.pdf> accessed 18 March 2015

[333] Dr Alejandro Cravioto, Dr Claudio Lanata, Engr Daniele Lantagne Dr Balakrish Nair, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti 2011' (undated) <www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> accessed 26 July 2015

[334] Mark Doyle, 'Haiti cholera epidemic "most likely" started at UN camp - top scientist' *BBC News* (22 October 2012) <www.bbc.co.uk/news/world-latin-america-20024400> accessed 25 August 2013; Deborah Sontag, 'In Haiti, Global Failures on a Cholera Epidemic' *New York Times* (31 March 2012)

families lodged an official claim with the UN for compensation, however to date the UN has indicated that, as the claims would necessarily require a review of political and policy matters, they are not receivable pursuant to Section 29 of the CPIUN.[335] As will be discussed in Chapter 5, the UN considers responsibility through the prism of its privileges and immunities which shape the remedies it affords internally. Yet the privileges and immunities that the UN possesses do not frame responsibility or the remedial and reparation obligations flowing from such responsibility, they simply place a limitation on the venue where these issues can be determined.

The *International Covenant on Economic, Social and Cultural Rights* recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[336] The Committee on Economic, Social and Cultural Rights has stressed that access to safe and potable water and adequate sanitation is an integral component of the right to health.[337] The obligations flowing from this include the obligation to refrain from polluting water or arbitrarily interfering with a person's access to water and sanitation.[338]

Assuming that the evidence is capable of supporting the claim that the cholera outbreak was caused by inadequate sewage in the Nepali camp, the question is whether this was a foreseeable risk that the UN should have planned for, and what further steps could have been taken to prevent the wrongful act. A strong argument can be made that sending troops from cholera endemic areas such as Nepal gives rise to a foreseeable risk of cholera

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<www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html?pagewanted=all&_r=0> accessed 25 August 2013

335 Letter from Patricia O'Brien, UN Under Secretary-General for Legal Affairs to Brian Concannon (21 February 2013) (on file with the author)

336 *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 12

337 CESCR, 'General Comment 14' The right to the highest attainable standard of health (11 August 2000) UN Doc E/C.12/2000/4, para 11

338 UNGA, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (8 August 2007) UN Doc A/62/214, para 82

spreading. Haiti's poor infrastructure and inherent vulnerability to the spread of disease would arguably heighten the duty of care. Indeed, the Panel of Experts report provides a series of recommendations, including screening or providing appropriate antibiotics to personnel coming from cholera endemic areas and treating faecal waste before disposal.[339] Albeit with the benefit of hindsight, both of these measures, as well as the other recommendations, could have stymied the spread of cholera in Haiti. Unlike the example of the UN's response to widespread or extreme criminality in missions, the proposed measures are fully within the IO's control and could have made a marked difference to the spread of the disease.

III.5 Conclusion

This chapter reveals an ongoing tension about the appropriate attribution of conduct. Unsurprisingly, this relates to the different interests at stake – with each entity striving for the interpretation which maximises its freedom and limits the potential for its liability. The limited jurisprudence leaves one to place important weight on the IOs' own views as to where the position is. However, this should be done with great caution.

With few exceptions, IOs have sought to limit the instances in which conduct can or should be attributed to them. For example, this is evidenced in the UN's stated positions on *ultra vires* acts, particularly by advocating for a requirement that only acts which occur within its overall functions may engage its responsibility, and putting forward a narrow view of those functions. It is also evidenced by the UN's own limited characterisation of the way in which acts may be adopted and acknowledged by it, and in its search for *ad hoc* solutions in order to avoid legal findings of liability. Yet, the functions that IOs take on continue to

[339] Final Report of the Independent Panel of Experts (n 333) 30

expand, and so does their interaction with and influence over individuals. The rules relating to attribution must necessarily reflect the different contexts in which IOs now operate, and arguably the practice of IOs will need to shift to meet growing responsibilities, including to refrain from prohibited conduct and to take adequate positive steps to prevent conduct, where such an obligation exists.

In contrast, States have sought to demonstrate IOs' effective control, even when the State retains control over key functions such as discipline and criminal sanctions. The jurisprudence has heralded the 'effective control' standard, which has also been adopted in the DARIO. Yet, this standard will only be meaningful if and to the extent that it is based on factual operating contexts.

Some of this tension between the different approaches appears ill-placed, in that attribution of conduct should not be an 'either or' proposition in which conduct is only attributed to the State or to the IO. Essential though, is the fact that multiple internationally wrongful acts may arise out of a single act, with different elements being appropriately attributed to the IO, the State or other entities.[340] This is because the vantage point of the IO will be different from other actors. It will have unique opportunities to act and to refrain from acting. It will also have limitations which may constrain its actions or limit the effectiveness of its interventions.

All these factors will be relevant to the consideration of attribution, which is predicated on a close factual reading of the operating context. Ensuring that these different

[340] See Mégret (n 172), who refers to a 'simultaneous responsibility'

layers of involvement enter into the analysis is essential to the appropriate assignation of responsibility and key to guarantee non-recurrence.

IV. THE OBLIGATION OF IOs TO AFFORD REPARATION TO INJURED INDIVIDUALS

IV.1 Introduction

In earlier chapters I concluded that IOs have certain obligations to respect human rights and IHL and I considered the contexts in which conduct entails an act of the organization. In this chapter, I analyse the consequences of such breaches for the responsible organization. I focus on the obligation to afford reparation flowing from human rights and IHL violations that engage the responsibility of IOs. I am concerned both with the procedures by which reparation claims are considered (remedial obligations) and the outcome of such procedures (forms of reparation). The chapter concentrates on IO obligations owed to injured individuals. Given the absence of rules in DARIO which concern this specifically and the limited relevant jurisprudence, I seek to determine where rules may lie, having regard to mainly indirect sources.

I consider whether there is an obligation to afford remedies and reparation under international law, who has this obligation, to whom it is owed and what it entails. In tandem, I consider the relationship between those obligations and individuals' rights under international law. An overarching issue is how the law of responsibility intersects with the specialised regimes of human rights and IHL and particularly, their application to individuals.

The jurisprudence concerning State obligations is limited by the nuances of claimant choices if and how to pursue a claim, and by the shortage of venues where claims can be pursued. There are also differences between human rights law and IHL approaches, including the extent to which individuals are understood to possess an actionable 'right' to seek reparation and what this may entail. The law is particularly under-developed in contexts of mass victimisation, given the emphasis in most treaties and related texts on individual recompense. Whilst international principles have been distilled,[341] it is debatable whether they constitute *lex lata* or *lex ferenda*.[342]

These limitations regarding State-owed obligations also impact on what can be said about IOs' obligations. This is because of the near total absence of relevant practice concerning IOs specifically. One must use the practice and *opinio juris* emanating from State violations to draw parallels to possible standards for IOs, so unclear State obligations influence what can be said about IO obligations.

I argue that the nature of the violation (as opposed to the type of entity responsible for the conduct) should frame remedial and reparation obligations. This is because these are secondary rules which arise when the primary obligation is breached; they have a symbiotic relationship with the primary obligation, from which they derive their status. It is also because special rules for IOs or any other actor should not be capable of displacing the general ones (to the extent that these general rules are capable of being ascertained), when the latter afford higher protections.

I conclude that *de lege ferenda*, IOs are obligated to afford remedies and reparation to injured individuals, both for human rights and IHL abuses. I arrive at this conclusion by

[341] E.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) (adopted without vote) [Basic Principles and Guidelines]
[342] Christian Tomuschat, 'Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law', in Marcelo G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law: LiberAmicorum Lucius Caflisch* (Martinus Nijhoff, 2007) 569-590

extrapolating relevant principles from State obligations. I argue that enforcement challenges do not *per se* impinge upon the existence of this obligation or any right that individuals may possess. The obligation to afford reparation is independent of its current capacity to be enforced. I argue further that implicit in this reparation obligation is the connected obligation on IOs to ensure that adequate and effective procedures are in place to give it effect.

IV.2 The origin and development of the concept of reparation

IV.2.1 Multidisciplinary origins

Reparation encompasses the various ways in which wrongdoers must answer for wrongdoing. It draws its meaning from disciplines including law,[343] psychology,[344] philosophy,[345] religion,[346] victimology,[347] sociology[348] and political theory.[349] It incorporates the purposes of reconciliation, rehabilitation, strengthening the rule of law, access to justice, compensation, restitution, deterrence and punishment. These purposes are not always compatible with each other given that some fulfil private interests whereas others serve societal or public ones.[350] Reparation is understood also as a process to respond to harm suffered by injured individuals and/or groups. However, particularly when negotiated in response to wide scale wrongs,

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343 Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2005) 465; Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual - Reparation in Instances of Grave Violations of Human Rights* (Kluwer 1999)

344 C Fred Alford, *Psychology and the Natural Law of Reparation* (CUP 2011)

345 Aristotle, *The Ethics* (JAK Thompson tr, Penguin 1955) 148–9; Viktor Frankl, *Man's Search for Meaning* (Washington Square Press 1959)

346 Abdullahi Ahmed An-Na'im, 'The Right to Reparation for Human Rights Violations and Islamic Culture(s)' in Theo Van Boven, Cees Flinterman, Fred Grünfreld and Ingrid Westendorp (eds), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (University of Limburg Human Rights Project Group, SIM 1992) 174, 180; Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (CUP 2009)

347 Kieran McEvoy, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy' (2012) 9 Eur J Crim 527

348 Eric Yamamoto, 'Friend, or Foe or Something Else: Social Meanings of Redress and Reparations' (1991-1992) 20 Denv J Intl L & Pol'y 223

349 Pablo de Greiff, 'Repairing the Past: Compensation for Victims of Human Rights Violations' in Pablo de Greiff (ed), *The Handbook of Reparations* (OUP 2006) 1-20; John Torpey, *Making Whole What Has Been Smashed: On Reparation Politics* (Harvard Univ Press 2006)

350 Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833

reparation can take on a political dimension and injured individuals may have little role in its conceptualisation or outcome.[351]

Increasingly the term ‘reparation’ has been monopolised by lawyers, a practice that Torpey has termed a ‘juridification of politics’.[352] This poses difficulties in that it is hard to fit all that reparation encompasses into the lens of the law.[353] It can be complicated and at times beyond their jurisdiction for courts to rule on matters which extend to social policy and politics. Reparation is also unachievable for the most egregious violations which forever change victims or in instances of mass victimisation, owing to prohibitive administrative costs associated with assessing the particular harms suffered by individuals one by one and limited evidence available to claimants. This introduces an ideational character to reparation. Yet, reparation that fits within the bounds of the law is more predictable and transparent; there are standards that wrongdoers are obliged to meet and that injured individuals can rightly expect. Extra-legal reparation processes can appear arbitrary. And, this ‘arbitrariness’ can become a negative rule whereby any measure, to the extent that it is termed ‘reparation’ may suffice to legitimise an award; this can further lessen the ability of injured individuals or groups to advocate that their particular legal rights are addressed. There is thus a challenge to ensure that reparation is transparent through adherence to accepted principles, while at the same time appreciating the multidisciplinary context and the practical limitations.

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[351] Cristián Correa, Julie Guillerot and Lisa Magarrell, ‘Reparations and Victim Participation: A Look at the Truth Commission Experience’ in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009) 385

[352] Torpey (n 349) 355

[353] de Greiff (n 349) 1-20

IV.2.2 Legal origins

Reparation has a fundamental placement in law; it is synonymous with law itself.[354] It derives from tort law, public law and the law of State responsibility. Domestically, injured individuals can pursue public law or tort actions against persons or entities who have wronged them, including State officials and the State itself. Crime victims may also pursue civil actions against perpetrators, either alongside criminal trials or as separate tort claims. Some countries have established administrative programmes to indemnify victims as an extension of social welfare policies,[355] or to respond to mass victimisation as part of political transitions.[356]

In international law, the obligation to afford reparation arises as a consequence of the breach of a primary obligation causing injury.[357] The PCIJ held in *Chorzów Factory* that it is 'a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'[358] Reparation is applicable to any breached international obligation causing injury.[359] This should include breaches of human rights and IHL. However, consistent with classical notions of international law as a set of rules applicable to States in their relations to each other,[360] reparation for human rights and IHL abuses first developed through inter-State claims applying the law of injury to aliens and diplomatic protection. The State of nationality would seek reparation from the offending State for the violation of its rights; the injured alien was not understood to possess rights

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[354] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 389

[355] Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 Oxford J Legal Studies 86

[356] See generally, de Greiff (n 349)

[357] ARS (n 3) Art 31, reflecting *Chorzów Factory (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21

[358] *Chorzów Factory (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 29

[359] ARS (n 3) Art 31 and commentaries

Lassa Oppenheim, *International Law: A Treatise* vol I (Ronald Roxburgh ed, 3rd edn, Longmans Green & Co 1920) 18-19 separate from the State of nationality.[361] Nonetheless, the rights framework has progressively influenced how international law is perceived. For instance, diplomatic protection is no longer understood only to relate to a State's own interest in injury to aliens; the concept now incorporates also an acknowledgement that the injured individuals are the beneficiaries of rights,[362] and that protection should be requested for their benefit.[363]

This classical framework underpins the ILC's approach to reparation. There is no reference in either the ARS or DARIO to obligations owed to individuals or to rights belonging to individuals. Nonetheless, the presence of a rights framework is felt. Both texts explain that the approaches taken are without prejudice to any right, arising from the international responsibility which may accrue directly to any person or entity other than a State.[364] The DARIO commentaries note that an area 'in which rights accrue to persons other than States or organizations is that of … breaches committed by peacekeeping forces and affecting individuals'.[365] In its rules on countermeasures, the DARIO specify that IOs are not permitted to breach obligations to refrain from the threat or use of force, to protect human rights, of a humanitarian character prohibiting reprisals, or other obligations under peremptory norms of general international law.[366] They also cite the 'not inconceivable' example of an IO committing aggression or infringing an obligation under a peremptory norm of general international law relating to the protection of human rights. Here, the commentaries indicate that '[i]f a serious breach does occur, it calls for the same consequences as in the case of States'.[367]

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[361] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Merits) PCIJ Rep Series A No 2, 12; *Nottebohm Case* (n 55)
[362] *Ahmadou Sadio Diallo (Republic of Guinea v DRC)* (Merits) [2010] ICJ Rep 639, [39]
[363] ILC, draft Articles on Diplomatic Protection, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc. A/CN.4/L/647, Art 19
[364] Article 33(2) of both text.
[365] DARIO (n 1) Commentary to Art. 33, para 5
[366] Ibid, Art 53 and commentary
[367] Id, Commentaries to Art 41, para 5

This move towards a more inclusive international law that takes into account the rights of individuals has been heralded by some as a ground-breaking shift.[368] Yet, there is debate about the extent of the evolution. Some argue that the areas in which individual rights may lead to action on the international plane remain circumscribed, confined to the instances in which States have created capacity for individuals to so act by treaty.[369] However, international law is not static or immutable; the question is whether the growing patchwork of jurisprudence, treaty law and declarative instruments relating to reparation can provide a sufficiently solid and compelling foundation for wider understandings.

IV.3 Victims' Right to a Remedy and Reparation for Human Rights and IHL Violations

IV.3.1 General Obligations

The State obligation to afford reparation is set out in human rights treaties[370] and by their interpretive bodies,[371] in declarative texts,[372] by independent experts[373] in academic

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[368] *Prosecutor v Tadić* (Decision on Motion for Interlocutory Appeal) IT-94-1-AR72 (ICTY, 2 October 1995) para 97

[369] Tomuschat, 'Reparation in Favour of Individual Victims' (n 342)

[370] See e.g., ICCPR (n 309) art 2(3); *Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 [CPPED] arts 18, 20(2), 24(4); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 [UNCAT] Art 14(1); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227 [CRC-OPSC] art 8; *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 [CPRMW] art 16(9); ECHR (n 77) arts 13, 41; ACHR (n 309) arts 25, 63(1); *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 [ACHPR], art 21(2)

[371] Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13 (n 250); Committee Against Torture, 'General comment 3', Implementation of article 14 by States parties (13 December 2012) UN Doc CAT/C/GC/3; CEDAW Committee, 'General Recommendation 28' (16 December 2010) UN Doc CEDAW/C/GC/28, para 32; CESCR, 'General Comment 3' (14 December 1990) UN Doc E/C.12/1991/23; CESCR 'General Comment 9' (3 December 1998) UN Doc E/C.12/1998/24, paras 2, 3, 8, 9

[372] E.g., Universal Declaration of Human Rights, UNGA Res 217(A)(III) (10 December 1948) (adopted by 48 votes to none, eight abstentions) [UDHR], art 8; *Basic Principles and Guidelines* (n 341); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985)

studies,[374] and as will be described, in judicial decisions. It is also reflected in IHL treaties, particularly Article 3 of the *Hague Convention IV*,[375] largely reproduced in Article 91 of *Protocol I*.[376] Declarative texts, such as the *Basic Principles and Guidelines*,[377] the *Principles on Housing and Property Restitution*,[378] and the International Law Association's *Declaration of International Law Principles on Reparation for Victims of Armed Conflict*,[379] also consider reparation for IHL violations and emphasise victims' 'right' to reparation. This differs from the treaty texts which refer simply to the obligation to compensate. Who must be compensated is not spelled out, nor whether any injury to individuals is subsumed by the injury to the State of nationality.

In human rights law, reparation entails two aspects: the right to a domestic remedy and the right to adequate and effective forms of reparation. Some texts focus on particularly

(adopted without vote) [Victims' Declaration], 4; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 [Impunity Principles], 31; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ESC Res 1989/65 (24 May 1989) UN Doc E/1989/89, 20; Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) (adopted by 144 votes to four; 11 abstentions), art 8(2); Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, (International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007) < www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 31 July 2015, 3(a)

373 See also, UN Human Rights Council, 'Report of the Special Rapporteur on violence against women (Reparations for women subjected to violence)' (23 April 2010) UN Doc A/HRC/14/22; UNGA, 'Report of the Special Rapporteur on trafficking in persons, (The right to an effective remedy for trafficked persons)' (9 August 2011) UN Doc A/66/283; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (4 June 2012) UN Doc A/HRC/20/14, paras. 49-62; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (9 August 2012) UN Doc A/HRC/21/46; UNGA, 'Interim report of the Special Rapporteur on torture' (11 August 2000) UN Doc A/55/290, paras 24-30; UNGA, 'Report of the Special Rapporteur on torture' (3 July 2003) UN Doc A/58/120, paras 29-35; UNGA, 'Report of the Special Rapporteur on torture' (15 January 2007) UN Doc A/HRC/4/33, paras 61-68; UN Commission on Human Rights, 'Report submitted by the Special Rapporteur on toxic waste' (19 January 2001) UN Doc E/CN.4/2001/55, paras. 74- 83; CESCR, General Comment 14, E/C.12/2000/4 (n 337) para 59

374 Shelton, *Remedies in International Human Rights Law* (n 343) 465; Randelzhofer and Tomuschat (n 343)

375 *Convention Respecting the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910)

376 Protocol I (n 196)

377 *Basic Principles and Guidelines* (n 341) 11

378 UN Commission on Human Rights, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons' (28 June 2005) UN Doc E/CN.4/Sub.2/2005/17, para 2.1

379 International Law Association, 'Declaration of International Law Principles on Reparation for Victims of Armed Conflict' Res 2/2010 (74th Conference, The Hague, 15-19 August 2010) Art 6, 30

heinous abuses[380] whereas others specify that the rights apply to an array of violations.[381] The connection between the procedure by which reparation is sought and the ultimate award is understood as indivisible.[382] Under IHL, the emphasis has solely been on the latter aspect.

Tomuschat argues that the reciprocity which he says underpins the State obligation to repair the harm caused to another State for a breach is crucially absent from the scenario of the individual whose rights are breached by its State of nationality.[383] He thus argues that there is no basis to derive an international obligation to afford reparation for breaches of human rights or IHL outside of treaties which specifically provide for it. However, as a secondary rule, reparation should have no separate need for justification beyond the primary rule from which it derives its status; it is the natural and required consequence of the breach.[384] The ILC does not distinguish between types of internationally wrongful acts;[385] the requirement of reparation attaches to any such act. Shelton explains that some international courts have inferred 'an inherent power to afford remedies.'[386] She refers to *LaGrand* on breach of consular rights, where the ICJ held that: 'no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the

[380] *Basic Principles and Guidelines* (n 341); *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 [GC1] Art 51; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 [GC2] Art 52; *Convention (III) relative to the Treatment of Prisoners of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 [GC3] Art 131; *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 [GC4] Art 148

[381] International Law Association, 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' (Hague Conference, 2010), Commentary to Art 4, 9

[382] Shelton, *Remedies in International Human Rights Law* (n 343) 7-9; HRC, General Comment 31 (n 250) para 16

[383] Tomuschat, 'Reparation in Favour of Individual Victims' (n 342) 577-581. See also, Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations* (2002) 10 Tulane J Intl & Comp L 157 and Marten Zwanenberg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Neth Q HR 654, 654-5

[384] Shelton, *Remedies in International Human Rights Law* (n 343) 465; Menno Kamminga, 'Legal Consequences of an Internationally Wrongful Act of a State against an Individual' in Tom Barkhuysen, Michiel Leonard van Emmerik and Piet Hein Kempen (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Martinus Nijhoff 1999) 65-74

[385] ARS (n 3) arts. 1, 12; DARIO (n 1) arts 1, 10

[386] Shelton, *Remedies in International Human Rights Law* (n 343) 52-3

obligation.'[387] Similarly, Gillard has argued in relation to IHL that 'the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions.'[388] The ICJ takes this approach in its *Wall* Advisory Opinion, where it held that Israel was obliged 'to make reparation for all damage caused by the construction of the wall' 'to al1 the natural or legal persons concerned'[389] as a result of the various international obligations that Israel was said to have breached,[390] which included violations of human rights and IHL.[391]

In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the ICJ pointed out that: '[...]the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.'[392] Thus, even when the UN is immune from legal process, this does not impact upon its responsibility or its obligation to afford reparations as a result of that responsibility. Immunities must be distinguished from responsibility for internationally wrongful acts and reparation for injury caused by such conduct. There is thus no general bar to liability or reparation for IOs on this basis, though the venues where such claims may be adjudicated may be limited by any applicable privileges and immunities.

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[387] *LaGrand Case (Germany v United States of America)* (Merits) [2001] ICJ Reports 466, [48]
[388] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85(851) Intl Rev Red Cross 532
[389] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, [152]
[390] Ibid, [147]
[391] Id, [114], [132] – [137]
[392] *Cumaraswamy* case (n 135) [66]

IV.3.2 Procedural Aspects: The Right to an Effective Remedy

(1) Human rights law

The right to reparation has been explained as entailing at least in part, the obligation to afford effective domestic remedies in response to human rights violations.[393] All human rights treaties and instruments require, either explicitly or implicitly, States parties to provide remedies under national law.[394] The *UN Basic Principles and Guidelines* explain the obligation to respect, ensure respect for and implement international human rights law and IHL as giving rise to a duty, *inter alia*, to '[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, ... irrespective of who may ultimately be the bearer of responsibility for the violation.'[395]

Because of the virtually uniform recognition of the right to an effective remedy in human rights treaties, some scholars have posited that it constitutes a principle of customary international law[396] with others going even further to posit its peremptory status[397] because it

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[393] E.g., Art 8 UDHR (n 372); Art. 2(3) ICCPR (n 309); Art. 83 CPRMW (n 370); *Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 [CERD] art 6; *Indigenous and Tribal Peoples Convention* (adopted 27 June 1989, entered into force 5 September 1991) ILO No 169, 72 Official Bull 59 art 12; *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) 129 UNTS 13 [CEDAW] art 2(c); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime* (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, art 6(6)

[394] M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Hum R LR 203

[395] *Basic Principles and Guidelines* (n 341) 3(c). See also, *Victims' Declaration* (n 372) 4, *Impunity Principles* (n 372) 32 and Vienna Declaration and Programme of Action, (World Conference on Human Rights, Vienna, 25 June 1993) UN Doc A/CONF.157/53, para 27

[396] See, Francisco Francioni, *Access to Justice as A Human Right* (OUP 2007) 1-56; Karel Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2003-4) 25 Mich J Intl L 1162; Bassiouni, 'International Recognition of Victims' Rights' (n 394) 206-7; Riccardo Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims?' in Randelzhofer and Tomuschat (n 343) 164; Shelton, *Remedies in International Human Rights Law* (n 343) 238

[397] VCLT art 53 (n 21) stipulates that treaties are void if they conflict with a peremptory norm of general international law. Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2011) 196; Antonios Tzanakopoulos, 'United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada' (2010) 8 J Intl Crim J 249, 264. See also, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Merits) [2012] ICJ Rep 143, dissenting opinion of Judge Cançado

relates to common values of the international community as a whole with the consequence that each and every member of the international community has a 'legal interest' in their observance.[398] Other scholars have been more circumspect. As Hilpold argues, '[t]here appears to be consensus about the 'core meaning', while some uncertainty remains at the margins. This latter area has given rise to much controversy in jurisprudence.'[399]

The peremptory status of the right to an effective remedy is largely unsupported. Koskenniemi highlights the lack of clarity with respect to which norms carry a peremptory status in his report on the fragmentation of international law.[400] Most judicial decisions and academic commentators that have considered the issue have tended to refer non-exhaustively to a narrow series of norms that most definitely fall within the categorisation. DARIO refers back to the ARS commentaries, which recognises that 'peremptory norms that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.[401] The ILC has never made specific reference to the obligation to afford domestic remedies in its consideration of peremptory norms; indeed its list is comprised exclusively of primary obligations. However, this is not in itself determinative of the status of any particular rule, given the approach of non-exhaustive listing.

Trindade, [219]: 'where there is no right of access to justice, there is no legal system at all. Observance of the right of access to justice is imperative, it is not "limited" by State immunity; we are here in the domain of *jus cogens*.'

[398] *Prosecutor v Kupreskic* (Trial Chamber Judgment) IT-95-16-T (ICTY, 14 January 2000) para 519

[399] Peter Hilpold, 'UN Sanctions Before the ECJ: the Kadi Case' in August Reinisch (ed) *Challenging Acts of International Organizations Before National Courts* (n 179) 18, 38

[400] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, paras 361-363; 374-379

[401] ARS (n 3) Commentary to Art 26, para 5

Some have argued that the peremptory status of a primary obligation will impact upon the secondary obligation, such as the right to a remedy and reparation, when it is understood to be necessary to give the primary obligation effect. Orakhelashvili has stated that '[i]f peremptory norms are nonderogable, the consequences thereof in terms of reparation must also be viewed as non-derogable. It thus lies beyond the power of directly interested States to determine whether and to what extent the reparation is due to the victims of breaches *of jus cogens'.*[402] But secondary obligations will not necessarily take on a peremptory character. Indeed, and despite the arguments made by Shelton and Gillard referred to earlier concerning the inherent power to award remedies and reparation in the face of a breach of a primary obligation,[403] components of the right to an effective domestic remedy such as the right to access a court may be restricted to the extent that the limitations pursue a legitimate aim and are necessary and proportionate to that aim, insofar as they do not 'reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.'[404] For instance, reasonable limitation periods can be lawful,[405] as can restrictions on vexatious litigants. Certainly, these exceptions operate restrictively in the domestic sphere in relation to States' obligations to remedy those human rights violations they are directly responsible for perpetrating. But nevertheless, there is a modicum of contingency in how the right to a remedy has been framed. And, the exceptions to this right have been even more pronounced when a State is asked to provide access to a remedy for breaches which fall outside of its national remit which may conflict with other principles of international law, such as immunities.[406] Immunities, by extinguishing the claim do in fact impair the very

[402] Alexander Orakhelashvili, 'Peremptory Norms and Reparation for Internationally Wrongful Acts' (2003) 3 Baltic YB Intl L 19, 27
[403] See notes 384-388 and accompanying text
[404] *Al-Adsani v UK* App no 35763/97 (ECtHR, 21 November 2001) [53]
[405] *Stubbings v United Kingdom* App nos 22083/93,22095/93 (ECtHR,22 October 1996) [50]
[406] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 397); *Jones v United Kingdom* (GC) App nos 34356/06, 40528/06 (ECtHR, 14 January 2014); *Stichting Mothers of Srebrenica v The Netherlands* App no 65542/12 (ECtHR, 11 June 2013) (finding the application inadmissible). These issues are discussed in more detail in Chapter VI.

essence of the right of access to court.[407] Yet, these immunities have been held to be lawful, on the basis that they pursue the legitimate aim of observing international law in the interest of good relations between States through respect of other States' sovereignty.[408]

But even with all the contingencies, the right to a remedy is nonetheless required to the extent that it is necessary for the proper exercise of the primary obligation, even in the context of armed conflict and occupation[409] as well as in states of emergency,[410] in the absence of any valid proportionality considerations. Thus, in a purely domestic context, the procedural remedy has been understood to require States to afford effective access to fair processes in which arguable claims can be determined. The remedy should be prompt, accessible and capable of offering a reasonable prospect of success.[411]

Jurisprudence and standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice processes. They specify the need to ensure that victims receive adequate information[412] and are assisted to access justice. Victims, including those with particular vulnerabilities, must be treated with humanity and dignity,[413]

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[407] Lorna McGregor, 'State Immunity and Human Rights Is There a Future after *Germany v. Italy*?' (2012) 11 J Intl Crim J 125, 133-36

[408] ibid, 134, referring to *Al Adsani v UK* (n 404) [54]. See also *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 397). This is discussed further in Chapter VI

[409] *Judicial Guarantees in States of Emergency* (Advisory Opinion) OC- 9/87, Ser A no 9 (IACtHR, 6 October 1987) paras 22–4; *Al-Skeini v United Kingdom* (n 248) [164] –[167]; *Legal Consequences of the Construction of a Wall* (n 389) [106]

[410] UN Human Rights Committee, 'General Comment 29' Derogations during a state of emergency (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 14

[411] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm no 155/96 (ACommHPR, 30th Ordinary Sess, 13-27 October 2001); *Silver v United Kingdom*, App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 March 1983) [113(b)]; *Mayagna (Sumo) Awas Tigni Community v Nicaragua* (Merits, Reparations and Costs) Ser C no 79 (IACtHR, 31 August 2001) para 112

[412] *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002); See also, CATHB (n 79) Art 15; *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012) [115]; Recommended Principles and Guidelines on Human Rights and Trafficking, (20 May 2002) UN Doc E/2002/68/Add.1, 9.2

[413] *AT v Hungary*, UN Doc CEDAW/C/32/D/2/2003 (CEDAW Committee, 26 January 2005) para 9.6(II)(vi); HRC, General Comment 31 (n 250) para 15; UN Committee on the Rights of the Child [CRC Committee], 'General Comment 5' General Measures of Implementation of the Convention on the Rights of the Child (3

and their privacy and safety, both physical and psychological, must be safeguarded.[414] Allegations of human rights violations that constitute crimes also give rise to an obligation to carry out prompt, impartial and thorough investigations capable of leading to the identification, and if appropriate, prosecution of the authors.[415] The type of procedure necessary to give effect to the right is contingent on the nature of the violation. Most bodies consider that the most severe human rights violations require judicial remedies, however, the powers provided by a remedial mechanism and the guarantees it affords will determine whether it is effective.[416] Remedies must be available to all persons within the State's jurisdiction, which has been understood to include instances when a State exercises effective control over an area outside its national territory.[417]

(2) State Human Rights Obligations Extrapolated to Frame IO Obligations

Clearly, any human rights obligation to afford domestic remedies is only capable of direct application by States. A key and obvious limitation in regards to IOs is that they do not have sovereignty nor do they generally control territory and thus would not have the wherewithal to afford domestic remedies in the traditional sense. An exception is when IOs administer territory, such as the temporary administration by the UN of Kosovo and East Timor. In such instances, the UN has recognised to a limited degree the need to develop certain internal

October 2003) UN Doc CRC/GC/2003/5, para. 24; *Basic Principles and Guidelines* (n 341), 12(c); *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) [98]

[414] *Basic Principles and Guidelines* (n 341) 10, 12(b)

[415] *Barrios Altos v Peru* (Merits) Ser C no 75 (IACtHR, 14 March 2001) paras. 42, 43; *Kaya v Turkey* App no 158/1996/777/978 (ECtHR, 19 February 1998); *Assenov v. Bulgaria* App no 24760/94 (ECtHR, 28 October 1998); *Aksoy v Turkey* (n 413); *Cantoral Benavides v Peru* (Merits) Ser C no 69 (IACtHR, 18 August 2000); *Güleç v Turkey* App no 21593/93 (ECtHR, 27 July 1998) [80] – [82]

[416] *Velásquez Rodríguez v Honduras* (Merits) Ser C no 4 (IACtHR, 29 July 1988) paras 62-68; *DRC v Burundi, Rwanda and Uganda*, Comm no 227/99 (ACommHPR, 20th Annual Activity Rep, May 2003) *Egyptian Initiative for Personal Rights and Interights v Egypt*, Comm no 334/06 (ACommHPR, 9th Extraordinary Sess, 23 February - 3 March 2011) [96] – [98]; *De Souza Ribeiro v France* (GC) App no 22689/07 (ECtHR, 13 December 2012) [79]

[417] *Ilaşcu v Moldova and Russia* (n 248); *Al-Saadoon v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010)

structures to give effect to the obligation to afford domestic remedies, which are described more fully in Chapter 5.

However, even when the IO does not administer territory *in toto*, to the extent that conduct is capable of being attributed to it, one may still posit its obligation *de lege ferenda* to afford the equivalent of domestic remedies in response to human rights abuses, and as explained in the section below, in response to IHL abuses. A central question is what standards should or must apply to IO internal administrative mechanisms. Should these standards relate to criteria under general international law or is it appropriate for them to be framed by IOs within the context of the development of IOs' internal rules and procedures? In answering this question, it is important to note that there is little specific international law relating to what IOs in particular are required to do.[418]

The dearth of international legal principles stems from the vagueness of the CPIUN, the failure of the ILC to consider precisely this issue in the DARIO and the absence of other bilateral or multilateral treaties on the point. The CPIUN explains that appropriate modes of settlement shall be put in place,[419] which has been interpreted to mean that when the immunity of the UN bars domestic claims, the organisation is obligated to put in place an alternative system to determine such claims. As has been stated by Reinisch, '[t]he General Convention's obligation to provide for alternative dispute settlement in case of the Organization's immunity from legal process can be regarded as an acknowledgment of the right of access to court as contained in all major human rights instruments'.[420] Thus the intention of the Convention according to Reinisch was to ensure that immunities did not

[418] See Chapter V
[419] CPIUN (n 134) Art. VIII Section 29(a). The *Convention on the Privileges and Immunities of the Specialized Agencies* (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261 Art IX provides for the same framework.
[420] August Reinisch, 'Convention on the Privileges and Immunities of the United Nations / Convention on the Privileges and Immunities of the Specialized Agencies' (UN Audiovisual Library of International Law, undated) <http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html> accessed 18 Match 2015

result in impunity; any exercise of immunity would need to be predicated on the provision of an 'appropriate mode of settlement.'[421] However, what constitutes an 'appropriate' mode of settlement is not set out in the Convention and has not been considered in other international texts such as the DARIO. The DARIO simply confirms that IOs are responsible for their wrongful acts and obliged to afford reparation.[422] DARIO describes reparation as needing to be 'full',[423] to wipe out all the consequences of the illegal act and re-establish the *status quo ante.* One can seek to imply from this an obligation for the IO to establish a procedure by which 'full' reparation may be awarded if and as appropriate; however this goes beyond what is stated in the text. Indeed, the DARIO refrains from considering the obligations IOs may have towards injured individuals, focusing exclusively on obligations the IO may have towards States and/or other IOs.

There is also limited international jurisprudence that considers what constitutes 'appropriate modes of settlement'. This stems from the absence of legal forums capable of adjudicating disputes which interpret IO obligations, the limited advisory jurisdiction of the ICJ notwithstanding.[424] Indirectly, the European Court of Human Rights in a line of cases[425] has been called upon to assess whether IOs' internal procedures are sufficiently robust alternative means of redress, when States have upheld IOs' immunities, to determine whether this infringed individuals' right of access to court guaranteed by Article 6(1) of the European

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[421] See, August Reinisch and Ulf Andreas Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004) 1 Intl Org LR 59, 72. See also, August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals' (2008) 7(2) Chinese J Intl L 285, 289. Note, however that this goes beyond the literal wording of Art 29 of the CPIUN which only requires the UN to establish appropriate modes of settlement in relation to particular types of disputes. For further analysis of Art 29, see Chapter V

[422] DARIO (n 1), arts 3; 31(1)

[423] DARIO (n 1) arts 31(1), 34. See also, *Basic Principles and Guidelines* (n 341), principle 18, which describes 'full and effective' reparation for gross human rights and serious IHL violations.

[424] *Effect of awards of compensation made by the UN Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47; *Cumaraswamy case* (n 135) [66]

[425] *Waite and Kennedy* v. *Germany* (n 121)

Convention. While the Court itself does not specify the standard, commentators have emphasised the importance for the alternate remedy to be capable of addressing the dispute, to be judicial in nature and that the adjudicators must be sufficiently qualified and independent.[426] This reference to the need for alternative means of redress has also proved important in the assessment by certain domestic courts of the immunity of IOs, with some denying immunities when they determined that there was no appropriate alternative remedy.[427]

In a later series of cases which concern the immunity of States before foreign courts, the ECtHR determined that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1.'[428] The availability of alternative means of redress is not considered material in these latter cases. This reasoning was adopted by the ICJ in *Germany v Italy*.[429] While the immunities of IOs were not at stake in these decisions, in the recent *Mothers of Srebrenica* case, the ICJ's judgment in *Germany v Italy* featured prominently in the Dutch Supreme Court's rejection of an exception to the immunity of IOs.[430] As McGregor argues, '[t]he cross-fertilization between the immunities of states and the immunities of international organizations in this case raises the question whether the ICJ decision will have

[426] Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Court of Human Rights* (Martinus Nijhoff 2010) 148-9
[427] Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals' (n 421) which refers to several domestic (mainly employment) cases which have begun to loosely consider whether the mode of settlement established by the IO is capable of providing an adequate remedy. See also, Mizushima Tornonori, 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means' (2008) 71 Modern Law Review 734, 743
[428] *McElhinney v Ireland* App no 31253/96 (ECtHR, 21 November 2001) [37]; *Al Adsani v UK* (n 404), [56]
[429] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 397) [100], [101]
[430] *Stichting Mothers of Srebrenica v Netherlands and United Nations*, Supreme Court [HR] LJN: BW1999, ILDC 1760 (NL 2012) 13 April 2012 [4.3.14]

a negative impact on the trend to deny international organizations immunity where no reasonable alternative to access justice exists.'[431]

In a study commissioned by the UN Office of Legal Affairs relating to the measures required to address the procedural injustices associated with the individual sanctions regime of the UN Security Council, Professor Fassbender notes that 'there is a legitimate expectation that the UN, through its organs, observes standards of due process, or "fair and clear procedures", on which the person concerned can rely.'[432] He notes further that '[t]he exact scope and intensity of those Charter-based rights of due process of individuals whose rights and freedoms are directly affected by acts of the United Nations is not generally predefined. Dependent on the circumstances of a particular situation, appropriate standards must be determined, suited to that situation, paying due regard to the nature of the affected rights and freedoms and the extent to which action taken by the UN is likely adversely to affect those rights and freedoms.'[433] To the extent that procedural mechanisms also apply to IHL claims, the same standards would apply. This is so because human rights and IHL are mutually reinforcing and the one may provide greater clarity to the obligations of the other, particularly where one body of law is silent. As human rights law is particularly instructive in regards to the standards for individual complaints procedures, as Roberts has indicated, it 'may not merely fill in gaps in the laws of war, but also provide procedures for assisting in the implementation of key provisions of those laws.'[434] Where the IO is for whatever reason incapable of giving effect to the procedural obligation through its own procedures, arguably it must afford a route to external adjudication, e.g., through the insertion of arbitral clauses

[431] McGregor (n 407) 135
[432] Reproduced in Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations' (2006) 3 Intl Org LR 437, para 6.6
[433] Ibid, para 10
[434] Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 594

accessible to those whose rights have been adversely affected and/or through clear and transparent procedures for the waiver of immunities.[435]

(3) IHL Obligations

Unlike human rights law, IHL treaties do not oblige States to afford victims with a procedural remedy, nor are there specialised international complaints mechanisms.[436] This is due to the genesis of IHL as a set of rules applicable to States in their relations with each other. The ICRC has made reference in its commentaries to this limitation. It has commented that '[t]he State is answerable to another contracting State and not to the former prisoner. On that point the recognised system was not in any way modified in 1949.'[437] It has expressed this view regarding the return of prisoners' valuables[438] and personal effects,[439] as well as for compensation for prisoners' work-related injuries.[440] This position has remained largely unchanged with Protocol I, though the ICRC has posited 'a growing tendency to recognise the exercise of rights by individuals,'[441] though it has avoided asserting this tendency as evidence of an established rule of customary international law or even an emerging one. Furthermore, the examples it provides to evidence the trend, do not demonstrate individuals' ability to independently seek out reparation, but more the ability of victims to

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[435] Considered in Chapter VI

[436] See Jann Kleffner and Liesbeth Zegveld, *'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law'* (2000) 3 YB Intl Humanitarian L 384, who argue that a specialised procedure should be established.

[437] GC3 (n 380) Commentary to Art 12. There is almost identical commentary for GC4 (n 380) Art 29. See also, GC3 (n 380), Commentary to Art 131. See also, Rudolf Dolzer, 'Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action - Lessons after 1945' (2002) 20 Berkeley J Intl L 296, 336

[438] GC3 (n 380) Commentary to Art 18(6); GC4 (n 380) Art 97

[439] GC3 (n 380) Commentary to Art 68; GC4 (n 380) Art 98

[440] GC3 (n 380) Art 68

[441] Protocol I (n 196) Art 91, ICRC commentary to Art 91, 1949 Conventions and Additional Protocols, and their Commentaries, <www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 31 July 2015; ICRC, 'Customary International Law Database' (undated) Rule 150 <www.icrc.org/customary-ihl/eng/docs/home> accessed 18 March 2015

benefit individually from reparation programmes that States have on occasion decided to establish.[442]

Some commentators have sought to imply procedural rights from the fact that victims are the ultimate beneficiaries of reparation.[443] The ARS commentaries to Article 33(2) recognise that reparation is owed not only to injured States but also to other injured parties, including individuals as the ultimate beneficiaries.[444] In the same sense, it has been suggested that the *travaux preparatoires* of Article 3 of the *Hague Convention IV* demonstrate that the victims of violations were the intended beneficiaries of compensation.[445] The ICJ has taken this approach by ordering States to afford reparation not only to injured States, but also to injured individuals.[446] The obligation to afford reparation to victims was also recognised by international commissions investigating wide scale human rights and IHL abuses.[447] Zegveld has implied an individual and directly enforceable procedural right under international law[448] from this understanding that victims are the ultimate beneficiaries of rights, arguing that individuals' rights *qua* beneficiaries necessarily imply procedural obligations. Others have considered that the progressive evolution of human rights has had an

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[442] ibid

[443] Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85(851) Intl Rev Red Cross 497, 507; Michaela Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Markovic* Case' (2003) 1 J Intl Crim J 406, 417. See also, Yves Sandoz, 'Unlawful Damage in Armed Conflicts and Redress under International Humanitarian Law' (1982) 22(228) Intl Rev Red Cross 131, 137; Kalshoven 'State Responsibility for Warlike Acts of the Armed Forces' (n 241) 835-6

[444] ARS (n 3) Commentary to Art 33, para 3

[445] Frulli (n 443) 417. See also, Sandoz (n 443) 137; Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (n 241) 835-6

[446] *Legal Consequences of the Construction of a Wall* (n 389) [152] – [153]; *Armed Activities on the Territory of the Congo (DRC* v *Uganda)* (Merits) [2005] ICJ Rep 168, [259]. See however, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 252), in which the Court made no finding as to the ultimate beneficiaries, possibly as a result of its limited conclusion that in relation to the wrongful acts determined by the Court, satisfaction was a sufficient form of reparation.

[447] E.g., International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur' (25 January 2005) <www.un.org/News/dh/sudan/com_inq_darfur.pdf> last accessed 18 March 2015; UN Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48, para 1868; UN Human Rights Council, 'Report of the International Commission of Inquiry on Libya' (2 March 2012) UN Doc A/HRC/19/68, para 17

[448] Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (n 443) 503

impact on the meaning of State responsibility and certain IHL provisions, including the recognition of procedural rights. For instance, Judge Jorda, then President of the ICTY, has implied from the universal recognition of the right to an effective remedy under human rights law, a similar right under IHL. He has written that '[t]he integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens.'[449] In a similar vein, Hoffmann has argued that 'in view of subsequent developments in international law… it does seem possible to argue that this provision [Article 3 of *Hague Convention IV*], as interpreted in the light of current international law, now indeed provides for such a right.'[450]

It has also been argued that States' obligation to enable victims to claim reparations when IHL obligations are breached can be implied from the wording of Article 1 common to the *Geneva Conventions of 1949* and *Protocol 1,* in which States undertake to respect and ensure respect for compliance with IHL, which has been recognised to reflect a principle of customary international law, also applicable to non-international conflicts.[451] While the breadth of 'ensure respect' is contested,[452] even under the narrowest of readings it requires States to adopt all necessary measures within their jurisdiction (both positive and negative) to ensure respect for the Conventions. The *Basic Principles and Guidelines* specify that the

[449] UNSC, 'Letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General' (3 November 2000) UN Doc S/2000/1063, Annex, 11, para 20. See also 'Report of the International Commission of Inquiry on Darfur' (n 447) para 593; Elke Schwager and Roland Bank, 'Is there a substantive right to compensation for individual victims of armed conflicts against a state under international law?' (2006) 49 German YB Intl L 367, 378, 391

[450] Rainer Hoffmann, 'Reparation for Victims of War and Non-state Actors?' (2007) 32 S Afr YB Intl L 291, 297. See also, Paola Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 310; Theo Van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Ferstman et al (eds) (n 351) 19, 26

[451] *Nicaragua case* (n 98) [220]

[452] The debate centres on whether the phrase obliges contracting States to take positive steps to ensure respect for the Convention outside of their jurisdiction. See, Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 YB Intl Humanitarian L 3; Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 EJIL 125

obligation to respect, ensure respect for and implement international human rights law and IHL includes, *inter alia*, the duty to: 'provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, … and provide effective remedies to victims, including reparation.'[453] However, this interpretation goes beyond the ICRC's general view as to the meaning of 'ensure respect'. The ICRC has not incorporated such an implied obligation into those model laws relating to treaties that do not expressly provide for such a right,[454] nor does it form part of its understanding of the status of customary international law.[455] In contrast, the ICRC has understood IHL to provide for the right of access to remedial procedures only in relation to specific scenarios and persons. For instance, the ICRC has specified that such a right exists in relation to the missing or disappeared. In its commentary on its model law on the missing,[456] it specified that amnesties must not, *inter alia*, 'preclude the initiation of civil proceedings or have a legal effect on the

[453] *Basic Principles and Guidelines* (n 341) 3. Note however, the contrary view of the delegate from Germany: UN Commission on Human Rights, Summary records of the 57th meeting, 61st sess (19 April 2005) UN Doc E/CN 4/2005/SR.57, 9, per Mr. Koenigs (Germany). Germany expressed the same position before the ICJ in the *Germany v Italy* case (n 397). See *Reply of the Federal Republic of Germany* (5 October 2010) paras. 40-42: <www.icj-cij.org/docket/files/143/16650.pdf> accessed 31 July 2015

[454] ICRC, 'Legislation for Common Law States on the 1949 Geneva Conventions and their 1977 and 2005 Additional Protocols' (31August 2008) <www.icrc.org/eng/resources/documents/misc/geneva-conventions-protocols-model-law-310808.htm> accessed 18 March 2015. Similarly, the ICRC has not read in to other conventions which do not have an express obligation to afford a domestic remedy. See, ICRC, 'Legislation for Common Law States on the 2008 Convention on Cluster Munitions' (31 December 2008) <www.icrc.org/eng/resources/documents/misc/cluster-munitions-model-law-010109.htm> accessed 18 March 2015; ICRC, 'Model Legislation for Common Law States to Implement the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction' (August 2003) <www.icrc.org/eng/assets/files/other/model_legislation_ottawa_convention.pdf> accessed 18 March 2015; Christopher Harland and Angela Woodward, 'A Model Law: The Biological and Toxin Weapons Crimes Act: An Act to implement obligations under the 1972 Biological and Toxin Weapons Convention and the 1925 Geneva Protocol' (2005) 87(859) Intl Rev Red Cross 573

[455] While it understands there to be a rule of customary international law that States must 'respect, and ensure respect' for IHL, both in internal and international armed conflicts, the ICRC has not set out a duty on states to establish remedial procedures whereby victims may assert their claims of violation. See, CIL Database (n 441) rule 139 and associated commentary

[456] ICRC, 'Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families' (2009) <www.icrc.org/eng/assets/files/other/model-law-missing-0209-eng-.pdf> accessed 18 March 2015

victims' right to reparations'.[457] The right has also been recognised by the ICRC to a limited extent in relation to prisoners of war.[458]

Invariably though, what is recognised is States' obligation to afford reparation and victims' right to *receive* it, not their independent right to *claim* it. This reflects the classical underpinnings of IHL and particularly the understanding that the right to receive reparation was capable of being given effect in IHL through diplomatic protection, however imperfect and discretionary that route may be. IHL claims lodged with domestic courts have usually failed on procedural grounds, because of the perceived incompatibility with peace settlements, sovereign immunity, act of State doctrine or the non-self-executing nature of the right to reparation under IHL and making reference to implied rights has not helped to overcome such blockages.[459] Those claims before domestic courts that have been successful are exceptional, and have mainly succeeded because of the existence of specific domestic legislation allowing for such claims. Nor does the administrative practice support such views. The instances in which claims procedures were established in response to IHL violations, such as pursuant to the *Treaty of Versailles*,[460] UN Compensation Commission,[461] Ethiopia Eritrea Claims Commission[462] or numerous property restitution commissions,[463] are *ad hoc* responses and not necessarily indicative of a pattern capable of expressing sufficient *opinio juris* and practice to give rise to an international rule regarding victims' procedural rights.

[457] Ibid, Commentary to Art 25
[458] See GC3 (n 380) Art 14 and ICRC commentary, ICRC, 1949 Conventions and Additional Protocols, and their Commentaries, <www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 31 July 2015
[459] These arguments are explored in chapter VI
[460] *Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles)* (adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188, Art 297(e)
[461] See, UN Compensation Commission (UNCC), 'Arrangements for Ensuring Payments to the Compensation Fund' (2 August 1991) UN Doc S/AC.26/1991/1, para 14
[462] Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (adopted 12 December 2000, entered into force 12 December 2000) 2138 UNTS 94, 40 ILM 260, Art 5
[463] International Organization for Migration, 'Property Restitution and Compensation: Practices and Experiences of Claims Programmes' Ref no 978-92-9068-450-3 (IOM 2008)

The degree of claimant engagement within these bodies has also varied. In some processes, injured individuals have no procedural involvement. In others, victims have been consulted usually in groups as to the harm suffered and their preferences for reparation, with or without needing to submit verifiable proof of individualised harm. In yet other instances, more rigorous processes have been established in which injured individuals may make a claim to an administrative procedure established precisely for that purpose or a court. The recent practice of international or internationally-supported criminal courts that allows victims to apply for reparation is an important procedural development, though procedures are highly restrictive.[464]

(4) IHL Obligations Extrapolated to IOs

The inability for injured individuals to claim reparation for IHL abuses is a particularly serious limitation for IO abuses. This is so, given the unlikelihood that the States of nationality (usually States that are in a situation of conflict or emerging from conflict) will exercise their discretion in favour of diplomatic protection on behalf of their nationals, whether for reasons of lack of capacity or lack of interest,[465] or because of the failure to first exhaust the internal remedies of the IO.[466] It might be feasible that troop contributing countries will take up their troops' claims with an IO through diplomatic protection. However, one can imagine the difficulties both practical and diplomatic for the authorities in failed or conflict-ridden States such as Somalia to lodge a dispute with the UN for the treatment of their citizens under the UN Operation in Somalia, or for the authorities of Sudan

[464] *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 7 July 2002) 2187 UNTS 90, UN Doc A/CONF.183/9, Art 75; *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia*, 9 February 2009, amended 17 September 2010) <www.eccc.gov.kh/en/document/legal/internal-rules> accessed 31 July 2015, Rule 23 *quinquies* (Civil Party Claim)

[465] A State's ability to exercise diplomatic protection against an IO was not directly considered in *Reparations for Injuries*, though it was raised by judge Kyrov in his dissenting opinion. See, *Reparation for Injuries* (n 6) 219: 'the opposite-and possible-situation in which the said State may find it desirable and necessary to protect the agent against the acts of the Organization itself.'

[466] Whether there is an obligation to first exhaust domestic remedies in this way is itself disputed. Chittharanjan Felix Amerasinghe. *Local Remedies in International Law* (2nd edn, CUP 2004) 371-2

to bring a claim against the UN for abuses which occurred under the UN Mission in the Sudan.[467]

Thus, an individualised claims process may be the only means by which the result of reparation may be achieved. Consequently, it is relevant to consider whether it is possible to derive an obligation on the IO to establish internal procedures for IHL abuses given the inability to safely rely on the traditional framework of diplomatic protection. Does the obligation to afford the result of reparation necessarily require the offending organization to ensure that there are procedural modalities in place to give effect to it? To answer in the affirmative would be to ensure that the end result of reparation is capable of being achieved. Such an approach emphasises that there is an implied obligation to afford an effective procedural mechanism through which the ultimate beneficiaries may gain access to reparation.[468] It would help ensure that the obligation to afford reparation is made to be practical and effective for its ultimate beneficiaries.[469] It does not go so far as to imply a cause of action - an unfettered right to claim reparation for IHL abuses in all instances, but the more limited proposition of implying an obligation on the wrongdoer to establish a procedural route where the one normally envisioned is not capable of practical application. Support for this approach may be found in the practice of the UN Claims Commission, which allowed certain international agencies to submit claims on behalf of stateless persons, who unlike other individuals could not rely on their governments to put forward claims on their

[467] This conundrum is raised by Dannenbaum, 'Translating the Standard of Effective Control' (n 172) 127-8
[468] See Bassiouni 'International Recognition of Victims' Rights' (n 394) 217, who argues that in relation to States' obligation to afford reparation, that, even though there is no explicit obligation to establish special procedures, those States whose existing legal frameworks are deficient must establish such procedures in order to ensure that they are capable of affording effective remedies, or else they would be implicitly violating their obligations.
[469] This approach has been taken by the European Court of Human Rights to recognise certain rights which are not explicitly stated in the Convention but are necessary by implication to give effect to stated rights. See, e.g., *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975); *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979)

behalf.[470] The ICJ has already recognised the ability for the UN to establish a Tribunal to deal with disputes between the Organization and staff members.[471] That ruling was based on the understanding that the adjudicative mechanism was required to fulfil the purposes of the Organization. Thus, given the need to deal fairly with employees and ensure employment rights, and taking into account the unavailability of other mechanisms to address this, it was considered necessary and appropriate to establish the Tribunal to give effect to the need.

IV.3.3 Forms of reparation

Similar to the procedural obligation, the reparation that is required to remedy a breach will depend on the violation and the harm caused, and should not depend on the entity that caused the harm. Indeed the DARIO takes an almost identical approach to ARS in its determination of the required forms of reparation. Both the ARS and DARIO describe reparation as needing to be 'full',[472] to wipe out all the consequences of the illegal act and re-establish the *status quo ante.* Both identify cessation, assurances and guarantees of non-repetition, and reparation, which may take the form of restitution, compensation, or satisfaction.[473] The approach of human rights treaties and their interpretive texts is similar, though with different emphases, mainly because the ILC understands cessation and assurances and guarantees of non-repetition to reflect inherent obligations resulting from wrongful acts, whereas human

[470] See, UNCC, 'Guidelines relating to paragraph 19 of the Criteria for Expedited Processing of Urgent Claims' (23 October 1991) UN Doc S/AC.26/1991/5, paras 3-4, specifying that 'A high number of individuals will most likely not be in a position to have their claims submitted by a Government. Among these individuals Palestinians represent the most numerous group. Furthermore, stateless persons and other individuals in the same position who still remain in Kuwait or who are situated on border lines are to be included in this category. The international community, represented by the UNCC, bears the overall responsibility for protecting the interests of the above-mentioned individuals.'
[471] *Effect of awards* (n 424) 58
[472] ARS (n 3) Arts 31(1), 34; DARIO (n 1), Arts 31(1), 34. See, *Basic Principles and Guidelines* (n 341) 18, which describes 'full and effective' reparation for gross human rights and serious IHL violations.
[473] ARS (n 3) Arts 30(a), 30(b), 31; DARIO (n 1) Arts 30(a), 30(b), 31

rights texts consider them as forms of satisfaction.[474] As Shelton indicates, there is 'a growing consensus on minimum standards'.[475] She, like others, identifies restitution as the primary or highest aim; other forms of reparation becoming relevant when restitution is not possible, or impractical, or does not manage to wipe out the consequences on its own.[476] Similar to human rights texts, restitution is understood in most IHL treaties as the main obligation, failing which compensation or other forms of reparation should be afforded.[477] Yet for many human rights and IHL violations, the concept of restoring the victim to the situation which pre-dated the violation (often a situation of marginalisation) would not align with other goals of guarantees of non-recurrence, which has led some to call for reparation with transformative potential.[478]

For human rights and IHL violations, restitution has been ordered most often to return individuals to property, restore identity, travel or work permits,[479] vacate arrest warrants,[480] expunge criminal records,[481] release individuals from prison,[482] or issue stays of execution in death penalty cases.[483] IHL treaties include the need to ensure that transferred detainees receive appropriate treatment, failing which the transferring authority has the obligation to

[474] Shelton, 'Righting Wrongs' (n 350), 849. She argues that listing 'cessation' as an independent measure, outside of reparation, ensures that the state ceases the wrongful conduct regardless of whether the injured party requests it. See, for the approach in human rights texts, *Basic Principles and Guidelines* (n 341), 18
[475] Shelton, *Remedies in International Human Rights Law* (n 343) 9
[476] Antonio Cassese, *International Law* (2nd edn, OUP 2002) 259. This is the approach taken by the PCIJ and ICJ. See, e.g., *Chorzów Factory* (Merits) (n 358) 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Merits) (n 252) para 460
[477] See, e.g., GC1 (n 380) Arts 34, 35; GC4 (n 380) Art 55; *Protocol for the Protection of Cultural Property in the Event of Armed Confli*ct (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358, Art 3; Guiding Principles on Internal Displacement, UNCHR Res 1998/50 (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 (adopted without vote), principle 29(2); *Convention for the Protection and Assistance of Internally Displaced Persons in Africa,* AU (adopted 22 October 2009, entered into force 6 December 2012), Art 12
[478] One of the main purposes of the *Nairobi Declaration* (n 372)
[479] *Principles on Housing and Property Restitution* (n 378) para. 2.1; *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, Comm no 292/04 (ACommHPR, 43rd Session, 7–22 May 2008) [85] – [6]
[480] *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (n 291)
[481] *Cantoral Benavides v Peru* (Reparations and Costs) Ser C no 88 (IACtHR, 3 December 2001) para 78
[482] *Loayza Tamayo v Peru* (Merits) Ser C no 33 (IACtHR, 17 September 1997) para 84
[483] *Fermín Ramírez v Guatemala* (Merits, Reparations, Costs) Ser C no 126 (IACtHR, 20 June 2005) para 130(c)

‘take effective measures to correct the situation or shall request the return of the prisoners of war’.[484] They also make specific reference to the requirement to return requisitioned property at the end of a war, failing which, compensation is required.[485] Similar obligations are mentioned in the *Convention for the Protection of Cultural Property* and its first protocol.[486] With respect to refugees and displaced persons, the obligation to facilitate return and assist them to recover property, is also a primary objective, failing which compensation or other forms of reparation may be acceptable alternatives.[487] Compensation is understood to cover any financially assessable damage both material and moral and loss of profit,[488] as well as the costs for legal or expert assistance, medicine, and psychological and social services.[489] Article 3 of the *Hague Convention IV* as well as Article 91 of *Protocol 1* refer to compensation, ‘if the case demands’, which is understood to require compensation if and when restitution is impossible.[490] These provisions make clear that compensation is required for all breaches committed by persons forming part of armed forces (regardless of the context in which they were committed); a recently agreed declarative text has gone further, indicating that States are responsible for the acts of private contractors they employ during armed conflict.[491] While the Geneva Conventions do not contain similar wording, the obligation to compensate has been implied from the common provision[492] that parties cannot absolve

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[484] GC3 (n 380) Art 12

[485] E.g., GC1 (n 380) Arts 34, 35; GC4 (n 380) Art 55

[486] *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 Art 18(b); *Protocol for the Protection of Cultural Property* (n 477) Art 3

[487] *Guiding Principles on Internal Displacement* (n 477) 29(2); AU, *Convention for the Protection and Assistance of Internally Displaced Persons* (n 477) Art 12

[488] ARS (n 3) Art 36; CATHB (n 79) Art 15(3)

[489] *Basic Principles and Guidelines* (n 341) 20; Model Law against Trafficking in Persons, (5 August 2009) UN Office on Drugs and Crime, Doc No V.09-81990 (E), Arts 28, 29; *Godínez Cruz v Honduras* (Interpretation of the Compensatory Damages) Ser C no 10 (IACtHR, 17 August 1990) para 27

[490] Protocol I (n 196) ICRC commentary to Art 91, 1949 Conventions and Additional Protocols, and their Commentaries, <www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 31 July 2015

[491] Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, (6 October 2008) UN Doc A/63/467–S/2008/636, para 8

[492] GC1 (n 380) Art 51; GC2 (n 380) Art 52; GC3 (n 380) Art 131; GC4 (n 380) Art 148

themselves of liability they incur in respect of grave breaches.[493] Rehabilitation includes measures for physical and psychological treatment[494] and scholarships and vocational training.[495] Certain specialist thematic IHL conventions emphasise the importance of targeted victim assistance and rehabilitation.[496] Satisfaction, understood as an exceptional remedy in the ARS and DARIO,[497] has been frequently ordered in human rights jurisprudence to address injuries which involve breaches of trust, which acknowledgement and commemoration may help to remedy.[498] Criminal investigations have also been ordered as satisfaction.[499] Cessation, as a form of satisfaction, has been emphasised as a remedy for continuing violations such as disappearances, wherein full disclosure of the truth and the need to locate and identify remains is understood as central.[500] Guarantees of non-repetition have included strengthening monitoring mechanisms and other procedural safeguards, changing policies or legislation, vetting public officials and setting up commissions of inquiry.[501]

The standard of reparations first articulated by the Permanent Court of International Justice and which has thereafter framed the quantum and quality of inter-State claims is 'full,' as needing to wipe out all the consequences of the illegal act and reestablish the *status quo ante*.[502] It is described in the ARS and DARIO in these same terms.[503] Human rights

[493] GC1 (n 380) Commentary to Art 51; GC4 (n 380) Commentary to Art 29
[494] *Plan de Sánchez Massacre v Guatemala* (Reparations) Ser C no 116 (IACtHR, 19 November 2004) para 106-8
[495] *Cantoral Benavides v Peru* (Reparations and Costs) (n 481) para 99(6); *Juvenile Reeducation Institute v Paraguay* **(**Preliminary Objections, Merits, Reparations and Costs) Ser C no 112 (IACtHR, 2 September 2004) para 340(13)
[496] See, *Convention on Cluster Munitions* (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, Art 3
[497] Shelton, 'Righting Wrongs' (n 350) 838; ARS (n 3) Commentary to Art 37, para 1
[498] *Cantoral Benavides v Peru* (Reparations and Costs) (n 481) para 81; *Mack-Chang v Guatemala* (Merits, Reparations and Costs) Ser C no 101 (IACtHR, 25 November 2003) paras 8, 9, 11, 12
[499] Bassiouni, 'International Recognition of Victims' Rights' (n 394) 263-264
[500] *Neira-Alegría v Peru* (Reparations and Costs) Ser C no 29 (IACtHR, 19 September 1996) para 69
[501] *Connateh v. Angola* (n 479) para 87
[502] *Chorzów Factory* (Merits) (n 358); *Legal Consequences of the Construction of a Wall* (n 389) [152]
[503] ARS (n 3) Arts 31, 34 and commentaries thereto; DARIO (n 1) Arts 31(1), 34. See, *Basic Principles and Guidelines* (n 341) 18, which describes 'full and effective' reparation for gross human rights and serious IHL violations

treaties and related texts tend to use descriptors such as fair, adequate or effective, used either singly or grouped together,[504] appropriate,[505] proportionate to the harm[506] and equitable.[507] These are not necessarily lesser standards; they help to clarify what is required, particularly when re-establishing the *status quo ante* is impossible and it is impractical to precisely quantify the harm.[508] There is therefore some consistency in what is understood to be required. This would align with the range of treaty references as well as the clarifying statements made by their interpretive bodies and UN independent experts. It would also be consistent with the findings of both domestic and international courts. Nonetheless, the practice of States has been varied and inconsistent. More simplified approaches tend to be taken when there is a large number of injured individuals who would be entitled to significant reparation that would be overwhelming for a court to adjudicate claim by claim, and/or when the nature of the violations is such that victims would not have the requisite proof to satisfy a court of their injuries using typical standards of proof.[509] In other cases, there is a failure to resort to full reparation or a failure to enforce international orders to this effect, simply because of the absence of political will.

The ICRC has expressed the view that the State obligation to afford reparation for IHL abuses constitutes a rule of customary international law, applicable in both international

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[504] *Protocol on the Statute of the African Court of Justice and Human Rights*, African Union (adopted 1 July 2008, not yet in force) Art 45; *Victims' Declaration* (n 372); ACHR (n 309) Art 63(1); *Godínez Cruz v Honduras* (n 489) para 27; CERD (n 393) Art 6; UNCAT (n 370) Art 14; CPPED (n 370) Art 24(4); CESCR, 'General Comment 9' (n 371) para 9; *Basic Principles and Guidelines* (n 341) 15

[505] CRC, General Comment 5 (n 413) para 24

[506] *Loayza Tamayo v Peru* (Reparations and Costs) Ser C No 42 (IACtHR, 27 November 1998) para 86; *AT v Hungary* (n 413) para 9.6(II)(vi); *Basic Principles and Guidelines* (n 341) 15, 18

[507] *Velásquez Rodríguez* (Compensatory Damages) (n 195) para 27, in which the IACtHR applied principles of equity. See also, *Djot Bayi v Nigeria*, ECW/CCJ/JUD/01/09 (ECOWAS CCJ, 28 January 2009) paras 45-6

[508] *Aloeboetoe v Suriname* (Reparations and Costs) Ser C no 15 (IACtHR, 10 September 1993) para 49

[509] See generally, Howard M Holtzmann and Edda Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007); Michael Bazyler and Roger Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (NYU Press 2006); Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010); Edda Kristjánsdóttir, 'International Mass Claims Processes and the ICC Trust Fund for Victims' in Ferstman et al (eds) (n 351) 170; Marc Henzelin, Veijo Heiskanen and Guénaël Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons From International Mass Claims Processes' (2006) 17 Crim L Forum 317

and non-international armed conflicts.[510] The same view was expressed in the final report of the International Commission of Inquiry on Darfur.[511] This is consistent with the approach taken by the ILC, which underscores that the reparations obligation attaches to all internationally wrongful acts, without distinguishing between international or non-international armed conflicts.[512] However, the status of the rule is controversial, owing to the limited and variable practice, typically contingent on States' interests and settlement prerogatives. The rule has been particularly controversial for non-international conflicts, given that no compensatory obligation was included in *Protocol II.*[513] In its study on customary international law, the ICRC refers to 'an increasing amount of State practice from all parts of the world,'[514] however the references from practice do not appear to establish a clear pattern for non-international armed conflicts. Yet, a failure t*o* recognise the reparations obligation in internal armed conflict may create discrepancies with other applicable law, given the significant if not complete overlap with non-derogable human rights obligations operating in such contexts. With respect to international armed conflicts, compensation has typically been dealt with at the inter-State level in multilateral or bilateral peace treaties or settlement agreements through token lump-sum amounts which had little or no correlation with the precise scale of the damages and harm caused to individual victims, in spite of the general international law standard requiring *restitutio ad integrum*.[515] As Kalshoven has noted, 'the agreements usually lay an obligation on the vanquished State to pay a more or less random amount, determined more by its perceived financial capabilities than by any serious attempt to assess the damage caused by the unlawful acts of either party's

[510] CIL Database (n 441) Rule 150
[511] 'Report of the International Commission of Inquiry on Darfur' (n 447) paras. 76, 592, 593. Note however that the compensation commission the Commission of Inquiry recommended was never established. For a contrary view on the law, see Christian Tomuschat, 'Darfur – Compensation for the Victims' (2005) 3 J Intl Crim J 579
[512] ARS (n 3) Art 31
[513] Protocol II (n 103)
[514] See ICRC, CIL Database (n 441) rule 150
[515] ARS (n 3); DARIO (n 1)

armed forces; and the victor State may or may not distribute (part of) the money to individual claimants'.[516] They emphasise *cy-pres* remedies, lump-sum payments to a large number of individuals calculated along the line of specific beneficiary groups, symbolic and communitarian (as opposed to individual) forms of reparation determined by judicial, quasi-judicial or non-judicial mechanisms. 'Full' reparation is not afforded because it is unrealistic – the compensable amount would be too high, there would be too many victims to repair, or because it is politically undesirable in the context of the end of the conflict.[517] At times, treaties deliberately exclude or settle claims.[518] Similarly, those international criminal courts and tribunals that allow reparation claims have not privileged the concept of 'full' reparation; quite the opposite, judgments to date have emphasised that, given the specific statutory or rules frameworks, and given the numbers of potential beneficiaries, a 'collective' or symbolic approach would be taken.[519]

IV.3.4 The impact of patchy enforcement

Thus, both for human rights and IHL, what the law says is required is disconnected from what happens in practice. A question arises as to how this state of exception impacts on the overall clarity of the rules pertaining to remedies and reparation for both human rights and IHL. It has been argued that the disconnect demonstrates the tenuousness or even absence of a right to reparation,[520] or the narrower point that it reveals the absence of a right to 'full'

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516 Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (n 241) 836
517 ICRC, 'Strengthening Legal Protection for Victims of Armed Conflicts' (Draft Resolution and Report, 31st International Conference of the Red Cross and Red Crescent, Doc No 31IC/11/5.1.1, 28 November – 1 December 2011), 27
518 Considered in Dolzer (n 437)
519 *Prosecutor v Lubanga* (Appeal on Reparations) ICC-01/04-01/06-3129 (ICC, 3 March 2015); *Co-Prosecutors v Kaing Guek Eav alias Duch*, (Appeal Judgment) 001/18-07-2007-ECCC/SC (ECCC, 2 February 2012) 281-320
Co-Prosecutors v Kaing Guek Eav alias Duch, (Appeal Judgment) 001/18-07-2007-ECCC/SC (ECCC, 2 February 2012) paras 630 - 717
520 Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (n 384) 177-180

reparation.[521] Tomuschat, for example, has argued that '[w]henever chaos and anarchy set in, the magnitude of the sums required for effective reparation makes it imperative not only on economic, but also on legal grounds, to call into question the seemingly invincible proposition that reparation must wipe out all of the negative consequences of an injurious act.'[522] However, it can and has been argued that the exigencies of particular situations do not lower the overall standards; the overarching rules remain even if for practical reasons, the results are abridged.[523] The DARIO takes this approach in Article 31, the commentary of which specifies that: 'It may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law.'[524]As Judge Yusuf recognises in his dissenting opinion in *Germany v Italy*, 'Such arrangements appear to have been resorted to for policy or practical reasons aimed at avoiding the prospect of innumerable private suits, or a delay in the conclusion of peace treaties and the resumption of normal relations between formerly belligerent States',[525] they do not imply an absence of individual rights.[526] The *Basic Principles and Guidelines* also take this approach, by recognising the importance for States to 'endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation,' 'in addition to individual access to justice'.[527]

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[521] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 397), [94]
[522] Christian Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in Randelzhofer and Tomuschat (n 343) 11
[522] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 397) [94]
[523] Schwager and Bank (n 449) 393; DARIO (n 1) Commentary to Art 31, para 4
[524] DARIO (n 1) Commentary to Art 31, para 4
[525] *Jurisdictional Immunities of the State (Germany v Italy)* (n 397) Judge Yusuf Dissenting Opinion, [16]
[526] *Ibid*, para 19. See also, *Basic Principles and Guidelines* (n 341) 13
[527] *Basic Principles and Guidelines* (n 341) 13

It has also been argued that to recognise rights as actionable directly by individual victims would not only lead to chaos, but may also inhibit peace. Tomuschat has argued that it must be left to the people to decide, in the exercise of their right of self-determination, how they wish to deal with such a past.[528] Some of these arguments are familiar. Both the numbers and the peace arguments have been raised in the transitional justice context[529] where also, it has been stated that governments may have other priorities and should not be held back by needing to satisfy victims' rights or needs. Yet, I would argue that the challenges do not give licence to a violating State to opt out of obligations to repair simply because to do so would be difficult, messy, politically sensitive or time-consuming. Just as amnesties were not capable of being justified for some of the worst crimes under international law, regardless of the potential political merits for recognising them, one cannot absolve a State of its obligation to afford remedies and reparation, simply because it would not be expedient or in the State's perceived interest to so provide. The opposing view would lead to the counter-intuitive conclusion that the more widespread the violation, the less rights victims are entitled to.[530]

The ILC recognises the challenges posed by mass victimisation in the ARS and DARIO texts. While an earlier version of the ARS exempted debtors from the need to afford full reparation when to do so would 'result in depriving the population of a State of its own means of subsistence',[531] the final text of the ARS and DARIO omits this provision and instead introduces elements of equity and reasonableness. This is most evident with the reference to restitution, which is only required if it 'does not involve a burden out of all

[528] Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) (n 384) 175-6
[529] Hurst Hannum, 'Peace versus Justice: Creating Rights as well as Order out of Chaos' (2006) 13 Intl Peacekeeping 582
[530] Joe Verhoeven, 'Comments in Discussion (Part 1)' in Randelzhofer and Tomuschat (n 343) 55
[531] Article 42(3) of a former version of the ARS (n 3) (not retained). ILC, 'Report of the International Law Commission on the Work of its 48th session' (6 May – 26 July 1996) UN Doc A/51/10, para 66

proportion to the benefit deriving from restitution instead of compensation.'[532] The commentaries make clear that the provision applies 'only where there is a grave disproportionality between the burden which restitution would impose … and the benefit which would be gained, either by the injured State or by any victim of the breach.'[533] Similarly, satisfaction 'shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.'[534] However, the texts never stray from the principle of 'full' reparation. Flexibility is introduced in how it may be achieved, and punitive or exemplary damages are not entertained,[535] however there is no license to restrict the quantum or quality of reparation that is owed should the amount prove difficult on the wrongdoer. Certainly, parties to a dispute may come to their own arrangements, though as will be canvassed in Chapter V, a key issue here is who may appropriately make such accommodations. DARIO makes clear that the 'rules of the organization' are capable of impacting the relations between the organization and its Member States and organizations,[536] and indeed that such 'rules' may 'modify the rules on the forms of reparation that a responsible organization may have to make towards its members.'[537] However, is the IO capable of agreeing with its Member States rules modifying its obligations on reparation, when injured individuals (as opposed to Member States) are the ultimate beneficiaries? As will be explained in Chapter V, I argue that IOs cannot agree modifications with Member States to the detriment of third parties.

Some might argue that extremely scarce IO funding necessarily requires them to skirt reparation obligations. However, as the International Law Association has noted, it is not

[532] DARIO (n 1) Art 35(b); the same provision appears in ARS (n 3) Art 35(b)
[533] ARS (n 3) Commentary to Art 35, para 11
[534] DARIO (n 1) Art 37(3)
[535] ARS (n 3) Commentary to Art 36, para 4
[536] DARIO (n 1) Art 32(2)
[537] Ibid, Commentary to Art 32, para 3

clear whether necessity may be invoked to shield a debtor from responsibility under the ARS,[538] and the same would apply to DARIO. Article 25 of both texts focuses on the use of necessity to preclude wrongfulness, not to preclude reparation in response to behaviour that is determined to be internationally wrongful. To the extent that the failure to afford a remedy and reparation constitutes its own separate internationally wrongful act, the principle of necessity arguably comes into play.[539] The ARS commentaries note that necessity may enable a State 'for the time being, not to perform some other international obligation',[540] and thus it would not be a licence to avoid reparation, at most to delay its implementation. However, in DARIO, the commentaries maintain that as a matter of policy, necessity should not be capable of being invoked by IOs as widely as by States,[541] and nevertheless, the question of compensation is not extinguished by the preclusion of wrongfulness; even in such circumstances the State may be obliged to afford 'full' reparation.[542]

IV.4 Conclusions

Despite the ILC's statement that responsible IOs must afford reparation for the injuries caused, this Chapter demonstrates the difficulty to extrapolate from this general statement clear rules regarding reparation to injured individuals in the case of human rights and IHL breaches. This difficulty does not evidence an absence of rules or a legal vacuum. It simply evidences a haziness or lack of clarity with respect to those rules, as they have nowhere been cohesively spelled out, an unfortunate omission of the ILC. The very limited institutional practice on reparations for such violations is both a result of this lack of clarity as well as a

[538] See International Law Association, *Reparation for Victims of Armed Conflict (Substantive Issues)* (n 381) 20-21
[539] ARS (n 3) Commentary to Art 25, para 7
[540] Ibid, Commentary to Art 25, para 1
[541] DARIO (n 1) Commentary to Art 25, para 4
[542] ARS (n 3) Art 27(b)

factor contributing to the continued ambiguity. There is virtually no practice because the law is imprecise. There is a self-serving circularity in the comfort of this imprecision. The imprecision serves as a shield for IOs to hide behind, enabling them to maintain a position that they are not required to do more to facilitate access to remedial processes and adequate reparation, or that whatever special measures they put in place are superior to the absent obligations they have under general international law. Structures put in place by IOs do not need to be measured against external standards because the latter are imprecise. The lack of access engendered by this shield of imprecision ensures that there are few examples to give evidence to any rule.

The route to determining IO obligations is circuitous. Obligations must necessarily be derived having regard to broad principles, by implication from the IOs' functions and purposes, and through the analogous practice of States. As such, it is often difficult to make precise distinctions between what the law 'is' as a matter of fact and what the law 'ought to be.' As indicated, however, this does not mean that there is no law, that there is no obligation; there is simply not a full or extensive body of law, and there will naturally be divergences in opinion as to where the law is. Following on from the above and as will be explained in detail in later chapters, the biggest challenge is therefore the absence of recourse to impartial judicial bodies to assess where the law is and to contribute to the progressive development of a body of law capable of establishing the law with greater clarity and precision, and certainly, affording reparation to injured individuals, as appropriate.

With those rather large caveats, I conclude that IOs are obligated to ensure that there are impartial and effective procedures in place to enable injured individuals to obtain reparation. This obligation does not depend for its existence on an enforcement regime, it has an independent existence. In relation to human rights law, this obligation derives from the State obligation to afford effective domestic remedies. In IHL, it derives from the need to make practical and effective the result of reparation, given the inability to rely on the traditional route of diplomatic protection. Neither body of law necessarily gives rise to a cause of action that injured individuals may activate directly, absent any further steps taken to establish such jurisdiction. However the failure by IOs to establish effective procedural routes would constitute a further internationally wrongful act for which they incur responsibility. There is thus an implied obligation on IOs to resolve any procedural gaps impeding access to procedures that may lead to reparation. As obligations are meant to be practical and effective, the absence of an effective enforcement structure cannot be an acceptable or static solution; the enforcement structure must certainly catch up with the obligation.

I further conclude that IOs are obligated to afford injured individuals with full reparation which corresponds to the harm suffered. What 'full' reparation entails and what forms of reparation will be appropriate will depend on the violation and the harm caused. With respect to IHL, reparation is most clearly identified as required with respect to violations amounting to grave breaches, however it is not limited to this. Regard must be had to the variety of discrete provisions setting out obligations to restitute, compensate or rehabilitate; the particular circumstances and the overarching principle set out in DARIO that an internationally wrongful act entails an obligation to afford reparation. As is evident from the practice, there will be instances when full reparation may not be possible, given the nature of the violation, the large number of presumed victims or for other reasons. The rule however is one of full reparation, and there is thus no open licence to diverge from that general principle under the colour of any law. Necessity has not been recognised as a rationale for precluding full reparation. Nonetheless, there is a discord between the rigidity of the law and the practice. There is an absence of rules regarding ‘second-best’ remedies and reparation, particularly, how to assess when a State or other wrongdoer is justified even on a temporary basis in affording anything other than ‘full’ reparation, and what standards should be employed to assess such ‘second-best’ measures. Nonetheless, there are a range of approaches that have been taken by administrative bodies, as to how best to address such challenges with a view to realising adequate and effective forms of reparation that correspond to the greatest possible extent to the harm. Language such as ‘appropriate’, ‘effective’, ‘capable of responding to the harm’, suggest that ‘second-best’ measures must seek to approximate, to the greatest possible extent ‘full’ reparation.

V. INTERNAL ADJUDICATION BY IOS AND THE CAPACITY TO AFFORD REPARATIONS

V.1 Introduction

In this chapter I consider the nature, remit and functioning of review mechanisms established by IOs to address grievances concerning IO conduct. I assess the extent to which such mechanisms serve as adequate modes of redress for injured individuals and whether they may result in effective forms of reparation. The practice is diverse, though adjudicative mechanisms that consider grievances from individuals not connected to the organization remain few. I compare and contrast the models employed by IOs and the organs of the UN in particular to assess whether there are uniform standards or coalescing practice.

A review of the most relevant internal mechanisms reveals different understandings of, and degrees of adherence to, external rules and principles. For the most part, there has been little regard to the procedural and substantive rights of affected individuals that are explored in Chapter IV. IOs tend to apply a *lex specialis* approach to the creation and handling of internal dispute resolution mechanisms, which bears little resemblance to the rights of injured individuals, that I have argued, may exist. Thus, while these mechanisms will faithfully follow internal rules, apply prescribed procedures and justify their decisions in light of same, there is insufficient consideration in most cases by the IOs themselves, or by any other body, whether internal rules and procedures comply with broader notions of fairness and the fundamental rights of claimants.

A key question I raise is whether the recourse to an institutional *lex specialis* for the handling of reparation claims involving breaches of human rights and IHL is sound or appropriate. If reparation is a 'right' owed to victims of human rights and IHL or even an obligation owed to them as the ultimate beneficiaries, it is questionable whether IOs can restrict their procedures and claimants' entitlements in the pursuit of their own understanding of rules and obligations.

I analyse the impact of this 'exceptionalism' in several key areas, which I argue has given IOs and the UN in particular an unhealthy monopoly on the framing of the law which results in impunity. The incentives to recognise claimants' procedural and substantive rights are low; there is no reciprocity because the power relationships between claimants and IOs are highly asymmetric. The victims have limited sway on IO procedures and limited influence on their governments to pursue claims on their behalf. As such, there are few consequences when IOs fail to meet these wider obligations.

Internal adjudicative mechanisms tend to have a monopoly on dispute resolution. These mechanisms do not provide effective access to claimants or adequate tools for enforcement but because they are the only avenues to resolve claims, and because the injured individuals have no independent power within the international political system, the victims are unable to negotiate greater access or greater results.

V.2 The rationale for creating internal adjudicative mechanisms

In municipal law, administrative bodies are designed to afford accountability for administrative action or inaction, by reviewing the decisions, rules and practices of administrative actors. They promote transparency and help ensure that administrative actors act within their mandates with due regard to the fiduciary responsibilities created by those mandates. There is no exact equivalent under international law, yet some scholars have begun to map what they consider as the developing field of global administrative law.[543]

IO internal adjudicative mechanisms are established for some of the same purposes as municipal ones: to promote fairness, justice and transparency,[544] provide oversight,[545] address common disputes which if not resolved could impact on the smooth running of the IO and the ability to meet its mandate, and ensure that there is a possibility to review IO practices.[546]

In municipal law, internal adjudicative mechanisms are also created to provide flexible, more accessible and less costly avenues for claimants, and to give the opportunity to the government department to rectify its own mistakes before external processes come into play. These rationales translate less well to the IO context because there are usually no external court processes for individuals to approach given operable immunities and problems of standing. Thus, the creation of IO internal adjudicative mechanisms stems more from the unavailability of more formal structures, rather than because the latter are cumbersome or ineffective. Indeed, internal adjudicative mechanisms are created to justify the immunities that many IOs benefit from, which, aside from limited exceptions,[547] prevent claims from

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[543] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale LJ 1490

[544] This was the ICJ's rationale in *Effect of Awards*, 'It would, … hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.' *Effect of Awards* (n 424) 14

[545] The UN High Commissioner for Refugees Inspector General's Office was created to 'strengthen the UNHCR's oversight capacity, to assess, monitor and recommend improvements in operational management'. UNHCR, 'Report on UNHCR's Inspection and Investigation Activities' (30 May 2002) UN Doc EC/52/SC/CRP.12, 1

[546] *Effect of Awards* (n 424) 14

[547] See Chapter VI

being resolved by domestic courts.[548] There are usually no alternative forums to resolve disputes when internal remedies are exhausted or unavailable, ineffective or unreasonably delayed.

V.3 IOs' own understanding of their obligations – a *lex specialis*?

In Chapter IV, I analysed the content of IOs' obligations to afford remedies and reparation for breaches attributable to the IO. Those obligations should form the basis for the assessment of the adequacy of IO internal adjudicative mechanisms. This is so because unlike the equivalent under municipal law, IOs' internal processes are not subject to oversight by courts. The use of abridged procedures and forms of reparation which do not meet applicable standards might be justifiable if access to a court or other higher decision-making body is not prevented. When there is no such access, the abridged procedures must satisfy the applicable standards; they must be fair, effective and capable of leading to an appropriate result.[549]

IOs' own understanding of their obligations, in a sense their own internal *opinio juris* is one lens through which their practice can be understood. However it is alone incapable of determining the law, given the limited practice and almost non-existent independent jurisprudence. Adjudicative decisions which consider IO practice are mainly taken by bodies established and run by the IOs themselves. The few arms-length bodies that have been established invariably have only recommendatory powers, and thus the decision whether to comply with any recommendations rests with the IO itself.

[548] Olufemi Elias, 'Remarks by Olufemi Elias' (2012) 106 Am Soc'y Intl L Proc 355, 356
[549] Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights' (n 432) paras 6.6; 10; 12.10

The standards of fullness, adequacy and effectiveness have not framed IO approaches to reparations, despite the DARIO requirement of 'full' reparation for internationally wrongful acts.[550] IOs tend to be guided by internal rules and procedures only. As von Bernstorff argues, 'such review mechanisms tend to confine the applicable standards to the ones the 1O has given itself in the form of internal rules and guidelines. As a result, such mechanisms … do not explicitly allow for the application of general international law...'[551] For example, the UN has an internal practice that has developed over the course of its history which has largely gone unchallenged by States. It has argued that this practice has coalesced into a *lex specialis* which entitles it to operate in its own internal vacuum, without having to consider external and arguably significantly wider human rights and IHL standards. The UN Secretariat's comments on DARIO reveal its view that both the process and the result of claims against the organization form part of its *lex specialis*, and as such, the special rules it has created should exempt it from having to follow any general ones.[552] The range of limitations it has introduced 'prevails over the duty to provide full reparation under draft article 33 [of DARIO].'[553] The International Monetary Fund has taken a similar approach,[554] recognising only limited exceptions.

[550] DARIO (n 1) Art 31(1). However, DARIO does not spell out IOs' obligations to injured individuals – it only covers reparation owed to States or other IOs

[551] Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' (2008) German LJ 1939, 1959

[552] ILC, Responsibility of international organizations, Comments and observations received from international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/CN.4/637/Add.1, para 16 (8): 'the obligation to make reparation, as well as the scope of such reparation, must be subject, in the case of the United Nations, to the rules of the organization, and more particularly, to the *lex specialis* rule within the meaning of draft article 63.' See also, paras 17(2), 20(3), 25(2)

[553] Ibid, comments to draft art 63, para 2

[554] Id, 9 para 2. See also its earlier statement in ILC, *Comments and observations received from Governments and international organizations* A/CN.4/556, 38 (n 131): 'the rules of an organization are lex specialis as between the organization and its members and agents and among its members. It is therefore not possible to suggest, … that in some cases (other than involving obligations of a peremptory nature) general international obligations might prevail over the rules of an organization. Such a suggestion ignores the international agreements between the organization's members regarding the exclusive application of the laws governing their relations and it suggests that lex generalis prevails over lex specialis.'

It is questionable whether UN practice has crystallised sufficiently to ground a *lex specialis* rule.[555] The rules of the organization include the constituent agreement and acts taken pursuant to it, including agreements concluded by the organization with third parties and judicial/arbitral decisions.[556] Certainly, Security Council and General Assembly resolutions, status of forces and mission agreements may amount to 'rules'. And, the consistent UN practice is to address private claims and claims concerning the conduct of officials where it refuses to waive immunity. However, there is no practice concerning human rights and IHL abuses attributable to the organization; this is absent from the UN's internal remedial regime as is later described. Consequently, there is no *lex specialis* to displace the general rule. Certainly, it is arguable that the failure to address human rights and IHL claims is an expression of a negative rule.

The DARIO does not address this. Article 32(1) emphasises that '[t]he responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part',[557] but 32(2) indicates that it is 'without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations'. The Commentary notes the irrelevance of internal law to such determinations,[558] but distinguishes this general rule from the particular relationship between an organization and its members, noting, *inter alia*, that 'Rules of the organization could … for instance, modify the rules on the forms of reparation that a responsible organization may have to make towards its members'.[559] While it might be possible for the organization and its members to agree rules to govern specific scenarios, and

[555] Art 64 DARIO (n 1). See also, Art 32 DARIO
[556] Ibid, Art 2(b)
[557] Id, Referring to Part Three
[558] Id, paras 1-2 of the Commentary to Art 32
[559] Id, para 3. The statement is criticised in Christiane Ahlborn, 'The Rules of International Organizations' (n 192) 46

they have done so regularly, is it legitimate to develop abridged frameworks when the responsible organization owes reparation not to its members, but to injured individuals? Under a classical international framework, the rights of injured individuals are subsumed by their State of nationality but arguably this is an inadequate cover in the present circumstances. The injured individuals have not voluntarily agreed to the special regime.[560] Aspects of human rights and IHL are not subject to derogation even in a state of emergency, including as I argued in Chapter IV, the obligation to afford a domestic procedural remedy to victims of human rights breaches and the obligation to afford adequate and effective reparation in the case of both human rights and IHL violations.[561] As such, arguably neither IOs nor States can derogate from such principles by way of any special law.[562]

In his report on fragmentation, Koskenniemi considers the application of *lex specialis* and notes that '[i]n regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held overriding. At least derogation to the detriment of the beneficiaries would seem precluded.'[563] Elsewhere he lists among several 'concerns that may seem pertinent', 'prohibition to deviate from law benefiting third parties, including individuals or non-State entities'.[564] Arguably applying the UN's *lex specialis* would frustrate the purpose of the general law, which is to ensure that victims of violations receive adequate and effective reparation. Injured individuals would be affected by the operation of the *lex specialis*[565]and failure of the special regime could be inferred as a result

560 ILC, Koskenniemi, A/CN.4/L.682 (n 400) para 61
561 HRC, General Comment 29, CCPR/C/21/Rev.1/Add.11 (n 410) para 14
562 ARS (n 3) Official Commentary Arts 40, 41, 48
563 Koskenniemi, A/CN.4/L.682 (n 400) para 108
564 Ibid, para 109
565 ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, paras 251(8)-(10)

of it having ‘no reasonable prospect of appropriately addressing the objectives for which [it was] enacted’.[566]

As has been explained, opinions on the nature and extent of IO obligations owed to individuals will differ; the law is nowhere precisely spelt out. As will be shown, differing views about the law disadvantage individuals vis-à-vis the organization. Individuals’ lack of standing before independent judicial or quasi-judicial bodies before which they can assert their view of the law means that the IO’s view will be incapable of challenge – it will simply trump.[567]

V.4 An assessment of IO procedures

In this section, I assess IO adjudicative practice in light of the standards set out in Chapter IV. While the examples appear numerous, the mechanisms remain exceptional and they have limited competence.[568]

On one end of the spectrum, audit, evaluation and inquiry mechanisms assess whether IOs comply with institutional mandates and that the work produced the relevant results in the most cost-effective manner. Usually, they perform audits at periodic intervals and/or at the end of a phase of work. Sometimes they carry out ad hoc investigations in response to

[566] Ibid, para 251(16)

[567] Koskenniemi, A/CN.4/L.682 (n 400) para 52: ‘Differing views about the content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, they put legal subjects in an unequal position vis-à-vis each other. The rights they enjoy depend on which jurisdiction is seized to enforce them.’

[568] Armin von Bogdandy and Mateja Steinbrück Platise, ‘ARIO and Human Rights Protection: Leaving the Individual in the Cold’ (2012) 9 IO LR 67, 74

perceived problems or failings.[569] While these mechanisms do not afford remedies to individuals, they can initiate reflection and serve as the catalyst for more targeted measures. Somewhat middle ground mechanisms include ombudsperson-like bodies that review complaints and provide informal dispute-resolution services for categories of persons usually though not always connected to the IO.[570] They can also provide upward feedback and make recommendations to rectify a variety of institutional failings, which may include reparation. There are then recommendatory and/or fact-finding bodies which, similar to Ombudsperson institutions can receive individual complaints however they usually have more detailed procedures. Examples include the Kosovo Human Rights Advisory Panel (HRAP) which examined complaints of alleged human rights violations committed by or attributable to the UN Interim Administration Mission in Kosovo (UNMIK)[571] and the World Bank Inspection Panel.[572] In contrast, certain third party claims arising in the context of UN peace support operations are adjudicated through abridged administrative procedures; local claims review boards have been established by the UN for that purpose.[573] As a further category, certain IOs - mainly regional or sub-regional organisations, have taken a more judicial approach.[574]

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[569] E.g., the OIOS carries out monitoring, internal auditing, inspections, evaluations and investigations. See, UNGA, 'Review of the efficiency of the administrative and financial functioning of the United Nations' (12 August 1994) UN Doc A/RES/48/218 B. For peacekeeping examples, see UNSC, 'Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda' (15 December 1999) UN Doc S/1999/1257; UNGA, 'The Fall of Srebrenica' (15 November 1999) UN Doc A/54/549

[570] See, e.g., UN Secretariat, 'Office of the Ombudsman — appointment and terms of reference of the Ombudsman' (15 October 2002) UN Doc ST/SGB/2002/12; UNMIK Regulations 2000/38 (30 June 2000), 2003/8 (15 April 2003), 2006/6(16 February 2006), 2007/15 (19 March 2007); Law No.03/L – 195 on the Ombudsperson (Kosovo). An Ombudsperson with a mandate relating to the listing and de-listing procedures of the Al Qaida sanctions committee was created by UNSC Res 1904/2009 (17 December 2009) and extended by Res 1989 (17 June 2011) and Res 2083 (17 December 2012)

[571] UNMIK, 'Regulation 2007/3 amending Regulation 2006/12 on the Establishment of the Human Rights Advisory Panel' (12 January 2007)

[572] International Bank for Reconstruction and Development, International Development Association, 'The World Bank Inspection Panel' (22 September 1993) Res IBRD 93-10 and Res IDA 93-6

[573] UNSG, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations* UN Doc A/51/389 (n 162)

[574] See Chapter VII

Often, internal adjudicative mechanisms are set up reactively, in response to real or perceived gaps in accountability structures, typically following damning audit reports, media coverage or external investigations. Aggrieved individuals tend to have some direct access to the mechanism, though the breadth of the mandates varies significantly. The standards of evidence applied by such bodies are equally varied however they generally operate more flexibly than traditional courts. The mechanisms are designed to be 'claimant-friendly' – faster, with relaxed rules of procedure and evidence; however the extent to which they satisfy such design aims is debatable. The results of such mechanisms are equally varied; some mechanisms are solely recommendatory whereas others can take binding decisions. Very few are designed to serve as incentives to the IO to conform their future practice to the decision.

V.4.1 Employment disputes

Most internal mechanisms have been established to adjudicate disputes between IOs and employees. These bodies apply IO internal regulations, and are more similar to domestic labour courts than international courts. The ICJ recognised in one of its earliest advisory opinions that such mechanisms are 'essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity'[575] and vital to bring consistency with the wider principles of justice espoused by the Charter.[576]

In 1927, the statute for the League of Nations Administrative Tribunal was adopted with competence to adjudicate claims based on service contracts or staff regulations made by officials or ex-officials of the League of Nations Secretariat or the International Labor Office. This was the precursor to the ILO Administrative Tribunal, which is open to officials, former

[575] *Effect of Awards* (n 424) 57
[576] Ibid. This rationale is maintained in UN employment judgments. See e.g., *Buendia v UN SG* UNDT/2011/008 (UN Dispute Tribunal, 12 January 2011) para 4

officials and their heirs of the ILO or other organizations which have recognised the jurisdiction of the Tribunal for employment matters.[577] Similarly, UN employees can resort to the UN Dispute Tribunal, with appeals to the UN Appeals Tribunal.[578] Other IOs have instituted similar processes. Illustrative examples include the administrative tribunals of the Council of Europe;[579] European Union;[580] Organisation of American States;[581] World Bank;[582] Asian Development Bank[583] and African Development Bank.[584]

These models apply only to employees and deal only with employment matters. As such, they are unavailable to external individuals with human rights or IHL grievances against the organisations, though the tribunals have considered cases concerning discrimination and the dismissal or non-renewal of contracts of whistle blowers for making public claims of IO misconduct.[585] Nonetheless, the model illustrates that where there is will to develop adjudicative systems, these can provide a measure of accessible and independent justice for eligible claimants.[586]

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[577] Art 6 (a), (b) *Statute of the Administrative Tribunal of the International Labour Organization* (adopted and entered into force 9 October 1946, as amended)
[578] UNGA, 'Administration of justice at the United Nations', Res 62/228 (6 February 2008) and 63/253 (17 March 2009); UNGA, 'Administration of justice at the United Nations: Report of the Secretary-General' (1 August 2014) UN Doc A/69/227; UNGA, 'Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations' (24 April 1995) UN Doc A/C.5/49/65
[579] Art 60, *Staff Regulations of the Council of Europe*, COM Res (81)20, 25 September 1981, as amended
[580] Annex 1, *Protocol (No 3) on the Statute of the Court of Justice of the European Union*, C 83/210, 30 March 2010
[581] *Statute of the OAS Administrative Tribunal*, AG/RES. 35 (I-O/71), 22 April 1971
[582] Art II, *Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation* (adopted and entered into force 30 April 1980 as amended)
[583] Art II, *Statute of the Administrative Tribunal of the Asian Development Bank* (adopted and entered into force February 2006)
[584] *Statute of the Administrative Tribunal of the African Development Bank* (adopted and entered into force 16 July 1997)
[585] *Hunt-Matthes v UN SG* UNDT/2013/085 (UN Dispute Tribunal, 28 May 2013). See also *CP v ICC* No 2757 (ILOAT, 9 July 2008)
[586] Elias (n 548)

V.4.2 Finance and development

IOs with development or financial remits have established adjudicative mechanisms that accord standing to individuals. The World Bank Inspection Panel was the first in a line of bodies[587] established to ensure that the IOs concerned implemented faithfully their own policies when supporting development projects, and it has had occasion to consider human rights impacts.[588] The idea for the inspection panel arose from the failure of the Bank to consult local populations about its investment in the Sardar Sarovar dam and irrigation projects in India. As was determined, the Bank did not adequately consider the need to resettle and rehabilitate displaced people or mitigate the projects' environmental effects, contrary to the internal policies developed specifically for those purposes.[589] The Sarovar dam commission findings led to an internal review of other Bank projects, which confirmed that the Bank disregarded its own social and environmental policies and tolerated its borrowers' violation of same.[590] This ultimately led to the establishment of the Inspection Panel in 1994.

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[587] Other bodies include the Office of the Compliance Advisor, which can receive complaints about International Finance Corporation and/or Multilateral Investment Guarantee Agency projects [Article 2.1.2, *Compliance Advisor Ombudsman Guidelines* (adopted 2000, revised 2013) <www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf> accessed 31 July 2015, and each of the regional development banks [*African Development Bank Independent Review Mechanism Operating Rules and Procedures* (adopted and entered into force 16 June 2010); *Asian Development Bank Accountability Mechanism Policy (2012)* <www.adb.org/documents/accountability-mechanism-policy-2012> accessed 31 July 2015; European Bank for Reconstruction and Development Project Complaint Mechanism Rules of Procedure, (adopted 7 May 2014, entered into force 7 November 2014) <www.ebrd.com/downloads/integrity/pcmrules.pdf> accessed 31 July 2015 Inter-American Development Bank Independent Consultation and Investigation Mechanism <www.iadb.org/en/mici/how-to-submit-a-complaint-to-the-icim,1758.html> accessed 31 July 2015

[588] See generally, Daniel Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2004-5) 36 Geo J Intl L 403; Dana Clark, Jonathan Fox and Kay Treakle (eds) *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield 2003)

[589] Bradford Morse and Thomas Berger, 'Sardar Sarovar - Report of the Independent Review' (Resource Futures International 1992)

[590] Willi Wapenhans (ed), *Effective Implementation: Key to Development Impact: Report of the World Bank's Portfolio Management Task Force* (World Bank 1992)

The Panel can receive complaints by groups of individuals who represent a commonality of interests (single claimants are ineligible) and whose rights or interests have been or are likely to be directly and adversely affected. Also, claimants must show that they took steps 'to bring the matter to the attention of [Bank] Management with a result unsatisfactory to the Requester'.[591] The Panel has a degree of independence, however it is the Bank management that decides whether to authorise the claims, and determines whether Panel recommendations will be implemented and lead to reparation of any kind. While general consultation can take place, the claimants are not afforded the right to comment on any response received from the Bank management nor will they have access to the Panel's report of its findings prior to the Board's decision.[592]

The Panel has considered World Bank and the lending countries' compliance with human rights standards in a number of cases.[593] In the *Chad-Cameroon Pipeline and Petroleum case*,[594] Bank management argued that human rights concerns are only relevant for the Bank if they have direct economic effects on a Bank financed project.[595] The Panel considered this view too 'narrow',[596] and indicated that the situation raised questions and warranted renewed monitoring by the Bank.[597] While the Panel recognised the relevance of human rights to the Bank's policies, its response was arguably weak and overly measured. In

[591] World Bank Inspection Panel, 'Operating Procedures', reprinted in (1995) 34 ILM 510, 512
[592] Fatma Marouf, 'Holding the World Bank accountable for leakage of funds from Africa's health sector'(2013) Health and Human Rights J, n 76-80, <http://www.hhrjournal.org/2013/08/27/holding-the-world-bank-accountable-for-leakage-of-funds-from-africas-health-sector/> accessed 18 March 2015
[593] See generally, Steven Herz and Anne Perrault, 'Bringing Human Rights Claims to the World Bank Inspection Panel' (2009) <www.bicusa.org/en/Document.101841.pdf> accessed 18 March 2015
[594] *Chad-Cameroon Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project* (Investigation Report) Case no 22, Rep 23999 (World Bank Inspection Panel, 17 July 2002) <http://ewebapps.worldbank.org/apps/ip/PanelCases/22-Investigation%20Report%20(English).pdf> accessed 27 July 2015
[595] ibid, para 212
[596] id, para 214
[597] id, para 217

follow up, the management report justified consultative actions already taken and reiterated its lack of mandate over human rights.[598] In the *Honduras: Land Administration Project case*, which concerned a claim by the Garifuna people that they had not benefited from genuine participation in the Project decision-making processes, and that the Project would impede their access to ancestral lands, the Panel expressed concern that the Bank did not adequately consider whether the Project would comply with the ILO Indigenous Peoples' Convention.[599] Again, the Panel recommendations were vaguely framed though the follow-up reports of Bank management appear to take seriously in this particular case the recommendations made,[600] arguably because of the clear Bank policy concerning indigenous rights.[601]

Some IOs focused on investment provide individuals who have disputes with contracting states direct access to arbitration proceedings. This is set out for private investors under the *1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States* and the 1978 Additional Facility Rules,[602] which has been

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[598] See, *Chad-Cameroon Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project* (Management Report and Recommendation) Case no 22, Rep 24667 (World Bank Inspection Panel, 21 August 2002) para 51 and Annex 1 No 28 <http://ewebapps.worldbank.org/apps/ip/PanelCases/22-Management%20Report%20and%20Recommendation%20(English).pdf> accessed 27 July 2015

[599] *Honduras: Land Administration Project (IDA Credit 3858-HO)* (Investigation Report) Case no 38 (World Bank Inspection Panel, 12 June 2007) para 258

[600] *Honduras Land Administration Project (CREDIT NO. 3858-HO)* (Management Report and Recommendation) INSP/39933-HN (World Bank Inspection Panel, 3 August 2007) <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=63> accessed 27 July 2015; *Honduras Land Administration Project (CREDIT NO. 3858-HO)* (Progress Report: Implementation of Management's Action Plan) (World Bank Inspection Panel, 9 March 2009) <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=63> accessed 27 July 2015

[601] World Bank, 'Operation Policy 4.10 - Indigenous Peoples', (July 2005, revised April 2013) < http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> accessed 31 July 2015

[602] Art 25 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159; Art 2, International Centre for Settlement of Investment Disputes, *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules)* (10 April 2006) ICSID/11

integrated into a range of regional trade agreements.[603] In certain instances, they also allow individuals to bring claims against IOs before specially designated tribunals.[604]

V.4.3 Peacekeeping and territorial administrations

There is significant scope for IOs to cause harm to local populations during peacekeeping operations. The UN has indicated that peacekeeping-related claims mostly concern: 'non-consensual use and occupancy of premises, personal injury and property loss or damage arising from the ordinary operation of the force, and such injury and damage as result from combat operations'.[605] However, as will be described, this would not be the sum total of the harm caused.

The UN foresees specific procedures for third-party claims in peacekeeping and peace support operations.[606] Virtually identical procedures are in place in African Union missions.[607] In contrast, NATO operations emphasise the responsibilities of troop-contributing states to compensate for any harm caused during the mission,[608] given that NATO plays a coordinating and non-directive role.[609]

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[603] See, e.g., Chapter 11 of the *North American Free Trade Agreement*. (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289, 605 (1993)
[604] See Chapter VII
[605] UNSG, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations* UN Doc A/51/389 (n 162) para 3
[606] Art 51, UN Model SOFA (n 133); UNGA, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping' (21 May 1997) UN Doc A/51/903, para 8
[607] E.g., *Status of Mission Agreement on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan* (adopted and entered into force 4 June 2004) <www.issafrica.org/AF/profiles/sudan/darfur/soma.pdf > accessed 31 July 2015
[608] NATO, 'NATO Claims Policy for Designated Crisis Response Operations' (5 May 2004) AC/119-N(2004)0058
[609] See Chapter III

The Model Status of Forces Agreement, which is a template for the agreements the UN signs with host States, provides for the establishment of a standing claims commission,[610] with one member appointed by the UN Secretary-General, one member by the host Government and a chairman jointly by the Secretary-General and the Government. However, no such commission has ever been established.[611] Not all missions take place in countries where governments are willing or able to participate in a claims commission, nor will it always be clear who may legitimately represent the Government in volatile conflict contexts, thus alternative mechanisms would in any event be needed.[612]

But, the local claims review boards that have been established in their stead 'as the need arises'[613] are deficient in a number of respects.[614] First, they are not automatically in place at the start of a mission[615] which means aggrieved individuals would need to use general channels to contact the mission, and the mission would then decide whether the grievance 'merits' the establishment of a claims procedure. Second, the decisions are not made public and the review boards are comprised solely of UN staff, thus not meeting basic requirements for independence and impartiality.[616] Third, despite the need for efficiency, review boards experience backlogs and delays, with many claims remaining unresolved at the end of the mission period.[617] And, there has been no attempt to introduce procedural

[610] Art 51, UN Model SOFA (n 133)
[611] UN Doc A/51/903 (n 606) para 8
[612] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (n 115) 115
[613] UNSG, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations* UN Doc A/51/389 (n 162) para 22
[614] See Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011) 225-6; Dannenbaum, 'Translating the Standard of Effective Control' (n 172) 126-8; Mégret, 'The Vicarious Responsibility of the United Nations' (n 172) 262-3
[615] The UNGA's Advisory Committee on Administrative and Budgetary Questions has pointed out the 'need for adequate publicity on claims procedures, including specific information on the filing period and of the United Nations office to be notified.' See, UNGA, 'Third-party claims: Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment, death and disability benefits' (1 October 1997) UN Doc A/52/410, para 15
[616] A/51/903 (n 606) para 10
[617] UNSG, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations* UN Doc A/51/389 (n 162) paras 26, 28

safeguards for third-party claimants and aggrieved individuals do not have an obvious way to appeal. The model SOFA provides that 'any appeal which the UN or the host state agree to allow from the award of the claims commission, shall, unless otherwise agreed by the parties, be submitted to an arbitral tribunal. The decisions of the claims commission and the arbitral tribunal shall be binding on both parties'.[618] There is no such framework for local claims review boards. Even if such a model were made applicable to decisions taken by review boards, the aggrieved individual is not a party to the SOFA, and would need to rely on his or her State of nationality to pursue an appeal on his or her behalf.

In principle, the State of nationality could espouse the individual's claim and use negotiation, conciliation or arbitration. This was the approach employed by Belgium and other sending States following the deaths of their citizens in the UN Operation in the Congo in the 1960s.[619] However, as the UN Secretary-General has acknowledged, this approach 'is largely dependent on the State's willingness to espouse the claims of its nationals'.[620] The few diplomatic negotiations have been undertaken by States whose nationals served on peacekeeping missions, and not the States hosting those missions. Yet the majority of injured individuals are citizens of the host State where the mission operates. It will rarely be in the host State's power or interests to pursue such claims, and to distribute any award received fairly and equitably to the individuals concerned, given the disarray of the conflict or post-conflict context. As Verdirame notes, '[f]or Congolese citizens who suffered the brunt of the

[618] UN Model SOFA (n 133)
[619] UNSG, 'Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals' (20 February 1965) (1965) UN Juridical Y 39
[620] UNSG, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations* UN Doc A/51/389 (n 162) para 37

conflict, no such fund was created, partly because of the failure of their authorities to advocate their case'.[621]

Hindsight has led some to call for independent oversight. Following the Somalia mission, the UN Department of Peacekeeping Operations noted that without independent oversight to address grievances of the local population, 'the United Nations was perceived by many in Somalia to be "above the law", which undercut its efforts to promote human rights. Likewise, the United Nations Operation in Somalia (UNOSOM)'s attempts to promote an open and free political process in the country was partially handicapped by an apparent lack of transparency in its own political operations'.[622]

Territorial Administrations

When an IO serves as a territorial administrator - in effect, the *de facto* government, the need for mechanisms to address grievances from the local population is stark.[623] In Kosovo, the lack of accountability of the international territorial administration was raised by the Council of Europe.[624] It recommended setting up a human rights court to adjudicate alleged human rights violations attributable to the IO administration, and with competence to annul IO decisions and acts that were incompatible with human rights obligations and to

[621] Verdirame (n 614) 338. See also Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability' (n 172) 127-8

[622] UN DPKO Lessons-Learned Unit, Friedrich-Ebert-Stiftung, Life & Peace Institute, Norsk utenrikspolitisk institutt, 'The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM) April 1992 - March 1995' (Life and Peace Institute, 1995)

[623] Ralph Wilde, *International Territorial Administration* (n 175) 450-3; Carsten Stahn, *The Law and Practice of International Territorial Administration* (n 175) 760; Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (OUP 2004) 145-52

[624] European Commission for Democracy through Law (Venice Commission), 'Opinion No. 280/2004 on Human Rights in Kosovo – Possible Establishment of Review Mechanisms' (11 October 2004) CDL-AD (2004)033, para 2

allocate appropriate redress or compensation.[625] The court was never established though other accountability structures recommended by the Council's Venice Commission were partially heeded[626] such as the establishment of an ombudsperson institution and human rights advisory panel, as described below.

The Kosovo Ombudsperson Institution was established in 2000. It had authority to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by UNMIK or any emerging central or local institution.[627] Its jurisdiction was limited temporally to cases arising after 30 June 2000 and excluded cases involving KFOR, the military presence[628] 'placing one of the most significant areas of potential complaints outside the reach of the ombudsperson's jurisdiction.'[629] The Ombudsperson had only recommendatory powers[630] and observers have indicated that UNMIK frequently failed to implement the recommendations.[631] In 2006, UNMIK replaced the international ombudsperson with a national one appointed by the Kosovo Assembly, who had jurisdiction only over indigenous Kosovo institutions.[632] An ombudsperson office was also established in East Timor within UNTAET.[633] However, its mandate was more limited in scope than the one in place in Kosovo.[634]

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[625] Ibid, paras 104, 106

[626] For example, the Venice Commission recommended the establishment of a 'Provisional System of Independent Review of the Compatibility of UNMIK Acts or Omissions with Human Rights Standards', Id, paras 115-123

[627] UNMIK, 'Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo' (30 June 2000), s. 3.1; UNMIK, 'Regulation 2006/6 on the Ombudsperson Institution in Kosovo' (16 February 2006), s. 3.1

[628] UNMIK Regulation 2006/6, ibid, sections 3.2–3.5; See also Chesterman, *You, The People* (n 623) 147-8

[629] Duncan French and Richard Kirkham, 'Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?' (2009) 7 NZ YB Intl L 179, 198; though, they argue that this did not prevent the Ombudsperson from considering issues relating to the security presence.

[630] UNMIK Regulation 2000/38 (n 627) s 4

[631] Rebecca Everly, 'Reviewing Governmental Acts of the United Nations in Kosovo' (2007) 8(1) German LJ 21, 32

[632] UNMIK Regulation 2006/6 (n 627)

[633] Frederick Rawski, 'To Waive or not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2002-3) 18 Connecticut J Intl L 103, 116, 125; UNGA, Advisory Committee on Administrative and Budgetary Questions, 'Financing of the UN Transitional Administration in East Timor' (30 October 2000) UN Doc A/55/531, para 33

[634] Amnesty International, 'East Timor, Justice past, present and future' (2001) AI Index: ASA 57/001/2001, 29 et seq

Oversight of UNMIK's compliance with human rights obligations was eventually transferred to the HRAP.[635] It was mandated to 'examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of their human rights'.[636] HRAP had a limited temporal jurisdiction. It could receive claims relating to alleged violations of human rights that had occurred from 23 April 2005 or which arose prior to this date where these facts give rise to a continuing violation of human rights.[637] This is despite the fact that the IO administration was in place since 1999.[638] Furthermore, the deadline to submit new complaints to the Panel was set at 31 March 2010, which coincided with the scaling down of UNMIK following Kosovo's declaration of independence.

There were three panel members.[639] These were not UN employees, and indeed the panel has been comprised of academics, judges and lawyers specialised in international law.[640] The Panel was deemed to be 'non-adversarial',[641] and could hold public hearings limited to clarifying the facts.[642] The decisions were advisory only, and the Special Representative of the Secretary-General has often failed to implement them. Similar to the limitations imposed on the Ombudsperson's office, the Panel had no jurisdiction over KFOR. KFOR has not followed the recommendation to set up a similar Advisory Board.[643]

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[635] UNMIK Regulation 2006/12 (n 154)
[636] Ibid, ss 1.1, 1.2
[637] Id, s 2
[638] UNSC Res 1244 (n 152)
[639] UNMIK, 'Administrative Direction 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel' (17 October 2009) , s 3.1
[640] <www.unmikonline.org/hrap/Eng/Pages/Members-of-the-Panel.aspx> accessed 18 March 2015
[641] HRAP has taken issue with this, noting that 'On this point, the Panel is of the opinion that it is hard to reconcile the Administrative Direction with the spirit, if not the wording, of UNMIK Regulation No. 2006/12'. [HRAP, 'Annual Report' (2009) para 41 <www.unmikonline.org/hrap/Eng/Documents/annual_report2009.pdf> accessed 18 March 2015]
[642] UNMIK Administrative Direction 2009/1 (n 639) ss 1.1, 1.2, 1.4. See also, HRAP Annual Report 2009, ibid, paras 41, 42
[643] Venice Commission, (n 624) paras 125–133

When the panel was first established, claims to HRAP could be filed if all other available avenues for review had been exhausted, and within a period of six months from the date on which the final decision pertaining to the claim was taken. As part of its review, HRAP assessed whether the availability of UN local claims review boards (discussed earlier under peacekeeping) could be considered a remedy requiring exhaustion. However, in mid-course UNMIK introduced a new Administrative Direction which set out an additional admissibility requirement that 'any complaint that is or may become in the future the subject of the UN Third Party Claims process or proceedings … shall be deemed inadmissible for reasons that … [this process or proceedings] are available avenues'.[644] Thus, subsequent to the Direction, the Panel was only in a position to consider whether the UN Third Party Claims Process was capable in principle, by virtue of the limited scope of the claims considered by that process, of addressing the claim.[645] In its 2009 Report, HRAP clarified that '[c]omplaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction no. 2009/1 to the extent that they have resulted either in personal injury, illness or death, or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such a nature will normally not run counter to the requirement of exhaustion with the UN Third Party Claims Process.'[646] Professor Chinkin, a member of HRAP, commented that '[i]nternally, it seems that UNMIK had failed to appreciate the implications of what the establishment and functioning of an independent complaints mechanism would entail; namely

[644] UNMIK Administrative Direction 2009/1 (n 639) s 2, para 2.2

[645] In the *Balaj* case, which concerned the killing and/or serious injury of individuals who participated in a demonstration, the effectiveness of the criminal investigation that followed, and the impossibility for the complainants to bring a claim against UNMIK before any court or other body capable of providing redress [*Balaj and others v UNMIK* Case no 04/07, Decisions of 6 June 2008, 31 March 2010 and 11 May 2012], HRAP initially determined the claim admissible. It then determined that it was no longer admissible on the basis of para 2.2 of Administrative Direction 2009/1 (n 639). However, it ultimately admitted the claim when it was clear that the UN Third Party Claims Process had come to an end and would not be capable of serving as a remedy. See similarly, *NM and others v UNMIK*, Case No 26/08 (HRAP, 31 March 2010) , which concerned members of the Roma community in Kosovo who were living in UNMIK administered camps, who suffered lead poisoning as a result of the soil contamination in the camp sites.

[646] HRAP Annual Report 2009 (n 641) para 61

that there would in fact be investigations and questions asked of UNMIK with respect to alleged human rights violations raised by complainants.'[647]

Following the establishment of the EU Rule of Law Mission in Kosovo (EULEX),[648] that mission established a Human Rights Review Panel (HRRP), which operates on a similar basis to HRAP. It has jurisdiction over claims relating to alleged human rights violations by EULEX in the conduct of its executive mandate occurring after 9 December 2008, the date on which the mission became fully operational.[649] It can make non-binding recommendations on the basis of its findings, and follow up on the implementation of its recommendations with the Head of EULEX. It complements the accountability system of EULEX which includes the EULEX Internal Investigation Unit and the EULEX Third Party Liability Insurance Scheme.[650] It has decided a range of cases, including ones that consider violations of the right to life, prohibition of torture, liberty and security, fair trial, respect for private and family life, freedom of expression and the right to an effective remedy.[651]

In several territorial administrations acts of the IO were also capable of challenge before domestic courts. These, however are exceptional occurrences; most administrations rely on the *sui generis* status of their mandates and decisions as well as their institutional immunities to avoid having decisions so challenged. In Bosnia and Herzegovina, for instance, the Constitutional Court deemed itself competent to examine the compatibility of laws

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647 Chatham House, 'The Kosovo Human Rights Advisory Panel' (International Law Meeting Summary, 26 January 2012) 5 <www.chathamhouse.org/sites/default/files/public/Research/International%20Law/260112summary.pdf> accessed 18 March 2015

648 *Council Joint Action 2008/124/CFSP on the EU Rule of Law Mission in Kosovo* (adopted and entered into force 4 February 2008) (2008) OJ L42/92 amended by *Council Joint Action 2009/445/CFSP* (adopted and entered into force 9 June 2009) (2009) OJ L148/33

649 Rule 25(2) *EULEX Human Rights Review Panel Rules of Procedure*, 15 January 2013 <www.hrrp.eu/ROP.php> accessed 31 July 2015

650 HRRP, 'Annual Report' (8 June 2010 – 31 December 2010) <www.hrrp.eu/docs/HRRP_Annual_Report_2010.pdf> accessed 18 March 2015

651 See ibid, and subsequent Annual Reports available at: <www.hrrp.eu/annual-report.php> accessed 18 March 2015

enacted by the High Representative with the constitutional provisions and human rights guarantees under the Dayton Peace Agreement.[652] In East Timor, the UN Transitional Administration in East Timor (UNTAET) introduced a *habeas corpus* procedure to challenge unlawful arrest or detention,[653] and allowed for certain of its decisions to be challenged in domestic courts.[654]

V.4.4 Asylum and migration

The human rights impacts of IO conduct also pervade asylum and migration policies. The Office of the UN High Commissioner for Refugees can take binding refugee status determination decisions in several countries; these decisions impact on the lives of vulnerable applicants. As Pallis argues, '[i]n many circumstances, the life of the individual hinges on the quality of the status determination procedure on, for example, whether the legal test is correctly applied, or on whether the facts of the individual's case are properly communicated and understood. A procedural failure can leave refugees at risk of return to the country from which they fled *(refoulement),* can deny them a durable solution-and it may cost them their lives.'[655] Unlike the UNHCR recommended procedures for refugee status determination carried out by States,[656] status determination by the UNHCR contains fewer safeguards for applicants, and does not afford the same possibilities for review.

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[652] Andrew Mitchell and John Farnik, 'Global Administrative Law: Can it Bring Global Governance to Account?' (2009) 37 Federal LR 237, 248-9

[653] Carsten Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm' (2005) 27 Houston J Intl L 311, 334

[654] Ibid, 334, 335

[655] Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2004-5) 37 NYU J Intl L & Pol 869, 878. See also, Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 Intl J Refugee L 251 (1999); Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 Intl J Refugee L 1, 9-12

[656] UNHCR, Determination of Refugee Status (12 October 1977) 8 (XXVIII) – 1977; UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures) (31 May 2001) UN Doc EC/GC/01/12

The Office of Internal Oversight Services (OIOS) has issued a number of reports concerning UNHCR, including ones which chronicled corruption in its Nairobi office[657] and the sexual exploitation of refugees in West Africa.[658] OIOS recommended UNHCR to set up an 'external reporting process for refugees or asylum-seekers who are victimized or otherwise mistreated by UNHCR or its partner non-governmental organization staff members'.[659]

UNHCR set up the Inspector General's Office (IGO) to strengthen its own internal oversight capacity[660] and following on from the OIOS recommendations access by alleged victims to the IGO was facilitated, leading to a significant increase in claims. The IGO can receive individual complaints, including allegations of staff misconduct raised by refugees.[661] The office's mandate concerns professional misconduct,[662] and thus it tends to deal with issues such as fraud or abuse as opposed to problems which may arise in the course of refugee status determination. Furthermore, the IGO structure lends itself to investigations against particular staff persons, which might possibly lead to disciplinary action. Presently however, IGO reports seldom result in sanctions for the officials responsible for the misconduct. Nor do they address the crucial question of remedies to the aggrieved parties.

Concerns have equally been raised about the structures in place to oversee the European Agency for the Management of Operational Cooperation at the External Borders of

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657 UNGA, 'Investigation into allegations of refugee smuggling at the Nairobi Branch Office of the Office of the United Nations High Commissioner for Refugees' (21 December 2001) UN Doc A/56/733
658 OIOS, A/57/465 (n 174)
659 A/56/733 (n 657) para 87
660 UNHCR, 'Relationship between the Inspector General's Office (IGO) and the United Nations Office of Internal Oversight Services (OIOS)' (Informal Consultative Meeting, 21 July 2005) <www.unhcr.org/42de51652.pdf> accessed 18 March 2015
661 Pallis (n 655) 892-898
662 UNHCR, 'How to report misconduct and what to expect?' (undated) <www.unhcr.org/4a1278f06.html> accessed 18 March 2015

the member States of the European Union (FRONTEX),[663] an agency that was established in 2004.[664] The Parliamentary Assembly of the Council of Europe has recognised that 'although … [FRONTEX] plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations it coordinates' and it 'is concerned about the lack of clarity regarding the respective responsibilities of European Union States and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations coordinated by that agency.'[665] FRONTEX can initiate joint operations to control the external borders of the EU and also co-ordinates joint returns from Member States to countries of origin, though the responsibility for such actions principally lies with the Member States.[666] FRONTEX typically operates through Member States, and thus the instances in which responsibility may be attributed to FRONTEX over and above the States concerned may be few. This is similar to NATO, which takes a subsidiary coordinating role in peacekeeping operations; troop-contributing States retain autonomy and authority in relation to troops' actions. Despite this, since its establishment, concerns have been raised about the liability of FRONTEX for human rights

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[663] Amnesty International, 'The Human Cost of Fortress Europe: Human Rights Violations against Migrants and Refugees at Europe's Borders' (2014) AI Index EUR 05/001/2014. See also, Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office', (2011) European Parliament Study, Directorate General For Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Civil Liberties, Justice And Home Affairs, EU Doc PE 453.196, 105; PACE, 'Frontex: Human Rights Responsibilities' Doc 13161 (Committee on Migration, Refugees and Displaced Persons, 8 April 2013)

[664] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, EU Doc L 304/2, 22 November 2011

[665] PACE, The interception and rescue at sea of asylum seekers, refugees and irregular migrants (21 June 2011) Res 1821 (2011), paras 5.4 and 10 respectively

[666] Ibid, Art 1.2

violations which have been said to have occurred under the guise of its joint operations,[667] and the lack of clarity regarding its responsibility.[668]

In 2011, reforms to FRONTEX underscored the Agency's commitment to carry out its work 'fully respecting applicable Union law, including the Charter of Fundamental Rights of the European Union; applicable international law, including the Geneva Convention relating to the Status of Refugees (…) and obligations relating to access to international protection, particularly the principle of non-return.'[669] In 2012, FRONTEX appointed a Fundamental Rights Officer and set up a Consultative Forum on Fundamental Rights to monitor compliance with the Strategy. It has developed internal procedures to report possible violations and can follow up reports of violations. On 6 March 2012, the European Ombudsman initiated an inquiry into FRONTEX operations and underscored the importance of granting effective access to a complaints mechanism for infringements of fundamental rights in all FRONTEX activities submitted by persons individually affected by the infringements and also in the public interest.[670] The Ombudsman also initiated an inquiry into the means through which FRONTEX ensures respect for fundamental rights in joint return operations.[671]

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[667] Ska Keller, Ulrike Lunacek, Barbara Lochbihler and Hélène Flautre, '*Frontex Agency: Which Guarantees for Human Rights?*' (2011) Migreurop, European Free Alliance <http://barbara-lochbihler.de/cms/upload/PDF_2011/GL_Frontex_E_1.pdf> accessed 18 March 2015; Human Rights Watch, 'The EU's Dirty Hands Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (2011) 46 <www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf> accessed 18 March 2015; Human Rights Watch, 'Pushed back, pushed around: Italy's Forced return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (2009) <www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf> accessed 18 March 2015
[668] PACE Resolution 1821 (n 665) para 10
[669] Art 1.2.2, *Regulation (EU) No 1168/2011 of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, OJ 2011 L 304, 25 October 2011
[670] *Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)* (12 November 2013) paras 79-83
[671] European Ombudsperson, 'Ensuring respect for fundamental rights in joint operations for the forced return of irregular third-country migrants' OI/9/2014/MHZ, 20 October 2014

In principle, following the *Lisbon Treaty*[672] FRONTEX's actions could be the subject of proceedings before the Court of Justice of the EU. If it had jurisdiction, the CJEU could review the legality of FRONTEX acts and annul them if it had acted unlawfully,[673] and rule on allegations relating to the failure to act.[674] Possible violations of human rights could result in non-contractual liability if the conduct is attributable to an EU action. But, it will be difficult to attribute conduct to FRONTEX given its primary role of coordinating Member States' actions, though this would turn on the facts in any given case. Nonetheless, access of irregular migrants to the CJEU is extremely limited.[675]

V.4.5 Policing, criminal record keeping and transfer of data

Cross-border policing and intelligence sharing in the detection of crime and the pursuit of alleged offenders has also given rise to human rights concerns for the institutions involved. A key question is the extent to which conduct can be attributed to the IOs involved in such work; whether the IOs, by their own actions contribute to violations of human rights, and/or whether such actions are merely in the guise of coordination or support to State actions.

Policing

Interpol publishes 'red notices' regarding persons wanted by States for prosecution or to serve a sentence based on an arrest warrant or court decision. These notices are based on information supplied by States and while not binding, they are used to seek the location and arrest of wanted persons with a view to extradition or similar lawful action. This can lead to the arrest of individuals, which in turn can cause situations which 'are not in conformity with

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[672] *Treaty of Lisbon* (n 75); PACE Resolution 1821 (n 665) Art 3.1
[673] Arts 263, 265 Treaty of Lisbon, ibid
[674] Ibid, Art 267. Elspeth Guild and Florian Geyer (eds) 'Security Versus Justice?: Police and Judicial Cooperation in the European Union' (Ashgate 2008) 44
[675] For an analysis of the limited standing of individuals to pursue claims before the CJEU, see Chapter VII

international law'.[676] For instance they may lead to arrest warrants which may violate immunities, result in unlawful or arbitrary arrests and detentions, extraditions or transfers which violate the political offences exceptions under extradition law and/or breaches of the prohibition on *refoulement*. Given Interpol's role in circulating such information and the consequences of such circulation, it has devised a procedure to allow individuals who are the subject of the notice to approach an internal Commission for the Control of Interpol's Files[677] to review what personal information is held and to ensure that the processing of that information conforms with Interpol's rules and does not infringe the basic rights of the persons concerned.[678]

The Commission consists of three data protection experts, one computing science expert and one member of the Executive Committee. For their nomination, regard is had to their expertise and independence. The experts are chosen by the General Assembly from candidates who are nominated by Member States and preselected by the Executive Committee. The rules contain various provisions to make clear that the Commission acts independently,[679] though the degree of its independence is subject to debate.[680]

This Commission is charged with reviewing individual complaints and ensuring that Interpol facilities are used in compliance with relevant legal rules. But it has the capacity to provide only partial relief, in that any review will only occur after the information is stored

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676 UN Doc A/CN.4/556 (n 131) 20. See Chapter III, where Interpol's 'acknowledgement and adoption' of conduct as its own, is discussed

677 Interpol, *Rules relating to the Control of Information and Access to Interpol's Files* (RCI), (ICPO-International General Assembly, Cancún, 73rd Sess, 5-8 October 2004) Res AG-2004-RES-08. See Interpol, 'Composition of the Commission for the Control of INTERPOL's Files (the Commission) - Amendment to Article 2 of the Rules on the Control of Information and Access to INTERPOL's Files (RCI)' (ICPO-INTERPOL General Assembly, Singapore, 11-15 October 2009, 78th Sess) Res AG-2009-RES-13, that amended Arts 2.a and 2.b of the RCI. See generally, Cheah Wui Ling, 'Policing Interpol: The Commission for the Control of Interpol's Files and the Right to a Remedy' (2010) 7 IO Law Rev 375; Savino (n 178) 299-336

678 Arts 1(a), 4(a), 9(a) RCI, ibid

679 Art 5.a and 5.e.1 RCI, id

680 Wui Ling (n 677) 394-7

and circulated, and thus it does not serve an initial preventive function.[681] Also, the Commission's power to release the data it holds to individuals is severely limited by member sovereignty; it must receive the permission of the data supplier before data can be released to the individual.[682] This is understood as necessary to preserve the integrity of police investigations.[683] In some cases, the result of its investigation may itself remain classified,[684] which can prove problematic for the claimant. As Wui Ling notes, 'the Commission may not be able to explain to the individual the kind of violation that took place or the remedial steps that have been taken. With such limited information, the individual is often unable to verify if the Commission's recommendations have been complied with'.[685] Furthermore, the Commission is only empowered to recommend the release to the individual and/or the altering or removal of data; the ultimate decisions on what action should be taken rests with the General Secretariat of Interpol,[686] and/or the Executive Committee,[687] as appropriate. Accordingly, when the Commission takes a final view, its report and recommendations are forwarded to the General Secretariat, who ultimately decides whether data should be deleted or amended, with permission of the data source.

Europol has a similar body, the Joint Supervisory Body, which handles requests for personal information held by Europol and for such information to be corrected or deleted.[688] Unlike the Interpol Commission, Europol has instituted an appeals process, whereby concerned individuals can appeal decisions of the Joint Supervisory Body to the Appeals

[681] Savino (n 178) 313-14
[682] Art 11(b) RCI (n 677)
[683] Wui Ling (n 677) 401
[684] See Art 18(4) of the RCI (n 677)
[685] Wui Ling (n 677) 401
[686] Art 6(b) article 5(e) (3)-(4) and article 6(a) RCI (n 677)
[687] Article 22.e, Interpol Constitution, as argued by Wui Ling (n 677) 391
[688] See, website of the Joint Supervisory Body <http://europoljsb.consilium.europa.eu/opinions/rules.aspx?lang=en>accessed 31 July 2015

Committee,[689] and the decisions are made public.[690] Furthermore, the European Ombudsperson has also taken up issues concerning Europol's handling of requests for access to documents.

Listing procedures

The UN Security Council has instituted an administrative procedure as a result of the impact of the listing procedures of its Al-Qaeda/Taliban Sanctions Committee on individuals' freedom of movement and access to personal bank accounts. The use of mandatory sanctions is intended to apply pressure on a State or entity to comply with the objectives set by the Security Council without resorting to the use of force. Sanctions thus offer the Security Council an important instrument to enforce its decisions. The listing procedures stem from Security Council resolution 1267,[691] adopted under Chapter VII of the Charter which requires States to, *inter alia*, freeze funds and other financial resources and to take steps to restrict the entry into or transit through their territory of individuals, groups, undertakings and other entities associated with Al-Qaeda designated by the Committee. As a result, affected individuals' bank accounts have been frozen and they have been unable to travel. When the resolution was adopted, there was no formal procedure through which affected individuals could challenge their inclusion on a list. States were simply bound to comply with the requirements of the resolution. Individuals could request their government under the guise of diplomatic protection to request the Sanctions Committee to review the case; however States were not obliged to take up such cases, nor was the Sanctions Committee obliged to review the case.

[689] Arts 12-29 *Act No 29/2009 of the Joint Supervisory Body of Europol of 22 June 2009 laying down its rules of procedure*, (adopted 22 June 2009, entered into force 1 December 2009) (2010) OJ C45/2
[690] Available on the website of the Appeals Committee: <http://europoljsb.consilium.europa.eu/appeals-committee/appeals-committee---decisions.aspx?lang=en> accessed 31 July 2015
[691] The Committee was first established by UNSC, Res 1267/1999 (15 October 1999)

Pursuant to SC Resolution 1730, the Security Council established a focal point within the Secretariat (Security Council Subsidiary Organs Branch) to receive delisting requests directly from aggrieved individuals.[692] This provided a direct route for individuals to seek a measure of redress. The mechanism was established to ensure fair and clear procedures for removing individuals and entities from sanctions lists,[693] however it is not independent; it was simply a structure tasked with receiving petitions from individuals or through their State of residence or citizenship, and ensuring that such requests were duly placed before the Committee. Individual petitioners had no right to consideration of their request, nor any right to be heard by the Sanctions Committee. Similarly, they were not provided with reasons for the Committee's decisions which were taken by consensus without clear standards of review to guide decision-making,[694] nor with any opportunity to appeal an unfavourable decision.

Three years later in 2009, the Security Council established an Ombudsperson to assist with delisting requests[695] in which it stipulated that the appointed individual should be 'an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions, … and further *decides* that the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.'[696] This in effect ended the involvement of the focal point. Under the revised procedure, petitioners can submit de-listing requests through the Ombudsperson.[697] Additionally, Member States may at any time submit directly to the Committee requests for

[692] UNSC, Res 1730/2006 (19 December 2006), para 1
[693] ibid, 5th recital; See also UNSC, 'Statement of the President of the Security Council' (22 June 2006) UN Doc S/PRST/2006/28
[694] Clemens Feinfaugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?'(2008) 9 German LJ 1513, 1532
[695] UNSC, Res 1904/2009 (17 December 2009)
[696] ibid, para 20
[697] UNSC, Res 2083/2012 (17 December 2012)

delisting of individuals, groups, undertakings, and/or entities inscribed on the Al-Qaida Sanctions List. Under the two procedures, designating States and States of citizenship and residence are entitled to review de-listing requests and indicate whether they support or oppose the request in order to facilitate the Committee's review. The Committee also carries out an annual review of the names on the Consolidated List of to ensure the list is accurate.

While the introduction of the mandate of the Ombudsperson provided several new safeguards for individuals, and in a subsequent resolution reversed the need for Committee consensus to allow a delisting request,[698] the Committee, an inherently political body, was still vested with the sole authority to overturn its decisions.[699] The Ombudsperson was not privy to information States did not wish to disclose. Petitioners' access to information, including exculpatory information, was similarly confined to States' discretion.[700] Furthermore, evidence obtained by torture has allegedly been used to justify designations and the Ombudsperson's office has not automatically rejected such evidence from her considerations.[701]

In order to address these challenges, the UN Special Rapporteur on Counter-Terrorism, Mr Ben Emmerson QC, has recommended the Security Council to establish an 'independent adjudicator at the United Nations level with jurisdiction to review and overturn a designation by the Committee.'[702]

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[698] UNSC, Res 1989/2011 (17 June 2011). A delisting recommendation by the Ombudsperson takes effect automatically 60 days after the Committee completes its consideration of the comprehensive report, unless the Committee decides otherwise by consensus. If there is no consensus, any member of the Committee may refer the delisting request to the Security Council (the "trigger mechanism" procedure).

[699] UNGA, Emmerson, A/67/396 (n 302) para 32

[700] ibid, para 39-41, 45. *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24, para 128; CJEU, *European Commission and Others v Yassin Abdullah Kadi* (GC), Joined cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013; *Her Majesty's Treasury v Mohammed Jabar Ahmed* [2010] UKSC 2, [78], [80] – [81], [239]

[701] Emmerson (n 302) paras 46-9

[702] ibid para 23

V.5 The characterisation of claims: Private Disputes vs. Claims Involving Public Policy

The UN considers responsibility through the prism of its privileges and immunities which shapes and constricts the remedies it affords internally. Article VIII(29)(a) of the CPIUN requires the UN to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which it is a party. The UN has recognised that, in accordance with Article VIII(29)(a), it 'is duty-bound to provide alternative modes of settlement to address disputes of a private law character.'[703] There are two difficulties with this approach. The first concerns the organisation's narrow view of what it considers as 'private', with all else falling into a wide chasm of non-receivable claims. The second difficulty concerns the UN's contention that it *only* has the obligation to afford alternative modes of settlement in relation to private claims. These will be considered in turn.

According to the UN, disputes of a private law character concern commercial disagreements (contracts and leases); third-party claims for personal injuries such as claims for injuries incurred on UN premises or caused by vehicles owned by the Organization or operated by its personnel for official purposes, claims related to operational activities for development, as well as employment-related claims.[704] In the peacekeeping context, it has indicated that most 'private law' disputes concern claims for compensation for personal injury or death and/or property loss or damage or claims arising out of commercial agreements that the UN has entered into to meet the requirements of a peace-keeping operation.[705] The UN has recognised that there may be other kinds of claims, however it has dismissed these outright, indicating that:

[703] A/CN.4/637/Add.1 (n 552) 31, para 18(2)
[704] See generally, UNGA, 'Administration of justice at the United Nations' (17 March 2009) GA res 63/253, UN Doc A/RES/63/253; UNGA, A/C.5/49/65 (n 578) 62
[705] A/C.5/49/65, ibid, para 15

> The Organization does not agree to engage in litigation or arbitration with the numerous third parties that submit claims (often seeking substantial monetary compensation) based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters. Such claims, in many instances, consist of rambling statements denouncing the policies of the Organization and alleging that specific actions of the General Assembly or the Security Council have caused the claimant to sustain financial losses. The Secretary-General considers that it would be inappropriate to utilize public funds to submit to any form of litigation with the claimants to address such issues.[706]

The meaning of the cited statement is unclear as is its basis in law. On one reading, the UN appears to suggest that these 'other' types of claims cannot be considered as 'private' in the sense of the CPIUN because they contain 'political or policy-related grievances against the United Nations.' Yet there does not appear to be any basis for the UN's contention that the existence of political or policy aspects of any grievances is sufficient to displace the private law character of any claim.[707] The Office of Legal Affairs appears to discount the claims concerning the UN Mission in Haiti's alleged responsibility for the spread of a cholera epidemic in Haiti on this precise basis. These claims concern allegations supported by scientific evidence that Haitians suffered death and personal injury as a result of the UN's failure to protect the local population from an outbreak of the cholera epidemic brought to the country by Nepali peacekeepers. The responsibility of the UN is arguably engaged by its failure to establish appropriate infectious disease screening procedures for incoming troops, its failure to ensure adequate sanitation on peacekeeping bases and its failure to respond adequately once the disease began to spread. In dismissing the claimants' request for the establishment of a standing claims commission or other appropriate mode of settlement, the Office of Legal Affairs indicates that the claims were not receivable as they would

[706] id, para 23

[707] See, IDI's 1957 statement, which notes that the right of access to an independent court also applies specifically to international organisations '(…) for *every* particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision.' IDI, Statement (1957) 47(II) *Annuaire de l'Institut de Droit International* 478

necessarily include a review of political and policy matters.[708] The CJEU took an analogous approach in its determination of the meaning of 'civil matters' in Article 1 of the *Brussels Convention*.[709] Yet as the plaintiffs' counsel have said the argument is untenable because 'it implies that the UN's tortious dumping of raw sewage into rivers of vulnerable countries where it operates is a matter of UN policy'.[710]

It is unclear where the outer limits of the distinction lie between 'private' and 'public'. Traditional private law regulates civil or commercial relationships between private individuals, with private international law regulating such relationships with a cross-border element. Public law usually denotes the relationship between a state and its citizens, and/or the relationship between states. In the Haiti claim, the government of Haiti is not participating in the dispute; the matter has been brought by private Haitians under the law of tort and they are seeking to recover monetary damages for their personal injuries. The UN has regularly committed itself to resolving claims relating to death and personal injury which occur in a peacekeeping context, when they concern for instance, motor vehicle accidents. It is unclear why other forms of death and personal injury which in principle may give rise to the responsibility of the organisation are understood as not receivable. The only difference appears to be the numbers of potential claimants. In a similar case, Roma claimants in Kosovo who were lodged in several internally displaced camps in northern Mitrovica sought to invoke UNMIK's responsibility as a result of the lead poisoning in the soil and consequent serious health ailments including deaths they suffered. They sought to claim before the local

[708] Letter from Patricia O'Brien (n 335)
[709] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention)* as amended (adopted 27 September 1968, entered into force 1 February 1973) OJ 1972 No L299/32; 1262 UNTS 153; (1968) 8 ILM 229. Case C-292/05 *Lechouritou v Germany* [2007] ECR I-01519 CJEU, para 41: 'The fact that the proceedings brought before the referring court are presented as being of a civil nature in so far as they seek financial compensation for the material loss and non-material damage caused to the plaintiffs in the main proceedings is consequently entirely irrelevant.'
[710] Letter from Brian Concannon Jr and Ira Kurzban to Patricia O'Brien, UN Under Secretary-General for Legal Affairs (7 May 2013) (on file with author)

claims review board, however due to a lengthy delay without substantive response the claimants filed their grievance with the HRAP, whose mandate is discussed earlier in this chapter. The Panel dismissed the claims, because it held that they were precisely the types of claims which should come within the ambit of the UN claims process:

> The substantive complaints … are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall *prima facie* within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.[711]

Thus, according to the HRAP, operational choices which may indeed involve questions of policy which result in death or personal injury should not escape the attention of the UN's claims process;[712] these are not simply 'rambling statements denouncing the policies of the Organization'.[713] The Roma claimants did go back to the claims process to pursue further their grievances; five years after their initial complaint was lodged they were told their claim was non-receivable.[714]

On another reading, the Office of Legal Affairs is simply stating its approach to contentious cases involving these 'other' issues. It does not find it appropriate to use public funds to submit to litigation for these 'other' matters when 'often' or 'usually' they relate 'to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters', or consist in 'rambling statements'.[715] The difficulty with this approach is

[711] *NM and Others v UNMIK* (HRAP, 31 March 2010) (n 645) para 40
[712] Note, however that Section 7 of UNMIK, 'Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo' (18 August 2000), which refers to third party claims, is worded differently, and arguably somewhat broader than the CPIUN (n 134) Art VIII Section 29(a). It provides that 'Third Party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel and which do not arise from "operational necessity" of either presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner provided for.'
[713] UNGA, Resolution 63/253 (n 704)
[714] *NM and others v UNMIK* Case no 26/08 (HRAP, 10 June 2012) para 8. In this decision, the HRAP decided to re-open proceedings, however at the time of writing, no decision on the merits had been taken.
[715] UNGA, Resolution 63/253 (n 704)

that when the UN decides not to submit to any form of litigation, the claimants have no other forum. They are fully reliant on the UN's good will to develop alternative modes of settlement when immunity forecloses other avenues. The sweeping dismissal of claimants' access to courts to assert their rights is striking in its disregard for those who allege to have suffered injury. As the UN Special Rapporteur has stated,

> the diplomatic difficulties surrounding this issue must be overcome in order to assure the Haitian people that the epidemic will be halted as soon as possible and that full reparation for damages will be provided. Some clarifications as to what really happened need to be given and, if necessary, those responsible for the tragedy should be punished, in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law mentioned earlier (para. 63). The United Nations should be the first to honour these principles. In this connection, the independent expert endorses the words of his predecessor, who, in his most recent report, noted that "while the independent expert deplores the way that certain organizations have exploited the issue for political ends, he is aware of the need that victims or their families have expressed to know the truth and perhaps even to be given compensation. He recalls that silence is the worst response" (A/HRC/22/65, para. 89).[716]

It is also questionable whether 'public' claims should inevitably be non-receivable. It is difficult to generalise as to the merits of any prospective claim, and on that basis to rule out an entire category of possible disputes (and particularly problematic when the body taking the decision to rule out the entire category of claims is the would-be respondent). The Office of Legal Affairs' quoted statement does not anticipate the UN's role in the administration of

[716] UN Human Rights Council, 'Report of the Independent Expert on the Situation of Human Rights in Haiti, Gustavo Gallón' (7 February 2014) UN Doc A/HRC/25/71, para 77. See also, UN Human Rights Council, Special Rapporteur on adequate housing, Independent Expert on the situation of human rights in Haiti, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the human right to safe drinking water and sanitation, 'Joint Allegation Letter to the Secretary-General' (25 September 2014) <www.scribd.com/doc/261396799/SR-Allegation-Letter-2014> accessed 31 July 2015, in which the Special Rapporteurs 'express serious concern that, allegedly, the United Nations failed to take reasonable precautions and act with due diligence to prevent the introduction and the outbreak of cholera in Haiti since 2010. We further express serious concern that to this date, allegedly, individuals affected by the cholera outbreak have been denied access to legal remedies and have not received compensation.' In his response, Pedro Medrano, Assistant Secretary-General and Senior Coordinator for Cholera Response, underscores that the claims are not receivable because they raise broad issues of policy that arose out of the functions of the United Nations as an international organization' and are therefore not receivable. Letter from Pedro Medrano to Special Rapporteurs (25 November 2014) para 97 <www.scribd.com/doc/261396640/Secretary-General-s-response> accessed 18 March 2015

territory involving extensive governance functions,[717] nor does it reflect an understanding of the organization's secondary obligations flowing from *any* internationally wrongful act whether 'public' or 'private'.[718] Hampson refers to this point regarding acts which are official but nevertheless not captured by the UN's internal conceptions of responsibility. She notes that there are circumstances when the distinction is nonsensical: 'The United Nations, however, does not appear to accept accountability for acts committed within the mandate. This poses particular difficulties in the case of [peace support operations] where the United Nations is, in effect, the Government of the territory…'[719]

Arguably, however, the difficulties posed are wider than instances in which the IO is the territorial administrator. In peacekeeping operations with a protection mandate, there will be instances when the policies, decisions and actions of IOs, properly construed as 'public' will significantly impact on individuals' lives and well-being. On one end of the spectrum, decisions of the Security Council to upgrade (or not) a particular mission, reinforce troop contingents and/or expand the types of activities that troops may engage in, may all have significant impacts on local populations.[720] At the other end of the spectrum, peacekeeping contingents may become involved in discrete aspects of governance such as detention or the transfer and relocation of civilian populations. Outside the peacekeeping context, there is an equally diverse spectrum of potential claims of a 'public' nature, including the individual impacts of sanctions regimes[721] and the operational refugee status determination procedures employed by UNHCR. The Office of Legal Affairs' comment refers to 'actions or decisions

[717] Karel Wellens, *Remedies Against International Organisations* (CUP 2002) 89
[718] DARIO (n 1)
[719] Hampson, E/CN.4/Sub.2/2005/42 (n 236) para 85
[720] The UN's failure to (adequately) intervene to protect the local populations in Rwanda and in Srebrenica are oft cited examples.
[721] UN Commission on Human Rights, E/CN.4/Sub.2/2000/33 (n 173) para 6

taken by the Security Council or the General Assembly in respect of certain matters'.[722] It thus emphasises a narrow subset of what might be termed 'public' – and those which necessarily involve the political organs which must take decisions to maintain international peace and security. Whether and the extent to which the Security Council is bound to respect international law, and/or should be so bound, has been extensively canvassed by other authors.[723] It suffices to state for the purposes here that one cannot treat all 'public acts' with the same brush: even if Security Council political decisions could not be subject to reparation claims by affected individuals because of their central nature to the functioning of the Organization,[724] or because they cannot be distinguished from the will of the States who take the decisions, this would and should not impact on other operational or policy-based decisions of IOs which directly impact individuals.

The CPIUN, from which this 'private' 'public' distinction derives, was agreed in 1946, and arguably the types of claims envisioned at that time reflect a different, much simpler era of UN activity. Article 29 of the Convention which sets out the requirement for the Organization to establish appropriate modes of settlement is limited. Sub-section (a) focuses on 'disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'. The emphasis on 'private' acts only is presumably because the possibility for the UN to act in a 'public' way was much more confined in

[722] UNGA, Resolution 63/253 (n 704)
[723] See generally, Reinisch, 'Developing Human Rights and Humanitarian Law Accountability' (n 173); Vera Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 Intl & Comp LQ 55; Jose Alvarez, 'Judging the Security Council' (1996) 90(1) AJIL 1; Antonios Tzanakopoulos, 'Disobeying the Security Council: Countermeasures against Wrongful Sanctions' (n 302)
[724] This was part of the Argument of the Third Chamber of the European Court in its decision to find the Srebrenica claim inadmissible: 'since operations established by United Nations Security Council resolutions under Chapter VII … are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations...' [*Stichting Mothers of Srebrenica and Others v the Netherlands* (n 406) [154]

1946.[725] Sub-section (b) relates to instances when the UN may be held responsible for the conduct of one of its officials when acting in its official capacity, where that official enjoys immunity and immunity has not been waived by the Secretary-General. It thus concerns those instances when the acts of an official may implead the Organization. The CPIUN does make reference to the possibility for the Organization to waive its institutional immunity,[726] though unlike Article 29(b), there is no explicit requirement in the Convention for the UN to provide appropriate modes of settlement when the Secretary-General decides not to waive it.[727] However, consistent with Reinisch's view on the purpose of Article 29, such a requirement could arguably be implied, in order to avoid the result of impunity.[728] Indeed, many IOs refer to the existence of immunities as the basis for establishing internal adjudicative mechanisms, with some commentators reading in to this an acknowledgement that immunity should not result in impunity.[729] This view was also affirmed by the ICJ in relation to the UN Administrative Tribunal: as the UN enjoyed immunity before national courts, it would be 'hardly consistent' with the goals of the UN and its Charter if it did not provide a legal remedy for staff disputes.[730] Yet, despite the expanding scope of IO activity, the UN has not taken the approach of implying obligations into the CPIUN. It has narrowly followed the language of the Convention.

The strength of the implied no impunity rationale is subject to debate. As has already been stated, the language of the CPIUN is narrowly confined. It is not clear why the treaty

[725] Eric De Brabandere, 'Immunity of International Organizations in Post-conflict International Administrations' (2010) 7 IO LR 79
[726] CPIUN (n 134) Art II(2)
[727] Unless the claim also involves an official whose immunity was not waived, the liability of which could be imputed to the organization.
[728] Reinisch, *Convention on the Privileges and Immunities of the United Nations*, UN Audiovisual Library (n 420) who notes that '[t]he General Convention's obligation to provide for alternative dispute settlement in case of the Organization's immunity from legal process can be regarded as an acknowledgment of the right of access to court as contained in all major human rights instruments'.
[729] Reinisch, ibid; Wui Ling (n 677)
[730] *Effect of Awards,* (n 424)

was framed in this way; the legislative history is silent on this point. Nonetheless, the most straight-forward reading of the text is that it was meant to be an exhaustive requirement. Appropriate mechanisms for the resolution of disputes are required in precise circumstances, and not for all those circumstances in which institutional immunities prevent aggrieved individuals from accessing justice. International jurisprudence in this general area has taken such an approach. The availability of immunity has been considered separately and distinctly from any other obligations, including the obligation to afford victims with access to a remedy.[731]

However, even with such a narrow reading, the ability for the UN to create appropriate settlement mechanisms would be permissive in other areas beyond those contemplated by Article 29 to the extent that mechanisms are understood to be required by virtue of the operational needs of its mandate.[732] IO *responsibility* is not circumscribed to the limited circumstances set out in the CPIUN; immunity does not impact on responsibility and the concomitant obligations that stem from such responsibility to afford reparation.[733] As the DARIO clearly spells out, an IO is responsible for any breach of an international obligation attributable to it.[734] As such, and in keeping with IOs' forays into areas not anticipated at the time of the adoption of the CPIUN, the UN *should* put in place appropriate settlement procedures to deal with matters which may engage its responsibility. Arguably, it *must* do so in order to ensure its continued ability to carry out its functions faithfully in accordance with the UN Charter – it would be untenable for IOs to avoid responsibility when their mandate requires them to promote responsibility of other actors under international law. As the UN

[731] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening*) (n 397); *Jones v The United Kingdom* (n 406); *Stichting Mothers of Srebrenica and Others v. the Netherlands* (n 406)
[732] *Effect of Awards* (n 424)
[733] *Cumaraswamy case* (n 135) [66]
[734] DARIO (n 1)

Special Rapporteur for Haiti puts it, 'The United Nations should be the first to honour these principles.'[735]

V.6 The characterization of conduct

The characterization of conduct is intrinsically linked with the appropriate modes of settlement required under Article VIII(29)(b) of the CPIUN.

Consistent with understandings of the immunity from legal process of individual officials, which is limited to conduct performed by them in their official capacity (immunity *ratione materiae*), *ultra vires* acts and omissions which may implead the organization will only be attributed to the organization if they are carried out in an official capacity.[736] As the DARIO commentaries indicate, this is intended to make clear that actions which took place in a purely private capacity are not attributable to the organization.[737] This distinction between official and private acts is derived from the law on State responsibility. As is set out in Chapter III, the Office of Legal Affairs has taken a wide approach to the 'off duty' (and thereby non-official) acts of peacekeepers, and a narrow characterisation of the *ultra vires* conduct that is 'on-duty'. Under such readings, the private conduct exception might exempt a wide range of conduct amounting to internationally wrongful acts.

When damages are caused 'from the necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate', existing UN

[735] Gallón (n 716)
[736] DARIO (n 1) Art 6(1)
[737] Ibid, Official Commentary, art 6, para 7

frameworks specify that the UN incurs no liability.[738] Part of the rationale for the exception is that the State receiving the peacekeeping operation should bear the costs of the operation, since the peacekeeping efforts are undertaken at its request or on its behalf. This is misleading because it is highly improbable that the host Government will assume responsibility for an internationally wrongful act attributable to the organization, given the absence of a legal obligation to do so, the exigencies of the conflict or immediate post-conflict context as well as the absence of means to oblige enforcement. As Prescott has noted, the denial of these claims 'will disproportionately impact the citizens of the receiving states. Typically, states receiving UN peacekeeping missions are in a shambles, and lack the resources and infrastructure to make their nationals whole for damages their governments waived when the UN was invited in. The wholesale exclusion of damages on grounds of operational necessity can only detract from the legitimacy of the UN mission in the eyes of the people whom the UN is ostensibly there to assist.'[739]

The Secretary-General has also suggested that the troop contributing country (or the individual troop member as appropriate) should bear the responsibility for affording reparation in full in cases of 'gross negligence or wilful misconduct'.[740] In such cases, the UN bears the full liability for compensation, while retaining the right to seek reimbursement from the member of the force or his troop-contributing country.[741]

The phrase 'gross negligence or wilful misconduct' is not precisely defined in the text, though the Secretary-General has noted that it relates to a situation 'when a member of a

[738] See UNGA, 'Resolution on Third-party liability: temporal and financial limitations' (17 July 1998) UN Doc A/RES/52/247, para. 6. See also, Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage' (2000) 94(2) AJIL 450, 453
[739] Jody Prescott, 'Claims' in Dieter Fleck (ed), *The Handbook of the Law on Visiting Forces* (OUP 2001) 173
[740] A/51/903 (n 606) para 14
[741] Ibid, para 14

peacekeeping operation, while performing his duties, has committed a wrongful act wilfully or with a criminal intent or because of gross negligence.'[742] The UN Department of Peacekeeping Operations' Disciplinary Directives define *serious* misconduct;[743] however it would appear that 'gross negligence or wilful misconduct' or where it entailed international criminal responsibility is a more onerous standard. As here, 'gross negligence or wilful misconduct' is often used in international agreements containing limited liability schemes as an exception for requiring full liability, such as the delivery of goods.[744] In such circumstances it tends to refer to exemptions from a limited liability scheme in situations when an act or omission was intentionally committed with the knowledge it will probably result in an injury or damage, or in reckless disregard of its consequences. In those types of regimes, however, liability is limited by contract (e.g., a bill of lading) or by providing a choice of rates depending on the (limited) recoverable value of the cargo. In the context of third party claims against the UN for peacekeeping abuses, the third parties as the ultimate beneficiaries of the rights and protections have not consented to any limitation on recoverability for breaches thereof, and the host States with whom the UN has entered into agreement are arguably unable to negotiate away such rights. Arguably, all human rights and IHL abuses perpetrated by a member of a peacekeeping mission would amount to gross negligence or wilful misconduct and/or constitute an act entailing international criminal responsibility. As such, while in a way the UN's approach positively enables those harmed to seek 'full' reparation, the notion that it will seek to recover such amounts from the troop contributing country necessary implies that the UN accepts no real liability for such acts, even though they occurred on its watch and when it exercised effective control. Thus the

[742] Id

[743] UN DPKO, Directives for Disciplinary Matters Involving Military Members of National Contingents (July 2003) UN Doc DPKO/MD/03/00993

[744] E.g., Art 29, *Convention on the Contract for the International Carriage of Goods by Road* (adopted 19 May 1956, entered into force 2 July 1961) 399 UNTS 189; *Convention for the Unification of Certain Rules Relating to International Transportation by Air* (adopted 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 Art 25

worst abuses are relegated to instances of abuse of a few 'bad apples' and do not consider the potential role of the institution in fostering the climate in which the acts were able to take place.

V.7 The results of IO adjudicative procedures: the potential for adequate and effective reparation

As set out in Chapter IV, reparation for violations of human rights and IHL can take a variety of forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparation should respond to the nature of the violations and the particular harm suffered. It should be adequate and effective. As set out in DARIO, IOs have obligations to afford reparation which responds to the harm, in the same way as States.

Of the mechanisms surveyed, none have the capacity to afford adequate and effective reparation in the manner envisioned in Chapter IV. Most of the bodies surveyed only have recommendatory powers, and thus the decision on whether to provide reparation, and if so the form that it should take is left to executive bodies, which have often failed to heed recommendations where these have been made and left victims without a substantial remedy. The World Bank Inspection Panel has no authority as part of its findings to propose or provide reparations, including recommending an injunction or a stoppage of ongoing work. In contrast, the Kosovo HRAP has on numerous occasions recommended UNMIK to afford reparation for the human rights breaches found by the Panel however adequate compensation has not been paid.[745] Part of the difficulty stems from UNMIK's position that it is bound by the UN General Assembly instruction which seeks to limit the organization's liability in peacekeeping operations, the terms of which have since been incorporated into agreements

[745] Chatham House (n 647) 10

with States.[746] This is despite the fact that the UN agreed to establish the specialist HRAP body distinct from the UN claims process, which has the authority to recommend the appropriate remedy in the case of a finding of a human rights violation. This significantly undercuts HRAP's mandate. As the Venice Commission has said: 'this controversy undermines the authority and effectiveness of the Panel and should be addressed by way of urgency by the Panel and UNMIK so that a satisfactory, pragmatic if need be, solution may be found and Panel determinations may be complied with by UNMIK.'[747] Yet the problem has not been satisfactorily addressed. While some HRAP applicants have received *ex gratia* payments, 'the compensation is limited to economic loss, including in particular loss of earnings. No compensation has been paid for pain and suffering, moral anguish, punitive or moral damages or other types of loss which are not directly related to the injury.'[748]

Very few mechanisms are able to afford compensation, and of those that do, often there are restrictions with respect to quantum, or the factual scenarios that may qualify. As indicated, caps have been put in place to limit the recoverable amounts in peacekeeping operations.[749] These include: a cap of $50,000 except in exceptional circumstances, and subject to requisite approval; a bar on compensation in the event of 'operational necessity'; a bar to compensation for non-economic loss, such as pain and suffering or moral anguish, as well as for punitive or moral damages. Aside from punitive damages which are not a well-recognized feature of international responsibility,[750] the other across the board limitations on the quantum and quality of reparation significantly impede local review boards from

[746] A/RES/52/247 (n 738)
[747] European Commission for Democracy Through Law (Venice Commission), 'Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo' (21 December 2010) 545/2009, CDL-AD(2010)051, para 46
[748] *Balaj and others v UNMIK* Case no 04/07 (HRAP, 27 February 2015), para 113, also, paras 271-274. See also, HRAP, 'Annual Report' (2014) paras 75-79 <www.unmikonline.org/hrap/Eng/Documents/Annual_report_2014.pdf> accessed 27 July 2015
[749] A/RES/52/247 (n 738)
[750] The ARS and DARIO both reject the notion of punitive or exemplary damages.

affording adequate and effective reparation which corresponds to the nature of the violation and the injuries caused. As Wellens has noted, 'one could question whether the restriction imposed by the public policy of the organization on the remedies available is not going beyond the minimum, which, … should ensure that as far as possible the extent of the compensation and the nature of the remedy should be governed by the *lex causae.*'.[751] One possibility to address the variety of situations is to develop a two tiered system whereby 'small' claims could be resolved by local claims review boards which are mandated to resolve claims up to a maximum amount. Claims which go beyond this amount could be addressed to some other judicial or quasi-judicial central venue which would have greater latitude to determine with precision appropriate and effective reparation. For reasons already described, injured individuals would need direct access to this central venue; it would be inappropriate and insufficient for such claims to be absorbed by States of nationality.

Also, the UN has introduced a temporal limitation into the procedure before local claims review boards whereby claims must be lodged within six months 'from the time the damage was sustained, or from the time the injury was discovered, and in any event not later than one year after the termination of the mandate of the operation.[752] The main rationale for the introduction of the limits has been its past practice of imposing temporal limits for staff claims relating to personal injury, incapacitation or death. But third party claims are different from staff claims, the terms of which are inevitably agreed by contract in which employees, and by extension their family members, are put on notice as to applicable procedures. While time limits are arguably important[753] in light of the short-term nature of many peacekeeping operations and the need to investigate claims in *situ*, it has been recognised that for certain human rights and IHL violations there should be no limitation period, and for others, the

[751] Wellens, *Remedies Against International Organisations* (n 717) 163-4
[752] A/51/903 (n 606) para 20
[753] *Stubbings v UK* (n 405) [50]

limitation period should not be unduly restrictive so as to inhibit claims.[754] Prescription periods should also be considered against the information the claimants would have received about where and how to file a claim, their situation and potential vulnerability in light of the spectre of the conflict or post-conflict environment, as well as the public interest in the claims being resolved.

The EULEX HRRP in Kosovo specifically excludes compensation from its remit. The Venice Commission, when commenting on this limitation, noted that it 'is of the opinion that, in principle, *restitutio in integrum* is the most suitable manner of redress of human rights violations. The possibility for the HRRP to recommend remedial action removing the effects, and the causes, of the violation is therefore crucial. However, in some cases the most effective remedy is financial compensation, which instead the HRRP cannot recommend.'[755]

Other forms of reparation aside from compensation are equally unavailable or inaccessible. Few mechanisms allow individuals to seek restitution or specific performance. For instance, individuals who are affected by INTERPOL's inclusion of certain data in its files have the right to file a complaint with the independent Commission for the Control of INTERPOL's Files. However, they do not have a right to the removal of such data in case the Commission finds in their favor. Such removal remains within the discretion of the Secretary General. None of the mechanisms afford victims that have suffered physical or psychological harm the ability to seek rehabilitation. Services are not in place to enable individuals to access specialist support, nor are funds available to enable victims to obtain such support on their own. Few mechanisms afford victims with satisfaction or guarantees of non-repetition. The fact that some adjudicative mechanisms have made findings of responsibility is itself a form of satisfaction, however depending on the harm suffered, this may ring hollow for many

[754] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?' (2010) 8 J Intl Crim J 79, 107-8; Impunity Principles (n 372) Principle 23, para (c)
[755] Venice Commission 2010 Opinion (n 747) para 67

victims. Also, decisions of adjudicative bodies are often not made public, impeding transparency, disadvantaging claimants and limiting their value as forms of satisfaction.[756]

Some of the wider fact-finding investigations led by OIOS or specially established commissions have been important markers to uncover wrongful conduct and to generate thinking within the organisation on necessary changes. They have exposed responsibility but have failed to take the corresponding step and determine adequate and effective reparations for the injuries caused. The Independent Inquiry established by the UN following the peacekeeping mission in Rwanda found clear failings in the response of the UN before and during the 1994 genocide in Rwanda, and attributed responsibility to a number of UN bodies and agencies, including the Secretary-General, the UN Secretariat, the Security Council, the UN peacekeeping mission operating in Rwanda in addition to the broader State membership of the United Nations. Despite the grievous consequences of this responsibility, it finds that what is warranted is 'a clear apology by the Organization and by Member States concerned to the Rwandese people'.[757] Nowhere does the Independent Inquiry indicate that additional forms of reparation should follow. The World Bank Inspection Panel investigations have prompted certain changes to a number of high-profile projects, however adequate and effective reparations to aggrieved individuals have not followed.

V.8 Conclusions

In summary, the current framework does not afford a realistic prospect for human rights and IHL abuses to be adequately resolved. The reasons for this are many and interlinked as described above. The most problematic of these stem from the UN's broad understanding of

[756] Wellens *Remedies Against International Organisations* (n 717) 104
[757] UN Doc S/1999/1257 (n 569) 30

its ability to apply a *lex specialis* to remedial claims and forms of reparation; the failure to characterise anything other than private claims against the organization as receivable; and the inability for injured individuals to challenge these understandings, which affords the UN a monopoly over the law and its procedures.

Some commentators have indicated that one should be happy with what we have and shouldn't expect more. French and Kirkham, for example, have argued that IOs would never have accepted 'more intrusive procedures - with greater legal enforcement powers - over the same subject-matter. This is not a viable political alternative.'[758] They contend that it would be unrealistic to expect more, or to think that the IOs themselves would allow for more.[759] However, on a rights based analysis, the question is not whether IOs would have been willing to do something more but whether as a matter of law, they must do so. If the latter is true then the question becomes how to move towards a legally compliant model. Indeed, should it be accepted that IOs must afford remedies and reparations for breaches of human rights and IHL that correspond to the standards that exist in those specialised fields, there is a corresponding obligation for them to establish the framework for that to be achieved, which might include strengthening the internal adjudicative framework.[760]

As identified, the most critical gap concerns the absence of an independent route for disagreements as to the state of the law to be addressed. Currently, human rights and IHL claims will not necessarily or typically be taken up by IOs for the reasons already cited, nor are they likely to be espoused by States on behalf of their nationals. Victims will thus have no route to assert their view as to the law, the position of the IO will simply trump unless the individual has access to a formal decision-making body before which they can state their

[758] French and Kirkham (n 629) 205-6
[759] ibid, 182
[760] Other measures are discussed in Chapters VI and VII

case. One route may be to appoint an independent ombudsperson who can reflect on these issues, receive any concerns and input from injured individuals and other sources and report on them to the appropriate IO political organs. Another approach would be to create a new thematic mandate under the system of special procedures of the Human Rights Council. An independent human rights expert could be appointed to assess IO compliance with human rights and IHL and the implementation of reparations obligations. Both these approaches would give greater visibility to the concerns of aggrieved individuals however they are not likely to provide the impetus for the adjudicative framework to be strengthened. The example of the independent HRAP's recommendations on reparations being routinely ignored despite the findings of (often serious) violations of human rights does not inspire hope.

One step further would be to provide the ombudsperson or mandate holder with the licence to take up such matters with independent judicial or quasi-judicial authorities, as necessary. If, for instance, reference questions were referred to the ICJ in order to provide Advisory Opinions to clarify aspects of law, this would provide a significant layer of independent review of IO action. Clearly, an ombudsperson or thematic mandate holder would not have access to the ICJ to request such opinions; they would need to be requested through an organ of the UN. Thus to work there would be a need to revise the rules so as to enable direct access to the ICJ (a difficult and unlikely prospect), or to limit the discretion of the relevant UN agencies to respond other than favourably, to the mandate holder/ombudsperson's request to forward requests for advisory opinions (equally difficult).

With respect to the identified procedural gaps, it is important to ensure that claims of a 'public' character can be receivable as a matter of principle. As indicated, there is no bar preventing the receivability of such claims and indeed, it could be argued that to establish a remedy is an obligation by virtue of the need for IOs to act in the fulfilment of their mandates. This could be accomplished in at least two ways: i) for peacekeeping and related mandates, extend the mandate of the local claims review boards to include claims of a public nature or involving policy questions, and remove or significantly restrict the limitations on liability that are in place for claims of a private nature. This would remove the central lacunae however it would not address the procedural limitations of these review boards; ii) It is possible and feasible to establish a special panel for peacekeeping claims to consider these particular types of issues, which could operate differently to standard review boards, with more accessible procedures for vulnerable victims. This could work as an independent structure, or be attached to other independent quasi-judicial structures within the UN system, such as the UN Dispute Tribunal and the UN Appeals Tribunal. Also, for transparency, it is important for decisions of local claims review boards to be publicly accessible, or at least made available in summarized format.

VI. CHALLENGING IO CONDUCT BEFORE DOMESTIC COURTS

VI.1 Introduction

The chapter is about domestic courts. It is the second in a trilogy of chapters which considers the venues where claims against IOs may be adjudicated. As was described in Chapter V, there are administrative bodies that can adjudicate certain claims against IOs though these are limited in scope and do not provide impartial scrutiny of the claims or result in adequate or effective reparation to claimants. Also, States have rarely exercised their discretion to pursue claims against IOs on behalf of their nationals. And, as will be described in Chapter VII, there is no international court before which individuals may pursue human rights or IHL claims against the UN or other IOs.[761] Thus, aggrieved individuals often have no other option than to seek a remedy before domestic courts even though the domestic character of such courts does not lend well to them playing this particular adjudicative role and IOs' immunities from the jurisdiction of domestic courts are near absolute. These principal barriers and multiple other ones, hamper domestic courts too from entertaining claims against IOs.

In this chapter, I analyse the extent to which domestic courts adjudicate disputes concerning IOs. I consider the barriers impeding such adjudication, the rationales for the creation and maintenance of these barriers, both in their historical context and having regard to their continued relevance today.

[761] Aside from certain regional courts which in limited circumstances can hear individuals' claims concerning the regional organisations of which the courts form part. See Chapter VII

The rules governing domestic courts' ability to adjudicate claims involving acts that occur outside the territory resemble the jurisdictional considerations for domestic courts when faced with claims against IOs. Even more so, the extent to which domestic courts may adjudicate claims concerning the conduct of a foreign sovereign state is somewhat analogous to the considerations governing domestic courts' jurisdiction over IOs. These two areas of exception are relevant as frames of analysis when determining domestic courts' jurisdiction over IOs. However, the extrapolations offer only limited assistance. IOs are fundamentally different to States and the underlying rationales for the jurisdictional rules that have developed to determine 'horizontal allocations of authority among sovereign states'[762] are not easily transposed to them. In particular, the possession of territory and sovereign equality, neither of which apply to IOs, underpin the rationale for rules relating to the allocation of jurisdiction between states.

As part of this analysis, I consider whether the absolutist arguments that domestic courts are *always* barred from adjudicating IO claims are necessarily valid, or whether a more nuanced approach which takes into account the particular context may be warranted. Does the fact that domestic adjudication impacts the independence of the IO mean that there are necessarily no instances in which such intrusions are warranted? I argue that in today's context, when the activities of IOs have become so varied and increasingly affect the lives of ordinary persons, an absolutist approach is not justifiable. Invariably, there will be institutional costs associated with the forays of domestic courts into such areas. However, this should not imply necessarily and in all circumstances that those costs are not warranted.

[762] Chimène Keitner, 'State Courts and Transitory Torts in Transnational Human Rights Cases' (2013) 3 UC Irvine L Rev 81, 92

Another question is whether allowing IO suits before domestic courts is the best way to increase IO accountability. Brower argues that, 'writers seem to have assumed that the expansion of municipal court jurisdiction would produce (1) few institutional costs, and (2) substantial benefits in the form of greater accountability … [but] the expansion of municipal court jurisdiction is unlikely to make international organizations significantly more accountable'.[763] But, while domestic courts may not be ideal forums to resolve disputes, at times they will be the only available forum. And, the limited practice suggests that the engagement of domestic (and international) courts in IO disputes– and even the threat of such engagement strengthens IO accountability by creating the incentive for IOs to establish and strengthen internal adjudicative mechanisms.[764] Thus, in addition to the direct impact access to domestic courts will have on aggrieved individuals, arguably such access can also serve an indirect regulating function on IO behaviour. Reinisch refers to this as 'a subsidiary control tool.' He argues that '[f]rom a policy perspective, it should be open to discussion whether such decentralized control of the acts of international organizations can positively influence the behaviour of international organizations or whether the ensuing risks of interference prevail.'[765]

I outline the limited ways in which domestic courts have overcome the various jurisdictional and procedural barriers to entertain claims against IOs and in contrast, the avoidance techniques some courts have used to entrench those same barriers. I conclude by outlining the areas in which further inroads may be made, focusing in particular on the relationship between immunities and the need for IOs to develop appropriate modes of settlement, as well as the criteria to determine whether immunities shall be waived by IOs.

[763] Charles H Brower II, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2000-1) 41 Virginia J Intl L 1, 8
[764] The proliferation of administrative tribunals and the strengthening of procedures to review individual sanctions regimes, both reviewed in Chapter V, are cases in point.
[765] August Reinisch (ed) *Challenging Acts of International Organizations before National Courts* (n 179) 8

VI.2 The Ability of Domestic Courts to Adjudicate Claims Involving IOs

As a preliminary issue, courts require jurisdiction to adjudicate claims. Generally, domestic courts have jurisdiction over persons and property and acts occurring within their territory. Territorial competence derives from State sovereignty – States' authority to act within their borders and to regulate internal affairs freely.[766] Also, adjudication of claims where the evidence is located will usually be most efficient and serves the interest of showing up close to those most affected by the acts that justice was done. For all these reasons, the State where the wrongs took place will normally have the strongest claim to jurisdiction.

Yet, territorial competence is anomalous when considering claims against IOs. IO conduct naturally impacts states and their citizens.[767] IOs operate on the territory of one or many states and their employees will be nationals of a state. However, the place where the wrong occurred can straddle several countries. The site of responsibility may be the country office, but particularly in a peacekeeping or development context, it is foreseeable that host state courts will be ill-equipped to adjudicate.[768] If the wrong stemmed from policies or directives taken by the headquarters, the site of responsibility may be more aptly construed as the headquarters. Regardless, by virtue of the IO's status and independence, this activity will place the IO outside the usual competence of the territorial state. There is thus no domestic court that has inherent or natural authority over IO conduct. As such, exceptions are most relevant when assessing domestic courts' jurisdiction over IOs.

[766] UN Charter (n 10) art 2, para 1; UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/25/2625

[767] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* (n 47) Separate Opinion of Judge Ago, 155

[768] See however, UNGA, 'Report of the group of legal experts on ensuring the accountability of UN staff and experts on mission with respect to criminal acts committed in peacekeeping operations' (16 August 2006) UN Doc A/60/980, 10-14, which recommends greater resort to host state jurisdiction in criminal matters, despite the practical challenges posed by the post-conflict environment.

There are two main exceptions to territorial competence. The first concerns a domestic court's competence over acts which took place outside its territory: extraterritorial jurisdiction. The second is the court's competence over actors typically understood as immune from the jurisdiction of domestic courts. Largely because of the dearth of IO-specific jurisdictional rules and because the decisions whether to adjudicate IO claims have proceeded on similar if not identical grounds, I extrapolate principles by reference to these two areas of exception.

VI.2.1 Extraterritorial jurisdiction and principles of restraint

Extraterritorial bases for exercising jurisdiction[769] reflect the variety of ways in which a claim's subject matter or the plaintiff or defendant interact with a particular country, even when the conduct does not fall neatly within the confines of that territory. These rules differ depending on the area of law. The rules governing the exercise of extraterritorial criminal jurisdiction over crimes occurring wholly or primarily outside a state's own territory are relatively clear and are reflected in a number of international treaties.[770] In contrast, there is no universal treaty governing the allocation of jurisdiction in civil matters between States or the mutual recognition of bases for exercising extraterritorial civil jurisdiction.[771] Nor is there an accepted uniform basis for determining domestic court jurisdiction over IO claims.

Extraterritorial competence in civil cases exists when plaintiffs are nationals of the State exercising jurisdiction and/or where defendants habitually reside or are domiciled in the

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[769] International Bar Association, 'Report of the Task Force on Extraterritorial Jurisdiction' (6 February 2009) <http://tinyurl.com/taskforce-etj-pdf> accessed 18 March 2015

[770] Ibid, 133-200

[771] The efforts which led to the 2001 draft *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* were aborted due to a lack of consensus on the text. See Hague Conference on Private International Law, 'Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference' (Interim text, 6–20 June 2001) <www.hcch.net/upload/wop/jdgm2001draft_e.pdf> accessed 18 March 2015. In Europe, a more uniform framework exists though jurisdiction for civil claims related to the exercise of public powers are outside the framework's scope and thus are left to States' national law. See, *Lechouritou v Germany* (n 709) paras 38-43

jurisdiction, or in more limited cases, when property or assets are located there. Domicile is the predominant basis for jurisdiction over multinational corporate defendants, including claims against parent companies for acts carried out by foreign subsidiaries.[772] In some countries, jurisdiction follows from service of defendants present within the jurisdiction. Jurisdiction may also exist by way of agreement between the parties.

As will be described, domestic courts also apply restraint principles to avoid exercising jurisdiction.[773] The decision to refrain from exercising jurisdiction over IOs stems from many of the same rationales employed to refrain from exercising jurisdiction over extraterritorial claims and claims concerning the acts of foreign states. This is so even though the underlying rationales for the latter cases do not apply seamlessly to IOs. Examples of avoidance and jurisdictional restraint are canvassed by Reinisch.[774] Some courts refuse to hear IO claims when there is no express grant of competence,[775] thereby introducing absolutist principles that go beyond what has been set out for foreign States. More frequently, jurisdiction is denied when a claim concerns an IO's compliance with its internal rules.[776] This form of rejection is often accompanied by an assessment that the IO has its own means to resolve the claim and thus there is no need for the forum State to adjudicate in order to ensure claimants' access to justice.

(1) *Forum non conveniens* and *lis pendens*

In mostly common law countries, the *forum non conveniens* doctrine affords judges discretion to disallow or stay a case or transfer it to another court when it would be

[772] *Lubbe v Cape Plc* [2000] UKHL 41, [2000] 1 WLR 1545. In contrast, other cases against domiciled parent companies have been disallowed on the basis of the principle of *forum non conveniens*. See, *Anvil Mining Ltd v Association canadienne contre l'impunité,* 2012 QCCA 117, leave to appeal denied (1 November 2013)
[773] This differs from immunities, where a domestic court does not have the competence to adjudicate a claim.
[774] August Reinisch, *International Organizations before National Courts* (n 38) 84-168; 233-251
[775] ibid, 123
[776] id, 114-15

significantly more convenient for it to be heard elsewhere.[777] It is designed to reduce the costs of litigation and avoid plaintiff 'forum shopping'. While there are different approaches, for the doctrine to apply, the court must be 'satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.'[778] Courts will also consider the extent to which the more convenient jurisdiction is actually so in practice – its accessibility to the parties, the costs of doing so and the ability to compel witnesses. In contrast, many civil law countries apply the *lis pendens* rule, which gives priority to the first jurisdiction seized of a case, thus favouring efficiency and predictability. Inside Europe, a *lis pendens* rule has been adopted in the Brussels Regime, which regulates which courts have jurisdiction in civil or commercial disputes.[779] The rule usually turns on whether it can be shown that the cause of action is the same in both jurisdictions.

These jurisdictional principles could help determine whether a forum state should adjudicate a claim against an IO that is brought before it. Domestic courts will need to assess whether there is a significantly more appropriate forum. There is the place where the impugned acts took place or where the impacts of those acts were felt (often this will entail multiple jurisdictions), the place convenient to the complainants by reason of their nationality or residence, or the location of the Headquarters. If the IO has its own internal dispute resolution mechanism, a domestic court may use *forum non conveniens* type arguments to refrain from exercising jurisdiction, to the extent that the internal IO forum affords the prospect for an adequate remedy. In contrast, the state where the acts took place may be

[777] Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of forum non conveniens in the United States, the United Kingdom, and Germany' (1994) 16 Loyola of Los Angeles Intl and Comp LR 455, 459; *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460
[778] *Spiliada*, ibid, 476-478
[779] Art 28, *Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (adopted 30 October 2007, entered into force 1 January 2010) OJ 2007 No L339/3; Art 22, EU *Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (adopted 12 December 2012, entry into force 9 January 2013)

understood as most appropriate, given that most plaintiffs are located there and it is the site of the evidence. However, that assumption may be displaced if that state is adjudged to be unable to afford fair and equitable proceedings, owing to the breakdown of the rule of law or associated challenges. There may be difficulties to apply such principles to actions involving multiple plaintiffs in an array of jurisdictions. Some may be present in the jurisdiction where the claim is lodged, others may be elsewhere and may have no knowledge of the proceedings and it could be difficult to bind them to any settlement or judgment. These issues have arisen in relation to a class action claim brought against the UN and certain UN officials in New York on the basis that certain plaintiffs (though not all) are citizens and residents of the USA and residents in New York and given the presence of the UN Headquarters in New York.[780] Domestic courts have had to navigate such challenges in class action claims brought against corporate defendants.[781] While this can complicate proceedings, solutions such as requiring opt-in clauses for foreign plaintiff classes could be pursued to promote fairness.[782]

(2) Political questions and act of state doctrines

Domestic suits may also be stayed or quashed pursuant to 'political questions' and act of state doctrines. Government acts can be non-justiciable under the separation of powers principle; as political decisions, their merits should not be scrutinised by the judiciary. The political questions doctrine is often used to avoid courts' scrutiny of foreign policy or national security considerations, which are understood to be more appropriately addressed by the executive.[783] The act of state doctrine stems from some of the same separation of power rationales,

[780] *Georges v United Nations* 13 Civ 7146(JPO) (SDNY) 9 January 2015, which concerns the UN's responsibility for the cholera epidemic in Haiti
[781] See, e.g., *Phillips Petroleum v Shutts* 472 US 797 (1985). Note however, that the Court's handling of foreign members of the class has been criticised. See, Debra Lyn Bassett, 'U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction' (2003) 72(1) Fordham LR 41
[782] Basset, ibid, 87
[783] See generally, Thomas Franck, *Political Questions / Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton Univ Press 1992)

particularly regarding the need to ensure the primacy of the executive in the conduct of foreign relations.[784] Courts should avoid ruling on the legitimacy of a foreign government's actions or laws as to do otherwise 'might hinder rather than further [this country's] pursuit of goals both for itself and for the community of nations as a whole in the international sphere'.[785]

Political questions and act of state doctrines are discretionary tools which have been interpreted flexibly.[786] Also, the doctrine is not applied uniformly as there has rarely been a clear line drawn between executive acts (containing non-justiciable elements) and those taken to implement executive decisions (which should in principle be justiciable).[787] Franck noted that when the political interests are to avoid certain issues from being litigated, there is a tendency for over-broad interpretations of the scope of the doctrine,[788] and the opposite has also been asserted: when political interests align with litigation, judges have been more 'activist' in asserting jurisdiction.[789]

There is no international law requirement to deny jurisdiction,[790] unlike, arguably and as is later described in this chapter, state immunity. That there are political aspects to

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784 Franck, ibid, 105; Prosper Weil, '*Le contrôle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers'* (1977) 23 *Annuaire Français de Droit International* 9, 30

785 *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964)

786 Thijmen Koopmans, *Courts and Political Institutions: A Comparative View* (CUP 2003) 98-104. See also, *Buttes Gas and Oil Co v Hammer (No. 3)* [1982] AC 888

787 Frulli (n 443) 411-12

788 Franck (n 783) 79

789 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 100, who takes a similar view to Franck, ibid, but argues that the same principle could also apply in reverse when political interests align with the plaintiffs.

790 Hazel Fox QC and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 71. See, *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No 3)* [2000] 1 AC 147 *per* Lord Millet, 269; *Sabbatino* (n 785) part V; *Belhaj v Straw* [2014] EWCA Civ 1394, [122]. See also, Dominique Carreau and Fabrizio Marrella, *Droit International* (11th edn, Pedone 2012), 1: '[…] la politique de retenue que les tribunaux américains ont longtemps pratiquée au nom de la théorie de l' « Act of State » est étrangère au droit international et n'est nullement dictée par lui. Elle relève de considérations tenant à une certaine conception de l'ordonnancement constitutionnel interne, en l'espèce au désir de respecter une stricte séparation des pouvoirs entre le « judiciaire » et « l'exécutif.'

questions before a court does not necessarily negate jurisdiction.[791] Courts may find it appropriate to assess the legality and constitutionality of governmental action, even in sensitive cases.[792] Domestic courts routinely investigate the lawfulness of foreign State conduct, particularly in regards to *refoulement* claims.[793] Furthermore, the act of state doctrine permits exceptions where the impugned act is contrary to public policy,[794] including breaches of international law such as gross violations of human rights.[795] As the English Court of Appeal held in *Yukos*, the act of state doctrine will not apply to 'a breach of international law which is a matter of deep concern to the worldwide community'.[796] Similarly, the Canadian Supreme Court in *Khadr* held that 'the deference required by the principle of comity ends where clear violations of international law and fundamental rights begin.'[797] This is also the position taken by the *Institut de droit international* in its 1993 resolution.[798]

As these restraint doctrines are not 'required' under international law, the basis for applying them to bar a claim or restrain the course of proceedings should satisfy wider considerations. In *Habib*, the Australian Federal Court in deciding to exercise jurisdiction took into account that the claim was brought by an Australian and concerned Australian officials' aiding and abetting torture allegedly committed by foreign officials. If the complaint was disallowed, State immunity would bar courts in other jurisdictions from

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791 *Legal Consequences of the Construction of a Wall* (n 389) [41]
792 *Canada (Justice)* v. *Khadr*, [2008] 2 SCR 125, 2008 SCC 28 [36] – [37]; *Hamdan v Rumsfeld* 548 US 557 (2006); *Boumediene v Bush* 553 US 723 (2008)
793 *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110
794 Fox and Webb (n 790) 71
795 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 72-77. *Oppenheimer v Cattermole* [1976] AC 249, 278, per Lord Cross of Chelsea; *Kuwait Airways Co v Iraqi Airways Co* [2002] UKHL 19; *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [53]; *Habib v Commonwealth of Australia* [2010] FCAFC 12, [112]. See also *Belhaj* (n 790) [81], [114], [121]
796 *Yukos Capital v OJSC Rosneft* [2012] EWCA Civ 855, [69]
797 *Khadr* (n 792) [17] – [18]. Note the nearly identical conclusion in *Habib* (n 795) para 37
798 IDI, 'The Activities of National Judges and the International Relations of their State' (Milan, 7 September 1993) art 2

adjudicating Australian officials' role in the crimes; there would be no adequate alternative means of redress.[799] Similar considerations were at play in *Belhaj*.[800] This approach approximates the ECtHR's jurisprudence whereby access to court restrictions must be proportionate.[801] Given that the political questions and act of state doctrines do not constitute absolute bars to proceedings, proportionality considerations apply, as they did in *Habib*.

The European Court diverged from this approach in *Marković,*[802] which concerned Italian officials' role in NATO's aerial bombing of a Belgrade radio station. The Italian Court of Cassation had ruled that the conduct of war was an 'act of government', and thus a political, non-justiciable question,[803] and thus prevented the case from being adjudicated. The Grand Chamber (GC) in a slim majority held that there had been no violation of the Convention. The applicants were not denied access to court but only failed to satisfy the conditions for their claim to be adjudicated under domestic law.[804] That the bar of their claims made access to justice 'theoretical and illusory' was inconsequential.[805] The majority decision held, similar to *Jones* on immunities,[806] that the political questions doctrine does not constitute a bar on the domestic courts' ability to determine a substantive right, but is a limitation on the scope of the substantive law of the State concerned. The dissent argued that the Court of Cassation and the majority had gone 'beyond any legitimate aim the political-act doctrine may be recognised as furthering and far beyond the bounds of proportionality'.[807] It significantly extended and thus blurred the lines on the scope of what may constitute political

[799] *Habib* (n 795) paras 118, 119, 129, 130
[800] *Belhaj* (n 790)
[801] *Waite and Kennedy v Germany* (n 121) [68] – [74]
[802] *Markovic v Italy* App no 1398/03 (ECtHR, 14 December 2006)
[803] *Presidency of the Council of Ministers v Markovic*, Corte Costituzionale, Cass Sez 8157/02, 8 February 2002, 85 *Rivista di diritto internazionale* (2002) 799, ILDC 293 (IT 2002) referred to in Frulli (n 443) 407
[804] *Markovic* (n 803) [114] – [115]
[805] Ibid, Concurring Opinion of Judge Costa, [12]
[806] *Jones v United Kingdom* (n 406). Request for referral to the Grand Chamber was rejected 2 June 2014. ECtHR Press notice 158, 3 June 2014
[807] id, Dissenting Opinion of Judge Zagrebelsky joined by Judges Zupančič, Jungwiert, Tsatsa-Nikolovska, Ugrekhelidze, Kovler and Thór Björgvinsson

acts – not only did the court exercise restraint in relation to 'political' decisions, it also extended that restraint to the lawfulness of actions taken pursuant to those political decisions.[808] Furthermore, the majority seemed to suggest that the court had no other option but to deny the claims (similar to state immunity). This is plainly not the case; given the absence of an international rule requiring such restraint, the court of cassation's decision was taken in the exercise of its discretion which should have led to a proportionality analysis.

Certain courts have applied extended versions of the political questions and 'act of state' doctrines to avoid considerations of acts of or attributable to IOs.[809] Versions of the political questions doctrine have entered into the consideration of whether domestic courts should be able to review the legality of key political decision making organs of the UN, on the basis that to allow review would inappropriately limit the IO's independence. Yet as Tzanakopoulos argues, when courts are requested to determine the legality of IO resolutions and States' obligations flowing from those resolutions, they have tended to restrict their analysis to the domestic implementing measures undertaken by states, while refraining from reviewing the legality of the orders or resolutions themselves.[810] Thus, cases have turned on whether States have breached national or international law when taking these measures. Most courts have read in an obligation on States to implement the IO resolution consistently with wider human rights obligations,[811] and thereby have avoided findings that a particular resolution breached States other obligations to protect human rights. On other occasions,

[808] id, also raised by Frulli, (n 443) in her analysis of the cassation decision. See also, Sangeeta Shah, 'Seeking Remedies for Violations of International Humanitarian Law: Markovic v Italy' (2007) 7(2) Human Rights LR 412
[809] Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (n 179) 54, 64-69
[810] ibid, 64-69
[811] *Nada v Switzerland* (n 302) [170], [171], [197]; *Al-Jedda v United Kingdom* (n 256) [102]

courts implicitly exercise restraint or exercise only cursory review [812] or have employed presumptions of legality, which the courts have only been prepared to rebut in exceptional circumstances.[813] Thus, the cases are not barred from proceeding but the subject matter impacts the methods and extent of the review.[814]

As will be explored under immunities, the need for IOs' absolute independence from domestic courts has been challenged. But even so, some courts appear to conflate the discretionary political questions and act of state analyses (with no or limited consideration of proportionality) with the rationale for the application of an absolute immunities regime, and thereby make the political considerations regarding domestic courts' jurisdiction over IOs impermeable. In the Dutch Supreme Court decision *Mothers of Srebrenica*[815] and the ECtHR's consideration and dismissal of the later complaint brought by the claimants,[816] both courts made much of the fact that entertaining claims against the UN would require Dutch courts to scrutinise the way in which the UN discharged its core function of protecting international peace and security,[817] which would 'interfere with the fulfillment of the key mission of the United Nations in this field.'[818] Had the courts determined jurisdiction separately from immunity, the consideration of the political aspects of the cases may have been more measured, drawing inspiration from the discretionary act of state and political

[812] *Prosecutor v Tadic* (Decision on Motion for Interlocutory Appeal) (n 368) paras 18-22. Jose Alvarez, 'Judging the Security Council' (1996) 90 AJIL 1, 11-12; *Ntakirutimana v Reno* 184 F 3d 419 (5th Cir) 5 August 1999, part V

[813] *Rukundo v Federal Office of Justice*, Federal Supreme Court, Nos 1A.129/2001, 1.A.130/2001, 3 September 2001. Referred to in d'Aspremont and Brölmann (n 179) 111. See also, August Reinisch, 'Should Judges Second-Guess the UN Security Council?'(2009) 6 Intl Org LR 6 (2009) 257, 264-66

[814] This is similar to the approach taken by courts that have adjudicated claims despite comity and/or separation of powers issues. For instance, some courts limit themselves to reviewing the extent to which the executive appropriately exercised its discretion (e.g., *Abbasi* (n 795)), or will review the legality or constitutionality of the act of the executive, but will refrain from ordering anything other than declaratory relief (e.g., *Khadr* (n 792), *Abbasi* (n 795))

[815] *Mothers of Srebrenica v. Netherlands*, Netherlands Supreme Court (n 430)

[816] *Stichting Mothers of Srebrenica v The Netherlands* (n 406) [152]

[817] Ibid; *Mothers of Srebrenica v. Netherlands*, Supreme Court (n 430) paras 4.1.1, 4.3.4

[818] *Stichting Mothers of Srebrenica and Others v the Netherlands* (n 406) [154]

questions doctrines as appropriate. The assessment of immunities should have focused solely on the operable international law framework and the application of the CPIUN.[819]

The courts were careful to limit their analyses to the narrow set of circumstances where courts are asked not only to assess the legality of Security Council action under Chapter VII but to determine liability and assess consequential damages. Nonetheless, there is a risk that this jurisprudence will lead to wider, unwarranted interpretations – that any ancillary act stemming from a Security Council resolution would be out of bounds. In this regard, the argument put forward on behalf of the UN in the Haiti cholera litigation before US courts, is that any act of the UN Mission in Haiti established by UN Security Council resolution would be outside the jurisdiction of the courts.[820]

VI.2.2 A Procedural Bar *par excellence*: IO Immunities before Domestic Courts

'Immunities' are procedural rules which exempt certain individuals and/or entities from the adjudicative or enforcement jurisdiction of courts. They belong to the entity benefiting from the immunity: 'Immunity from jurisdiction is the absolute privilege of whoever enjoys it.'[821]

The law on IO immunities remains in development. The ILC had attempted to assemble the core principles, leading in part to the finalisation of the 1975 *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*.[822] However it never entered into force and the ILC abandoned the topic

[819] CPIUN (n 134)
[820] *Georges v United Nations* 13 Civ 7146(JPO) (SDNY) Statement of Interest filed by the US State Dept, 7 March 2014 . This is analysed under immunities below.
[821] *Manderlier v Organisation des Nations Unies, (Ministre des Affaires Etrangères),* Brussels CT, 11 May 1966, (1966) JT 721; (1972) 45 ILR 446, 453
[822] (adopted on 14 March 1975, not yet in force) Doc A/CONF.67/16

in 1992 because of lack of interest from Member States.[823] Thus there is no universal treaty concerning IO immunities. For the UN and affiliated agencies, immunities are set out in the UN Charter, the CPIUN and the similar treaty for affiliated agencies.[824] Aside from these, the status of IO immunities can be gleaned from IOs' constituent agreements, headquarters agreements[825] and regulations.[826] These have also been analysed in academic texts and jurisprudence. Certain elements of these immunities may constitute customary international law, though this is limited by the divergent approaches taken by domestic courts. Fox and Webb explain that 'the extent of such "organizational immunities" is debated.'[827]

The CPIUN is silent on who determines whether the UN is immune in a given case, notwithstanding the final judicial determination that might be made by the ICJ.[828] The UN Office of Legal Affairs considers that the determination of immunities is made exclusively by the Secretary-General, and that such determination has conclusive effect and therefore must be accepted by domestic courts.[829] Certain commentators have agreed.[830] The ICJ's position is more nuanced, holding, somewhat consistently with the US[831] and UK[832] statements in the *Cumaraswamy* case, that the Secretary-General's finding 'creates a presumption which can

[823] UNGA, 'Report of the International Law Commission on the work of its 44th session' (25 November 1992) GA res 47/33, UN Doc A/RES/47/33, para 7. See also, Peter Bekker, 'The Work of the International Law Commission on "Relations between States and International Organizations" Discontinued: An Assessment' (1993) 6(1) Leiden J Intl L 3
[824] *Convention on the Privileges and Immunities of the Specialized Agencies* (n 419)
[825] *A v UN Economic Commission for Latin America*, Supreme Court of Chile, 8 November 1969, (1969) UN Juridical Yearbook 237
[826] For example, UNMIK Regulation 2000/47 (n 712)
[827] Fox and Webb (n 790) 572
[828] Anthony Miller, 'Privileges and Immunities of United Nations Officials' (2007) 4 Intl Org LR 169, 196
[829] *Cumaraswamy case* (n 135), Written Statement submitted on behalf of the Secretary-General of the UN, 2 October 1998, [44], [46]
[830] E.g., Bekker, *The Legal Position of Intergovernmental Organisations* (n 29) 173-8; Miller (n 828) 199. In *Manderlier v Organisation des Nations Unies et l'État Belge (Ministre des Affaires Etrangères),* Brussels CA, 15 September 1969; (1969) 69 ILR 139, the Court held that it would be acting *ultra vires* if it were to assess the essential nature of immunities granted by the General Convention to the UN. See also, the Separate Opinion of Judge Weeramantry in the *Cumaraswamy* case (n 135) 97, in which he sets out the rationale for this determination to be within the sphere of the Secretary-General's authority, but for compelling reasons.
[831] *Cumaraswamy case* (n 135) Statement of the United States, 7 October 1998, [22]
[832] ibid, Statement of the United Kingdom, October 1998, [6]

only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.'[833]

In principle, and as will be argued later in this section, there is a need to ensure that there is some appropriate mode of adjudication to assess responsibility and determine reparations. This reasoning stems from the fact that immunities are distinct from responsibility; an IO or any other actor may be responsible for damages arising from unlawful behaviour, even though operable immunities may bar a particular court from adjudicating the claim.[834] It also stems from the language of Article VIII(29) of the CPIUN, which requires in certain circumstances that the UN make provisions for appropriate modes of settlement of disputes when it fails to waive its immunity.[835] Appropriate modes of settlement could be an internal IO adjudicative mechanism or recourse to some form of arbitration. Yet as described, such mechanisms have their own limitations and are not always available or accessible.[836] The extent to which the absence of an adequate alternative forum, or the failure by the IO to provide recourse to another forum, impacts on domestic courts' ability to overide IOs' immunities is contested, and the jurisprudence in this regard is variable. The ICJ's pronouncement in *Germany v. Italy*,[837] and comparable jurisprudence at the ECtHR,[838] while mainly in cases concerning State immunity, arguably have a chilling effect on domestic courts' ability to ignore or override immunities when faced with competing objectives. In this section, I consider the extent to which this has impacted the developing jurisprudence on IO immunities, having regard to their different character and purpose.

[833] id, Advisory Opinion, [61]
[834] id, [66]
[835] Discussed in Chapter V
[836] ibid
[837] *Jurisdictional Immunities of the State (Germany* v *Italy, Greece intervening)* (n 397)
[838] *Jones* (n 406)

(1) The history, rationales and scope of IO immunities

IO immunity developed from the law of State immunity, which itself developed from sovereign immunity. Traditionally, the sovereign was understood as absolutely immune from the jurisdiction of his or her own courts, and this was extended to the jurisdiction of foreign courts.[839] The principle of *par in parem non habet imperium*[840] - that one equal (sovereign) cannot sit in judgment of another - underpinned classical notions of immunity. State immunity grew directly from this immunity of the sovereign, and reflects the principles of comity, reciprocity and sovereign equality. It provided states with immunity from suit in their own territorial courts and was also traditionally understood as affording an absolute immunity to states from the jurisdiction of foreign courts.

Over time, it has evolved into a more restrictive formulation.[841] States are no longer recognised as being immune from the jurisdiction of their own courts. With respect to States' immunity before foreign courts, a number of exceptions to the principle have been recognised, primarily to satisfy States' international commercial aspirations and the need to allow for the resolution of disputes.[842] State immunity is understood to cover only those acts which are of a public, governmental or sovereign nature (*acts jure imperii*); immunity does not extend to acts *jure gestionis* (private or commercial acts).[843] Other exceptions which have been recognised include certain torts committed by States or their officials within the jurisdiction of the forum State – e.g., a State official who injures someone in a road accident

[839] See, Shaw (n 56) 698
[840] *Al-Adsani v. The United Kingdom*, (n 404) [54]
[841] *Cudak v Lithuania* (GC) App no 15869/02 (ECtHR, 23 March 2010) [64]; *Trendtex Trading Corporation Ltd v The Central Bank of Nigeria* [1977] 1 QB 529
[842] See, e.g., *Trendtex Trading*, ibid; *Schooner Exchange v McFadden* 11 US 116 (1812) 136
[843] Fox and Webb (n 790) 413-434. See also, Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 Brit YB Intl L 220, 227; *Convention on Jurisdictional Immunities of States and Their Property* (adopted 2 December 2004, not yet in force)

in the forum State.[844] The tort exception has not been held to extend to personal injury caused by 'matters relating to the core area of state sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security'.[845]

There have been attempts to read in additional exceptions to State immunity, on the basis of the nature of the impugned conduct[846] or by implying a waiver to immunity.[847] Other attempts have been made to argue that immunity should not be recognised in those instances when to grant it would result in the foreclosure of all remedies to the victims.[848] However, the ICJ in *Germany v Italy* made clear that immunity was not made contingent on the nature of the acts or the impact that the application of immunity would have on the availability of a remedy.[849] Thus, under the current state of the law, a State enjoys jurisdictional immunity from legal proceedings in the domestic courts of another State with respect to its *acta jure imperii*, regardless of the gravity of the acts alleged and irrespective of the impact such immunity may have on victims' access to justice. Immunity exists but for the well-recognised *jure gestionis* exceptions.

[844] See, e.g., *Fogarty v United Kingdom* Appl no 37112/97 (ECtHR, 21 November 2001); *McElhinney v. Ireland* (n 428)

[845] *McElhinney*, ibid, [38]

[846] E.g., *Ferrini v Germany*, Corte Costituzionale, Cass Sez Un 5044/04, 11 March 2004, 87 *Rivista diritto internazionale* (2004) 539, 128 ILR 659 (where the Italian Court of Cassation determined that immunity was unavailable for acts which violate *jus cogens* norms)

[847] *Prefecture of Voiotia v Germany*, Greek Areios Pagos, Cass Nr 11/2000 (288933), 4 May 2000, 129 ILR 514

[848] *Jones* (n 406)

[849] *Germany* v. *Italy* (n 397) paras 92-97. Note however, the Italian Constitutional Court's later decision in *Sentenza n 238*, Corte Costituzionale, Cass Sez 238/14, 22 October 2014, in which it held that the legislation that Italy had enacted to give effect to the ICJ judgment was unconstitutional. See Anne Peters, 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order' (*VerfBlog*, 23 December 2014) <http://www.verfassungsblog.de/en/let-not-triepel-triumph-make-best-sentenza-no-238-italian-constitutional-court-global-legal-order/> accessed 18 March 2015

(2) The Differing Rationales for IO Immunity

The traditional understanding of the absolute inviolability of the State was transposed to the domain of IOs. The rationale for IO immunities is however different from that for State immunity. IO immunity is not so concerned with the status, equality or dignity of the organisation. The notion of sovereign equality and the related principle of reciprocity do not apply to IOs because they are not sovereign; as IOs are not governments, there is no sovereign that their agents personally represent and IOs have no jurisdiction comparable to that of a State from which they could establish reciprocal rules and relations.[850]

The rationale for IO immunities relates to the need to preserve their independence.[851] Indeed, immunities are understood to be the main, and perhaps the only way in which to protect their independence and enable them to carry out their functions.[852] IOs can be particularly vulnerable to interference because they do not possess the power of a State but ultimately need to operate on or within the territory of States. If IOs were capable of being sued before national courts, they would arguably be under the control and influence of the States in which they operate, which would arguably impede them from discharging effectively their mandates.[853] One could imagine an IO carrying out sensitive peacekeeping within a State or monitoring a ceasefire between a State and non-State armed actors. If the IO was subject to the jurisdiction of local courts this could jeopardise its independence. Also, immunities help ensure that no State derives an unfair advantage from its association with an

[850] Alice Ehrenfeld, 'United Nations Immunity Distinguished From Sovereign Immunity' (1958) 52 Am Soc'y Intl L Proc 88, 92-3

[851] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 132-7; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu case)* (Advisory Opinion) [1989] ICJ Rep 177, [44] – [55]; Eric de Brabandere, 'Immunity of International Organizations in Post-conflict International Administrations' (n 725) 87-89

[852] ILC, Report by Leonardo Díaz-González, Fourth Report on Relations between States and International Organizations (Second Part of the Topic) 'Report of the International Law Commission on the Work of its 26th session' (6 May to 26 July 1974) UN Doc A/CN.4/424, paras 32-3

[853] Clarence Wilfred Jenks, *International Immunities* (Stevens 1961) 17

IO.[854] As de Brabandere has argued,[855] freeing IOs from the control of domestic courts is an essential means by which to preserve States' sovereign equality. If one State – typically the Host State – had the ability to exert undue influence over an IO, this would undermine the ability of the IO to act fairly and neutrally to all States.

Yet, there are counter-arguments to the need for IO immunity. The first is that the ultimate objective is that the IO is able to function effectively to achieve its mandate. Independence is one of the important conditions for this objective to be met however it is not the only condition, and arguably not the only way in which it can be achieved. If an IO's immunity leads to a gap in accountability for acts over which it has responsibility, this gap may be the greatest detriment to the ability of the IO to achieve its mandate, given the centrality of respect for human rights and the rule of law to the mandates of IOs and the UN in particular. As Miller recounts, the Preparatory Commission of the UN study on privileges and immunities affirmed that 'any excess or abuse of immunity and privilege is as detrimental to the interests of the international organization itself as it is to the countries that are asked to grant such immunities'.[856] Wellens has similarly contended that the 'the principle of fairness towards parties dealing with an IO and to other third parties seems to require a more circumscribed immunity, in the same way as that principle underpins restricted state immunity.'[857] The second is that the scenario of the weak IO needing to be defended from the unchecked and capricious power of a State on whose territory the IO operates is not always the reality. When the UN is operating as the territorial administrator, its powers are

[854] Díaz-González (n 852) para 28; Miller (n 828)182
[855] de Brabandere (n 725) 87-89
[856] Miller (n 828)180
[857] Karel Wellens, 'Fragmentation of International Law' (n 396) 1176

significant vis-à-vis the host State, and a ‘blanket lack of accountability paves the way for impunity.’[858]

But even where the IO is strong vis-à-vis the host State, the change in balances of power still may not override the need for IO immunities. Other rationales continue to apply. For instance, IO immunities remove the need for the IO to defend itself before local courts with diverse understandings of the law in each country in which it operates and the associated inconsistencies in the characterisation of IO acts.[859] As Ehrenfeld has argued, ‘it would be a serious burden were the Organization to defend itself in the local courts of the diverse countries in which it operates or maintains an office. There is also the real possibility of a local prejudice against certain programs or a lack of understanding on the part of local courts of the Organization's substantive immunities from certain local laws.’[860] Immunities also shield IOs from vexatious litigation. The UN has placed emphasis on both these principles, ‘not only to preserve its independence in principle, but because exercise of local jurisdiction seriously interferes with effective working of the relief programs’.[861]

Thus, IO immunities are important and serve a range of purposes. However, as will be described, this does not require them to be absolute.

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[858] *Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (18 August 2000) and on the Implementation of the Above Regulation 2001* (Ombudsperson Institution of Kosovo, 26 April 2001) para 23 <www.ombudspersonkosovo.org/repository/docs/E4010426a_874491.pdf> accessed 27 July 2015
[859] *Broadbent v OAS* 628 F 2d 27 (DC Cir) 8 January 1980
[860] Ehrenfeld (n 850) 90
[861] ibid, 91-2

(3) The Articulation of IO Immunities

The UN Charter specifies that the UN is only accorded the privileges and immunities necessary to fulfil its purposes.[862] However the later 1946 CPIUN confers on the UN, its property and assets, wherever located and by whomsoever held, 'immunity from every form of legal process,'[863] subject only to an express waiver by the organization. A similar provision appears in the Specialized Agencies' Convention.[864] The Council of Europe, African Union and Organization of American States (OAS)' provisions all refer to 'immunity from every form of legal process.'[865] By contrast, the Charter of the OAS[866] provides that the Organization shall have 'such legal capacity and privileges and immunities necessary for the exercise of its functions and the accomplishment of its purposes.'[867]

The differences in the framing of IO immunities in the UN Charter and the later CPIUN have led to debate as to the precise scope of the immunity. Authors have interpreted this discrepancy in different ways. As will be described, for some there is an inconsistency between the two texts and the Charter should prevail. Others have specified that the treaty prevails. In *Manderlier*, the Belgium Court of Appeals held in 1969 that the signatories of the UN Charter had determined the privileges and immunities necessary in adhering to the CPIUN. As a consequence, courts would be acting *ultra vires* if they assessed the essential nature of immunities granted by the CPIUN.[868] The most commonly held view is that the more precise and detailed rules of the CPIUN must be respected as an interpretation of what

[862] UN Charter (n 10) Art 105(1)
[863] CPIUN (n 134) Art II
[864] *Convention on the Privileges and Immunities of the Specialized Agencies* (n 419) s 4
[865] *General Agreement on Privileges and Immunities of the Council of Europe*, (adopted 2 September 1949, entered into force 10 September 1952) CETS No 2, art 3; *General Convention on the Privileges and Immunities of the Organization of African Unity*, OAU CAB/LEG/24.2/13 (adopted and entered into force 25 October 1965), Art 1; *Agreement on Privileges and Immunities of the Organization of American States* (C-13) **(**adopted 15 May 1949, entered into force 4 June 1951) Art 2
[866] *Charter of the Organization of American States*, (adopted 30 April 1948, entered into force 13 December 1951)
[867] Ibid, Art 133
[868] M*anderlier* (Court of Appeals) (n 830)

the ‘functional’ standard in the Charter means in respect to jurisdictional immunity;[869] in other words, that the later text is an interpretation of the first. Under this approach, IO immunities are functional in nature but absolute in character.[870] Yet, does the functional nature of IOs whose mandate and sphere of activity depends on their mandates, introduce a contingency or relativism into IO immunities, and if so how does, or how should this impact on the adjudicative jurisdiction of domestic courts? Arsanjani, formerly of the UN Office of Legal Affairs, has written that:

> Immunity … does not necessarily mean “absolute” immunity, for not all activities undertaken by IOs are within their principal functions. IOs may conduct activities of a so-called private nature that only minimally affect their major functions, but that may have adverse impact on the public order of a particular State. The appropriate degree of immunity of IOs from suits in local courts should depend on (1) the nature of the IOs (the degree of universality), (2) the purpose of the IOs (the extensiveness of the function), (3) the intention of IO members as expressed in the constituent instruments of IOs and subsequent agreements, (4) practice, and (5) the particular acts in question.[871]

The first way in which IO immunities have been framed focuses on IOs’ limited international legal personality. Some argue that the fact that IOs can only act in pursuit of their purposes means that the functional immunity they possess is inevitably absolute –all IO acts are official acts to which functional immunity extends.[872] As Reinisch and Weber have noted, ‘since international organizations can only act within the scope of their functional personality

[869] The UN Office of Legal Affairs has stated that the ‘detailed application’ of the principle contained in Art 105 of the Charter ‘was effected *inter alia* through the [General Convention]’. UN Office of Legal Affairs, ‘Opinion prepared at the request of the Committee on Relations with the Host Country’ (1983) UN Juridical YB 222. Others regard the multilateral instruments as ‘implementation of the brief and general provisions of the constituent instrument of the organization’.
[870] *Cumaraswamy case* (n 135) [66]. The failure of the law of IOs to embrace a theory of restrictive immunity (unlike for State immunity) is discussed in Emmanuel Gaillard and Isabelle Pingel-Lenuzza, ‘International Organisations and Immunity from Jurisdiction: to Restrict or Bypass’ (2002) 51 ICLQ 1, 1-4. See also, Michael Singer, ‘Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns’ (1995) 36 Virg J Intl L 53, 135; de Brabandere (n 725) 87
[871] Mahnoush Arsanjani, ‘Claims against International Organzations: *Quis custodiet ipsos custodes*’ (1981)7(2) Yale J World Public Order 131, 163
[872] August Reinisch, *International Organizations before National Courts* (n 38) 127 *et seq*

there is no room left for non-functional acts for which immunity would be denied'.[873] Yet, as Reinisch has argued, 'the idea of functional immunity is rather imprecise in so far as it could refer both to the rationale for granting immunity at all. **..** as well as to a certain content of immunity to be accorded.'[874] Article 105 of the UN Charter provides that immunities apply to 'functions in connexion with the Organization,' which some commentators have argued is broader than simply those acts which are official,[875] requiring an examination of both the acts themselves and the context in which they were carried out.[876] In *Spaans,* the Dutch Supreme Court determined that for functional immunity to be conferred, it was necessary to demonstrate that the acts in question are 'immediately connected to the tasks entrusted to the organisation,'[877] whereas in *De Luca*, the question of whether the case 'relates to' acts performed by the defendants in their official capacity was determined on the basis of whether the acts alleged occurred in the course of an official's exercise of functions, and not on the nature of the underlying conduct.[878] Yet the national jurisprudence is equivocal, with an equal, if not greater number of cases taking a very expansive approach to the definition of function.

Human rights and IHL violations attributable to the IO may be *ultra vires* acts and nonetheless the conduct could constitute an act of the organisation, depending on the context. 'Official' acts would benefit from immunity to the extent that the acts were taken pursuant to organisational policies, however they would not necessarily benefit from the proviso in Article 29 of the CPIUN for appropriate modes of settlement to be put in place, as arguably

[873] Reinisch and Weber (n 421) 63. See also, de Brabandere (n 91) 88
[874] August Reinisch, *International Organizations before National Courts* (n 38) 331
[875] For example, Miller (n 828) 193, posits that it also covers activities that are reasonably connected with those acts.
[876] The ICJ in both the *Mazilu* (n 851) [56] – [60] and *Cumarawamy* (n 135) [50] cases looked to the particular circumstances in which the acts were carried out.
[877] *Spaans v Iran-US Claims Tribunal,* Supreme Court [HR], LJN: AC 9158, NJ 1986, 438 (1987) 18 NYIL 357, ILDC 1759 (NL 1985), 20 December 1985, referred to in Thomas Henquet, 'International Organisations in The Netherlands: Immunity From the Jurisdiction of the Dutch Courts' (2010) Netherlands Intl LR 268, 274-5
[878] *De Luca v United Nations* 841 F.Supp 531 (SDNY) 10 January 1994, 534-535

they do not arise out of contracts or other disputes of a private law character, nor do they necessarily involve any official of the UN for which immunity is waived.[879] Similarly, certain offensive conduct of individual officials would not be in the performance of official functions and immunity would not apply. Nevertheless, there are instances when the UN is unprepared to enable a host state to exercise jurisdiction.[880] But, as this would not be a case of an official who enjoys immunity that the organisation decides not to waive, Article 29(b) is inapplicable. Without the requirement of Article 29 pressing the UN to establish appropriate modes of settlement, which it has interpreted as an exhaustive requirement, no appropriate mode of settlement for such types of claims exists. Thus, my view is that the functional nature of IOs does not result in absolute immunity; it is more so the narrow interpretation of the need for appropriate modes of settlement that serves as a practical bar. As I have argued earlier, and as is made clear in DARIO and elsewhere, immunity does not equate with lack of responsibility. The responsibility of the IO for such types of wrongful acts remains intact, even if access to remedies appears to be foreclosed.

The second approach has been to contend that because the rationales that have led to a more restrictive understanding of State immunity do not seamlessly apply to IO immunity, one cannot transpose the trend to IO immunities. The distinction between public and private acts which underpins the trend towards a more restrictive understanding of State immunity 'has little direct relevance in determining the scope of immunities'[881] of an organisation. The issue was canvassed in a recent case concerning the scope of immunities of the East African Development Bank, in relation to its lending transactions.[882] The judges determined that the

[879] The meaning of Art 29 is considered in Chapter V
[880] See, UNSG, 'Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations' A/60/980 (n 768) paras 21-22
[881] Fox and Webb (n 790) 574
[882] *East African Development Bank v Blueline Enterprises Ltd* (Civil Appeal No 110 of 2009) [2011] TZCA 1, 22 December 2011

'restrictive theory of State immunity as a principle of common law has no application in the present case'.[883] They place significant weight on what they understand to be the clear construction of immunities in the constituent agreements. In such instruments, 'member States have full sovereignty to grant such privileges and immunities to the organisation as they deem it proper for the purpose of achieving its objectives. The courts should always be loath to interfere with the States' transparent exercise of their sovereign powers or impose constrained interpretations on such treaties on the basis of fanciful reasons.'[884] The language in the *East African Development Bank Act*[885] is clear in its provision of absolute immunity to the Bank. The language is almost identical to the CPIUN, though in the latter case there is the need to interpret in light of the more nuanced language of the UN Charter. Jurisprudence has tended to recognise the absolute immunity of IOs (and the UN in particular) on the basis of a textual reading of the CPIUN.[886] Even with the CPIUN wording in place however, some US judgments have incorporated a restrictive understanding of UN immunities, given the precise wording of domestic implementing legislation.[887]

The third approach has been for some to argue that absolute immunity is required in order to enable IOs to function in accordance with their mandates. De Brabandere, for instance, has noted that 'to allow the organization to function properly, the only result can be to give the organizations full immunity from the jurisdiction of national courts and tribunals. The opposite would clearly compromise the independence of the organization if it could be

[883] ibid, 14
[884] id, 29
[885] See in particular, the East African Development Bank Act, Act No 7 of 1984 (Cap 231) (Tanzania), as amended by the Finance Act 2005 (No 13) Arts 44, 45
[886] This has been confirmed expressly by the ICJ in the *Cumaraswamy case* (n 135) [66]: 'any such claims against the United Nations shall not be dealt with by national courts'.
[887] In *Dupree v OAS* 76-2335 (US Distr Ct DC) 31 May 1977, 22 June 1977 (1982) 63 ILR 92, (1977) UN Juridical Yearbook 260, 261, the Court held that since foreign sovereigns were only entitled to restricted immunity, international organisations too were entitled only to restricted immunity. However, the case can be distinguished by the particularities of the US Act on IO Immunities which provides that IOs should benefit from the same immunity enjoyed by foreign sovereigns.

subjected to pressure for the official (judicial) institutions of the host state.'[888] This has been the position taken by the UN Legal Office.[889] Ehrenfeld, formerly of the UN Office of Legal Affairs, argued that '[n]othing short of complete immunity from process can give the necessary protection from this kind of litigation and from a variety of interpretations of the nature of the Organization's operations and the applicability of substantive law.'[890] In this sense, absolute immunity is justified as necessary to fulfil IOs' functions. But, are IOs as frail as is perhaps suggested?[891] The main arguments of de Brabandere and others appear to be that the purpose for granting IO immunity is ever present and vital. They focus much less on why *absolute immunity* is necessary, more so on why immunity is *absolutely necessary*. There is a failure to distinguish between the need for immunity on functional grounds, and the character of that immunity, in those cases in which it is deemed necessary. In contrast to de Brabandere's position, some scholars have argued that a restrictive approach 'should' apply to IO immunities because absolute immunity is indeed not necessary to allow IOs to function. Something less than 'absolute' immunity is required, though determining how best to approximate this nuanced test has been difficult. As Reinisch and Weber have argued, there is no 'workable and practicable test for a functional immunity'.[892] Others have emphasised that while something less than absolute may be desirable, it is simply inconsistent with the practice.[893]

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[888] de Brabandere (n 725) 87-88
[889] *Broadbent v. OAS* Brief for the UN as *Amicus Curiae,* (1980) UN Juridical Yearbook 227, 230. The UN argues that by virtue of its functions, it requires absolute immunity, 'complete protection from national jurisdiction'.
[890] Ehrenfeld (n 850) 92
[891] Gaillard and Pingel-Lenuzza (n 870) 2. 'Just as the reinforcement of the authority of the State made possible its submission to the rule of law, so international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of justice.'
[892] Reinisch and Weber (n 421) 63
[893] Gaillard and Pingel-Lenuzza (n 870) 2

(4) The Impact of Immunities on Claimants' Ability to Access Justice

A constant question has been if, and if so how, immunities relate to and interact with other principles of international law. When immunity is upheld, claimants' ability to access courts can be detrimentally affected particularly if there are no alternative avenues for justice. Does this correlative fact have any bearing on the way in which immunity is determined and/or recognised? As indicated in Chapter V, Article 29 of the CPIUN can be understood as intending to ensure that IO immunity does not have the result of negating the prospects for justice, however these intentions are not always borne out by the practice. Neither the CPIUN, nor any other treaty which recognises the obligation on States or other duty bearers to ensure access to courts, creates a direct reciprocal or conditional relationship between the immunity afforded to the UN and the right of aggrieved individuals to access court. The absence of an avenue to access courts does not necessarily impinge on the recognition of immunities, which are considered on their own terms. However, the failure to afford an effective remedy may constitute a separate violation for which the IO bears responsibility.

There are two trends in the jurisprudence which analyses the relationship between immunities and access to justice. Some would argue that the second trend has overtaken the first. I argue that there remains a narrow space in which the first trend remains relevant.

The first trend is to affirm that the recognition by a domestic court of State or IO immunity can be an unjustifiable restriction on the claimant's ability to access court. Whether the restriction on access to justice is justifiable will depend on whether it is proportionate and restricts the right in the least possible way. This type of analysis has been prevalent in the jurisprudence of the ECtHR concerning Article 6 of the Convention.[894] It has also been applied in a number of domestic cases.[895] The availability of alternative means of dispute settlement will be one element in the assessment of whether the application of immunity is proportionate, but this availability has never served as a *precondition* to upholding immunity.[896] One might posit that the possibility of recourse to administrative tribunals for staff members with employment grievances, or the recourse to arbitration for commercial contractors or to local claims commissions might constitute alternative remedies, but as is clear from *Waite and Kennedy*, it is not enough for these forums to exist, they must be adequate and effective to redress the harm, and in a matter of speaking, must constitute a form of equivalent protection to the recourse that would otherwise had been available had access to courts not been curtailed.[897] In that case, it was determined that an alternative remedy did exist and thus Article 6 was not breached, though as some have criticised, the Court did not enter into a substantive assessment of the availability of that remedy to the applicant.[898]

Waite and Kennedy concerned the European Space Agency and some have posited that the type of analysis which guided the ECtHR in that case may have been shaped by the specificities of a European agency, and would not necessarily extend to universal IOs. Reinisch notes these difficulties, holding that, ‘It is clear that the high level of integration

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[894] See, *Waite and Kennedy v. Germany* (n 121)*; Beer and Regan v Germany* App no 28934/95 (ECtHR, 18 February 1999)
[895] *Western European Union v Siedler*, Cass Nr S 04 0129 F, ILDC 1625 (BE 2009), 21 December 2009; *African Development Bank v Haas*, French *Cour de Cassation* (soc) 25 January 2005 (2005) JT 454, 138 ILM 198; *General Secretariat of the ACP Group v Lutchmaya,* Cass Nr C 03 0328 F, ILDC 1573 (BE 2009), 21 December 2009
[896] *Waite and Kennedy v Germany* (n 121) [59], [68]
[897] Note however that this jurisprudential trend has mainly been limited to Europe. See, in contrast, *Brzak v United Nations* 551 F Supp 2d 313 (SDNY) 29 April 2008, 318-19 , where the Court held that the UN possessed absolute immunity.
[898] Kloth (n 426) 142-4

within the EC/EU differs markedly from the UN system.'[899] These differences were picked up upon by an English High Court in *Entico v UNESCO*, which concerned a claim brought by a publishing company for breach of contract.[900] There, the Court distinguished *Waite and Kennedy* on the basis that the European Convention had been adopted after the 1947 Specialized Agencies Convention and was limited to Europe. The Dutch Supreme Court adopted similar reasoning when distinguishing the *Mothers of Srebrenica* claim against the UN from the considerations at play in *Waite and Kennedy*, and 'opted not to engage in the increasingly accepted balancing act in which upholding immunity of an international organization is made dependent on certain human rights factors, in particular on the right to access to court, [which] is not a test that applies to the UN'.[901] The claimants in *Georges* sought to argue that in the narrow context of peacekeeping, the requirement that the UN establish a claims commission is an essential component of the status of forces agreements which recognises the UN's immunity. The failure to establish the commission (as opposed to the ineffectiveness of a mechanism so established) constituted a material breach of the status of forces agreement, which essentially prevented the Organization's immunity from kicking in.[902] This argument was ultimately not accepted by the District Court,[903] though the case is under appeal.

The second trend emphasises that only the beneficiary of the immunity may choose to waive it; a domestic court cannot decide whether to recognise it regardless of whether other appropriate modes of settlement are available. Under this reasoning, as a procedural rule, immunity only determines access to a particular jurisdiction; any substantive consideration of

899 Reinisch. 'Should Judges Second-Guess the UN Security Council?' (n 813)
900 *Entico v UNESCO* [2008] EWHC 531 (Comm), [24]
901 Aleksandar Momirov, 'Dutch Courts and Srebrenica: Ascribing Responsibilities and Defining Legally Relevant Relationships' (2012) 43 Neth Y Intl L 233, 245. *Mothers of Srebrenica v. Netherlands*, Netherlands Supreme Court (n 430) para 4.3.5
902 *Georges v United Nations* 13 Civ 7146(JPO) (SDNY) Oral Argument, 23 October 2014 (on file with author)
903 *Georges* (n 780)

its impact on access to justice is immaterial.[904] This second trend aligns with recent jurisprudence on State immunity. The ECtHR in *Al Adsani v the United Kingdom* determined that when a State complies with a public international law rule like State immunity, its actions cannot be said to be disproportionate. Thus it recognised the applicability of a proportionality analysis as a matter of principle, but the act of compliance with a public international law rule exempted the Court from the need to carry out a thorough analysis: it would 'clearly' be proportionate. The position shifted somewhat further with *Jones* where the ECtHR made clear that the proportionality test was never arrived at: immunity meant that there was no access to court the UK could have given; it was not theirs to give. This approach is mirrored in *Germany v Italy* where the ICJ did not find persuasive the argument that the absence of alternative means of securing redress could impact on the recognition of State immunity.[905]

It is relevant to consider the extent to which this new jurisprudence impacts on the *Waite and Kennedy* line of cases relating to IO immunities. In effect, *Waite and Kennedy* overruled prior jurisprudence. In *Spaans*, the European Commission found no incompatibility with the Convention in recognising and upholding the immunity of the Iran-US Claims Tribunal.[906] The *Waite and Kennedy* bench did not refer to this prior jurisprudence. Before domestic courts, in *Manderlier*, an early Belgian case which concerned damages the claimant suffered as a result of abuses committed by UN troops in the Congo, the Brussels Court of Appeal made clear that IO immunities did not depend on the existence of another appropriate

[904] *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, [2000] UKHL 40. See also, *Jones v Saudi Arabia* [2007] 1 AC 270 per Lord Hoffman: 'there is not even a *prima facie* breach of Article 6 if a State fails to make available a jurisdiction which it does not possess' [64]

[905] *Germany v. Italy* (n 397) para 101

[906] See *Spaans* (n 877) and *Spaans v The Netherlands* (Decision on Admissibility) App no 12516/86 (ECommHR, 12 December 1988), where the European Commission regarded the grant of immunity from suit to the Iran-United States Claims Tribunal by the Netherlands as a restriction of national sovereignty which did not give rise to an issue under the Convention.

mode of settlement: '... it must be admitted that in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations; and although this situation, which does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights, may be regrettable, it must be recognized that the judge of first instance was correct in declaring that the action brought against the United Nations was inadmissible.'[907] The Dutch Supreme Court decision in the *Mothers of Srebrenica* case held that the *Waite and Kennedy* analysis was inapplicable, given that the former Court was not faced with a case concerning the UN, and particularly Article 103 of the UN Charter.[908] The ECtHR later made clear here that even in the absence of an alternative remedy, the recognition of immunity is not *ipso facto* constitutive of a violation of the right of access to a court. It thus applied *Waite and Kennedy*, but finds the case inadmissible for a combination of reasons – particularly that the dispute concerns the use by the Security Council of its powers under Chapter VII of the United Nations Charter, and the fact that Article 6 does not require the Netherlands to provide a remedy against the United Nations in its own courts.[909] As such, the *Waite and Kennedy* type of analysis for IO immunities appears to narrowly survive *Germany v. Italy*, though to date, the few courts that have considered it have given weighty deference to the role of the Security Council pursuant to Article 103 of the Charter. The facts of the *Mothers of Srebrenica* case, which concerned the key decision-making responsibilities of the UN in maintaining international peace and security, easily met the proportionality considerations. It will be interesting to see how American courts operating outside of the frame of the European Court assess the different facts in the cholera claims, which arguably do not raise those same decision-making responsibilities of the UN; at issue is how the organisation carried out its day-to-day operations on the ground.

[907] *Manderlier* (Court of Appeals) (n 830) para 69
[908] *Mothers of Srebrenica v. Netherlands*, Netherlands Supreme Court (n 430)
[909] *Stichting Mothers of Srebrenica v The Netherlands* (n 406)

It is also relevant to consider whether any of the differences between State and IO immunities impacts on the seamlessness of the jurisprudence. As Reinisch has argued, in State immunity cases, there is always another forum – the courts of the territorial state.[910] Whilst the ECHR in *Jones* paid little attention to this issue, it was canvassed in *Germany v Italy*. In the latter case, it was argued that Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The majority was not persuaded by such arguments, holding that international law does not make 'the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.'[911] However, Yusuf in his dissent, focusing on the exceptional circumstances of the case, argues that 'The assertion of jurisdiction by domestic courts for a failure to make reparations for serious breaches of the law of armed conflict admitted by the responsible State, particularly where no other means of redress is available, could not, in my view, harm the independence or the sovereignty of another State. It simply contributes to the crystallization of an emerging exception to State immunity, which is based on the principles underlying human rights and IHL on the widely-held *opinio juris* of ensuring the realization of those rights, including the right to an effective remedy, in those circumstances where the victims would have no other means of redress.'[912] While the Dutch Supreme Court in *Mothers of Srebrenica* recognises the distinction between State immunity (and thus the *Germany v Italy* approach) and IO immunities, it notes that the difference is not so great to justify a different approach: 'The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the Association et al. base their claims'.[913]

[910] Reinisch and Weber (n 421) 85-6
[911] *Germany v. Italy* (n 397) para 101
[912] Ibid, Judge Yusuf dissent, para 51
[913] *Mothers of Srebrenica v. Netherlands*, Netherlands Supreme Court (n 430) para 4.3.14

A third trend, taken up mainly by theorists, concerns the ability to apply the principle of countermeasures as a rationale to justify the denial by domestic courts of IO immunity. Under international law, States may be entitled to respond to a breach of an international obligation by taking countermeasures to ensure cessation of the wrongful act and reparation for its consequences. The ILC has set this out in the ARS,[914] and this principle has equally been incorporated into the DARIO in regards to breaches of an international obligation by the IO. Only those countermeasures that meet certain substantive and procedural conditions may be legitimate.[915] Thus it has been raised whether the breach of an international obligation in relation to human rights and/or IHL and the concomitant failure to afford reparations in response to the breach, provides a State with the ability to take the countermeasure of not recognising immunities which would otherwise apply before its courts. The issue has arisen in relation to States' breach of the international obligation to prohibit torture. As Moser has pointed out,[916] the UN Committee Against Torture, when examining Canada's state party report, raised in general terms the issue of countermeasures as a possible route for Canada to override immunity before Canadian courts: 'as a countermeasure permitted under international public law, a State could remove immunity from another State - a permitted action to respond to torture carried out by that State'.[917] In principle, the breach of an individual's human rights constitutes an internationally wrongful act against that individual's State of nationality. The taking of countermeasures by that State would be as a matter of principle a justifiable response, at least after that State sought to resolve the matter by other lawful means such as diplomatic protection.[918] This is Moser's argument. She contends that

[914] ARS (n 3) Art 22
[915] DARIO (n 1) Art 22
[916] Patricia Tarre Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to *Jus Cogens* Violations: The Human Rights Answer to the ICJ Decision on the *Ferrini* Case' (2012) 4 Goettingen J Intl L 809, 811
[917] UN Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention (1 May 2005) UN Doc CAT/C/SR.646/Add.1, para 67
[918] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 344 'An exception to immunity rules based on the rules on

outside of the enumerated exceptions in the ARS, 'there are no other established restrictions that delimit which norms may be affected by countermeasures. … there is nothing in the nature of State immunity that prevents the potential of its non-recognition as a countermeasure.'[919] Tzanakopoulos recognises the possibility for domestic courts to apply countermeasures. He notes that '[d]omestic courts can thus be seen as applying a countermeasure when they determine that another subject of international law has perpetrated an internationally wrongful act and they respond to that breach. This response will sometimes not be limited simply to reciprocal non-application of a treaty against another State, as described above; it may involve other measures as well, such as for example the denial of sovereign immunity.'[920] As is explained by Fox and Webb, the issue of countermeasures was mentioned by Italy in its oral pleadings in *Germany v. Italy*, though it was not the main basis upon which Italy argued its case[921] nor was it referred to in the judgment.[922] Yet, Fox and Webb note that the relevance of the law of countermeasures to State immunity 'seems questionable'.[923]

Taking this argument one step further, a State could just as easily deny the immunity of an IO as a countermeasure where the IO fails to afford reparations in response to a breach of human rights and/or IHL attributable to it. Yet it is nonetheless difficult to justify in light of the ICJ jurisprudence in *Germany v Italy*. If the immunity belongs to the offending State (or IO), it is not within the power of a domestic court to decide not to recognise it, it is outside its competence. Indeed, the argument on the availability of countermeasures is

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countermeasures should hence be contingent on the fruitless result of the fulfilment of the obligations resting on the executive of the forum state as well as the fulfilment of the requirements of the local remedies rule.'

919 Moser (n 916) 832

920 Tzanakopoulos, 'Disobeying the Security Council' (n 302) 194

921 Italy's arguments focused on there being an exception to State immunity for serious violation of human rights and IHL, which the ICJ ultimately rejected.

922 Fox and Webb (n 790) 16

923 ibid

similar in its core to that of an implied waiver of immunity: if a State carries out an internationally wrongful act, a domestic court is entitled to hold that the state has, as a direct consequence, waived its entitlement to immunities.[924] Yet, this argument, which persuaded the Court in the *Prefecture of Voiotia* case,[925] was later resolutely rejected.[926]

(5) Waivers of Immunity

Constituent agreements allow for an IO to waive its immunity. The CPIUN provides that the organisation's immunity from every form of legal process may be 'expressly waived' in 'any particular case'.[927] The same wording is used in the Specialized Agencies Convention,[928] the Council of Europe General Agreement,[929] the OAU General Convention[930] and the OAS Agreement.[931]

To be accepted, the waiver must come from the Secretary-General or similar head of the organisation, not the official or office implicated in the proceedings. This is because immunities are given in the interests of the organisation, and do not constitute a personal benefit to any individual or group.[932] The need for an express waiver by the organisation is more onerous a test than what is required for a waiver of immunity by a State, where consent to a claim may be implied from conduct consistent with consent, such as taking a positive

[924] Van Alebeek (n 918) 345, makes oblique reference to this argument, citing Willem Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations' in Ronald St John MacDonald, Douglas Millar Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff, 1983) 581, 606
[925] *Prefecture of Voiotia* (n 847)
[926] *Germany v. Italy* (n 397)
[927] CPIUN (n 134) Art. II, section 2
[928] *Convention on the Privileges and Immunities of the Specialized Agencies* (n 419) Art III, section 4
[929] *General Agreement on Privileges and Immunities of the Council of Europe* (n 865) Part II, Art. 3
[930] *General Convention on the Privileges and Immunities of the Organization of African Unity* (n 865) Art. II (1), though it does not qualify the term waiver with the word 'express'.
[931] *Charter of the Organization of American States*, (adopted 30 April 1948, entered into force 13 December 1951) Art 2
[932] See, e.g.,CPIUN (n 134) section 20

step in the proceedings other than simply to plead immunity.[933] Domestic courts have by and large followed this approach, refusing to imply waivers. For example, in *Mendaro v World Bank*, the Court of Appeals for the DC Circuit held that: ‘Courts should be reluctant to find that an international organization has inadvertently waived immunity when the organization might be subjected to a class of suits which would interfere with its functions’.[934] In recent litigation in the United States, the plaintiffs have sought to argue that the UN waived its immunity from domestic courts when it failed to establish mechanisms to settle third-party claims in accordance with the applicable status of forces agreement.[935] Yet the provision addresses limitations on UN liability, not waivers of immunity. As set out in *Bisson*, waivers cannot be implied by the conduct of the organization; any waiver to be recognised as such must be expressed made by the appropriate authority of the organisation. [936]

The waiver stipulations in constituent agreements provide no guidance as to when it would be appropriate for IOs to waive the immunity of the IO, providing what would seem to be an absolute discretion. This differs from the references in such agreements to the waiver of immunities of IO officials and other categories of personnel benefiting from some form of functional immunity. The distinction between cases brought against a named official and those cases brought against the organisation as such are perhaps overstated, given the typical practice of claimants to name in their actions both types of defendants. Nonetheless, the CPIUN treats these two categories differently.

The discretion to ‘waive’ immunity lies with the Secretary-General according to section 20 of the CPIUN. The Secretary-General has ‘the right and the duty to waive the

[933] Fox and Webb (n 790) 373; 575
[934] *Mendaro v World Bank* 717 F2d 610 (DC Cir) 27 September 1983
[935] *Laventure v United Nations* 14 Civ 01611 (EDNY) class action complaint, filed 14 March 2014
[936] *Bisson v United Nations* 06-6352, 2007 WL 2154181 (SDNY) 11 February 2008.

immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations'. Section 21 adds that the UN shall 'cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article'.

As detailed elsewhere, in accordance with Article 29(b), when the Secretary-General decides not to waive immunity in respect of a claim brought against named UN officials, in return the Organization is obliged to establish an alternative appropriate mode of settlement. In such instances, the Agreements stipulate with some more clarity that waivers should be employed, when immunity would impede the course of justice and where immunity can be waived without prejudicing the organisation.[937] The African Union and Council of Europe agreements similarly refer to the right and duty to waive in such instances.[938] In contrast, the OAS formulation is obligatory, setting out that in the circumstances described, the Secretary-General 'shall waive' the privileges and immunities of any official or member of the staff.[939] The European Union formulation also requires a waiver, though this is muted by the vagueness of the framing of the circumstances in which EU institutions 'shall waive,' which is set out as 'wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.'[940] The language of 'duty to waive' would seem to obligate the organisations concerned to do more than consider whether they simply wish to

[937] CPIUN (n 134) ss. 20, 23; *Convention on the Privileges and Immunities of the Specialized Agencies* (n 419) s. 22; *General Convention on the Privileges and Immunities of the Organization of African Unity* (n 865) Art VI (4); *Additional Protocol to the OAU General Convention on Privileges and immunities*, OAU CM/1034(XXXV) Rev 3, Annex 1 (adopted 1 June 1980, entered into force 6 August 2012) [OAU Additional Protocol], Arts 2(5), 3(4); *Agreement on Privileges and Immunities of the Organization of American States* (n 865), Art 14; *General Agreement on Privileges and Immunities of the Council of Europe* (n 865) Art 19
[938] Ibid
[939] Id, OAS Agreement, Art 17
[940] *Protocol on the Privileges and Immunities of the European Union*, C 310/261, 16 December 2004, Art 17

waive immunity. As Miller sets out, the importance for the UN to waive immunities of officials so as to prevent abuses was a clearly articulated principle already from the Preparatory Commission responsible for drafting the General Convention. Its minutes set out that

> It is ...most desirable that both the United Nations and all specialized agencies should adopt the principle that privileges and immunities are only given to their officials in the interests of the Organization in whose service they are, and in no way for the benefit of the individual concerned, and that, in consequence, the Secretary-General both can waive immunity and will in fact do so in every case where such a course is consistent with the interests of the United Nations. This rule has long been in force in the International Labour Organization.[941]

The duty to waive would thus seem to operate as a presumption that they will waive immunity in the absence of any compelling reason taken in good faith[942] why they would not, perhaps even obliging the organisations concerned to provide clear reasons when a decision is taken not to waive. The organisations are arguably obliged to exercise their discretion in good faith, giving full and proper consideration to the potential to waive and thus not fettering what discretion they have under the constituent agreements to avoid waiving immunity.[943] However, the difficulty to independently review the decision to waive or not waive, limits the practical impact of such a duty.[944]

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[941] Miller (n 828) 236

[942] A number of authors have focused on the overriding need for the organisation to consider waivers in good faith, regardless of whether the applicable treaty or related framework specifically sets out such an obligation. See, Bekker *The Legal Position of Intergovernmental Organisations* (n 29) 192; Jenks (n 853) 170

[943] See in contrast, the *Cumaraswamy case* (n 135) Written Comments of the Government of Costa Rica, 5, in which it is argued that 'the plain language of Section 23 [of the CPIUN] requires the Secretary-General to make subjective determinations about the likely effects of waiver based on his specialized institutional knowledge and his personal evaluation of facts. The fact that the Secretary-General's "duty" is to act only in accordance with "his opinion" renders the exercise of that duty unreviewable by a third party, and, therefore, non-justiciable. This is in stark contrast to the Secretary-General's decisions under Section 22 as to whether or not immunity exists, which are not similarly authorized to be made "in his opinion," but instead require the application of objective criteria and, thus, may be reviewed by the Court.'

[944] In principle, the Secretary-General's decision could be reviewed by the ICJ in the course of Advisory Opinion proceedings. See, *Cumaraswamy* case (n 135), Oral Statement of the United Nations, 7 December 1998 [59]; Written Statement of the Government of Federal Republic of Germany. However there is no forum before which an aggrieved individual seeking justice for UN abuses can seek to have the decision of the Secretary-General independently reviewed. Also, there are several examples of employees using the internal grievance procedures of the UN to complain about the decision to waive immunity in their cases, though these bodies have not engaged in any real consideration of the waiver process.

A question which follows is what criteria, if any, are used to determine whether the IO will waive immunity, and whether such criteria, if they exist, need to be considered subjectively or objectively. It is unclear whether the availability of an alternate justice process would suffice as a matter of principle to satisfy the test of not impeding the course of justice, or whether implied in the language of the constituent agreements is a need to ensure that the justice process is adequate and effective in light of the alleged act, or whether it is a more limited statement relating to whatever domestic processes of justice are underway – an obligation to ensure that these are not impeded. If the latter were the case, this would significantly widen the instances in which the organisations would need to waive, which is at odds with the practice, which is seemingly to waive immunity only sparingly. It would seem clear, at the least, that the obligation of the organisation to assess whether maintenance of the immunity impedes the course of justice requires a case by case consideration of the individual circumstances.

Similarly, it is difficult to assess what types of circumstances might not lead a waiver of immunity to prejudice an organisation, in one way or another. Miller says that 'it is difficult to envisage when immunity could properly be maintained if there was no UN interest to support such a result, only the personal interests of the official concerned'.[945] But, aside from parking tickets, spousal maintenance claims and perhaps motor vehicle injuries, most claims to be adjudicated in national courts against officials in relation to the performance of their official functions will evidently not be in the interests of the organisation. This is certainly the case if the organisations' independence and freedom from domestic processes are seen as vital to the very essence of the organisation. This general statement with

[945] Miller (n 828) 237

somewhat circular reasoning is indeed asserted by the Secretary-General in his written statement in the *Cumaraswamy case*, in which it is stated that '[t]he adjudication of United Nations privileges and immunities in national courts would be certain to have a dangerous effect on the independence of officials and experts, who would then have to fear that at any time, whether they were still in office or after they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written, or acts performed, as officials or experts.'[946]

The practice does not indicate that the gravity of the act is part of the assessment. With regard to allegations of gross violations of human rights or serious violations of IHL constituting crimes under international law, the UN has declined to waive immunity from the jurisdiction of domestic courts in civil cases.[947] The UN recognised this as a particular problem is relation to certain high profile crimes such as sexual exploitation in peacekeeping operations, though it nonetheless has often not waived immunity, given the fragility of host state legal systems.[948] Yet, despite not being party to the ICC statute, the UN has undertaken to 'cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities...'[949] The reasoning for this undertaking is not fully clear. The undertaking may relate to the fact

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[946] *Cumaraswamy case* (n 135), written statement of the UN Secretary-General, 2 October 1998, [54]

[947] See, e.g., *Mothers of Srebrenica v. Netherlands*, Supreme Court (n 430)

[948] See A/60/980 (n 768) paras 21-22: 'Many cases of criminal conduct, especially criminal acts of sexual exploitation and abuse, would not, however, be in the performance of functions and immunity would not apply. Notwithstanding, this does not necessarily mean that the person will be exposed to a criminal prosecution in the host State. Where there is a dysfunctional legal system in the host State, it may not be in the interests of the United Nations to agree (under the status-of-forces agreement) to the host State instituting criminal proceedings or to waive immunity or certify the absence of immunity where the host State requests the United Nations to do so. In these circumstances, a person's immunity appears to give him or her impunity at least vis-à-vis the host State.'

[949] *Negotiated Relationship Agreement between the International Criminal Court and the United Nations ICC-*ASP/3/Res.1 (entered into force 4 October 2004), Art 19

that the ICC is not domestic.[950] Or, it might stem from the distinction between civil and criminal immunities, or the nature of the crimes under the jurisdiction of the ICC and the reasoning that to maintain the immunity of officials accused of crimes under international law impedes the course of justice. If the latter were the case, this would imply some acceptance of a gravity test and could counter any argument against waiving the immunity of officials accused of such crimes from the jurisdiction of domestic courts, particularly in instances in which the ICC has no competence.

When a case is brought against the organization, not only is there no obligation to waive the organisation's immunity, there is also no obligation to provide an alternate method of settlement; the Secretary-General simply decides.

VI.3 Conclusions

Domestic courts have rarely entertained claims against IOs because of the limits of their jurisdiction and the near absolute immunities of IOs. Unlike the progressive recognition of restrictions to the immunity of States and their agents, there have been only limited parallel developments in the domain of organisational immunity. This stems in part from the paucity of cases that are brought before domestic courts, and the limited breadth of their subject matter; the majority of cases stem from employment or contractual disputes which domestic courts have dismissed with ease because of the existence of alternative forums for the resolution of these disputes. It also stems from the general reluctance of IOs to recognise a need to relax immunities in certain circumstances and of domestic courts to intervene.

[950] As per the reasoning in the *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (n 291) [61] in which the ICJ distinguishes between immunity from domestic courts and international criminal jurisdictions such as the ICC.

Where the immunity of IOs is in question, a careful balance should be drawn between the interests at stake. The immunities afforded to IOs are important and serve a range of purposes. However, this does not necessarily imply that these must be absolute. Immunities can directly interfere with individuals' ability to enjoy the right to a remedy and reparation. Neither the CPIUN nor other constituent agreements or regulations were designed to interfere with victims' genuine right to access justice; immunity should not equate with impunity. Yet, there has been insufficient emphasis in the jurisprudence on the functional character of IOs and of the need for IO immunities to accord with wider institutional mandates, such as encouraging and promoting respect for human rights and rule of law. The ICJ has stated that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the UN to promote this aim' and then not to afford a 'judicial or arbitral remedy'.[951] These wider considerations should, but as yet have rarely given rise to a more nuanced, case by case approach to determining the nature and extent of IO immunities. The blunt approach of affording absolute immunities and citing the need to do so on the basis of broad political mandates of IOs is more of a jurisdictional avoidance technique than an application of international law standards. Courts should apply their discretion more judiciously to distinguish between those cases where immunities are necessary to preserve the IO's legitimate ability to function and other instances when immunities are not a proportionate restriction on individual's rights to access justice and can, if not coupled with adequate internal dispute resolution mechanisms, result in impunity.

A main problem area for individuals is the absence of rigorous doctrine to guide decisions to waive immunity which leads to arbitrariness and seemingly inconsistent results.

[951] *Effects of Awards* (n 67)

Equally, the approach to what constitutes an ‘official act’ has been variable, both at the level of international organisations and in how the term has been construed by domestic courts. This has led to inconsistent results, often to the disadvantage of claimants. The tendency to establish one-off administrative ‘solutions’, as has been the case with the creation of administrative tribunals to determine employment claims and procedures to allow for a modicum of review of individual sanctions regimes, underpins the importance of claimants’ access to domestic courts – which has created the necessary impetus for IOs to strengthen accountability structures. However, it also leads to further arbitrariness and a disjointed approach.

What is most concerning is the denial in some cases of any recourse to justice. Given the vast functions accorded to IOs which have the potential to impact on individuals’ lives, it is appropriate for rigid formulations to be reviewed. Domestic courts should engage in greater scrutiny of the circumstances of the cases brought to them to determine whether they can and should exercise jurisdiction in a particular case.

VII. ADJUDICATION BY REGIONAL AND INTERNATIONAL COURTS

VII.1 Introduction

This chapter is the last in a trilogy about the venues where claims against IOs may be adjudicated. Chapter V considered internal IO adjudicative mechanisms and Chapter VI dealt with domestic courts. This third chapter focuses on international and regional courts.

Similar to my earlier findings, I conclude that international and regional courts afford inadequate and ineffective access to justice for most individuals who seek a remedy against IOs for their role in human rights or IHL violations. This is because there is no universal international court with the mandate or sufficiently broad rules of standing capable of playing this role and the few regional courts that can adjudicate individuals' claims against IOs can only do so in respect of the IOs which fall within the regional remit of those courts.

In this chapter, I compare and contrast the main international and regional courts which afford a degree of accountability over IO conduct and explain the manner and extent to which they have addressed individuals' claims against IOs for human rights or IHL breaches. In some instances, these courts have played an important, albeit indirect role in assessing the validity of IO conduct in the course of proceedings against States, or in assessing the acts of regional integration organization [RIO] institutions.

When considering the trilogy of venues, my view is that international courts would be the most appropriate complement to IOs' internal adjudicative mechanisms, if such courts were to be available. They would be more independent and impartial than IOs' internal processes. They would be fitting venues in light of IOs' international character and having regard to the desirability of a model that has the potential to influence IO practice, arguably better than municipal courts could do. For similar reasons, international courts are arguably more appropriate forums to adjudicate claims concerning IOs than regional ones. Not least, adjudication by international courts is better suited to claims which concern IOs with universal mandates and could help avoid conflicting jurisprudence emanating from regional courts.

But, international courts are no panacea. There are challenges, most notably having regard to the difficulty for individuals in remote areas to access an international court, even if rules of standing did not present formal obstacles. Beyond physical access, other practical challenges include the difficulty for international courts to engage with large numbers of potential claimants – borne out by the recent experience of the ICC.[952] Procedures of international courts tend to be complex, cumbersome, expensive and time-consuming.

In practice, individuals face numerous impediments to have their claims against IOs adjudicated by international or regional courts. These include limited subject matter and personal jurisdiction; limited or no *locus standi*; short limitation periods within which to commence proceedings and requirements to exhaust local remedies or to take steps to consult or negotiate a claim prior to bringing an international claim. Typically at least one or more of these or the way in which they operate in combination, will bar proceedings. In what follows, I focus on the first three impediments, as they represent the most consistent and severe barriers to justice within this field of inquiry.

[952] Carla Ferstman, 'The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future' (2012) REDRESS <http://www.redress.org/downloads/publications/121030participation_report.pdf> accessed 18 March 2015

VII.2 Subject Matter Jurisdiction – Human Rights and IHL

Subject matter jurisdiction, or jurisdiction *rationae materiae*, concerns a court's competence to adjudicate particular subjects or sources of law. International courts can only adjudicate matters which are in keeping with their constitutive instruments. This stems from the limited personality of the organizations that establish these courts, which is tied to their functions. Subject matter jurisdiction may be stipulated expressly in constituent agreements or implied from those instruments and interpreted and progressively developed by courts. As will be explained, many international and regional courts recognise their competence over human rights and to a lesser extent IHL violations. However, these areas are usually narrowly construed as State acts only, regardless of any wider understandings accorded to them in law or practice. This has impacted several courts' procedures, which in turn has restricted individuals from having their claims concerning IOs adjudicated.

VII.2.1 International Courts

No international court has a subject-specific mandate to adjudicate human rights and/or IHL violations. There have been proposals to establish an international human rights court and to afford individuals direct standing before it, but so far these have not been heeded.[953] Nor is there an international court with a specific mandate over IHL violations.[954] The ICC has jurisdiction over certain IHL violations but is restricted to determining individual criminal

[953] See, Australia's proposal for an international court of human rights. UN Commission on Human Rights, 'Draft Proposals for an International Court of Human Rights / Australia', Drafting Committee on an International Bill of Human Rights, 2nd Sess (10 May 1948) UN Doc E/CN.4/AC.1/27; Julia Kozma, Manfred Nowak and Martin Scheinin, 'A World Court of Human Rights – Consolidated Statute and Commentary' (2010) <www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf> accessed 18 March 2015; Martin Scheinin, 'Towards a World Court of Human Rights', (2009) Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights, <www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf > accessed 18 March 2015. Kozma, Nowak and Scheinin's proposal includes jurisdiction over IOs.

[954] Jann Kleffner and Liesbeth Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law' (n 436); Dieter Fleck, 'The Law Applicable to Peace Operations' in Andrew Clapham and Paula Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 246

responsibility. And, its limited reparations mandate does not extend beyond this; there is no possibility for the Court to award reparations against States, IOs or other legal persons.[955]

The ICJ has a wide and general subject matter jurisdiction for contentious proceedings,[956] whereas other international courts have mandates restricted to interpreting specific treaties[957] or subject matters,[958] none of which concern human rights or IHL specifically. The ICJ can adjudicate disputes concerning *inter alia* 'any question of international law' and 'the existence of any fact which, if established, would constitute a breach of an international obligation.'[959] It has considered an array of human rights and IHL issues in contentious cases including unlawful arrest, detention and expulsion,[960] consular rights infringements,[961] failure to extradite or prosecute,[962] racial discrimination[963] and mass violations of human rights during conflict.[964] It also determined that States breached IHL,[965] the related principles of non-intervention[966] and the obligation to prevent genocide.[967]

For advisory proceedings, the ICJ's jurisdiction *rationae materiae* is restricted to legal questions put forward by UN organs or specialized agencies authorised to make such requests. Article 96 of the Charter authorises the General Assembly and Security Council to

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[955] *Rome Statute of the International Criminal Court* (n 464) Arts 25(4), 75
[956] *Statute of the International Court of Justice* (n 10) Art 36(1)
[957] *Statute of the International Tribunal for the Law of the Sea,* Annex VI of the *Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Art 21
[958] *Statute of the UN Dispute Tribunal,* UNGA Res 63/253, 24 December 2008, Art 2, as amended
[959] ICJ Statute (n 10) Arts 36(2)(b), (c)
[960] *Ahmadou Sadio Diallo* (n 362), [73], [74], [80]
[961] Ibid, [97]; *Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* (Merits) [2004] ICJ Rep 128, [106]; *LaGrand Case* (n 388) [77], [91]; *United States Diplomatic and Consular Staff in Tehran* (n 279) [67], [77]
[962] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)* (Merits) [2012] ICJ Rep 422, [88], [117]
[963] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, [113], [184]
[964] *Armed Activities on the Territory of the Congo (DRC* v *Uganda)* (n 446), [207], [219] – [220]
[965] Ibid, [207] – [211], [219], [220], [249] – [50]
[966] *Nicaragua case* (n 98) [292]
[967] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (n 252) [449], [450]

request advisory opinions on 'any legal question.' Other UN organs or specialised agencies can request opinions on legal questions arising within the scope of these bodies' activities, provided that the requests were authorised by the General Assembly. Human rights law and IHL have been considered in many opinions.[968]

VII.2.2 Regional Courts

There are several courts in Europe, the Americas and Africa with human rights specific mandates. These courts have jurisdiction over rights reflected in the courts' founding treaties and additional protocols thereto.[969] If the treaties are sufficiently broad, jurisdiction can extend to other treaties not explicitly listed to the extent that they are in force between the parties, without valid reservations.[970] Invariably however, human rights courts are unable to also independently address breaches of IHL[971] or treaties such as the Genocide Convention,[972] though this would not prevent the treaties from serving as interpretive tools.[973] Human rights courts regularly recognise the application of human rights law to situations of armed conflict.[974]

Most regional human rights treaties require States Parties to secure to everyone within their jurisdiction or all persons subject to their jurisdiction, the rights defined therein.[975] The

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968 *Legal Consequences of the Construction of a Wall* (n 389) [114] – [137]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [105(2)(c)], [105(2)(d)]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 34) [118], [131]

969 ECHR (n 77) Art 32(1); ACHR (n 309) Arts 62(1), (3); Art 3, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights* OAU/LEG/EXP/AFCHPR/PROT(III) (Adopted 10 June 1998, entered into force 25 January 2004) [ACHPR Protocol]

970 Art 3 of the ACHPR Protocol, ibid, affords competence over any instrument, including international human rights treaties, which have been ratified by the State party in question. This is replicated in the *Protocol on the Statute of the African Court of Justice and Human Rights*, AU (adopted 1 July 2008, not yet in force) (2009) 48 ILM 317 [ACJHR Protocol] Art 28

971 *Las Palmeras case* (Preliminary Objections) Ser C no 67 (IACtHR, 4 February 2000) para 34

972 *Plan de Sánchez Massacre v Guatemala* (Merits) Ser C no 105 (IACtHR, 29 April 2004) para 51

973 *Bámaca-Velásquez v Guatemala* (Merits) Ser C no 70 (IACtHR, 25 November 2000) paras 208-9

974 *Serrano-Cruz Sisters v El Salvador* (Preliminary Objections) Ser C no 118 (IACtHR, 23 November 2004) paras 111-113; *Al-Skeini v United Kingdom* (n 248) [164]

975 Art 1 ECHR (n 77); Art 1 ACHR (n 309). See, *Al-Skeini*, ibid; *Loizidou v Turkey* (Preliminary Objections) (GC) App no 15318/89 (ECtHR, 23 March 1995) [60] – [64]

American Convention on Human Rights (ACHR) and ECHR contain explicit rules to this effect, but the African Charter and the American Declaration (applicable to OAS Member States that have not ratified the ACHR) are silent on this point.[976] Nonetheless, both the African and Inter-American commissions have recognised their competence over breaches occurring outside of the territory of the Respondent, if it exercised effective control.[977] So far, these commissions have only considered conduct occurring within the territorial scope of the relevant treaty. It is thus unclear whether actions outside the territorial space would also be covered. This is relevant for conduct taking place in overseas operations. If conduct is attributed to the sending State, are host State citizens able to avail themselves of regional human rights mechanisms applicable to the sending State? The answer is affirmative for the ECtHR[978] with some limitations,[979] though less clear for other regional mechanisms.

Several though not all[980] RIO courts can adjudicate human rights claims.

In Africa, owing to the absence of a functioning Africa-wide RIO court,[981] sub-regional courts have a particularly important role. While the East African Court of Justice

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976 Art 1, ACHPR (n 371); *American Declaration of the Rights and Duties of Man* (adopted by the Ninth International Conference of American States April 1948) [American Declaration]

977 *Coard v United States,* Case 10.951, Rep no 109/99 (IACommHR, 29 September 1999), para 37; *DRC v Burundi, Rwanda and Uganda,* Comm no 227/99 (ACommHPR, 20th Annual Activity Rep, May 2003); *Egyptian Initiative for Personal Rights and Interights v Egypt* (n 417) ; *Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia,* Comm no 157/96 (ACommHPR, 33rd Ordinary Sess 15-29 May 2003) [52]. See generally, Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); Takele Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (2011) 27 S Afr J Hum Rts 249

978 *Al-Skeini* (n 248)

979 *Bankovic v Belgium* (n 247) [80]

980 *Shanique Myrie v Barbados,* CCJ 3 (OJ) (CCJ, 4 Oct 2013) para 10; *Ricardo Duarte Moncada v Gobierno de Nicaragua, Alcaldía de Managua y Banco Centroamericano de Integración Económica (BCIE),* Case no 1-01-12-1994 (CACJ, 21 February 1995)

981 The African Court of Justice is not operational. Shortly after the entry into force of the *Protocol of the Court of Justice of the African Union* (adopted 11 July 2003, entered into force 11 February 2009), it was decided to merge it with the ACtHPR. The protocol on the establishment of this merged court put out of force the *Protocol of the Court of Justice of the African Union*. See, ACJHR Protocol (n 970) Arts 1, 2. See, Gino Naldi and Konstantinos Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg' (2012) 9 Intl Org LR 383, 387

(EACJ) has no jurisdiction over human rights violations *per se*, it can consider such cases if they fall within its overall jurisdictional framework.[982] It interpreted its mandate in this way even though the operative treaty refers to the possibility for the Court to have jurisdiction over human rights cases *at some future date*.[983] The Southern African Development Community (SADC) Tribunal held similarly in the *Mike Campbell case*.[984] There, the Zimbabwe Government contended that the SADC treaty did not concern human rights or agrarian land reform and thus those matters could not form the subject of a claim before the Tribunal. The SADC Tribunal held otherwise. Referencing general obligations in the Treaty,[985] it held that it had jurisdiction over the issues raised, which concerned Zimbabwe's land redistribution policy.

The political fallout from this and related SADC cases led the Zimbabwe Government to stop cooperation with the Tribunal. This ultimately led SADC heads of State to review the terms of the Tribunal,[986] effectively halting its operations.[987] In 2012, SADC resolved to negotiate a new Protocol on the Tribunal and determined that the Tribunal's mandate should be confined to interpreting the SADC Treaty and Protocols relating to disputes between Member States.[988] Some have argued that this retreat evidences the unbound commitment to

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982 *James Katabazi v Secretary General of the EAC*, Ref no 1 (EACJ, 20 November 2007)
983 Art 27(2), *Treaty for the Establishment of the East African Community as Amended* (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS I-37437 [EAC Treaty]
984 *Mike Campbell (Pvt) Ltd & 78 Others v Zimbabwe* 02/07 JUD (SADC Tribunal, 28 November 2008)
985 Art 4(c), *Treaty of the Southern African Development Community* (adopted 17 August 1992, entered into force 30 September 1993) [SADC Treaty].
986 SADC, Communiqué (30th Jubilee Summit of SADC Heads of State and Government, Windhoek, 16-17 August 2010) <http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan040981.pdf> accessed 31 July2015, para 32
987 SADC, Communiqué (Extraordinary Summit of SADC Heads of State and Government, Windhoek, 20 May 2011) <www.swradioafrica.com/Documents/SAD CSummit240511.pdf > accessed 31 July 2015, paras 7, 8. See also, Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35(4) Human Rights Q 870, 878-9; Frederick Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13(1) Human Rights LR 153, 161-164
988 SADC, Final Communiqué (32nd Summit of SADC Heads of State and Government, Maputo, 18 August 2012) <www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf> accessed 31 July 2015, para 24

State sovereignty over and above community values.[989] Others like Nkhata see the pushback as a response to perceived judicial activism in the face of a vague and fragile mandate,[990] though EAC governments did not have the same response to the EACJ's arguably similar expansive judicial interpretations. The Economic Community of West African States (ECOWAS) took a different approach. In an early case, the ECOWAS Community Court of Justice (ECOWAS CCJ) determined that the Protocol establishing the Court did not afford it with the necessary competence to adjudicate human rights cases.[991] However, that finding spurred efforts to revise the Protocol.[992] The result of the revision process is a Court which now has a wide competence over any treaty adopted by the Respondent State, including the African Charter.[993]

Similarly, the founding treaties on the EU did not expressly reference human rights, however these have been recognised progressively in the jurisprudence of the CJEU and predecessor courts[994] and now form a core part of EU law. With the coming into force of the *Treaty of Lisbon*,[995] the *Charter of Fundamental Rights of the European Union*[996] binds all EU bodies and Member States,[997] including the CJEU. The CJEU also applies the ECHR, and Charter rights which correspond to rights already guaranteed by the ECHR are given the

[989] Nathan (n 987) 879
[990] Mwiza Jo Nkhata, 'The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflections on the Human Rights Mandate of the Tribunal of the Southern African Development Community' (2012) 20 Afr J Intl & Comp L 87, 99
[991] *Jerry Ugokwe v Nigeria*, ECW/CCJ/JUD/03/05 (ECOWAS CCJ, 7 October 2005) paras 29-33
[992] *Supplementary Protocol Amending the Protocol Relating to the ECOWAS Community Court of Justice* (adopted 19 January 2005, entered into force 19 January 2005) ECOWAS Doc A/SP.1/01/05 [ECOWAS 2005 Protocol]
[993] Article 9(4) of the ECOWAS 2005 Protocol enables Court to entertain cases that concern 'violation of human rights that occur in any Member State'; and Article 10(d) affords the Court the possibility to hear cases from individuals on application for relief for violation of their human rights'. See, Solomon Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54(1) J Afr L 1, 14-19
[994] Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1
[995] *Treaty of Lisbon* (n 75)
[996] 2000/C 364/01 (adopted 7 December 2000, entered into force 1 December 2009) [EU Charter]
[997] Art 6(1) TEU (n 75). Stelios Andreadakis and Sonia Morano-Foadi, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: the European Judicial Approach to Fundamental Rights' (2011) 17 Eur LJ 595, 610

same meaning and scope as, and no lesser degree of protection than, provided under the ECHR.[998] Nonetheless, significant gaps remain. The CJEU has no jurisdiction over acts adopted within the EU's Common Foreign and Security Policy (CFSP),[999] with the exception of sanctions.[1000] Accountability is thus restricted for the EU's military, anti-piracy and external border control actions which all have significant potential to impact human rights.

It is likely that certain acts undertaken by Member States under the guise of the EU will be attributed to the EU.[1001] Without access to the CJEU for areas linked to CFSP, the prospects for EU accountability are slim, despite the EU's own obligation to compensate for damages caused by its institutions or servants in the performance of their duties.[1002] The EU has established only one mechanism to assess alleged human rights violations attributable to an EU Common Security and Defence Policy mission - the Human Rights Review Panel (HRRP), which can review alleged human rights violations by EULEX Kosovo.[1003] But, it can only issue non-binding recommendations for remedial action (other than compensation) by the Head of Mission. Thus, without access to the CJEU, the victims of these violations have no recourse to a court, nor any ability to ensure the recommendations are heeded.[1004]

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[998] See, Case C-400/10 PPU *J McB v LE* [2010] ECR I-08965, para 53

[999] See Art 24(4) TEU (n 75) and Art 275 TFEU (n 75). See, e.g., Case T-271/10 *H v Council of the European Union, European Commission and Mission de police de l'Union européenne (MPUE) en Bosnie-Herzégovine* (GC, 10 July 2014) [Under appeal, Case C-455/14 P, lodged 29 September 2014]

[1000] Art 275 TFEU (n 75)

[1001] Applying the rationale of the ECtHR's decision in *Behrami and Behrami v France* and *Saramati v. France, Germany and Norway* (n 130) which attributed conduct to UNMIK. Stefano Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights' (2011) 22(3) EJIL 829, 845-6. See also, the draft explanatory report to the accession agreement of the EU to the ECHR, which envisions that acts of EU institutions, bodies, offices or agencies, or persons acting on their behalf, will be attributed to the EU. *Draft Explanatory report to the Agreement on the Accession of the European Union to the ECHR* (2 April 2003) COE Doc 47+1(2013)007, Art 21(a)

[1002] Art 340(2) TFEU (n 75)

[1003] See Chapter V

[1004] Gentian Zyberi, 'The applicability of general principles and instruments of international law to peace missions of the European Union' in Aurel Sari and Ramses Wessel (eds), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?* **(**CLEER Working Papers 2012/6, TMC Asser Institute 2012) 21, 33

A possible solution lies with the EU's planned accession to the ECHR, which would afford ECtHR oversight over the conduct of the EU and its institutions.[1005] Accession was recommended as early as 1979, given the increasing impact of the Community's activities on citizens, and the need to counterbalance its powers 'by their formal subjection to well-defined fundamental rights.'[1006] Discussions have continued ever since. A draft accession treaty was agreed in 2013.[1007] However, the CJEU determined that it was incompatible with EU law, one of the reasons being that it allowed the ECtHR to assess the human rights compatibility of CFSP decisions without prior scrutiny by the CJEU, potentially jeopardising the autonomy of EU law. [1008] As such, changes to the accession agreement would need to be agreed, if accession is still to be pursued. If further negotiation results in an exemption of CFSP matters from the jurisdiction of the ECtHR, this would reduce the value of accession.[1009]

VII.3 Personal Jurisdiction - Claims concerning IOs

Aside from RIO courts, most international or regional courts with subject matter competence over human rights and/or IHL cannot adjudicate claims against IOs.

[1005] Art 6(2) TEU (n 75). See, Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 HRLR 645

[1006] European Commission, 'Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2 May 1979) COM (79) 210 final

[1007] *Draft revised agreement on the accession of the European Union to the ECHR*, (5th Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the EU to the ECHR, Final Report to the CDDH) (10 June 2013) COE Doc 47+1(2013)008rev2, Appendix I

[1008] Opinion 2/13, *Request for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission* ECLI:EU:C:2014:2454 (Grand Chamber, 18 December 2014) paras 95-100

[1009] Eva-Maria Poptcheva, 'Human rights applied to CSDP operations and missions' (European Parliamentary Research Service Briefing, 21 January 2014) <www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130712/LDM_BRI(2014)130712_REV2_EN.pdf> accessed 18 March 2015

VII.3.1 International Courts

General international courts such as the ICJ can only adjudicate contentious cases against States, and then only in specified circumstances.[1010] IO conduct can be considered as part of advisory proceedings, albeit in limited and usually indirect ways. The ICJ can also use its advisory procedure to 'review' decisions of certain international administrative tribunals,[1011] or provide an opinion on a difference between the UN and a Member State arising out of the interpretation or application of a convention which designates the ICJ for this purpose.[1012] These 'reviews' or treaty-based opinions, which may have binding effect in accordance with the treaties, headquarters agreements or other texts which accord them that status,[1013] nevertheless must comply with the procedures for Advisory Opinions set out in the Charter.[1014]

The procedure is imbalanced. Advisory proceedings can only be lodged by the IOs themselves, not by those who have grievances with IOs.[1015] Only the IO is 'represented,' though the ICJ has taken certain procedural steps to assist the 'party' that does not benefit from standing.[1016] IOs tend to bring proceedings in which they are seeking legal advice to resolve a matter before one of the organs of the UN or to support a particular position. This limits their capacity to serve as a check on IO actions or as a route whereby the grievances of natural or legal persons unaffiliated with the IO may be aired and resolved; those types of

[1010] ICJ Statute (n 10) Arts 34-36
[1011] The Administrative Tribunal of the International Labour Organisation affords this possibility. The UN Administrative Tribunal previously had this system in place, but this was abolished with the establishment of the internal appeals mechanism. Paolo Vargiu, 'From Advisory Opinions to Binding Decisions: The New Appeal Mechanism of the UN system of Administration of Justice' (2010) 7(2) Intl Organizations L 261
[1012] CPIUN (n 134), Art VIII, s 30
[1013] Roberto Ago, '"Binding" Advisory Opinions of the International Court of Justice' (1991) 85 AJIL 439
[1014] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10, [21] – [27]
[1015] Ibid, [65]; UN Charter (n 10) Art 96
[1016] id, [3], [6], [7], [12], [45]

advisory opinions are not sought by IOs. Even when there is a treaty right for a State to insist upon a 'binding' Advisory Opinion, there is no obligation on the State to seek enforcement of this right. For instance, the Government of Haiti has not sought to insist in accordance with Article 30 of the CPIUN that the UN bring a request for an Advisory Opinion to the ICJ in relation to the differences arising out of the interpretation and application of Article 29 of the Convention. This is despite the fact that Office of Legal Affairs' interpretation has scuppered efforts of the many Haitians affected by the cholera epidemic to obtain an effective resolution of their disputes with the UN. Under the law of diplomatic protection, Haiti is not obliged to take up the disputes of its citizens.

The ICJ has assessed various matters concerning IOs in the course of its findings. It recognised that the UN's international personality gives rise to both rights and duties, and UN competence to present an international claim.[1017] It also determined that, in relation to 'acts performed by the United Nations or by its agents acting in their official capacity' that '[t]he United Nations may be required to bear responsibility for the damage arising from such acts.'[1018] The ICJ affirmed that the UN can establish a tribunal to deal with staff disputes[1019] in order to fulfil its purposes. While it has made clear that the Charter does not enable it to review decisions of UN organs,[1020] in a number of its proceedings the ICJ has carried out limited inquiries into the validity of the actions of UN organs,[1021] as did the ICTY, at least for the purposes of confirming its own jurisdiction.[1022]

[1017] *Reparation for Injuries* (n 6) 179
[1018] *Cumaraswamy case* (n 135) [66]
[1019] *Effect of awards* (n 424) 58
[1020] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 114, [42] –[46]; *Continued Presence of South Africa in Namibia* (n 34) [89]
[1021] See, e.g., *Certain expenses of the United Nations* (n 32) 20-23; *Continued Presence of South Africa in Namibia* (n 34) [89] – [95]; *Legal Consequences of the Construction of a Wall* (n 389) [25] – [35]
[1022] *Prosecutor v Tadić* (Decision on Jurisdiction) IT-94-1-T (ICTY, 10 August 1995) paras 16, 40; ICTY, *Prosecutor v Tadic* (Decision on Motion for Interlocutory Appeal) (n 368); Jose Alvarez, 'Judging the Security Council' (1996) 90 AJIL 1, 11-12

These assessments of IO conduct are noteworthy. Nonetheless, they are relatively few and are not evidence of a burgeoning process of substantial or coherent review by the ICJ, nor do they resolve its lack of competence to resolve contentious claims concerning IOs.[1023] Sir Robert Jennings has noted 'the extraordinary anomaly of an international community in which international organizations play an increasing role and yet, even interstate organizations cannot be parties, or be made parties, to contentious cases before the supreme court of that community.'[1024]

Other international courts with subject specific mandates cannot adjudicate claims against IOs that are not parties to the agreements relevant to those courts. In this sense, the WTO Appellate Body cannot rule on any actions or inactions of the WTO; however it can consider claims made against the EU which is a WTO member since 1 January 1995.[1025] Similarly, the International Tribunal on the Law of the Sea can consider claims made against the EU, which ratified the *UN Convention on the Law of the Sea*.[1026] Other IOs may in future become parties to the Convention which would enable claims to be lodged against them.[1027] The Seabed Disputes Chamber can also hear claims against the EU as a party. Claims can also be lodged against the International Seabed Authority which administers the resources of

[1023] The inability to sue NATO forced Yugoslavia to bring its claim related to the NATO aerial bombing campaign against individual NATO members only. See, *Legality of Use of Force (Yugoslavia v. United States of America)* **(**Application Instituting Proceedings) 1999 General List No 114, filed with ICJ Registry, 29 April 1999 . At the same time, an application instituting proceedings was filed against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain and the United Kingdom
[1024] Robert Jennings, 'The United Nations at Fifty: The International Court of Justice After Fifty Years' (1995) 89 AJIL 493, 504-5
[1025] At the time of writing, 80 disputes had been filed against the EU as respondent. See WTO, 'The European Union and the WTO' <www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> accessed 18 March 2015
[1026] *Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. It was ratified by the European Community on 7 December 1984.
[1027] Ibid, Arts 20(2), 305

the deep seabed and the Enterprise, which once established will serve as the Seabed Authority's operator on mining issues.[1028]

VII.3.2 Regional Courts

Most RIO courts can adjudicate claims against only those IOs that form part of their internal system. These tend not to be full-fledged contentious procedures but instead help ensure the proper interpretation and valid application of the acts of the internal system. Annulment, reference or review proceedings can be lodged before many RIO courts.[1029] These same courts can adjudicate cases where it is alleged that the RIO failed to fulfil an obligation or infringed a legal provision binding upon it.[1030] Additionally, some courts are mandated to resolve employment disputes.[1031]

In contrast, regional human rights courts have not exercised jurisdiction over IOs given their limited competence under their constituent agreements and the restrictive interpretations they have given to these agreements. The European Commission confirmed the lack of personal jurisdiction over the European Community in its 1978 *Confedération Française Démocratique Du Travail* decision.[1032] The ECtHR has equally affirmed that it had

[1028] Id, Part XI, s 5, art 187

[1029] *Agreement Establishing the CCJ* (adopted 14 February 2001, entered into force 23 July 2002) Arts XII(1)(c), (d), XIII, XIV; *Statute of the CACJ* (adopted 10 December 1992, entered into force 2 February 1994) (1995) 34 ILM 923, Arts 22(b), (k), 23; *Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol)* (adopted 28 May 1996, entered into force 25 August 1999) (1979) 18 ILM 1203 [Treaty Creating the CJAC], Arts 17-20, 32-34; TFEU (n 75) Arts 19(b), 218(11), 263, 267, 269; EAC Treaty (n 983) arts 27(1), 28(2), 30(1); ECOWAS 2005 Protocol (n 992) Art 9(1)(a), (b) and (c)

[1030] See, Art XII(1)(b) *Agreement Establishing the CCJ* (ibid); Art 22(g) *Statute of the CACJ* (ibid); Arts 37, 38 Treaty Creating the CJAC (ibid); Arts 263, 265, 271(b), (c), (d), 272 TFEU (n 75); Art 28(1) EAC Treaty (ibid); Art 9(1)(g), (2) ECOWAS 2005 Protocol (ibid); Arts 17, 18 *Protocol on SADC Tribunal* (adopted 7 August 2000, entered into force 14 August 2001)

[1031] Art 31 EAC Treaty (n 983); Art 9(1)(f) ECOWAS 2005 Protocol (ibid); Art 19 *Protocol on SADC Tribunal*; Art 270 TFEU (n 75); Art 40 Treaty Creating the CJAC (n 1029)

[1032] *Confedération Française Démocratique du Travail v European Communities, alternatively: their Member States a) jointly and b) severally* (Decision on Admissibility) App no 8030/77 (ECommHR, 10 July 1978) para 3. See also *M & Co v Germany* (n 108) 144; *Matthews v United Kingdom* (n 108) [32] no jurisdiction over acts of universal IOs.[1033] And, as indicated above, the planned accession of the EU to the ECHR has been stymied by a recent opinion of the CJEU.[1034] Until such time as the EU accedes, claims against it and its institutions are inadmissible *ratione personae*.

Both the African Commission and Court on Human and Peoples' Rights have refrained from exercising jurisdiction against AU and sub-regional institutions in Africa. Following the suspension of the work of the SADC Tribunal, several recipients of judgments impacted by the suspension claimed to the African Commission.[1035] Their initial claim was brought against SADC institutions and SADC Member States. The Commission admitted the case against the fourteen States, but not against the SADC institutions, because it has 'no jurisdiction over intergovernmental organizations and their organs'.[1036] Civil society groups also sought to encourage the African Court on Human and Peoples' Rights (ACtHPR) to issue an advisory opinion on the matter, however it declined to do so given that the matter was pending before the Commission.[1037]

The ACtHPR has denied competence over cases brought against the AU and its institutions, though its rulings used other rationales for dismissal.[1038] However, the Protocol

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[1033] E.g., the ECtHR cases *Behrami v France* (n 130); *Galić v the Netherlands* Decision on Admissibility, App no 22617/07 (ECtHR, 9 June 2009); *Blagojević v The Netherlands,* Decision on Admissibility App no 49032/07 (ECtHR, 9 June 2009); *Berić v Bosnia and Herzegovina*, Decision on Admissibility App nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 (ECtHR, 16 October 2007); *Kalinić and Bilbija* v Bosnia and Herzegovina, Decision on Admissibility, App nos 45541/04, 16587/07 (ECtHR, 13 May 2008); *Gajic v Germany* Decision on Admissibility, App no 31446/02 (ECtHR, 28 August 2007)

[1034] *Opinion 2/13* (n 1008)

[1035] *Luke Munyandu Tembani and Benjamin John Freeth v Angola and Thirteen Others*, Comm no 409/12 (ACommHPR, 54th Ordinary Sess, 22 October – 5 November 2013)

[1036] Ibid, paras 15, 80

[1037] *Request for an Advisory Opinion by Pan African Lawyers' Union and the Southern Africa Litigation Centre*, App no 002/2012 (ACtHPR, 15 March 2013)

[1038] *Femi Falana v African Union*, App no 001/2011 (ACtHPR, 26 June 2012), dismissed on the basis of lack of standing; *Efoua Mbozo'o Samuel v the Pan African Parliament*, App no 010/2011 (ACtHPR, 13 September 2011), dismissed for lack of subject matter jurisdiction. In the latter case, Judge Fatsah Ouguergouz issued a Separate Opinion in which lack of personal jurisdiction over the Pan African Parliament is addressed, [7] – [11]

establishing the Court and its jurisdiction only outline subject matter jurisdiction; personal jurisdiction is not set out.[1039] If this approach were adopted by the merged African Court of Justice and Human Rights, then claims against AU institutions would only be capable of being made to the General Affairs section, and these could not involve human or peoples' rights.[1040] Thus, the merging of the two courts and the strict demarcations of competencies would have the effect of narrowing jurisdiction. Unlike some other RIO courts which are competent to address human rights claims against RIOs, the merged AU court would appear not to have this possibility, in the absence of creative interpretation.

VII.3.3 Limited indirect review by regional courts?

Like the ICJ, some regional human rights courts have exercised limited review over IO acts. Several RIO courts have done similarly in respect of IOs outside their regional remit. These cases address State responsibility, with the reviews of IO acts being incidental to the assessment of that responsibility.

The jurisprudence does not follow a linear or chronological trajectory, nor does it appear satisfactory. One is left with an overall impression of the need for an international court with a mandate to assess directly IO responsibilities. Focusing the attention on the State implementers of acts originating from IO decisions appears to be based on ensuring a measure of accountability for what would otherwise be unaccountable IO acts. Yet, State responsibility does not displace the need for IO responsibility. As the DARIO makes clear, '[e]very internationally wrongful act of an international organization entails the international responsibility of that organization'.[1041] Focusing exclusively on State responsibility may also

[1039] Art 3(1) ACHPR Protocol (n 969)
[1040] See Art 17 of the ACJHR Protocol (n 970) which explains the competencies of the General Affairs and Human Rights sections. See also, Naldi and Magliveras (n 981) 398-400
[1041] DARIO (n 1) Art 3

undermine the notion that IOs have distinct and separate legal personalities from the Member States that establish them. Co-mingling these two responsibilities in effect pierces the veil of the separate personality of the IO, which may also undermine IO independence in the longer-term.

The jurisprudence can be separated into four main categories:

(1) The primacy of Article 103 of the UN Charter

In several cases in which responsibility was attributed to IOs, these same courts determined that they could not ascertain also States' and/or RIO's separate responsibility arising from their implementation of the impugned acts, because to do so would constitute an unwarranted intrusion with the fulfilment of the IO's key mission.

The 2005 *Yusuf and Kadi* decisions take this approach.[1042] The applicants requested an annulment of the EC regulation imposing Community-wide restrictions on legal and natural persons suspected of terrorism, which was put in place to comply with the UN Security Council sanctions regime. The Court determined that according to international law, UN Member States' obligations under the UN Charter which extend to the implementation of Security Council decisions prevail over any other obligation, including those under the ECHR and EC Treaty.[1043] As the purpose of the European regulation was to give effect to Security Council resolutions, any review of its lawfulness would necessarily require the

[1042] Case T 306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-03533; Case T 315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649. The decisions were overruled by Court of Justice of the European Communities in Kadi 2008 (n 302)
[1043] Case T 306/01 ibid, paras 233-234, 240, 249

Court to examine the lawfulness of the Security Council resolutions,[1044] which it had no authority to do.

Somewhat at odds with the first part of its ruling, the Court of First Instance of the European Communities (CFI) set out a limited exception. It considered itself competent to assess the lawfulness of the regulation and, indirectly, of the Security Council resolutions implemented by that regulation in the light of the higher rules of general international law comprising *jus cogens*, from which neither the Member States nor the bodies of the UN may derogate.[1045] It proceeded upon this review[1046] and determined that no principles of *jus cogens* are impacted by the resolution. The lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*, because the right to access courts is not absolute.[1047]

The *Behrami and Saramati* cases[1048] affirm the CFI's approach. The cases concerned the conduct of French and Norwegian military personnel in Kosovo, who served under the KFOR NATO military mission. Mr Behrami alleged a violation of the right to life, following the killing of one son and serious injury of another, due to French KFOR troops' failure to mark and defuse un-detonated cluster bombs. Mr Saramati's claim concerned his unlawful detention in a KFOR camp. At the time of the incidents, Kosovo was under the authority of a UN Interim Administration – UNMIK, and the ECtHR attributed the conduct to UNMIK

[1044] Id, para 266
[1045] Id, para 277
[1046] Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke J Comp & Intl L 69, 91; Mielle Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities' (2006) 19(3) Leiden J Intl L 753, 769-772; Christina Eckes, 'Judicial Review of European Anti-Terrorism Measures—The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14(1) European L J 74, 90-91
[1047] Case T 306/01 (n 1042) para 341
[1048] *Behrami v France* (n 130)

‘exclusively’.[1049] This conclusion was criticised not least because it implied that attribution of responsibility to UNMIK necessarily prevented an inquiry into States’ distinct liability for their specific roles in relation to the events.[1050]

The ECtHR determined that it cannot scrutinise conduct of States that is covered by Security Council resolutions, because the acts ‘were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.’[1051] To embark on a review would ‘interfere with the fulfilment of the UN's key mission … [and] would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.’[1052] It distinguished its *Bosphorus* ruling on the need for ‘equivalent protection’, because the acts in question were not carried out by France and Norway on their territories or as a result of a decision by their authorities.[1053] Article 103 of the Charter prevails over all other obligations under other international agreements in the event of a conflict between them. *Bosphorus* was thus inapplicable because the UN ‘was acting in pursuit of its “fundamental mission . . . to secure international peace and security,” the efficacy of which would be undermined if troop-contributing States could scrutinize orders given to their troops’.[1054]

(2) A presumption of harmony

The ECtHR took a more nuanced approach in several post *Behrami* cases.[1055] *Nada v. Switzerland,*[1056] a delisting case, concerned an Egyptian national living in an Italian enclave

[1049] The rationale on the attribution of conduct to UNMIK is discussed in Chapter III.
[1050] Aurel Sari, ‘Jurisdiction and International Responsibility’ (n 246) 159
[1051] *Behrami v France* (n 130) [151]
[1052] Ibid, para 149
[1053] Id, para 151
[1054] Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’ (n 172) 124
[1055] *Behrami v France* (n 130) [149]
[1056] *Nada v. Switzerland* (n 302) [121] – [122]

surrounded by Switzerland who was effectively prevented from travelling as a result of Switzerland's implementation of UN sanctions. *Al Jedda v. the United Kingdom*[1057] concerned the lawfulness of UK detention practices in Iraq, under the cover of UN Security Council resolutions. In both cases, the ECtHR determined that there was a presumption that 'the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations'.[1058] Both these cases also turned on the fact that the respective Respondent States were understood to have discretion in how they were to implement the measures. Yet, in both cases there was no more than cursory consideration of the legal protections within the UN system.

(3) Limited review or presumption of validity

The African Commission on Human and Peoples' Rights was called upon to assess the compatibility of an embargo imposed against Burundi by States of the Great Lakes region following a coup d'état carried out by the Burundian army. The decision to impose the embargo was taken at the Arusha Summit of the States of the Great Lakes Region in 1996, but was thereafter endorsed by the OAU and UN Security Council. The Commission noted that, once endorsed by the Security Council, the embargo was no longer the act of a few States but imposes obligations on all UN Member States. It then went on to assess the validity of the embargo as endorsed, holding that '[t]he critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate

[1057] *Al-Jedda v United Kingdom* (n 256) [101] – [102]
[1058] ibid, [102]; cited affirmatively in *Nada* (n 302) [171]

purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of. … We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made.'[1059]

Another area of review concerns allegations that States' breached applicants' rights when surrendering them to international criminal tribunals. In *Naletilic*, the ECtHR exercised limited review over the ICTY when it determined that the Tribunal afforded defendants sufficient procedural guarantees. It declared the claim inadmissible, one of the reasons being that the Tribunal 'in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence.'[1060]

(4) The presumption of 'equivalent protection'

The ECtHR' doctrine of equivalent protection is set out in *Bosphorus*.[1061] The case concerned Ireland's potential responsibility for implementing the sanctions regime against the Federal Republic of Yugoslavia to the detriment of a Turkish charter company, whose leased aircraft Ireland impounded because it was owned by the Yugoslav national airline. The ECtHR recognized that States Parties retain responsibility for their conduct whether it stems from domestic law or acts taken to comply with international obligations.[1062] It would not be compatible with the ECHR to absolve States completely for any actions taken in pursuit of international obligations. State action in these areas is justified:

[1059] *Association pour la sauvegarde de la paix au Burundi* (n 977) [75] – [76]
[1060] *Naletilic v Croatia,* Decision on Admissibility, App no 51891/99 (ECtHR, 4 May 2000) [1(b)]
[1061] *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005) [152] – [153]
[1062] ibid, para 153

> … as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
>
> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[1063]

The ECtHR made clear that the presumption of equivalent protection can only apply when the Member State had no discretion in implementing the international obligation. When there is discretion, States' responsibility is fully engaged. The ECtHR has undertaken this assessment in a number of cases, though it has only rarely determined that an IO does not afford equivalent protection. In *Bosphorus*, the ECtHR held that the protection afforded by the EU was not 'manifestly deficient' and thus the presumption of equivalent protection was not displaced.[1064]

The *Bosphorus* principle concerned the ECtHR's relationship with the EU, ostensibly as a tool to respect complementary legal regimes. But, it has since been applied to other IOs. It was applied to the ICC in *Djokaba Lambi Longa v. The Netherlands,*[1065] which concerned a detained defence witness from the DRC who was brought to the Netherlands to testify in ICC proceedings. While in The Netherlands, he claimed asylum, and asked the ICC to defer his

[1063] id, paras 155, 156
[1064] id, para 159-166
[1065] *Djokaba Lambi Longa v The Netherlands* App no 33917/12 (ECtHR, 9 October 2012)

removal to the DRC until that claim was decided. While his claim was being processed, he was held in the UN Detention Unit. He challenged the lawfulness of his detention on the basis that the term for his imprisonment in the DRC had already expired, and therefore the ICC had no basis to detain him. The ECtHR determined that the ICC's detention of Mr. Longa was not a sufficient basis to attract Dutch jurisdiction.[1066] In this respect it followed its earlier jurisprudence in several ICTY fair trial and abuse of process cases.[1067] But, the applicants, pursuant to *Bosphorus,* argued that the presumption of equivalent protection was rebutted, because the protection offered by the ICC to defence witnesses was insufficient. This was rejected, but in so doing, the ECtHR carried out a rudimentary review of ICC procedures. It affirmed that Longa's detention had a basis in the provisions of international law governing the functioning of the ICC, observed that there were provisions in the ICC's rules to protect witnesses, and indicated that it was not evident that Longa would be kept in detention by the DRC authorities by the operation of those rules.[1068]

The *Bosphorus* principle was also the basis upon which the African Commission accepted that it had jurisdiction to consider whether SADC Member States violated the African Charter by acts they undertook under the guise of SADC institutions.[1069]

Bosphorus was also central to the analysis in the 2008 and 2013 *Kadi* judgments before the CJEU. The 2008 judgment annulled Regulation 881/2002 in so far as it concerned Mr Kadi, distinguished *Behrami* and affirmed that it was competent to review the legality of EU regulations even though these stemmed from Security Council resolutions. The Court recognised that the Community needed to attach special importance to Security Council

[1066] ibid, para 80
[1067] *Galić* (n 1033) *Blagojević* (n 1033)
[1068] *Djokaba Lambi Longa* (n 1065) [78], [80]
[1069] *Luke Munyandu Tembani and Benjamin John Freeth v Angola and Thirteen Others* (n 1035) [134]

resolutions adopted under Chapter VII which reflect the Council's primary purpose to maintain international peace and security.[1070] However, the Charter does not dictate how these resolutions should be transposed into domestic law; States have discretion as to how to implement. Because of the absence of judicial protection, the UN Sanctions Committee's de-listing procedure does not satisfy the presumption of equivalent protection.[1071] Thus, the Community judicature must 'ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.'[1072] The Court held that for a review to be effective, the EU must be in a position to explain why a person appears on a sanctions list and to give that person an opportunity to be heard. Persons should be informed that they appear on a list when the listing decision is taken or as swiftly as possible thereafter.[1073] These requirements were not met in Mr Kadi's case, resulting in the infringement of his rights.

The Court maintained the effects of the annulled regulation in so far as it concerned Mr Kadi for three months in order to allow the Council to remedy the infringements. Thereafter, the Sanctions Committee provided a summary of the rationale for the listing, which was shared with Mr Kadi, who was afforded the opportunity to respond. Before the expiry of the three month term, Mr Kadi was re-listed under a new EU regulation.

Consequently, he lodged a new action for annulment.[1074] With respect to the level and intensity of the review, the General Court in its 2010 judgment determined that there was a

[1070] Kadi 2008 (n 302) paras 294, 310- 313
[1071] ibid, paras 298, 321-325
[1072] id, para 326
[1073] id, paras 336-341
[1074] Case T-85/09 *Yassin Abdullah Kadi v Commission* [2010] ECR II-05177 [Kadi 2010]

need to respect 'the principle of a full and rigorous judicial review of [freezing measures such as those at issue in this instance]', which were taken to require indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying the listing.[1075] This was understood as necessary, 'at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection.'[1076] The Court further determined, *inter alia*, that the lack of proper access to information and evidence used against him, and without giving him proper opportunity to be heard, has meant that Mr Kadi was unable to adequately defend his rights and thus compromising his right to effective judicial review and effective judicial protection.[1077] That decision was then appealed by the Commission and others, but was ultimately dismissed.[1078]

The *Bosphorus* analysis was also applied to the UN sanctions regime in *Al-Dulimi and Montana Management Inc. v. Switzerland*[1079] which concerned Switzerland's freezing and confiscation of an Iraqi national's assets in accordance with UN Security Council resolutions. The ECtHR concluded that Switzerland had no discretion whether to implement the sanctions,[1080] thus the Court considered whether the UN afforded sufficient human rights protections as compared to ECHR standards. It held that it did not. Even though the Sanctions Committee had introduced a range of safeguards including a de-listing procedure, these did not afford equivalent protection.[1081] The case is controversial in that it makes a clear break from *Behrami* (which had distinctly rejected the *Bosphorus* reasoning from cases which

[1075] ibid, paras 126, 129
[1076] id, paras 127, 128
[1077] id, paras 181, 183, 184
[1078] Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* ECLI:EU:C:2013:518 (Grand Chamber, 18 July 2013) [Kadi 2013]
[1079] *Al-Dulimi and Montana Management Inc v Switzerland*, App no 5809/08 (ECtHR, 26 November 2013) [referred to GC]
[1080] ibid, [90]; *Nada* (n 302) [121], [122]
[1081] *Al-Dulimi*, id, para 106

concerned obligations stemming from Article 103 of the UN Charter).[1082] The consequence of the ruling is unequivocal; it affirms that ECHR Member States will violate their ECHR obligations if they comply with the UN sanctions regime.

Arcari argues that the equivalent protection doctrine is better able (than for instance the *Behrami* approach of pure primacy of the UN Charter) to balance the range of interests at stake, both legal and political.[1083] But as he notes, this will depend on how rigorously the doctrine is applied. He suggests that the progressive strengthening of the judicial review requirement – from a rather lax and flexible standard of 'equivalent protection'[1084] to the more rigid and precise requirement of 'effective and independent judicial review'[1085] has perhaps swung the pendulum too far.[1086] I would disagree. The strengthening of the EC's review model has played an instrumental role in galvanising attention to the deficiencies in the Sanctions Committee's procedures, as no other court could do, and in the absence of a specially mandated international court. It thus not only has helped to safeguard fundamental human rights protections for the individuals concerned, but has contributed indirectly to the progressive strengthening of the system.

VII.4 *Locus standi* of individuals before international and regional courts

Standing, or *locus standi*, refers to whether a person or entity has the right to be heard in court. This term can apply to potential plaintiffs who wish to lodge proceedings and to those

[1082] Maurizio Arcari, 'Forgetting Article 103 of the UN Charter? Some perplexities on "equivalent protection" after Al-Dulimi' (2014) 6 Questions of Intl Law 31, 35-6
[1083] ibid, 36-38
[1084] *Bosphorus* (n 1061)
[1085] *Al Dulimi* (n 1079)
[1086] Arcari (n 1082) 39

who wish to address or be heard by a court in ongoing proceedings brought by others. The focus of this section is on the ability of individuals to lodge proceedings. As will be shown, the practice is mixed. Some courts afford a modicum of standing to individuals however the rules tend to be more onerous than what is in place for other parties. Furthermore, the way rules of standing interact with other rules on jurisdiction can combine to impede individuals from accessing courts.

A court will usually determine standing in accordance with explicit rules, only allowing certain types of parties to lodge proceedings: e.g., only States, or Parties to a Treaty, certain types of individuals such as employees or persons recognised as victims under the treaty regime. For instance, before the ICJ, only States may lodge contentious claims.[1087] This underpins the purpose of the ICJ to regulate disputes between sovereign States and underscores the traditional conception of international law which gives preeminence to the role of States in international affairs.

Some rules on standing are silent or vague and contextual, requiring judicial interpretation and discretion. Assessments tend to involve whether there is an identifiable dispute concerning the applicant raising a legal question that can be properly answered by the court. Courts will consider the degree of connection of the applicant to the dispute, such as whether the issue to be addressed is causing harm to the applicant or that the applicant has a sufficient interest in the matter to which the application relates. Criteria will depend on the court and the purpose for which standing is sought. Overly restrictive interpretations of these or related principles can greatly reduce the number and type of persons eligible to bring an action.

[1087] ICJ Statute (n 10) Arts 35, 36

Proposals have been made to grant IOs standing as plaintiffs and defendants before international tribunals and the compulsory jurisdiction of the ICJ in particular.[1088] But even if those proposals were heeded, this would only tackle part of the problem. Without standing for natural and legal persons, these would have to rely on States to espouse the claims through diplomatic protection. States have rarely brought claims against other States for the violation of their citizens' rights,[1089] and there is no indication that they would be more willing to bring contentious claims against IOs. Alter notes that in the limited instances in which States have espoused their nationals' claims, they have refrained from raising sensitive issues which fall outside their political interests.[1090] Furthermore, real or *de facto* stateless persons, refugees and others without normal relations with their States of nationality are disadvantaged by diplomatic protection regimes.[1091] Persons coming from failed States, States in conflict or political or economic turmoil will be similarly disadvantaged by the disinterest or lack of capacity of their States of nationality.

While some might argue that increasing individuals' access to international adjudication may affect State sovereignty, impede international courts' efficiency and effectiveness; these courts may drown in a flood of frivolous, malicious and unmeritorious applications, others including Lauterpacht have countered these suggestions.[1092]

[1088] Anastasia Telesetsky, 'Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility before the International Court of Justice' (2012) 21 Minn J Intl L 75, 96-103
[1089] Stefan Trechsel, 'A World Court for Human Rights' (2003) 1 Nw Univ J Intl HR (unpaginated)
[1090] Karen Alter, 'Private Litigants and the New International Courts' (2006) 39(1) Comparative Political Studies 22, 24
[1091] Note, however, Article 8 of the ILC's Draft Articles on Diplomatic Protection, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.684, which allows States to exercise diplomatic protection in favour of stateless persons and refugees who at the date of injury were lawfully resident in those States, except in respect of injury caused by an internationally wrongful act of the State of nationality of the refugee. This provision is permissible, not obligatory. Furthermore, it does not extend to the vast majority of situations involving individuals with unregulated residential status and persons who have become stateless or acquired refugee status subsequent to their injuries.
[1092] Hersch Lauterpacht, *International Law and Human Rights* (FA Praeger 1950) 186-194

VII.4.1 Regional human rights courts

Regional human rights courts have an inconsistent approach to standing. The Inter-American and African systems rely heavily on commissions to vet individuals' access to courts, whereas the access of States Parties to those courts is direct. Individuals must file a claim with the Inter-American Commission before their claim can be presented by the Commission to the Inter-American Court.[1093] This system is also in place for the ACtHPR, though individuals may institute cases directly before the Court if the State concerned has accepted the competence of the Court to receive cases in this way.[1094] The ECtHR initially had a similar procedure however it has since been streamlined.[1095] In addition to the inevitable delays caused by multiple tiers, dual processes also introduce contingency into individuals' access, given commissions' discretion whether to introduce an individual's claim before the court.[1096]

For the most part, regional human rights courts specify in their constituent agreements the jurisdictional bases for claims and the limitations on same. As set out in the prior section, the personal jurisdiction of regional human rights courts tends to be restricted to States. However, the ACHPR Protocol is silent on the issue, which has impacted on an individual's standing before the Court in a case directed at the African Union. In the *Femi Falana case*, which concerned a challenge by a Nigerian lawyer of the validity of Article 34(6) of the ACHPR Protocol, the Court determined that while its statute afforded limited ability for

[1093] ACHR (n 309) Arts 44, 51(1), 61(1). While individuals cannot lodge independent proceedings before the Court and formally it is the Commission that takes forward the proceedings before the Court, it has been recognised that the alleged victims have full and autonomous standing before the Court. See, Art 25 of the *Rules of Procedure of the Inter-American Court of Human Rights*, Approved by the Court during its LXXXV Regular Period of sessions, 16-28 November 2009

[1094] Art 55 ACHPR (n 371); ACHPR Protocol (n 969) Arts 5, 34(6)

[1095] See, Arts 25(1), 48 of the original ECHR and Art 34 of the current text. The merging of the functions of the Commission and Court occurred in 1998 by virtue of the adoption of *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby* (adopted 11 May 1994, entered into force 1 November 1998) CETS No 155

[1096] ACHPR (n 371) Art 55; ACHR (n 309) Art 62 claims to be brought against AU institutions, individuals were only entitled to lodge such claims if the State (presumably of their nationality) consented to the Court's jurisdiction. The Court's reasoning stemmed from its reading of the jurisdictional provisions of the Statute which provide that individuals may have access to the court when the State in question submits a declaration to that effect. The majority held that the fact that the AU is not a State does not automatically mean that no declaration is necessary to found jurisdiction.[1097] Article 34(6) of the Protocol which requires States to make a declaration to accept the competence of the Court to hear and determine human rights cases filed by individuals and NG0s was also deemed necessary to enable individuals to make claims against non-State respondents. The decision provoked a number of separate and dissenting opinions. Judges Ouguergouz and Mutsinzi understood that the Court had no mandate whatsoever to consider human rights claims against the AU.[1098] In their joint dissenting opinion, Judges Akuffo, Ngoepe and Thompson argued that Article 34(6), the provision the Applicant sought to challenge, should not itself be used to bar him from approaching the Court. They note that the

> Applicant's answer to Respondent's argument is that since he is not citing a Member State, but rather the Respondent, Article 34(6) has no application. There is merit in this argument. The Article only requires that State Parties make the declaration, and not non-State Parties. The law is not against an individual *per se*, but is aimed at protecting a State Party which has not made the declaration; that is why even a foreign individual can sue a State Party that has made the declaration. [1099]

Before the ECtHR, persons with standing need not be citizens of the Respondent State nor any of the States Parties of the Convention, nor do these individuals need to be resident or present in the territory of any State Party. This enables the Court to consider claims concerning the actions of States Parties outside of their territorial jurisdiction.[1100] The

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[1097] *Femi Falana* (n 1038) [59] – [61], [63]
[1098] Ibid, Separate Opinion of Judge Fatsah Ouguergouz, [11], [12]; Separate Opinion of Judge Jean Mutsinzi, [7], [8]
[1099] Id, Dissenting Opinion of Judges Sophia Akuffo, Bernard Ngoepe and Elsie Thompson, [8.5]
[1100] *Al-Skeini* (n 248)

American Convention is similarly broad, referring to 'any person or group of persons'.[1101] The African Charter and ACHPR Protocol are silent as to whether applicants' nationality poses a restriction on access to the Commission and Court. However as described, in *Femi Falana*, the applicant sought to claim against the AU (and not his State of nationality), but the Court used the failure of the applicant's State of nationality to ratify the Protocol as a means to dismiss the claim,[1102] thereby confounding the need for a potential respondent to have accepted the jurisdiction of the court to adjudicate claims lodged by individuals against it, and the nationality of the applicant, which should be an irrelevant consideration. The Inter-American Commission has a vague *locus standi* clause, and it is thus not clear whether claims can be brought from citizens outside of the region.[1103] Certain RIO courts also restrict *locus standi* to nationals from the States of the respective regions. This is the case with the Caribbean Court of Justice.[1104]

In addition to these differences in standing, there are further distinctions in regards to the various regional human rights mechanisms' understanding of 'which' individuals may have standing, or who might be the object of a human rights claim. Article 34 ECHR envisages applications to the Court from those claiming to be the victim of a violation of a Convention right by one of the contracting States. In its jurisprudence, the Court has held that only direct victims of a violation acting in their personal capacity have standing,[1105] though claims of violations of the right to life may be brought on behalf of those who died (or disappeared) by their next-of-kin, recognised as 'indirect victims' for those purposes.[1106] In

[1101] ACHR (n 309) Art 44
[1102] *Femi Falana* (n 1038)
[1103] *American Declaration* (n 976) Art 1
[1104] *Agreement Establishing the CCJ* (n 1029) Art XXIV
[1105] *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) [36]; *Tănase v Moldova* (GC) App no 7/08 (ECtHR, 27 April 2010) [104] – [111]; *Aksu v Turkey* (GC) App nos 4149/04, 41029/04 (ECtHR, 15 March 2012) [50] – [54]
[1106] *Gakiyev and Gakiyeva v Russia* App no 3179/05 (ECtHR, 23 April 2009) [165]; *Çakici v Turkey* (GC) App no 23657/94 (ECtHR, 8 July 1999) [98] – [99]

contrast, neither the African Charter or ACHPR Protocol, nor the American Convention, contains similar specifications as to what types of individuals have standing. To the contrary, they explicitly allow for *actio popularis*, allowing claims to be brought by certain organisations, recognizing that it will not always be possible for victims to file claims directly. However, the ACJHR Protocol specifies that only 'Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol' may have standing.[1107] Naldi and Magliveras have interpreted this limitation as affording standing to 'African individuals and African NGOs' only,[1108] though the term 'individuals' is not prefaced in the text by 'African', and thus whether individuals too must necessarily be African is unclear. However, taking into account the ACtHPR' ruling in *Femi Falana*,[1109] which interpreted the standing requirement as connected to the nationality of the applicant, their concerns are justified. If indeed standing is limited to African nationals only, this impedes the Court from adjudicating extra-African violations of human rights. A near identical provision appears in the Rules of Procedure and Evidence of the Inter-American Commission on Human Rights. Article 23 specifies that those eligible to submit petitions comprise of '[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS.'[1110] There is no known case in which the Inter-American or African commissions considered whether nationals from other continents would be eligible pursuant to these rules. If these rules were to be construed narrowly, this would pose a significant limitation on accountability, given the extent of both African and American States' involvement in global peace operations, and the potential impacts of those operations on nationals from other regions. As for the reference to only African or OAS NGOs, as Naldi and Magliveras explain,

[1107] ACJHR Protocol (n 970) Art 30(f)
[1108] Naldi and Magliveras (n 981) 405 fn 86.
[1109] *Femi Falana* (n 1038)
[1110] Rule 23, Rules of Procedure of the Inter-American Commission on Human Rights (entered into force 1 August 2013)

the difficulties for many African NGOs to register may limit the impact of this important *actio popularis* rule.[1111] The same may also apply to NGOs from certain OAS Member States.

VII.4.2 RIO courts – individuals' standing to pursue claims

Neither has the approach of RIO courts been uniform. Most RIO courts afford a modicum of standing to natural and legal persons however the rules tend to be more onerous for such applicants than for other parties. Furthermore, some RIO courts only afford standing to individuals from the respective region.[1112] Most of such courts allow for some form of annulment, reference or review proceedings concerning IOs. However, not all of these allow individuals to lodge such proceedings. And, of the ones that do, some have placed significant restrictions on standing.

(1) The Court of Justice of the European Union (CJEU)

The CJEU has served as a model for many other RIO courts. While it is known for the breadth of its cases and relatively wide subject matter jurisdiction, the standing of natural and legal persons is quite restrictive.

Natural and legal persons are able to bring a direct action against any EU body or institution for acts which are of direct and individual concern to them. They can bring actions for annulment to void a directive or decision adopted by an EU body.[1113] In addition, they can challenge the failure of an EU body or institution to act, where there was a duty to act. In order for such actions to be lodged, the individual must first call upon the institution to act.[1114] The Treaty on the Functioning of the European Union (TFEU) does not afford

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[1111] Naldi and Magliveras (n 981) 405 fn 86
[1112] E.g., *Agreement Establishing the CCJ* (n 1029) Art XXIV; EAC Treaty (n 983) Art 30(1)
[1113] TFEU (n 75) Art 263
[1114] ibid, Art 265

individuals the possibility to bring complaints against Member States. When a natural or legal person believes that a Member State has infringed Community law, it can advise the Commission or another Member State who may choose to bring proceedings before the CJEU.[1115] The Commission is not obliged to act on complaints lodged with it by natural and legal persons.

Natural and legal persons face heavy burdens to institute proceedings before the CJEU. Art 263(4) of the TFEU allows them to bring actions for annulment to the CJEU General Court against EU institutions only to the extent that the acts complained of:

i) are addressed to them specifically;

ii) are of direct and individual concern to them, in other words where they can demonstrate that they have been distinguished individually in the measure and has direct effects (and thus it is not enough for it to be a measure of general application, the applicants need to show that the measure targets them specifically by reason of certain attributes which were peculiar to them or by reason of circumstances which differentiated them from all other persons); or

iii) in relation to regulatory as opposed to legislative acts, so long as it does not entail implementing measures (which would be a matter for national courts), they can challenge such acts if they can show direct concern, but need not demonstrate individual concern.

Article 263(4) TEU has been interpreted narrowly. For instance, seal hunters who brought a claim to annul the basic regulation prohibiting the marketing of seal products on

[1115] id, Art 258

the EU internal market, were prevented by the CJEU from so doing, because the seal hunters lacked the required direct and individual connection to challenge a legislative act.[1116] This is in contrast to the less onerous requirements for States or EU institutions to seek review of EU acts.[1117]

One of the rationales for the CJEU's narrow and rigid standing rules is that the system preserves the preeminent role of national courts. The system encourages would-be applicants to address themselves to national courts, which if appropriate, could initiate a reference application to the CJEU for a preliminary ruling.[1118] In the *Area Cova SA* case, legal persons sought to challenge this rationale and the cumbersome and ineffective reference procedure.[1119] After all, States are not obliged to agree to pursue references; often they do not. When Dutch courts denied the *Mothers of Srebrenica* claim against the UN because of the UN's immunity before Dutch courts, the stichting requested that the Supreme Court seek a preliminary ruling from the CJEU on the relationship between UN immunities and the principle of effective judicial protection. The Supreme Court refused to do so.[1120] As has been noted by the ECtHR, the reasons for the refusal may well have been justified.[1121] Nevertheless, it underscores that the reference procedure is purely discretionary.

Area Cova SA's arguments on the reference procedure were not accepted.[1122] In a later case, a First Instance Court (now General Court) disagreed with the *Area Cova SA* ruling, and held that 'The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then

[1116] Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625 (Grand Chamber, 3 October 2013)
[1117] See, TFEU (n 75) Art 263 (2) and (3)
[1118] This procedure is set out in Art 267 TFEU (n 75)
[1119] Joined Cases C-300/99 P and C-388/99 P *Area Cova SA and Others v Council* [2001] ECR I-00983
[1120] *Stichting Mothers of Srebrenica v The Netherlands* (n 406) [171]
[1121] ibid
[1122] *Area Cova SA* (n 1119) para 54

asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection.'[1123] Nonetheless this later ruling was reversed on appeal.[1124]

These cases were decided before the entry into force of the Lisbon Treaty and thus before the Fundamental Rights Charter became directly applicable before the CJEU. Nevertheless, the post-Lisbon practice does not appear to have evolved. Thus far, CJEU judges have refrained from giving a more expansive reading to standing rules in light of the Charter.[1125] If the EU were to become party to the ECHR as planned, *locus standi* before the CJEU would be but one further area where the ECtHR might have greater influence. To date, given the limitations of the ECtHR's mandate with respect to acts of the EU or any other IO, judgments which have considered these or related issues have focused on the need for the applicant to rebut the presumption of 'equivalent protection', which is a relatively weak test. However, it is questionable whether this will be a sustainable argument going forward.

(2) RIO courts in the Americas

The Andean Court of Justice affords the widest standing to individuals of all RIOs. Largely mirrored on the CJEU, in many respects it has exceeded the CJEU in respect to access by natural and legal persons, though its subject matter jurisdiction is more restricted. Natural and legal persons can bring suits to nullify decisions or acts adopted by the Andean Community that affect their subjective rights or their legitimate interests.[1126] This provides much wider scope for standing, when compared to the CJEU's requirement that individuals show that the

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[1123] Case T-177/01 *Jégo-Quéré et Cie* v *Commission* [2002] ECR II-02365, para 45
[1124] Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR 2004 I-03425, paras 30-39
[1125] European Praesidium of the Convention, 'Updated Explanations Relating to the Text of the Charter of Fundamental Rights' (9 July 2003) CONV 828/03, 41
[1126] Treaty Creating the CJAC (n 1029) Art 19

acts are of direct and individual concern to them.[1127] Mirroring the CJEU provisions,[1128] individuals whose rights and interests are affected can also challenge an Andean institution's failure to carry out an activity for which it is expressly responsible, first through a procedure to demand fulfilment of the obligation and thereafter, as needed, to seek recourse before the Court.[1129] Individual are also able to appeal directly to the Court if they disagree with the Secretariat's prior disposition on a non-compliance complaint against a Member State[1130] (which goes beyond what is available for individuals at the CJEU).[1131] The Andean Court can also arbitrate disputes involving the application of Andean law, including those involving natural and legal persons.[1132]

The Central American Court of Justice also affords standing to natural and legal persons. Any party, including a natural or legal person can approach the Court regarding a State's non-compliance with any Conventions, Treaties or rules of the Central American integration system; any matters regarding actions by Central American institutions that affect anyone; any grievance concerning the disregard of local court orders by a branch or office of government, or to rule on any matter, arbitrate, mediate or decide on matters *ex aequo et bono*.[1133] However, as indicated, it has specifically determined that its mandate does not extend to human rights. This is stipulated in the Statute and has been confirmed in its jurisprudence.[1134]

[1127] TFEU (n 75) Art 263(4)
[1128] TFEU (n 75) 265
[1129] Treaty Creating the CJAC (n 1029) Art 37
[1130] Ibid, arts 24, 25
[1131] TFEU (n 75) Art 258
[1132] Treaty Creating the CJAC (n 1029) Arts 38, 39
[1133] Statute of the CACJ (n 1029) Arts 22, 39
[1134] The CACJ has likewise excluded human rights from its competence in accordance with Art 25 of its Statute. See also, CACJ, *Ricardo Duarte Moncada case* (n 981)

The Caribbean Court of Justice operates on the basis of a presumption of no standing for natural or legal persons, which may be rebutted with special leave of the Court.[1135] In applying its discretion, the Court must consider whether the interest of justice requires that standing be granted, and whether the persons seeking standing have suffered prejudice in respect of a benefit owed to them directly that the State has failed to espouse.[1136] Individual are only entitled to apply for standing to pursue claims concerning the interpretation and application of the Treaty.[1137] The Court has granted special leave to individuals alleging *inter alia* discriminatory immigration laws[1138] and breach of CARICOM rules on free movement.[1139] Unlike States, individuals cannot request advisory opinions.[1140] The presumption of no standing also applies to natural and legal persons who wish to bring claims against CARICOM institutions.

(3) RIO courts in Africa

Somewhat exceptionally, the initially framework of the ECOWAS CCJ provided exclusive competence to States to lodge contentious proceedings. The Protocol on the Court provided that only the Authority of Heads of State and Government and the Member States acting individually could initiate contentious cases.[1141] Despite this, a local Nigerian businessman who suffered losses as a result of Nigeria's closure of the border with Benin sought to bring a claim against Nigeria for violating ECOWAS laws and his right to freedom of movement. The claimant argued that the absence of a clear statutory basis for the *locus standi* of individuals did not prevent the Court from exercising its inherent jurisdiction in his favour.

[1135] *Agreement Establishing the CCJ* (n 1029) Art XXIV
[1136] ibid
[1137] id, Art XXII (1)(d)
[1138] *Maurice Tomlinson v Belize and Trinidad and Tobago* CCJ 2 (OJ), (CCJ, 8 May 2014)
[1139] *Shanique Myrie case* **(**n 980)
[1140] *Agreement Establishing the CCJ* (n 1029) Art XXIII (2)
[1141] *Protocol on the ECOWAS Community Court of Justice* (adopted 6 July 199, entered into force 5 November 1996), ECOWAS Doc A/P.1/7/91, Art 8

Given that Nigeria was the defendant, it was not realistic to expect Nigeria to espouse its national's claim.[1142] The Court dismissed the case for lack of standing, but the dismissal led to a discussion on the need to amend the Protocol to give standing to legal and natural persons. A revised Protocol was adopted in 2005,[1143] which provides now arguably the widest direct access to natural and legal persons of any international or regional court.[1144]

Similar to the CJEU, the EACJ allows individuals to bring reference proceedings to challenge the legality of the acts of EAC Member States or Community institutions,[1145] as does the ECOWAS CCJ.[1146] However, the EACJ limits access to individuals who are resident in the sub-region. And, for both courts, the ability of individuals to bring reference proceedings is predicated on them being able to demonstrate a sufficient direct and personal connection to the act in question. The ECOWAS CCJ had occasion to consider this issue in several cases. *Odafe Oserada v ECOWAS Council of Ministers* concerned the Applicant's attempt to declare unlawful the ECOWAS regulation that allocated the post of Secretary General of the Community Parliament to Guinea. In arriving at its decision, the court referred to CJEU jurisprudence on standing and determined that 'there should exist, as an additional condition, a sufficiently direct relationship of cause and effect. The act made by the Council of Ministers, i.e. the Regulation complained of, must affect the legal status of the Applicant.'[1147] This was later confirmed in the *Oluwatosin Rinu Adewale* case.[1148] The Court affirmed that to have access to the Court under that provision the claimant must be 'the

[1142] *Olajide Afolabi v Nigeria*, ECW/CCJ/APP/01/03 (ECOWAS CCJ, 27 April 2004) para 15
[1143] ECOWAS 2005 Protocol (n 992)
[1144] ibid, art 10(c), (d), (f). See generally, Ebobrah (n 993)
[1145] Art 30 of the EAC Treaty (n 983)
[1146] Art 10 (c) of the ECOWAS 2005 Protocol (n 992)
[1147] *Odafe Oserada v ECOWAS Council of Ministers*, ECW/CCJ/JUD/01/08 (ECOWAS CCJ, 16 May 2008) para 33
[1148] *Oluwatosin Rinu Adewale v ECOWAS Council of Ministers,* ECW/CCJ/JUD/07/12 (ECOWAS CCJ, 16 May 2012)

person whose interest is directly and immediately affected by the act or inaction that is being contested.'[1149]

As indicated, the SADC Tribunal is currently non-functional, largely as a result of Zimbabwe's reaction to human rights decisions and SADC's decision to revise its operating procedures. The planned revisions are set to end the *locus standi* of natural and legal persons.[1150]

The future merged African Court of Justice and Human Rights has a split standing requirement. Individuals or relevant non-governmental organizations[1151] are eligible to submit claims to the human rights section of the court only. This bifurcated structure has the effect of impeding individuals from pursuing annulment claims as is the practice before some other RIO courts. Naldi and Magliveras consider this to be 'a serious omission.'[1152] Individuals' lack of standing means that they would have to rely on States to bring any matters they have to the General Affairs section, on their behalf. But as Naldi and Magliveras have noted, 'having to rely on the traditional principle of diplomatic protection is simply wholly inadequate for this sort of situation. Unfortunately, the impression is given of a lack of 'joined-up' thinking.'[1153] The rules on standing may also have the effect of preventing individuals from pursuing claims against AU institutions, though this is not precisely set out in the text.[1154]

[1149] ibid, para 45
[1150] See section VII.II.2
[1151] ACJHR Protocol (n 970) Art 30 (f)
[1152] Naldi and Magliveras (n 981) 399, 400
[1153] ibid, 400
[1154] See *Femi Falana* (n 1038)

VII.5 Conclusions

Out of all the courts surveyed, not one enables individuals to make a direct claim against a universal IO, other than in the contexts of specialised regimes like the *UN Convention on the Law of the Sea*, or staff employment claims. Nor is there a single court where States may espouse their nationals' claims against universal IOs. While regional human rights courts provide a useful venue for indirect claims against States for their role in the acts of IOs, as was explored in Chapter III, at times these courts attribute responsibility solely to the IO and thus the case against the State will be dismissed for lack of competence. Similarly RIO courts have no jurisdiction against universal IOs. Also, RIO courts invariably do not provide adequate access for victims of human rights or IHL violations attributable to IOs, for a combination of access limitations, whether these stem from the CJEU's narrow rules on standing, the bifurcated rules of the African Court of Justice and Human Rights, the limited subject matter jurisdiction before the Central American Court of Justice or the impact of the various planned revisions to the SADC Tribunal's competence.

The courts are not human rights courts and do not incorporate many of the procedural rules common to human rights courts that foster access to justice and take cognizance of the nature of particular kinds of violations. The CJEU has thus far not felt it necessary to ensure that all its remedies are effective or enforceable. As was held in *Area Cova SA*, even if it could be established that there was no effective remedy, this 'cannot constitute authority for changing, by judicial action, the system of remedies and procedures established by [the Treaty].'[1155] The EACJ has produced other challenges for applicants with human rights and IHL claims. In a case concerning widespread torture and killings that the applicants allege the

[1155] *Area Cova SA* (n 1119), para 55

Respondent government knew about but did nothing to investigate, the Court refused to extend its inordinately short limitation periods, even though the facts arguably constituted continuing human rights violations,[1156] despite the widely accepted jurisprudence of other courts on this point.[1157]

Without doubt, the most significant challenge with respect to international and regional courts is access. Nonetheless, there are additional problems of result. Of the few courts that allow individuals to bring proceedings against regional or sub-regional IOs, these tend to be restricted to judicial review or nullity proceedings. Enforcement of judgments constitutes an additional barrier. While the legal frameworks of many courts make clear that rulings are binding upon the parties, this has not always led them to be enforced. Even without accounting for Zimbabwe's extreme reaction to the SADC tribunal following several contentious rulings against it, the traditional tools for enforcement of domestic judgments are unavailable in the regional and international spheres. The powers of suasion and the pull of Community cohesion and integration may be enough in some cases, but usually fall short in the most sensitive ones.

Given the challenges to bring claims against IOs, particularly universal ones, those claims that have addressed the responsibility of universal IOs are necessarily indirect, as are the remedies. Nevertheless, the pressure placed on universal IOs as a result of RIO judgments against RIO institutions or regional human rights courts against States, may lead to important changes within the universal IO, even though those courts cannot order such changes directly. This is best evidenced with the sanctions de-listing cases before the CJEU and ECtHR. The

[1156] *Independent Medical Legal Unit v the Attorney General of the Republic of Kenya and 4 Others*, Ref Appeal no 1 of 2011 (EACJ, 15 March 2012)
[1157] See, e.g., *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Ser C no 124 (IACtHR, 15 June 2005) para 39; *Varnava v Turkey* (GC) App nos 16064/90, 16065/90, 16066/90 (ECtHR, 18 September 2009)

UN Sanctions Committee has progressively strengthened its procedures and following the *Kadi* CJEU litigation, Mr Kadi was ultimately de-listed. As Patricia O'Brien, the former Under-Secretary-General for Legal Affairs and United Nations Legal Counsel has noted, there were a variety of factors which caused the UN Sanctions Committee to progressively amend its procedures. She has surmised, in relation to the *Kadi* litigation that '[t]his Judgment has undoubtedly marked an important development in the consideration of the legal regime of sanctions. It would, however, be an unfair assessment to consider that adaptations of the sanctions regime developed by the Security Council have only been triggered by such external elements.'[1158]

Nonetheless, one cannot discount the role played by the CJEU and to a lesser extent, the ECtHR. One can question whether the impact of the sanctions cases is a one-off quasi-success. The ECtHR's attribution of conduct to UNMIK in the *Behrami and Saramati* cases should have had a corresponding impact on the strengthening of the UN's operational procedures or internal accountability structures. O'Brien has said in regard to this and other like cases: 'Following the *Behrami* decision, I have actually engaged my Office in a thorough internal review of the past and current practice of the Organization regarding issues of international responsibility. In none of the instances I have just referred to has the UN been held accountable. We cannot, however, satisfy ourselves with such myopic reasoning. As I have striven to demonstrate today, the United Nations needs to lead by example.'[1159] As I have argued elsewhere, while the UN indeed *needs* to do so, it is not yet doing so.[1160] Thus, all one can posit is that indirect suasion has the potential for a modest influence on the

[1158] Patricia O'Brien, 'Legal Challenges Facing the United Nations: An Appraisal from the Legal Counsel's Perspective' (Sean Lester Lecture of the Irish Society of International Law, 11 March 2010) 27 <http://legal.un.org/ola/media/info_from_lc/53-ISIL-11-March-2010.pdf> accessed 18 March 2015
[1159] ibid, 31-32
[1160] Chapter V

procedures of universal IOs. The case for an international court with the mandate to adjudicate directly the acts of IOs, especially the universal ones, is all the more important.

VIII. CONCLUSIONS

In this thesis, I have shown that IOs have human rights and IHL obligations. These are aligned with IOs' purposes and their capacities to act and react in any given situation. While these will not always approximate State obligations, at a minimum IOs must comply with peremptory norms of international law (which may include elements of human rights and IHL) that apply to all subjects under international law.

The existence of these obligations notwithstanding, the ability to practically enforce them is made complicated by how the imputation of liability has been interpreted and applied by IOs. Attribution of conduct is determined in relation to who exercised 'effective control' but conduct will only engage IO responsibility if the organ or agent acts in an official capacity and within the IO's overall functions, even where this conduct is *ultra vires*. This is more onerous a test than that in place for State responsibility. This, when combined with IOs' understanding of the types of acts that would fit within their overall functions and the narrow approach taken to the circumstances in which conduct can be acknowledged and adopted as their own, dilutes significantly the circumstances in which conduct may be attributed to the IO. Furthermore, while IO responsibility for acts or omissions including complicity in the acts of others or other modes of accessorial liability are incorporated into the DARIO framework, the absence of independent redress mechanisms to determine such liability has kept these forms of responsibility in the realm of ineffectual statements of principle. The inability to challenge IO understandings affords them a monopoly over the law and its procedures.

When IO responsibility is engaged, the secondary rules of responsibility come into play: IOs are required to afford remedies and reparation when conduct attributable to them produces internationally wrongful acts causing harm.

IOs are obligated to ensure that there are impartial and effective procedures in place to enable injured individuals to obtain reparation. In relation to human rights law, this derives from the State obligation to afford effective domestic remedies. In IHL, it derives from the need to make practical and effective the result of reparation, given the inability to rely on the traditional route of diplomatic protection. Neither body of law necessarily gives rise to a cause of action that injured individuals may activate directly, absent any further steps taken to establish such jurisdiction. However the failure by IOs to establish effective procedural routes would constitute a further internationally wrongful act for which they incur responsibility. There is thus an implied obligation on IOs to resolve any procedural gaps impeding access to procedures that may lead to reparation.

The law makes clear that reparation must fully address the harm caused. Despite this, the standards of fullness, adequacy and effectiveness have not framed IO approaches to reparations. I have argued that once responsibility is established, it is but for reparation to be determined on the basis of the underlying violation and the harm caused. There is no further contingency introduced at the stage of reparations, because of an apparent difficulty for the wrongdoer to make full reparations. While parties to a dispute may come to their own arrangements, I have argued that the IO is incapable of agreeing with its Member States rules modifying its obligations on reparation, when injured individuals (as opposed to Member States) are the ultimate beneficiaries.

Article 39 of DARIO requires that members of a responsible IO 'take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation.' This thesis demonstrates that much more can be done by IOs and their Member States to develop the means to ensure that IOs can fulfil their obligations to afford reparations for harms caused by or attributable to them.

That more *can* be done is a simple, rather uncontroversial conclusion. As the thesis has reflected, both the procedural aspects of redress (in particular the degree of access to a redress mechanism, how it functions, it's impartiality from the IO) and the reparation that might ultimately be afforded (the quantum and quality of reparation, for what types of harms, with which caveats) are extremely limited.

Adjudicative decisions which consider IO practice are mainly taken by bodies established and run by the IOs themselves. The few arms-length bodies that have been established invariably have only recommendatory powers, and thus the decision whether to comply with any recommendations rests with the IO itself. Most of the bodies surveyed only have recommendatory powers, and thus the decision on whether to provide reparation, and if so the form that it should take is left to executive bodies, which have often failed to heed recommendations where these have been made and left victims without a substantial remedy. Very few mechanisms are able to afford compensation, and of those that do, often there are restrictions with respect to quantum, or the factual scenarios that may qualify.

Narrow jurisdictional rules and rigid *locus standi* provisions have limited the potential of national, regional and international courts to serve as alternative forums. National courts have rarely entertained claims because of immunities. Yet, there has been insufficient emphasis in the jurisprudence on the functional character of IOs and of the need for IO immunities to accord with wider institutional mandates, such as encouraging and promoting respect for human rights and rule of law. IOs have also shown reluctance to recognise a need to relax immunities in certain circumstances. There is an absence of rigorous doctrine to guide decisions to waive immunity which leads to arbitrariness and seemingly inconsistent results.

No regional or international court enables individuals to make a direct claim against a universal IO pertaining to human rights or IHL. Nor is there a single court where States may espouse their nationals' claims against universal IOs. RIO courts have no jurisdiction against universal IOs or other IOs outside their regional system. Also, RIO courts invariably do not provide adequate access for victims of human rights or IHL violations attributable to the RIO over which the RIO court has jurisdiction, for a combination of access limitations. While regional human rights courts provide a useful venue for indirect claims against States for their role in the acts of IOs, they are incapable of addressing directly the responsibility of IOs. However this should not underestimate the important role they play as catalysts for reforms to the procedures of universal IOs.

Why more *must* be done will depend on one's vantage point. As a matter of law, I have argued that more must be done by IOs because IOs have obligations under human rights and human rights and IHL which give rise to obligations to afford reparations in case of breach. The failure to afford reparations cannot be justified by the absence of adequate procedures; to the contrary, the failure to act constitutes an additional internationally wrongful act. Also, more must be done in order to preserve the integrity of the IOs. This is not a simple moral imperative but a necessary consequence of IOs' mandates and to fulfil their functions. The rules must necessarily reflect the different contexts in which IOs now operate, and arguably the practice of IOs will need to shift to meet growing responsibilities, including to refrain from prohibited conduct, to take adequate positive steps to prevent conduct where such an obligation exists and to afford remedies and reparation in the case of breach. IOs need to not only embrace the principle of human rights and IHL compliance, but also the consequences of such compliance. This will inevitably introduce challenges, as can be seen with the stalled process for the EU to accede to the ECHR. This requires a significant change in orientation, which is overdue.

The simplest route forward would to reconfigure IO internal adjudicative mechanisms so that they become fairer, more transparent, impartial and accessible, and so that they have the potential to afford adequate and effective reparation. In this thesis, I have set out a number of ways in which these could be strengthened. But there is also a need for independent oversight of such structures, even if the mechanisms themselves are strengthened.

It is also appropriate for IOs to develop more rigorous and transparent doctrine to guide decisions to waive immunity. This would avoid arbitrariness and seemingly inconsistent results. Nonetheless in most cases international courts would be a better complement to IOs' internal adjudicative mechanisms. They would be more independent and impartial than IOs' internal processes. They would be fitting venues in light of IOs' international character and having regard to the desirability of a model that has the potential to influence IO practice while safeguarding IO independence from the possibility of State interference, arguably better than municipal courts could do. For similar reasons, international courts are arguably more appropriate forums to adjudicate claims concerning IOs than regional ones. Not least, adjudication by international courts is better suited to claims which concern IOs with universal mandates and could help avoid conflicting jurisprudence emanating from regional courts. But it would be a complex route to make claims against IOs justiciable before international courts and even more complicating but still necessary – to allow individuals to lodge such claims. This would have the benefit of affording independent judicial oversight and would ensure that individuals are not overly reliant on their States of nationality. However, it would require significant reconfiguration of the current legal order and significant political will which is not evidently in place. And, there would be a need not only to afford notional access to existing international courts, but to ensure individuals in remote areas have practical access, even if rules of standing did not present formal obstacles.

Maintaining the status quo is by far the easiest option for the IOs and perhaps also for States. But, as argued throughout the thesis, it is not a viable option any longer, given the continued expansion of IO activities and consequent intrusions on individuals, and given the progressive however nascent developments in international law.

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