ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS
BY INTERNATIONAL ORGANISATIONS
ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS

Jan Wouters
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Stefaan Smis
Pierre Schmitt
(eds.)
SUMMARY OF CONTENTS

Contents ................................................................. ix
Abbreviations ............................................................ xxii

Accountability for Human Rights Violations by International Organisations: Introductory Remarks
Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt ........... 1

PART I. GENERAL CONCEPTS

Accountability of International Organisations: An Evolving Legal Concept?
Ige F. Dekker ................................................................. 21

International Organisations as Independent Actors: Sweet Memory or Functionally Necessary?
Niels M. Blokker ............................................................. 37

Human Rights and the Rise of International Organisations:
The Logic of Sliding Scales in the Law of International Responsibility
Olivier De Schutter .......................................................... 51

Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations
Frederik Naert ............................................................... 129

The 'Italian Job': How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States
Matteo Tondini ............................................................... 169
PART II. PEACE AND HUMANITARIAN OPERATIONS

Human Rights Accountability of International Organisations in the Lead of International Peace Missions
  Ulf Häußler ............................................................. 215

Accountability of the United Nations: The Case of Srebrenica
  Peter R. Baehr ............................................................ 269

On the Social Life of International Organisations: Framing Accountability in Refugee Resettlement
  Kristin Bergtora Sandvik .............................................. 287

PART III. INTERNATIONAL CIVIL ADMINISTRATION

Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organisations
  Ralph Wilde ............................................................ 311

Human Rights Accountability of International Administrations: Theory and Practice in East Timor
  Eric De Brabandere .................................................... 331

  Remzije Istrefi ........................................................... 355

The Ombudsperson Institution vs the United Nations Interim Administration Mission in Kosovo (UNMIK)
  Gjylbehare Bella Murati ................................................ 373

PART IV. ECONOMIC GOVERNANCE

Accountability of International Organisations: An Analysis of the World Bank’s Inspection Panel
  Rekha Oleschak-Pillai .................................................... 401
Summary of Contents

The Accountability of the International Monetary Fund for Human Rights Violations
   Pierre Schmitt ......................................................... 431

The World Trade Organization: an Obstacle to Enforcing Human Rights Obligations?
   Jeroen Denkers and Nicola Jägers .................................. 461

TRIPs and Human Rights: Access to Cheaper AIDS Medicines
   Stefaan Smis, Stephen Sevidzem Kingah and Christine Janssens .... 485

Accountability of Development Agencies through the Use of Human Rights Indicators
   Gauthier de Beco .................................................. 505

PART V. STAFF OF INTERNATIONAL ORGANISATIONS

Accountability of International Organisations for Violations of the Human Rights of Staff
   Chittharanjan Felix Amerasinghe .................................. 527

Human Rights Accountability of International Organisations vis-à-vis Their Staff: the United Nations
   Sarah Hunt ......................................................... 545

Workplace Equality in International Organisations: Why is It an Illusory Concept?
   Osmat Azzam Jefferson ........................................... 567

An International Organisation’s Point of View
   Edward Kwakwa .................................................. 591

List of Contributors ..................................................... 601
Table of Cases .......................................................... 607
Index ................................................................. 617
CONTENTS

Summary of Contents ................................................................. v
Abbreviations ................................................................. xxi

Accountability for Human Rights Violations by International Organisations:
Introductory Remarks
Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt ............... 1
I. Background .................................................................................. 1
II. Aim of the Book ........................................................................... 1
III. Contentious Legal Issues .......................................................... 5
   A. Are International Organisations Bound by International
      Human Rights Norms? ........................................................... 5
   B. Accountability of Member States of International
      Organisations ......................................................................... 10
   C. Obstacles to Accountability of International Organisations ...... 11
   D. The Need to Create Mechanisms To Ensure Accountability ...... 13
IV. Structure of the Book ................................................................. 15
   A. General Concepts ................................................................. 15
   B. Peace and Humanitarian Operations ....................................... 16
   C. International Civil Administration .......................................... 16
   D. Economic Governance ........................................................ 17
   E. Staff of International Organisations ...................................... 18

PART I. GENERAL CONCEPTS

Accountability of International Organisations: An Evolving Legal Concept?
Ige F. Dekker ................................................................................ 21
I. Introduction .................................................................................... 21
II. Concepts of Accountability .......................................................... 23
   A. Approaches to Accountability .................................................. 23
   B. The ILA Concept of Accountability ........................................... 25
   C. Critical Assessment ............................................................... 28
III. An institutional Concept of Accountability ................................... 31
   A. An Institutional Approach ....................................................... 31

Intersentia ix
## Contents

B. Accountability as a Legal Institution ........................................... 32  
C. Accountability and the Institutional Character of International  
Organisations ................................................................. 34  
IV. Concluding Observation ......................................................... 36

### International Organisations as Independent Actors: Sweet Memory or Functionally Necessary?

Niels M. Blokker ................................................................. 37

I. Introduction ........................................................................... 37  
II. Attribution of Powers ............................................................ 39  
III. International Legal Personality ............................................... 43  
IV. The Theory and Practice of the Independence of International  
Secretariats ........................................................................... 46  
V. Concluding Remarks ............................................................ 49

### Human Rights and the Rise of International Organisations:  
The Logic of Sliding Scales in the Law of International Responsibility

Olivier De Schutter ................................................................. 51

I. The Human Rights Obligations of International Organisations ...... 55  
   A. The international Organisation 'Succeeding' to the Human Rights  
      Obligations of Its Member States ....................................... 57  
   B. Human Rights as Part of General Public International Law ...... 68  
II. The Problem of Accountability – One: State Responsibility .......... 73  
   A. The Establishment of the International Organisation and the  
      Initial Transfer of Powers ............................................... 77  
   B. The Decision-Making Process Within the Organisation .......... 86  
   C. The Implementation of Decisions Adopted by International  
      Organisations ............................................................... 94  
   D. The Logic of Sliding Scales in Examining Questions of State  
      Responsibility ............................................................... 102  
III. The Problem of Accountability – Two: The Responsibility of  
     International Organisations ............................................... 104  
    A. Self-Regulation ............................................................. 104  
    B. Accession to International Human Rights Treaties ............... 110  
    C. The Role of National Courts ......................................... 119  
    D. The Logic of Sliding Scales Expanded ............................... 123  
IV. Conclusion ........................................................................ 125
Contents

Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations
Frederik Naert ................................................................. 129

Introduction ................................................................. 129

I. Are International Organisations Bound by Treaties Concluded by Their Member States? ................................................................. 130
   A. General Considerations .................................................. 130
   B. The EU, GATT and Customs Agreements ............................ 136
   C. The EU and the ECHR ...................................................... 138
   D. The EU and Other Member State Treaties, Including the UN Charter ................................................................. 139
   E. Other International Organisations ...................................... 154

II. Some Reflections on Responsibility of Member States for Their Own Actions in the Framework of International Organisations .......... 155
   A. Responsibility for the Actions of an International
      Organisation Resulting from Its Establishment .................... 156
   B. Responsibility of a Member State for Its Own Subsequent
      Conduct in the Framework of an International Organisation ..... 162

Conclusion ................................................................. 168

The ‘Italian job’: How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States
Matteo Tondini ................................................................. 169

I. Introduction ................................................................. 169

II. A Few Remarks on Legal Personality and Accountability of International Organisations ................................................................. 172
   A. The Attribution of Legal Personality to International
      Organisations and Their Accountability to Third Parties ........ 172
   B. The Establishment of Internal Claim Settlement Mechanisms ... 174
   C. ‘Accountability’ and ‘Responsibility’ .................................... 176
   D. The ILC Draft Articles .................................................... 177

III. Possible Responsibility of UN Member States in Peace Operations .... 180
   A. Possible Responsibility of Contributing States for
      Violations Committed by UN Military Forces ...................... 180
   B. Possible Responsibility of Member States for Violations
      Committed by UN Police Forces and Civilian Officers .......... 185
   C. Possible Human Violations Committed by UN Territorial
      Administrations: The UNMIK Case .................................... 188
IV. Some Brief Remarks on International Organisations as Subjects
Bound to Human Rights Law and Extraterritorial Application
of Human Rights Treaties ......................................................... 191
A. The Mandatory Nature of Human Rights Law for International
Organisations ................................................................. 191
B. The Extraterritorial Application of Human Rights Conventions . . 193
V. The "Job": Bringing States to Courts ................................. 195
A. Finding the Right Forum .................................................. 195
B. International Courts ............................................................. 198
VI. The "Italian Job" in the Most Recent Case Law (Be Assured –
Your Sins Will Find You Out!) ........................................... 201
A. The Behrami & Saramati Cases ........................................... 202
B. The Al-Jedda Case .............................................................. 206
C. Other Relevant Cases ......................................................... 208
VII. Concluding Remarks ......................................................... 211

PART II. PEACE AND HUMANITARIAN OPERATIONS

Human Rights Accountability of International Organisations in the Lead
of International Peace Missions
Ulf Häußer ................................................................. 215
I. Preliminary Remarks and Introduction ................................. 215
II. The Institutionalisation of Transitional Authority – A Brief
Typology of Peace Missions .................................................... 218
III. The Effects of Actions of Peacekeeping Operations on
Human Rights ................................................................. 222
A. Exercise of Transitional Authority vis-à-vis Ex- and
Would-Be-Belligerents or Governance Institutions in
Receiving States ................................................................. 223
B. Exercise of Transitional Authority Directly Affecting
the General Public ............................................................. 226
C. Conclusion ................................................................. 229
IV. Attribution of Conduct of Peacekeeping Operations to
International Organisations ................................................. 229
A. To Whom to Attribute I: Peace Missions or Lead Organisations? . 230
B. To Whom to Attribute II: Lead Organisations or Contributing
States? ................................................................. 232
C. Further Attribution Criteria .............................................. 251
D. Conclusion ................................................................. 253
PART III. INTERNATIONAL CIVIL ADMINISTRATION

Understanding the International Territorial Administration
Accountability Deficit: Trusteeship and the Legitimacy of
International Organisations

Ralph Wilde ................................................................. 311

I. Introduction .......................................................... 311
II. Trusteeship ............................................................. 313
   A. Colonial Trusteeship ............................................. 313
   B. International Territorial Administration as a Form
      of Trusteeship ...................................................... 316
   C. The Progressive Internationalisation of Trusteeship .......... 316

III. Accountability under Trusteeship ................................. 317
   A. Humanising Colonialism ........................................ 317
   B. Requirement of Accountability .................................. 318
   C. Accountability in the Trusteeship Context ..................... 318

IV. Reviving the Trusteeship Council ................................. 320
   A. International Oversight of State-Conducted Trusteeship .... 320
   B. The Trusteeship Council and ITA .............................. 321

V. Self-Determination as an Explanation for the Lack of Accountability .. 322
   A. The Repudiation of Trusteeship ................................. 322
   B. The Link with Accountability .................................... 324

VI. The 'Legitimacy' of International Organisations as an
    Explanation for the Lack of Accountability ...................... 324
   A. Normative Ideas of State-Conducted Trusteeship .............. 325
   B. Normative Ideas of International Organisations ............... 326

VII. Conclusion ......................................................... 329

Human Rights Accountability of International Administrations: Theory
and Practice in East Timor

Eric De Brabandere ...................................................... 331

I. Introduction .......................................................... 331
II. Human Rights Obligations of International Organisations ....... 333
   A. The UN Charter ..................................................... 334
   B. Human Rights as Customary International Law .................. 335
   C. Human Rights and Military Contingents ......................... 339
   D. Observations on the Attribution of Conduct .................... 342

III. Immunity and Accountability Mechanisms in East Timor .......... 344
   A. UNTAET’s Human Rights Obligations ............................ 345
   B. Immunity of International Actors ............................... 346
   C. Alternative Accountability Mechanisms ......................... 349

IV. Conclusion .......................................................... 354

Remzije Istrefi ................................................................. 355

I. Introduction ................................................................. 355
II. UNMIK’s Mandate as a Cause of Human Rights Violations ........... 359
III. The Applicable Law in Kosovo and UNMIK Accountability ........ 361
IV. UNMIK Accountability at the Domestic level ................................ 362
   A. Judicial Review ......................................................... 362
   B. Ombudsperson Institution in Kosovo .................................. 363
V. UNMIK’s Accountability at the International Level .......................... 364
   A. Is the Advisory Panel an Adequate Mechanism to Deal
      with Alleged Human Rights Violations in Kosovo? ............ 366
   B. Creation of a Human Rights Protection Mechanism:
      A Sui Generis Body for Kosovo .................................. 367
   C. The Authority for Establishing the UN Commission for Kosovo ... 369
   D. The Mandate and Structure of the UN Commission for Kosovo ... 369
   E. Composition of the UN Commission for Kosovo .................. 370
   F. Procedural Rules of the UN Commission for Kosovo ............ 370
   G. Jurisdiction of the UN Commission for Kosovo .................. 371
   H. UNMIK’s Accountability in Front of the UN Commission
      for Kosovo .................................................................. 372
VI. Conclusion ..................................................................... 372

The Ombudsperson Institution vs the United Nations Interim
Administration Mission in Kosovo (UNMIK)

Gjylbehare Bella Murati .................................................. 373

I. Introduction ...................................................................... 373
II. The United Nations Mission in Kosovo .................................. 374
   A. The Legal Framework Governing the UNMIK ...................... 374
   B. The Legal Implications Arising from UN SC Resolution 1244 ... 376
   C. The United Nations Domestic Lawmaking .......................... 377
   D. UNMIK and Its Role in the Judiciary ................................. 378
III. The Ombudsperson Institution ............................................. 382
   A. Protecting Residential Property (Housing and Property
      Directorate and Housing and Property Claims Commission) .... 384
   B. Protecting the Right to Liberty and Security of Person .......... 390
   C. Protecting Freedom of Expression ..................................... 393
IV. Conclusion ..................................................................... 397
PART IV. ECONOMIC GOVERNANCE

Accountability of International Organisations: An Analysis of the World Bank’s Inspection Panel
Rekha Oleschak-Pillai

I. Accountability in International Law
   A. Accountability of International Organisations
   B. Who is Accountable?
   C. For What?
   D. To Whom?
   E. By What Mechanisms?
   F. With What Outcomes?

II. World Bank and Human Rights Violations

III. Inspection Panel
   A. Perceptions in International Legal Discourse
   B. Operational Standards and Policies

IV. Investigations by the Inspection Panel
   A. India Ecodevelopment Project (1998)
   B. NTPC Project (1997)
   C. Coal India Project (2001)

V. Outcomes and Concluding Remarks

The Accountability of the International Monetary Fund for Human Rights Violations
Pierre Schmitt

I. The Sources of the International Human Rights Obligations of the IMF

II. The Significance of the Human Rights Obligations of the IMF
   A. The Mandate of the IMF
   B. The Practice of the IMF
   C. Evolution of the Mandate and the Practice of the IMF

III. Mechanisms of Accountability
   A. Accountability: Probably the Weakest Aspect of IMF Governance
   B. Internal Accountability Mechanism
   C. External Accountability Mechanisms

IV. Conclusion
Part IV. The Use of Human Rights Indicators in Development Programming

A. Establishing Human Rights Indicators for Development Programmes ........................................ 519
B. Actors using Human Rights Indicators for Development Programmes ...................................... 521

Part V. Staff of International Organisations

Accountability of International Organisations for Violations of the Human Rights of Staff

Chittharanjan Felix Amerasinghe ................................................................. 527

I. International Organisations and the Substantive Law of Human Rights .................................. 527
II. Accountability ......................................................................................... 531
   A. Desirability of Judicial Machinery ..................................................... 531
   B. Judicial Machinery: A Human Right ................................................. 535
   C. Authority to Establish Courts .............................................................. 536

III. Independence of Judicial Organs ........................................................................ 538
   A. Qualifications .................................................................................... 539
   B. Emoluments ...................................................................................... 540
   C. Renewals of Terms of Appointment .................................................. 540

IV. Human Rights Recognised by International Administrative Tribunals ............................... 541
   A. Discrimination Based on Sex ............................................................. 541
   B. Due Process of Law ......................................................................... 542

V. Conclusion .............................................................................................. 543

Human Rights Accountability of International Organisations vis-à-vis Their Staff: The United Nations

Sarah Hunt ..................................................................................................... 545

Introduction ................................................................................................. 545
I. The History of Diplomatic Immunity: How Did It Become Professionalised? ......................... 546
II. An Internal Recognition of Failings of the UN Legal System ................................................ 548
III. Applicability of Human Rights Principles and International Law: General Understanding vs Practice in the Field of the Law of the International Civil Service ....................................................... 549
IV. The Potential Application of Public International Law to International Organisations ........................................... 552
   A. What Substantive Legal Standards Apply to the Rights and Entitlements of International Organisation Staff Members? .... 553
   B. These and Many Other Employees Rights are Guaranteed in Various ILO Conventions, in Most National Legal Systems and in European Union Laws ........................................... 553
   C. A Relevant and Related Question is the Extent to Which International Law or Fundamental Concepts such as Due Process, Are Applicable ...................................................... 553

V. Internal Claims Involve Appeals Against Administrative Decisions Relating to Discipline of Staff or Grievances, Involving Other Staff or Management ....................................................... 556

VI. The UN Redesign Panel Report ........................................... 559

Conclusion ................................................................. 565

Workplace Equality in International Organisations: Why is It an Illusory Concept?

   Osmat Azzam Jefferson ............................................ 567

I. Introduction ........................................................... 567

II. Equality and Discrimination Concepts in International Organisations ....................................................... 570

III. Mapping the Core Rules in the Ensemble of Employment Conditions ....................................................... 572
   A. The Contract with the Organisation ................................. 572
   B. What Are the Statutory Elements? .............................. 573
   C. The Right of Recourse to an Administrative Court .......... 574

IV. How Are the Core Rules Used and What is Their Impact on Staff? ....................................................... 577
   A. Effect on Junior Staff .................................................. 577
   B. Effect on Selected Groups of Staff .............................. 580

V. What Core Elements are Needed to Realise Equality? .............................................................. 584
   A. The Unilateral Right of the Organisation to Amend Statutory Elements ........................................... 584
   B. Ambiguous and Unclear Broad Provisions of Anti-Discrimination Laws ........................................... 585

VI. Informal Remedies and Administrative Courts .............................................................. 586
   A. Accountability Standards and Their Enforcement ............ 587
   B. Can These Legal Discrepancies be Challenged and Changed? ....................................................... 588

VII. Personal View ....................................................... 589
Contents

An International Organisation’s Point of View
Edward Kwakwa ................................................................. 591
I. Introduction ................................................................. 591
II. Human Rights Obligations of International Organisations ........ 592
III. Human Rights Obligations of International Organisations
    vis-à-vis Their Staff Members. ........................................ 594
IV. Conclusion .............................................................. 600

List of Contributors .......................................................... 601
Table of Cases ............................................................... 607
Index ................................................................. 617
## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
</tr>
<tr>
<td>ADL</td>
<td>Anti-Discrimination Law</td>
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<tr>
<td>AMIS</td>
<td>African Union Mission in Sudan</td>
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<tr>
<td>AMISOM</td>
<td>African Union Mission in Somalia</td>
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<tr>
<td>ARV</td>
<td>Antiretroviral Drug</td>
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<tr>
<td>ASR</td>
<td>Articles on State Responsibility</td>
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<tr>
<td>ATCA</td>
<td>Alien Tort Claims Act</td>
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<tr>
<td>BverfG</td>
<td>Bundesverfassungsgericht</td>
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<tr>
<td>CCA</td>
<td>Common Country Assessment</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>CIL</td>
<td>Coal India Limited</td>
</tr>
<tr>
<td>CIVPOL</td>
<td>Civilian Police</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<tr>
<td>CONOPS</td>
<td>Concepts of Operations</td>
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<tr>
<td>CPT</td>
<td>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EAP</td>
<td>Environmental Action Plan</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECommHR</td>
<td>European Commission on Human Rights</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ELDO</td>
<td>European Launcher Development Organization</td>
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<tr>
<td>EPZ</td>
<td>Export Processing Zone</td>
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<td>ERRC</td>
<td>European Roma Rights Centre</td>
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<td>EU</td>
<td>European Union</td>
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<td>EULEX</td>
<td>European Union Rule of Law Mission in Kosovo</td>
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Abbreviations

FAO Food and Agriculture Organization of the United Nations
FIAN Food First Information and Action Network
GATT General Agreement on Tariffs and Trade
GSP General System of Preferences
HPCC Housing and Property Claims Commission
HPD Housing and Property Directorate
HRC Human Rights Committee
IACHR Inter-American Commission on Human Rights
IACtHR Inter-American Court of Human Rights
IAT International Administrative Tribunal
IBRD International Bank for Reconstruction and Development
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
ICFTU International Confederation of Free Trade Unions
ICJ International Court of Justice
ICRC International Committee of the Red Cross
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the Former Yugoslavia
IDA International Development Association
IFC International Finance Corporation
IFI International Financial Institution
IHL International Humanitarian Law
ILA International Law Association
ILC International Law Commission
ILO International Labour Organization
IMF International Monetary Fund
IMP Independent Monitoring Panel
INBAR International Network for Bamboo and Rattan
INTERFET International Force in East Timor
IP Intellectual Property
IPR Intellectual Property Right
IPTF International Police Task Force
ISAF International Security Assistance Force
ITA International Territorial Administration
KFOR Kosovso Force
KPS Kosovo Police Service
LDC Least Developed Country
LNT Administrative Tribunal of the League of Nations
LOAC Law of Armed Conflict
LSMS Legal System Monitoring Section
<table>
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<tr>
<td>MDB</td>
<td>Multilateral Development Bank</td>
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<tr>
<td>MFN</td>
<td>Most Favoured Nation</td>
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<tr>
<td>MINUSTAH</td>
<td>United Nations Stabilisation Mission in Haiti</td>
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<td>MONUC</td>
<td>United Nations Organization Mission in the Democratic Republic of the Congo</td>
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<tr>
<td>MoU</td>
<td>Memorandum of understanding</td>
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<td>MSU</td>
<td>Multinational Specialised Units</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>North Atlantic Treaty Organization</td>
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<td>NFTC</td>
<td>National Foreign Trade Council</td>
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<td>NHRC</td>
<td>National Human Rights Commission</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<tr>
<td>OCTA</td>
<td>US Omnibus Trade and Competitiveness Act</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<tr>
<td>OHR</td>
<td>Office of the High Representative</td>
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<td>Ombudsperson Institution for Kosovo</td>
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<td>OIOS</td>
<td>Office of International Oversight Services</td>
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<td>OPCW</td>
<td>Organisation for the Prohibition of Chemical Weapons</td>
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<td>OPLAN</td>
<td>NATO Operation Plan</td>
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<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>OTCA</td>
<td>Omnibus Trade and Competitiveness Act</td>
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<tr>
<td>PAP</td>
<td>Project-affected person</td>
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<td>PIC</td>
<td>Peace Implementation Council</td>
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<td>PIFWC</td>
<td>Person Indicted For War Crimes</td>
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<td>PIK</td>
<td>Police Inspectorate of Kosovo</td>
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<td>PISG</td>
<td>Provisional Institutions for Self Government</td>
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<td>PRDSS</td>
<td>Property with Designated Special Status</td>
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<td>Rules of Engagement</td>
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<td>Special Court for Sierra Leone</td>
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<td>SEZ</td>
<td>Special Economic Zone</td>
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<td>SOFA</td>
<td>Status of Forces Agreement</td>
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<td>SOMA</td>
<td>Status of Mission Agreement</td>
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<td>SOP</td>
<td>Standing Operating Procedure</td>
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<td>SRSG</td>
<td>Special Representative of the Secretary General</td>
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<td>STANAG</td>
<td>Standardization Agreement</td>
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<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TPRM</td>
<td>Trade Policy Review Mechanism</td>
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<td>TRIPs</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>United Nations</td>
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<td>United Nations Assistance Mission in Afghanistan</td>
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<td>UNAMET</td>
<td>United Nations Assistance Mission in East Timor</td>
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<td>United Nations Assistance Mission for Iraq</td>
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<td>United Nations - African Union Mission in Darfur</td>
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<td>UNAT</td>
<td>United Nations Administrative Tribunal</td>
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<td>United Nations Development Assistance Framework</td>
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<td>United Nations Development Programme</td>
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<td>UNEF</td>
<td>United Nations Emergency Force</td>
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<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>United Nations Peacekeeping Force in Cyprus</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<td>UNIFIL</td>
<td>United Nations Interim Force in Lebanon</td>
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<td>United Nations Observer Mission in Georgia</td>
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<td>United Nations Interim Administration Mission in Kosovo</td>
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<td>United Nations Mission in Sudan</td>
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<td>United Nations Operation in Somalia</td>
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<td>UNPROFOR</td>
<td>United Nations Protection Force</td>
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<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
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<td>United Nations Transition Assistance Group</td>
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<td>WBAT</td>
<td>World Bank Administrative Tribunal</td>
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<td>World Health Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS: INTRODUCTORY REMARKS

Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt

I. BACKGROUND

On 16–17 March 2007, an international conference on the theme of the present volume was organised in Brussels to mark the first issue of the journal *Human Rights & International Legal Discourse*. A selection of contributions presented at the conference has been published in the journal1, while other papers including the keynotes have been adapted and are included in the present book, in addition to new contributions. The further conceptualisation of this book, the painstaking editing process, the collection of additional contributions, the updating of many chapters in liaison with the authors and the writing of a number of additional chapters, including the present editorial introduction, took place as part of an ongoing inter-university project between the Universities of Leuven (Katholieke Universiteit Leuven), Brussels (Vrije Universiteit Brussel) and Ghent (Universiteit Gent) funded by the Fonds Wetenschappelijk Onderzoek – Vlaanderen. We are grateful to the Fonds Wetenschappelijk Onderzoek – Vlaanderen, the Vlaamse Interuniversitaire Raad – University Development Cooperation, the Cabinet of the Minister of Foreign Affairs of Belgium, the Royal Flemish Academy of Belgium for Sciences and Arts, the Minister of External Relations of the Brussels Capital Region, and our universities for their support.

II. AIM OF THE BOOK

The present book is designed to explore the mechanisms through which accountability can be realised for violations of human rights committed by, or attributable to, international organisations and their staff. The subject is at the

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intersection between human rights law, public international law and the law of international organisations. It profoundly affects some of the basic tenets and doctrines of the latter legal arena.

Some may consider the theme of the book far-fetched. How could one imagine international organisations violating human rights? Have they not been set up by their Member States with the purpose of contributing to the provision of global or regional public goods and does this not imply that they generally protect and promote, rather than violate, human rights? Some international organisations and bodies have even specifically been established to protect and promote human rights. One may think of regional human rights courts with great achievements, such as the European Court of Human Rights and the Inter-American Court of Human Rights, and of the plurality of bodies, committees and offices set up in the framework of the United Nations (UN), from the UN Human Rights Council to the treaty bodies that monitor the respect for the global human rights treaties and the Office of the High Commissioner for Human Rights. The UN itself is a prominent example of an international organisation which, from its inception in 1945, not only ‘reaffirm[ed] faith in fundamental human rights’ but has as one of its primary objectives ‘promoting and encouraging respect for human rights and for fundamental freedoms for all’, including promoting such respect and observance of human rights at a universal level. Many other international organisations, particularly also regional ones (e.g. the European Union (EU), the African Union (AU) and the Organization of American States (OAS)), include human rights protection among their primary or accessory goals.

One should note that international organisations have proliferated enormously (currently their number is well over 500) and over the years they have unfolded an unprecedented scope and intensity of activities in a wide range of policy fields. This expansion may be explained by the need for collective action to face global and regional problems: international organisations provide a means to institutionalise inter-State cooperation. International organisations are frequently intervening in peace-keeping operations and military action. They sometimes even exercise administrative powers over territories. Many of them are heavily involved in international policy-making and/or standard-setting. Together

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2 Third recital of the preamble of the Charter of the United Nations (UN Charter).
3 Art. 1(3) UN Charter; see also Art. 13(1)(a) (General Assembly), Art. 62(2) (ECOSOC), Art. 76(c) (trusteeship system).
4 Art. 55(c) UN Charter.
with an increasing impact of the activities of international organisations on the lives of people around the world, inevitably situations multiply in which human rights (political, civil, but also economic, cultural and social) may be threatened or violated through the actions, operations or policies of such organisations.

Since international organisations exercise important aspects of public authority and even act as substitute for States in some instances, an efficient accountability system has to be created in order to review the decisions made and to sanction any misconduct, similarly to the checks and balances established to control democratic governments. As observed by Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights, ‘an international accountability deficit is no good for anyone, least of all the local population. No one, especially an international organisation, is above the law.’

The theme of responsibility of international organisations has progressively gained the attention of legal scholars and international bodies in the past two decades. Especially the work of the International Law Commission (ILC) and of the International Law Association (ILA) should be mentioned in this respect.

The ILC decided to include the topic in its work programme in 2000. Two years later, it established a Working Group and appointed a Special Rapporteur,

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7 T. Hammarberg, Council of Europe Commissioner for Human Rights, ‘International Organisations acting as quasi-governments should be held accountable’, 8 June 2009, also available at the Commissioner’s website at www.commissioner.coe.int.


9 ILC, Report of its fifty-second session, 1 May to 9 June and 10 July to 18 August 2000, UN Doc. A/55/10, pp. 135 et seq.
Professor Giorgio Gaja. From its fifty-fifth (2003) to its sixty-first (2009) sessions, the ILC has received seven reports from the Special Rapporteur and provisionally adopted draft articles 1 to 66. According to draft article 3, ‘[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization.’ Draft article 4 provides that ‘[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) [i]s attributable to the international organization under international law; and (b) [c]onsstitutes a breach of an international obligation of that international organization.’ The ongoing process of ILC work has permitted one to take into consideration the comments made by States and international organisations on the draft articles provisionally adopted by the ILC and to consequently make amendments thereto. For instance, in the 2006 report, draft article 28(1) went as follows: ‘[a] State member of an international organisation incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.’ In 2009, the ILC substantially modified the provision and proposed draft article 60(1), which no longer links State responsibility to the conferral of powers to an international organisation:

‘A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.’

Partly prior to and parallel with the work of the ILC on the responsibility of international organisations, another important attempt in this area was made by the ILA. It established a specific Committee in 1996 to study the accountability of international organisations. The ILA Committee took a broader approach than the one taken by the ILC. Whereas the ILC only focuses on the responsibility towards Member and Non-Member States, the ‘recommended rules and practices’ of the

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10 ILC, Report of its fifty-fourth session, 29 April to 7 June and 22 July to 16 August 2002, UN Doc. A/57/10, pp. 228 et seq.
12 ILC, Report of the sixty-first session 4 May to 5 June and 6 July to 7 August 2009, UN Doc. A/64/10, chapter IV, paras. 31–51.
14 ILC, Report of the sixty-first session, 4 May to 5 June and 6 July to 7 August 2009, UN Doc. A/64/10, p. 38.
15 ILC, Report of its fifty-fourth session, 29 April to 7 June and 22 July to 16 August 2002, UN Doc. A/57/10, p. 229.
ILA Committee cover the accountability of an international organisation towards their members and third parties, i.e. ‘victims or wrongdoers who are not members of the [international organisation] concerned: states, other [international organisation]s, individuals or legal persons, including private entities’. Moreover, the ILA Committee focused on the ‘accountability of international organisations’, which is a broader concept than their responsibility. According to the final report of the ILA Committee published in 2004, ‘accountability of [international organisation]s is a multifaceted phenomenon. The form under which accountability will arise will be determined by the particular circumstances surrounding the acts or omissions of an [international organisation], its member States or third parties. These forms may be legal, political, administrative or financial. A combination of the four forms provides the best chances of achieving the necessary degree of accountability.’ The concept of accountability is thoroughly analysed by Ige F. Dekker in Chapter 2 of this book.

III. CONTENTIOUS LEGAL ISSUES

A. ARE INTERNATIONAL ORGANISATIONS BOUND BY INTERNATIONAL HUMAN RIGHTS NORMS?

As a preliminary to the analysis of the accountability of an international organisation for human rights violations, the binding character of international human rights law has to be assessed in regard to international organisations, which – with one exception for the EU – are not bound as signatories by any human rights treaty.

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17 Ibid., p. 20.
19 Reference is made to the UN Convention on the rights of persons with disabilities, to which the EU (prior to the entry into force of the Treaty of Lisbon: the EC) is a signatory. It should also be noted that the Treaty of Lisbon (Treaty on European Union amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, O.J. C 306 (17 December 2007); consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as they are amended by the Lisbon Treaty are published in O.J. C 85 (30 March 2010)) empowers the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Art. 6(2) Treaty on European Union. Accession by the EU has become possible from the point of view of the Council of Europe now that Protocol No 14 (Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, done at Strasbourg 14 May 2004 (CETS No. 194, entered into force on 1 June 2010) inserts Art. 59(2) into the Convention, enabling the EU to accede to the latter.
Indeed, the international human rights legal framework is generally designed for States. But does this mean that international organisations are not bound by any international human rights norms? This question necessitates, in the first place, a query into the international legal personality of the international organisation at hand\textsuperscript{21} and the legal consequences flowing from its status as a subject of international law.\textsuperscript{22} If their independent personality is recognised, international organisations will be held internationally responsible for their acts in case of a violation of an applicable international norm.\textsuperscript{23}

The aforementioned question also begs another fundamental issue, namely the extent to which international human rights norms not only belong to established rules of treaty law, but also form part of customary international law and/or general principles of international law.\textsuperscript{24} Although there seems to be a convergence of views on the obligation of international organisations to respect at least some human rights\textsuperscript{25}, controversies persist, notably as to the identification of sources of this obligation and its scope. For several authors, this obligation rests on the customary status of international human rights. The massive adoption and continuous affirmation of the fundamental human rights listed in the Universal Declaration of Human Rights (UDHR)\textsuperscript{26} have, so it is submitted, transformed these rules – or at least some of them – into customary international law.\textsuperscript{27}


\textsuperscript{23} Apart from the ongoing work of the ILC in this area and the final report published by the ILA in 2004, op. cit. n. 16, see the references mentioned supra in footnote 8.

\textsuperscript{24} See O. De Schutter, Chapter 4.


\textsuperscript{27} See notably H. Hannum, loc. cit. n. 25, at p. 322; C. Tomuschat, op. cit. n. 25, at p. 4.
customary international law applies to all subjects of international law, it is clear that such customary human rights norms are also binding upon international organisations. Other authors consider that human rights have become general principles of international law through the medium of the ‘general principles of law recognized by civilized nations’ mentioned in Article 38(1)(c) of the Statute of the International Court of Justice. Such general principles would not require State practice but rather result from ‘a variety of ways in which moral and humanitarian considerations find a more direct and spontaneous “expression in legal form”.’ Moreover, some provisions of human rights law – such as the prohibition of racial discrimination – are considered as norms of jus cogens. It is generally admitted that peremptory rules bind international organisations.

Nevertheless, if obligations there are, their scope and content need to be clarified. In addition to the obligation to respect human rights, the question must be raised whether international organisations with no specific mandate in the area of human rights bear an obligation to protect, report on or monitor human rights. This question has been fiercely debated in relation to international development actors, such as the international financial institutions (IFIs) or the United Nations Development Program (UNDP). Let us take a closer look at these bodies in order to better gauge the debate and its sensitivities.

Human Rights are not mentioned in the Articles of Agreement of the International Monetary Fund (IMF), of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). At the IMF, this has been interpreted as indicating that the organisation has no mandate to promote human rights. At the World Bank, former General

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30 Ibid., at p. 105.


32 H.G. Schermers, loc. cit. n. 28, at p. 402.

Counsel R. Dañino acknowledged that ‘human rights and international human rights law have become increasingly relevant to helping the Bank achieve its mission and fulfil its purposes’ and that ‘it is now evident that human rights are an intrinsic part of the Bank’s mission.’ Yet, he added that the role of the Bank (and by extension, the Fund) ‘is not that of an enforcer of human rights obligations.’ Indeed, enforcement ‘is primarily the responsibility of member countries and of other, non-financial entities, such as the United Nations treaty monitoring bodies and regional human rights organizations.’

The relationship between IFIs and human rights has been discussed at length by scholars. Some authors suggest that international financial institutions should have with respect to human rights generally a ‘duty of vigilance’ to ensure that their actions have no negative effects on the human rights situation in their borrowing members. Others go further and consider that the IFIs’ substantial influence over borrowing countries make it ‘increasingly untenable that the IFIs should function without human rights responsibilities within their spheres of influence, and without accountability for the impact of their economic decisions on the exercise of human rights.’

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In a recent study on the impact of structural adjustment programmes on human rights in 131 developing countries between 1981 and 2003, R. Abouharb and D. Cingranelli concluded that ‘equitable economic development efforts would be more efficient and many of the negative impacts of World Bank and IMF loans and grants would be mitigated or eliminated if the IFIs pursued a human-rights based strategy of development assistance.’ Despite this external pressure, the IFIs maintain their suspicion towards human rights and show reluctance to integrate them in their operations.

Another important development actor is the UNDP, which works with 166 countries in order to achieve progress in development. At the UN World Summit of 2005, heads of government recognised that peace and security, development and human rights are the three interlinked and mutually reinforcing pillars of the UN system. Despite this consensus, the relationship between human rights and development has been subject to disagreement between UN Member States. Indeed, both within the General Assembly Triennial Comprehensive Policy Review (TCPR) process and the General Assembly’s System-wide Coherence (SWC) process, Member States diverged on the place of human rights in UN development activities. The G-77 and China expressed their concern about the inordinate emphasis given to human rights in UN development activities. The Group feared a discrimination against developing countries if human rights were to be considered as UN development objectives. Human rights ‘could be misused to introduce new conditionalities on international development assistance. This is not acceptable to the developing countries.’ Similar arguments were raised within the UNDP Executive Board discussions on the UNDP strategic plan 2008–2011. The final strategic plan states that ‘while UNDP should uphold universal United

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39 G.A. Sarfaty considers that human rights are a marginal issue at the World Bank because of the organisational culture of the latter. ‘Human rights are a particularly difficult set of norms to incorporate into an economic institution because doing so forces employees into a struggle between principles and pragmatism – that is, it creates a tension between normative, intangible values and goals, and practical ways to solve problems (which may make it necessary to reconcile competing principles). In an environment like the Bank where most issues are subject to cost-benefit analysis, employees may be ambivalent about principles that appear to be non-negotiable or subject to trade-offs. They may perceive potential costs in trying to render seemingly incommensurable values commensurate.’ G.A. Sarfaty, ‘Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank’, 103 American Journal of International Law (2009) pp. 647–683.


41 M. Akram, Statement on behalf of the Group of 77 and China at the operational activities segment of the 2007 substantive session of the ECOSOC, 12 July 2007, available at www.g77.org/statement/getstatement.php?id=070712.
Nations norms and standards, including those related to human rights, UNDP does not have any normative or monitoring role with regard to human rights.42 Yet, the terms ‘normative’ or ‘monitoring role’ have not been defined in the plan.43

B. ACCOUNTABILITY OF MEMBER STATES OF INTERNATIONAL ORGANISATIONS

Next to the accountability of international organisations themselves, the question arises whether Member States are or remain accountable for violations of human rights attributed to the international organisation of which they are a member. If one recognises that international organisations are bound by international human rights norms, the accountability for acts of the international organisation relies exclusively on the international organisation itself, and not on its Member States. However, it can be argued that a ‘piercing of the veil’ is or should be possible44, since it would prevent Member States from evading their obligations in acting through the international organisation.45 Such piercing of the veil would permit either holding top officials and/or collaborators of the organisations personally liable for human rights violations, and/or reaching (some of) the Member States that are behind the decisions in question that result in human rights violations.

The evasion by Member States of their obligations by acting (in one way or another) through international organisations constitutes an abuse of the legal personality of an international organisation. Moreover, situations can and do occur where Member States take advantage of their prerogatives as laid down in the constitutional act of the international organisation. If violations of human rights result from such behaviour of a Member State (or a number of Member States) that – based on its (or their) prerogatives in the decision-making process of the international organisation at hand (for example the veto right within the Security Council) – forces through a decision, should there not at least be the possibility for a concurrent accountability of this (these) Member State(s)?46

A way of ensuring that Member States do not evade their obligations by acting through international organisations would be to consider that international organisations are bound by the treaties that bind their Member States. Frederik Naert thoroughly analyses this question in chapter 5 of this book. Moreover, the ILC has integrated the topic of Member States seeking to avoid compliance in its draft article 60, provisionally adopted in 2009 and mentioned supra, II.

C. OBSTACLES TO ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS

Even if recognised in principle, accountability of international organisations for human rights violations faces difficult obstacles in practice. There is no international court that generally has jurisdiction over international organisations. Moreover, national courts may not adjudicate claims against international organisations because of the immunity traditionally granted to them. As a consequence, one is almost completely dependent on the goodwill of an international organisation to submit itself to an accountability mechanism. This being said, recent years have seen an evolution in international and national case-law grounded on the human rights principle of access to courts to waive immunity and offer individuals a mechanism to challenge acts of international organisations. In the parallel cases Waite and Kennedy v Germany (1999) and Beer and Regan v Germany (1999), the European Court of Human Rights ruled that immunity of jurisdiction of international organisations was permissible insofar as ‘the applicants had available to them reasonable alternative means to

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47 F. Naert, Chapter 5.
48 ILC, Report of the sixty-first session, 4 May to 5 June and 6 July to 7 August 2009, UN Doc. A/64/10, p. 38. See the text corresponding to footnote 14.
49 A. Reinisch, International Organisations before National Courts (Cambridge, Cambridge University Press 2000). For certain international organisations, constitutive documents provide for a limited immunity, as for instance Article VII (3) of the IBRD Articles of Agreement: ‘Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.’
Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt

protect effectively their rights under the Convention'.

While this case-law attempts to reconcile individual rights with the rights of the organisation, it also raises fundamental questions on the role of national courts. It requires national courts to assess the complaint mechanisms established by the international organisations. The question is whether national courts have the required expertise to decide on such cases and whether they constitute an appropriate forum to assess the specificities of the dispute settlement mechanisms set up by international organisations. Moreover, the rejection of immunity by national courts may open the door to divided decisions of the courts of different Member States of international organisations and lead to uncertainty and tensions.

Furthermore, interference by the national judiciary may threaten the independence of an international organisation in the discharge of its mission. Finally, even in the case of a victim obtaining a judgment convicting an international organisation, the question arises how this person can enforce the national decision.

These legal issues have direct and concrete implications for victims. In 2007, a group called the 'Mothers of Srebrenica' asked a Dutch court – The Hague District Court – to indict the UN for its failure to prevent the Srebrenica massacre and asked for financial compensation. In July 2008, the court ruled that it had no jurisdiction as the UN enjoys full immunity from actions by national courts. This decision was upheld on 30 March 2010 by the Court of Appeal in The Hague. The Court of Appeal considered that because of the UN's 'special position' in providing peacekeeping and ensuring peace and security around the world, it is very important that the UN has the broadest immunity possible allowing for as little discussion as possible in order to permit the UN to undertake its duties. The 'Mothers of Srebrenica' had also requested the Court


52 The D.C. Court of Appeals noted in Broadbent v. Organization of American States (1980) that '[a]n attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively.' Marvin R. Broadbent et al. v. Organization of American States et al., US Court of Appeals, DC Cir, 8 January 1980, 628 F.2d 27, 30–35 (DC Cir 1980).


of Appeal to submit the question whether the UN enjoys absolute immunity or not to the European Court of Justice. They argued that fundamental human rights enshrined in the legal order of the European Union were threatened by this immunity. This request was rejected by the Court of Appeal. As to the argument on their right of access to courts raised by the plaintiffs, the Court of Appeal held that this right is not limited by the immunity of jurisdiction of the UN since the victims can sue the perpetrators of the genocide and the State. Srebrenica survivors and victims’ families used the latter possibility in the past and filed a claim for compensation against the Dutch government, arguing that Dutch troops failed to take effective action to prevent the massacre. Yet, on 10 September 2008, the Hague District Court rejected the claim for compensation and ruled that the Dutch government could not be held responsible since the Dutch battalion was under UN command. Consequently, the Dutch State had transferred its powers in the area of security and freedom to the UN and could not be held liable for any violation committed during UN operations.56 As a follow-up to the decision of 30 March 2010 by the Court of Appeal in The Hague, lawyers for the families have declared that they may bring the case to the Dutch Supreme Court and once again request that the question be submitted to the European Court of Justice.57

D. THE NEED TO CREATE MECHANISMS TO ENSURE ACCOUNTABILITY

This example illustrates the urgent need to create mechanisms to ensure accountability of international organisations. Various mechanisms may be envisaged.58 Some have already been established, such as the Inspection Panel at the World Bank59, or the European Ombudsman60, who deals with complaints from citizens about maladministration by EU institutions. Certain mechanisms have been established by the UN, such as specific procedures for third-party claims with a private law character in peace support operations. Most of these

60 Article 228 of the Treaty on the Functioning of the European Union.
claims were settled by a local claims review board composed of UN officials and specifically established for a peacekeeping mission.\textsuperscript{61} Another important example of internal mechanisms set up by the UN are the UN Dispute Tribunal and the UN Appeals Tribunal\textsuperscript{62}, which replaced the UN Administrative Tribunal as of 31 December 2009.\textsuperscript{63} They have jurisdiction to adjudicate applications alleging non-observance of contracts of employment of staff members of the UN Secretariat or of their terms of appointment. Similar to the UN, the European Union has set up a European Union Civil Service Tribunal to deal with staff disputes.\textsuperscript{64} These mechanisms constitute very elaborate examples of an internal justice system established by international organisations. Other mechanisms remain at the level of theoretical suggestions, such as the creation of an independent human rights court or panel.\textsuperscript{65} It is noticeable that each of these mechanisms is specifically established to ensure the accountability of one single international organisation. One may be tempted to imagine a general mechanism to ensure accountability, applicable to all international organisations that accept its competence, such as the establishment by the UN Human Rights Council of a working group with the mandate of receiving complaints about the effects on the human rights situation of intergovernmental organisations’ operations.\textsuperscript{66} However, will the specificity of each international organisation not run counter to the establishment of a general system? Would tailor-made instruments corresponding to the specific mission and nature of the international organisation concerned not be preferable in order to optimise accountability?


\textsuperscript{63} UN Secretary-General, ‘Transitional measures related to the introduction of the new system of administration of justice – Secretary-General Bulletin’, SGB/2009/11, 24 June 2009.


\textsuperscript{65} T. Hammarberg, loc. cit. n. 7.

\textsuperscript{66} Cf. the proposal of S.I. Skogly, op. cit. n. 35 at p. 188.
IV. STRUCTURE OF THE BOOK

A. GENERAL CONCEPTS

The first part of the book focuses on a number of general concepts and fundamental problems. This pertains in the first place to the notion of ‘accountability’. This book’s title uses the term ‘accountability’, and not ‘liability’ or ‘responsibility’, for human rights violations of international organisations. Ige F. Dekker analyses these different concepts in his contribution and critically assesses the work of the International Law Commission on this topic.

Even though many international organisations have an international legal personality which is to be distinguished from their Member States, Niels M. Blokker examines whether international organisations are really independent actors and whether such independence corresponds to a functional necessity.

The question arises whether there remains also a form of responsibility for the Member States of the organisation. The interrelation between international organisations and their Member States is addressed by Olivier De Schutter, who suggests a logic of sliding scales in the law of international responsibility: ‘the more the organisation itself complies with human rights, and establishes mechanisms, whether internal or external, relying either on international monitoring bodies or on national courts, in order to ensure such compliance, the less there will be reasons to suspect that, by transferring powers to the organisation, the Member States have somehow ‘circumvented’ their human rights obligations.’

Frederik Naert discusses two aspects of the responsibility of Member States in the context of international organisations. In a first part, he analyses whether international organisations are bound by treaties binding their Member States, because that might be one way of ensuring that Member States do not evade their obligations when they act through international organisations. The second part of Frederik Naert’s contribution reflects on the responsibility of Member States for their own actions in the framework of international organisations. Matteo Tondini describes the possibility of suing before national and international judicial/supervisory bodies States that belong to international organisations.

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67 O. De Schutter, at p. 128.
B. PEACE AND HUMANITARIAN OPERATIONS

The risk of violations of human rights by international organisations is especially high when they exercise direct operational command and/or power, such as in the case of peacekeeping and humanitarian operations.69 This is the focus of the second part of the book. As explained by Ulf Häußler in his contribution on accountability for possible human rights violations by international organisations in the course of peace missions, ‘today’s peace missions differ considerably from classical Blue Helmet peacekeeping (...) many of these peace missions have become increasingly embedded in receiving states’ power balances, and some are expected to remain in that position for significant periods.’70 Peter R. Baehr focuses his analysis on the accountability of the United Nations in the case of Srebrenica, while Kristin Bergtora Sandvik investigates the role of procedural accountability in the organisation of humanitarian projects, especially on refugee resettlement. She postulates notably that ‘[a]ccountability measures are governance tools with complex effects. Devised as means to achieve greater legitimacy for bureaucratic interventions – by way of installing institutional cultures of human rights and administrative justice – these measures may themselves be transformed into instrumental ends through everyday practice.’71

C. INTERNATIONAL CIVIL ADMINISTRATION

Furthermore, one notices a significant expansion of the traditional peacekeeping missions, which have evolved toward complex operations and have even sometimes been entrusted with international territorial administration.72 In the third part of this book, the analysis of the accountability for human rights violations of international organisations concentrates on such cases of international territorial administration. Ralph Wilde focuses on the normative identity of the UN and explains the general denial of the legitimacy of international trusteeship as a way of understanding why the accountability

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70 U. Häußler, at p. 215.

71 K. Sandvik, at p. 289.

structures operating in relation to international territorial administration have been inadequate. Eric De Brabandere examines the issues of international territorial administration and accountability in concentrating on the UN Transitional Authority in East Timor, while Remzije Istrefi analyses the case of the UN Mission in Kosovo.73 In the latter case, the United Nations Interim Administration (UNMIK) has set up a non-judicial mechanism to address human rights abuses by the surrogate State (UNMIK), namely the Ombudsperson Institution. Gjylbehare Bella Murati addresses the role of the Ombudsperson in Kosovo, focusing in particular on the analysis of violations concerning the right to property, the right to liberty and security of an individual and the right to freedom of expression.

D. ECONOMIC GOVERNANCE

Rather than being directly and operationally involved, many international organisations operate mainly through policies in the areas of their specific mission, from development financing to the promotion of culture, health, justice, labour standards, monetary stability or trade. That is what the fourth part of the book focuses on. The organisations’ particular focus on their own specialised mission may bring them to inadvertently or even consciously neglect or prejudice human rights protection in specific areas. Especially in the realms of international economic governance such policies have attracted increasing attention in terms of their human rights implications. Throughout the years human rights problems arising from the policies of the Bretton Woods institutions, i.e. the International Monetary Fund and the World Bank Group have received considerable academic attention.74

Rekha Oleschak-Pilai’s contribution analyses the World Bank’s Inspection Panel, while Pierre Schmitt focuses on the International Monetary Fund’s accountability for human rights violations. Moreover, the other pillar of the international economic order – the World Trade Organization (WTO) – offers an intriguing example of the complexities of the relationship between an international organisation and its Members as far as the responsibility for respecting human rights is concerned. WTO Members are in an awkward position as WTO rules and disciplines are legally binding upon them and oblige them to implement such rules and disciplines in their national policies and legal systems, thereby often compelling them to prioritise trade over other societal values, including certain human rights. Jeroen Denkers and Nicola Jägers ask

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74 See the references mentioned supra n. 35.
whether the WTO forms an obstacle to enforcing human rights obligations. Stefaan Smis, Stephen Sevidzem Kingah and Christine Janssens focus on the relationship between one particular WTO agreement, the TRIPs Agreement (trade-related aspects of intellectual property rights), and human rights, notably the issue of access to cheaper AIDS medicines. The authors find that, although international trade can enhance human rights in some situations, the TRIPs Agreement has a negative impact on the right of access to cheaper HIV/AIDS medicines. Intellectual property and the right to health need not be friends or foes and a proper balance may be found. Finally, Gauthier de Beco analyses the possibility of using human rights indicators to improve the accountability of development agencies for their human rights obligations.

E. STAFF OF INTERNATIONAL ORGANISATIONS

Last but not least, the book’s fifth part concerns human rights related problems affecting the staff of international organisations. In the employment relationship with their own staff, international organisations are in a position of direct authority in which infringements of human rights can take place. In 2003, some 110,000 to 130,000 people were working as international public servants.\textsuperscript{75} Chittharanjan Felix Amerasinghe examines the accountability of international organisations for violations of the human rights of staff, with an emphasis on the recourse to judicial machinery for staff. Sarah Hunt focuses her analysis on the UN and the difficulties faced by litigants within the UN internal legal system. Osmat Azzam Jefferson analyses how workplace equality is understood, applied, and valued through practice in international organisations. She evaluates why such equality is an illusory concept and notes that it is in the international organisations’ best interest to ‘redesign and implement effective equality-based rules and to examine rules-based governance structures.’ As a distinguished international legal practitioner, Edward Kwakwa examines human rights obligations of international organisations in general and as applied to staff relations in particular from an international organisation’s point of view, namely the World Intellectual Property Organization.