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Responsibility as Opportunism: The Responsibility of International Organizations

Jan Klabbers

'… our legal system looks at nouns, seldom at adverbs'
James Lee Burke

INTRODUCTION

International law has, essentially, three responsibility regimes, for three different classes of actors. Individuals can be held responsible under international law, as can States and, it seems, international organizations. Individual responsibility is relatively straightforward: the standards against which the acts of individuals can be measured are laid down in the Statute of the International Criminal Court (hereafter ICC), and not really elsewhere.[1] There may be debate as to whether specific acts can be captured in terms of the ICC Statute — think of whether 'ecocide' can be seen as a crime against humanity — and there will be debates about the personal and territorial scope of the Court's jurisdiction. Still, the basic setting is relatively clear: there is a Court to determine such issues, which can hold individuals responsible for action in violation of certain standards, and those standards are fairly specific and reasonably well-defined legal standards.

This is not the case with State responsibility. There is no single instrument specifying when States can be held responsible for breaching specific standards. Arguably, it was once thought that the matter could be approached as responsibility for injury to aliens, but this was rapidly replaced by a more abstract approach, where States can be held responsible for each and any of their 'internationally wrongful acts'. Such acts comprise two elements: they must be attributable to the State, and violate an international legal obligation resting on that State. The idea makes sense: to formulate a single catalogue of all rights and all obligations of States would be impossible. The only viable alternative would have been to create specific responsibility regimes to go with specific policy domains. Some of that has materialized as *lex specialis* (the world trading regime, e.g., departs in some respects from the 'regular'

[1] The ICC Statute incorporates many standards originating from the Geneva Conventions.

law on State responsibility), but thinking in terms of lex specialis already presupposes the existence of a *lex generalis*, lest the system becomes completely fragmented, nay, shattered.[2]

With States, usually conceptualized as unitary actors, it makes sense to think in terms of attribution, and with States, it makes sense to think in terms of their international legal obligations and violations thereof. All States, even the most single-minded, conclude treaties; all States are subject to the workings of customary international law and general principles of law; and no State can escape what the International Court of Justice (hereafter ICJ) once referred to as the 'general rules of international law'.[3] The phrase is best understood as referring to the rules that make up the basics of the system and determine how the law is made and applied, such as those pertaining to statehood, the law of treaties or, indeed, the law of State responsibility.[4] And when push comes to shove, no State would want to extricate itself fully from the international legal system and the protection it offers.

In other words, with respect to both individual responsibility and State responsibility, there is something of a match between the system and its aspirations. There are standards of behaviour, and there are underlying ideas about how those relate to particular actors in the form of doctrines of attribution. Again, this is not to say that those systems work well, or even that they work at all; it is merely to say that some of the basic requirements of a liberal philosophy of responsibility are present.[5]

If the general approach to both individual and State responsibility in international law is philosophically reasonably coherent, the same does not apply to the law on responsibility of international organizations. The international community has available an abstract set of Articles on the Responsibility of International Organizations (hereafter ARIO), formulated over roughly a decade by the International Law Commission, spearheaded by its Special Rapporteur Professor (later Judge)

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[2] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

[3] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory opinion) [1980] ICJ Rep. 73, para. 37.

[4] Jan Klabbers, 'The Sources of International Organizations' Law: Reflections on Accountability' in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017), pp. 987–1006.

[5] By this, I suggest that our political philosophy is firmly grounded in liberal principles, including personal autonomy, i.e. the autonomy of individuals and, by analogy, States. Autonomous actors are entitled to see their autonomy respected, and can justifiably be held responsible for their own acts or acts done under their authority (though not those of others). For discussion see e.g. Karin E. Boxer, *Rethinking Responsibility* (Oxford: Oxford University Press, 2013).

Giorgio Gaja. The resulting articles, adopted in 2011,[6] are consciously modelled on the law on State responsibility. Here too, the basic idea is that organizations can be held responsible for their internationally wrongful acts, and here too, these are thought to consist of two elements: attribution, and the violation of an international legal obligation resting on the organization concerned. Both elements are highly problematic though. The system is based on a facile analogy with States, and arguably, it could hardly have been otherwise, given the epistemic priority of States and the chronology of events: once there was a regime on State responsibility, it stood to reason that the regime on international organizations and their responsibility should be more or less the same. The Articles have been widely criticized on various grounds (there was little practice to go on, and they tend to treat all organizations in cookie-cutter mode, ignoring important differences between organizations[7]), but some of the fundamental assumptions underlying the regime have not been interrogated to any serious extent. It remains unclear how obligation, attribution and especially causation work with respect to international organizations.

In what follows, I will start in Section I by discussing all too briefly some general issues relating to the responsibility of international organizations. Section II then will proceed by offering two examples, fairly typical, of the sort of situation in which international organizations can be involved. These examples do not involve obvious wrongdoing by international organizations; they do not involve, e.g., acts of torture attributable to the International Maritime Organization. Such obvious wrongdoings by international organizations are rare (though not non-existent), and when they occur and involve a breach of a legal obligation, should engage the responsibility of the organization concerned.

In practice, however, organizations are often involved in complex decision-making processes, often with a host of other partners or at least in force fields that engage a number of other actors. It is not even uncommon for international organizations to speak in several voices, with a political organ assigning a task to the administrative organ which the administrative organ is unwilling or unable to perform. In this light, focusing on responsibility for organizational acts of torture or similar obvious wrongdoings is of limited use.[8]

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[6] International Law Commission (ILC), *Articles on the Responsibility of International Organizations*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 66/100 (9 December 2011).

[7] Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013).

[8] Note also that ARIO is expected only to be invoked by States or international organizations, leaving those who most need protection (individuals subject to organizations engaging in territorial administration or performing acts of an international administrative nature) largely in the cold. See Armin von Bogdandy and Mateja Steinbrück Platise, 'ARIO and Human Rights Protection: Leaving the Individual in the Cold' (2012) 9(1) *International Organizations Law Review* 67–76.

Having presented these two examples, I will briefly discuss the three bottlenecks of responsibility in three separate sections: obligation (Section III), attribution (Section IV), and causation (Section V). The underlying argument suggests that with international organizations, causation assumes greater relevance than with either State responsibility or individual responsibility: all three raise relevant issues. The last section concludes.

I. On Responsibility and ARIO

It may be true, as Brigitte Stern has suggested, that in earlier days State responsibility rested on three pillars: wrongfulness, damage, and a causal link between the two. This is no longer deemed accurate or acceptable.[9] Damage has left the picture altogether, and I will not discuss it any further. Causation, likewise, plays not much of a role with respect to State responsibility, except when it comes to reparations. But for purposes of establishing State responsibility in itself, causation is not considered relevant anymore, and something similar applies to individual criminal responsibility. Both systems are relatively streamlined, in the sense that they are premised on an objective analysis: there is no need to demonstrate that the soldier engaged in a war crime 'caused' the crime to happen — the connection is much simpler: the crime itself suggests causation. Much the same applies to State responsibility: if it can be observed that State *A* breaches a treaty, there is no need to point out that *A*'s conduct 'caused' the breach, even if it may later be relevant whether the breach caused damage.[10] The basics, thus, are highly stylized, but this runs into problems in more complicated settings. International criminal law is more difficult to apply when the question is one of command responsibility, or when an accused soldier invokes in his defence that he acted on superior orders, and even more so when the role of a group is taken as relevant.[11] Here then attribution comes in, substituting for causation. Likewise, in State

[9] Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 193–220.

[10] Except in the obvious sense that the breaching party must be *A*, not *B*. Otherwise *A*'s actions cannot be considered causal in such an 'objective' analysis.

[11] Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart, 2014).

responsibility, attribution plays a role e.g. in determining whether a rebel movement acted under direction or control of a State. Causation as such therefore usually does not enter the picture.[12]

The same logic is far more difficult to apply with international organizations though — causation concerns cannot be wished away or subsumed under the heading of attribution. Part of the problem is that international organizations are, in an important sense, meta-organizations,[13] composed of other organizations (i.e. States) without necessarily having much authority over those States, and cannot do much without their Member States' cooperation. Graphically put: no international organization (not even the European Union, hereafter EU) has its own armed forces, its own police forces, its own customs officials, its own tax authorities, or any of the other agencies usually associated with the exercise of public power.

ARIO's rules on attribution understand as much, but cannot completely address it, because the lines of authority are multi-directional or non-hierarchical. When the North Atlantic Treaty Organization (hereafter NATO) authorizes the use of force, and Belgium troops subsequently kill an individual, is the killing caused by NATO or by Belgium? It would not have happened without NATO's authorization, but then again, neither would it have happened without Belgium's acceptance of NATO's authority. It cannot simply be claimed that Belgium is under effective control of NATO — such would deny Belgium's position as a sovereign State, and the possibility that it consented to it to use of force.[14] Claiming that NATO is subservient to Belgium, in turn, would negate the autonomous role played by NATO. In other words, the hierarchical construction which allows for the State responsibility system to operate — as even constitutionally independent State agencies are considered subservient to the State[15] — does not work with respect to international organizations. As a result, causation considerations assume greater prominence: the rules on attribution cannot fully do justice to what goes on when international organizations act. Likewise, the sharing of responsibility between States and international organizations cannot escape issues of causation completely, as the Amsterdam Guiding Principles

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[12] 'Causation is irrelevant to per se liability', as Cane suggests, invoking the example of trespass (which is generally illegal regardless of intent, consequences or damages). See Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002), p. 115.

[13] Göran Ahrne and Nils Brunsson, *Meta-organizations* (Cheltenham: Edward Elgar, 2008).

[14] Ana Sofia Barros, *Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions* (Cambridge: Cambridge University Press, 2019).

[15] Typically, the conduct of courts or parliaments is attributed to the State of which they form part.

attest.[16] Injury can result from the combined actions of States and international organizations, in which case it becomes relevant to establish a causal link between conduct and injury, and attribution alone does not suffice. There are exceptions of course: when a United Nations High Commissioner for Refugees (hereafter UNHCR) official decides to punish individuals in a refugee camp,[17] no further causation analysis is required. But few situations involving international organizations are quite as straightforward as that.

What makes things more difficult still is that most of the acts and decisions of organizations fall squarely within what Peter Cane calls the 'public law paradigm' of responsibility. He contrasts this to the criminal and civil law paradigms, and for present purposes the most relevant difference is that the public law paradigm involves balancing of interests in ways that do not apply to civil and criminal responsibility. Balancing enters the conversation in two ways, as Cane discusses. First, there is the question of how the public interest is balanced by public authorities (in our case: international organizations) against the interests of individual citizens, and second, how competing public interests are balanced by those public authorities.[18]

II. Two Cases

Sometimes, an international organization concerned is implicated in something that affects some negatively, and is simply wrong. Surely, the United Nations (hereafter UN) has no business bringing cholera to Haiti or allowing peacekeepers to engage in sexual abuse. Surely, the World Bank should not violate human rights, and surely the Security Council should not impose sanctions on a whim or in violation of human rights.[19] In some other cases, policy outcomes may be considered problematic, but remain within the realm of the legally possible and acceptable: whatever one thinks of Palestine and its statehood, it is within the powers of the United Nations Educational, Scientific and Cultural Organization (hereafter UNESCO) to consider it a State, for purposes of UNESCO. Likewise, the

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[16] André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15–72.

[17] The example derives from Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge: Cambridge University Press, 2011), p. 2.

[18] Cane, note 12, pp. 251–254.

[19] It has been argued that the imposition of sanctions on States tends to result in law-sponsored suffering. See Scott Veitch, *Law and Irresponsibility* (Abingdon: Routledge, 2007); see also Gavin Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (Cambridge: Cambridge University Press, 2020).

adoption or rejection of resolutions on military intervention are what the Security Council was set up for, with an almost unlimited discretion.

From a broader perspective, all decisions by international organizations come with winners and losers, and it is fully understandable that those who lose, cast their displeasure in legal terms. When the World Health Organization (hereafter WHO) declares a pandemic, much of the global economy falls on hard times, as the International Health Regulations recognize — the Covid-19 crisis provided a stern reminder thereof.[20] This suggests that decision-making and acting by international organizations rarely takes place in a vacuum. Whatever the organization does: some will win, and others will not.

Much of the work that international organizations do actually relates to this sort of concern, as the following two examples, taken from the work of anthropologist Robert Hitchcock, suggest. Hitchcock has been involved for several decades in development-related projects in southern Africa, and those projects naturally involved international organizations as well as a wide array of societal actors representing a variety of interests.[21]

The first example concerned the possible location of a refugee camp in Namibia, from Osire to M'Kata.[22] The camp had been set up in 1992 and housed many Angolan refugees, but also some others. By the year 2001 there lived more than 21,000 people in the camp, and commercial farmers in the Osire area, mostly of German or Afrikaaner origin, lobbied for the camp to be moved elsewhere. Some of the arguments raised included the overcrowding of the camp, security concerns, and the desirability of establishing 'a refugee settlement area that had sufficient land to allow agricultural activities to take place'.[23] The Namibian government suggested a spot in the Kalahari Desert region, M'Kata. This, however, would interfere with the situation of the indigenous communities living in the area, who were in the process of setting up a conservancy for purposes of community-based natural resource management. Relocation of the refugees, Hitchcock notes, could potentially affect both the social and natural environments in M'Kata, putting pressure on natural resources (water, food, firewood). On the other hand, some people spotted positive possibilities, such as more employment opportunities, better roads, and an expanded market for goods and services.

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[20] International Health Regulations, 2509 UNTS 79 (adopted 23 May 2005, entered into force 15 June 2007), Article 2: decisions shall take into account the effects on trade and transport.

[21] Note that my interest here is mostly heuristic, studying the cases as reported by Hitchcock for what they can teach about responsibility. Whether his rendition is historically fully accurate is, while not irrelevant, not presently my overriding concern.

[22] This section is based on Robert K. Hitchcock, 'From Boardrooms to Field Programs: Humanitarianism and International Development in Southern Africa' in Ronald Niezen and Maria Sapignoli (eds.), *Palaces of Hope: The Anthropology of Global Organizations* (Cambridge: Cambridge University Press, 2017), pp. 172–197, especially pp. 175–181.

[23] Ibid., p. 177.

Given the variety of interests and opinions involved, a serious political battle ensued, involving various Namibian ministries (the Ministry of Agriculture, Water and Forestry; the Ministry of Lands and Resettlement; the Ministry of Home Affairs and Immigration; and the Deputy Prime Minister's Office), local communities, and UNHCR. The communities of M'Kata even tried to get the World Bank officials involved, but these declined, being reluctant to be seen to participate in matters not obviously within the Bank's mandate. And to make things more complicated still, perceptions also played their role. The local M'Kata communities were not keen on voicing their objections, for fear of being portrayed as uncooperative and perhaps even targeted by the government. Likewise, some of the local staff of UNHCR seemed to worry mostly about their career prospects, and few of them had ever visited the Osire camp to begin with.[24] In the end, most of the refugees repatriated, meaning that relocation never took place.

Hitchcock's other example[25] concerns the Lesotho Highlands Water Project, a project funded in small part (some sources suggest as little as three per cent[26]) by a World Bank loan, with other lenders including the European Investment Bank, the African Development Bank, the Development Bank of Southern Africa, the government of Lesotho, and a number of commercial banks. The project affected a total of 573 people directly and around 20,000 people indirectly, through loss of livelihood resources, disruption of travel routes, etc. Some compensation was provided for, meant to maintain standards of living so people would not be worse than before the start of the project. Communal compensation was provided (e.g. support for community co-operatives), and houses, churches and schools were replaced.[27] While everyone agreed consultation of the affected population would be a good idea, their claim

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[24] Ibid., p. 179.

[25] Ibid., pp. 181–184.

[26] The Bank itself reports different figures in different places, but a constant factor is that the Bank's part is relatively small. Hitchcock's figures are endorsed by a Bank report (Haas, Mazzei and O'Leary, note 52 below), whereas a World Bank project overview reports that the Bank loaned 110 million USD instead of the 45 million USD mentioned by Hitchcock. See https://projects.worldbank.org/en/projects-operations/project-detail/P001396?lang=en (visited 1 September 2020).

[27] Hitchcock does not mention that several local mining companies went to court in Lesotho and to the World Bank Inspection Panel complaining of deprivation of their property rights as a result of the project. The latter found that some internal procedural obligations (internal to the Bank) had not been met. For a summary, see Andria Naudé Fourie (ed.), *The World Bank Inspection Panel Casebook* (The Hague: Eleven, 2014), pp. 107–111.

that their consent was required was rejected by the two governments involved (in addition to Lesotho, South Africa was involved[28]), and by the commission set up to run the project and the World Bank.

Separate issues related to the consequences, intended or not, of the project. One question was, who exactly could be considered as project-affected. It has been suggested, e.g., that the project caused dramatic increases in water prices, therewith negatively affecting townships in Johannesburg.[29] Another question arose as to which consequences could actually be blamed on the project. Hitchcock lists several consequences, ranging from the plausible (an earthquake induced by seismic activity following the filling of the new reservoir, and the drying up of springs elsewhere) to the contingent or highly indirect, such as an increase in HIV/Aids amongst the local population. Some consequences, moreover, are difficult to measure: a sense of feeling bereft may be very real but difficult to tackle.[30]

In both episodes, the overt role of international legal arguments was limited to law forming the background.[31] These were not battles of legal arguments (My right! Your obligation!). These were political discussions, structured by international and domestic law, but not conducted solely in terms of law, of legal rights and obligations. And on reflection, that makes sense: such discussions cannot be conducted solely in terms of rights and obligations, for that would entail that the discussions have already taken place elsewhere, in a different setting or context, between different actors or, worse perhaps, in highly abstract legal terms. Such an abstract discussion can never be sensitive to contextual concerns. One example to ponder: the 573 directly affected people in Lesotho formed a relatively small group; the size of the group facilitated issues of compensation and the rebuilding of houses and schools. Had the group consisted of 20,000 people, such would have been less likely, or at the very least the level of compensation would have been different (i.e. lower, in all likelihood). The general point for present

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[28] The project was based on a bilateral treaty between the two States ('Treaty on the Lesotho highlands water project between the government of the Kingdom of Lesotho and the government of the Republic of South Africa', signed at Maseru, 24 October 1986). The text can be found at http://www.fao.org/3/w7414b/w7414b0w.htm.

[29] Reportedly, the panel did not recommend an investigation, as claimants had not made a clear connection between Bank policies and the conditions they complained of. See Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights: Developing Standards of Transparency, Participation and Accountability* (Cheltenham: Edward Elgar, 2013), p. 230.

[30] Hitchcock, note 22, p. 186. Elsewhere he also lists a specific case of corruption as a consequence of the Project, therewith illustrating just how difficult it is to establish causation: surely, the Project as such cannot be considered to have 'caused' a specific instance of corruption. Robert K. Hitchcock, 'The Lesotho Highlands Water Project: Dams, Development, and the World Bank' (2015) 3(10) *Sociology and Anthropology* 526–538, at 530.

[31] Note the intersection of domestic and international issues and standards: such projects typically becomes sites of inter-legality. See Jan Klabbers and Gianluigi Palombella (eds.), *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019).

purposes: political action never takes place in a vacuum, and the search for legal answers typically needs to take context into account — and here it makes a difference whether 500 people will be displaced or 20,000; and it makes a difference whether the lobbyists in Namibia are agro-businesses or small-time peasants.

III. Obligation

It is not very clear whether there is much public international law applicable to international organizations. Some suggest that since Member States of organizations are subject to all sorts of international legal rules, therefore so are their organizations — but surely, such a position is untenable, as it ends up undermining the separate identity of international organizations.[32] The ICJ tried to clarify things in 1980, when rendering an advisory opinion in a dispute involving WHO's obligations under international law. The Court confirmed that international organizations are bound under international law by the treaties they are parties to, by their internal rules (which can be seen as international law) and, somewhat Delphic, by the 'general rules of international law'.[33]

The reference to treaty obligations is a fairly obvious one. However, international organizations — except the EU, which is the only international organization with a foreign policy deserving of the label — are parties to few treaties, and the categories of treaties tend to be fairly specific and related to the work of the organization. The main general category of treaties is composed of treaties related to the organization's legal status: most organizations have a headquarters agreement with their host State or host States, if only because it would be difficult to operate without one. Such agreements typically contain the rights and obligations of the organization and that of Member States, but not much more.[34] Likewise, organizations can sometimes be parties to treaties arranging their own privileges and immunities, although this is already less prevalent. These agreements tend to create obligations for Member States — to withhold prosecution of organizations and their staff members, to allow for tax-free imports, etc. — but while organizations are usually beneficiaries of such treaties, they are not always parties.

Beyond this, organizations are mostly parties to treaties related to their own activities. The UN, e.g., concludes agreements on peacekeeping with troop contributing countries, and with the States where peacekeepers will be stationed. And beyond this, organizations may often conclude agreements to

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[32] Jan Klabbers, *An Introduction to International Organizations Law*, 3rd edn (Cambridge: Cambridge University Press, 2015).

[33] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, note 3, especially para. 37.

[34] Alexander S. Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague: Kluwer and Martinus Nijhoff, 1995).

cooperate with one another; these often go by the designation ‘memorandum of understanding’ (MoU), and there is some controversy as to whether such MoUs can properly be seen as treaties to begin with.[35] Often, the organization may not have been given a specific competence to conclude treaties with other organizations, in which case it is more convenient, so the argument goes, not to regard them as treaties — although there is considerable doubt whether the ICJ would accept such a construction.[36]

Organizations thus are parties to few treaties but, more importantly, they are rarely, if at all, parties to what are sometimes considered to be the general, quasi-legislative treaties. With the exception of the EU, not a single international organization is a party to any human rights convention; to any convention in the field of humanitarian law; and to any convention relating to environmental protection. Hence, the first possibility mentioned by the ICJ, while appropriate in the context of the case (which concerned a headquarters agreement), offers little of general applicability.

The second option is more interesting: the organization is bound by its internal rules. This signifies that organizations can adopt (and possibly adapt) existing international law standards. In this manner, the Secretary-General of the United Nations has issued a bulletin proclaiming that the UN shall respect the principles of international humanitarian law; likewise, the World Bank has incorporated international standards in its operative directives and related internal documents.[37] In addition, their constituent instruments must rank among the relevant internal rules: these are typically treaties, but the organizations themselves are not parties to them.

The third source mentioned by the ICJ has generated considerable controversy, with many arguing that the reference to ‘general rules of international law’ can only mean that the Court referred to the total corpus of customary international law.[38] That construction raises some obvious issues: if the Court

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[35] Jeffrey L. Dunoff, ‘A New Approach to Regime Interaction’ in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), pp. 136–174.

[36] The ICJ has steadfastly rejected the proposition that MoUs concluded between States are not treaties; see e.g. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility Judgment) [1994] ICJ Rep. 112.

[37] Andria Naudé Fourie, *World Bank Accountability in Theory and in Practice* (The Hague: Eleven Publishing, 2016), especially pp. 132–147; also Philipp Dann and Michael Riegner, ‘The World Bank’s Environmental and Social Safeguards and the Evolution of Global Order’ (2019) 32(3) *Leiden Journal of International Law* 537–559.

[38] Kristina Daugirdas, ‘How and Why International Law Binds International Organizations’ (2016) 57(2) *Harvard International Law Journal* 325–381. The same author also urges organizations to publicly affirm some of their obligations under customary international law: Kristina Daugirdas and Sachi Schuricht, ‘Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies’ in Peter Quayle (ed.), *The Role of International Administrative Law at International Organizations* (Leiden: Brill and Nijhoff, 2021), pp. 54–87.

wanted to refer to customary international law, it could simply have said so. If it refers to 'general rules', that term itself must have some meaning. And if customary international law is ultimately based on State consent, as many would accept, then why would the same rules be binding on international organizations without their consent?[39]

The long and the short is that there are not many international legal obligations resting on international organizations, and to the extent that such obligations exist, they may even point in different directions. Put concretely: under its constituent instrument, the World Bank is to ignore non-economic considerations in its decision-making. This was considered difficult to reconcile with the injunction to consider a borrowing State's human rights record when deciding on a loan (as might follow from other putative international obligations), since a State's human rights record does not necessarily qualify as an economic consideration.[40]

While the ARIO suggest that an essential element of responsibility is the breach of an international legal obligation, it turns out that such obligations are few and far between. As a result, legal argument takes on different characteristics, with much of it being normative political argument in disguise. The Namibia scenario, as introduced above, illustrates matters well. The only international law obligations resting on UNHCR stem broadly from UNHCR's mandate and internal rules, and will have to relate to the well-being of refugees under UNHCR's care.[41] This does not, however, cover the local communities in M'Kata, the proposed site of relocation. UNHCR has no hard and fast legal obligations to respect the human rights of these local communities (who are not refugees, after all), as it is not a party to any human rights treaty, and it is doubtful whether it is bound by any customary rules on the topic, if these should even exist. As a result, the argument takes on different colours, somehow suggesting that should the refugee camp be moved to M'Kata, UNHCR would commit a wrong towards the local communities living there. Without it being spelled out, this would have to refer to a possible violation of their social and economic rights; these, however, are difficult to operationalize, and typically are a matter of degree and of balancing. In the absence of a legally binding obligation, and in the absence even of enforceable rules (regardless of their provenance), the discussion collapses into blaming UNHCR for something that has little connection to its legal position. What is more, UNHCR is blamed

[39] These are, incidentally, not the only issues thrown up by the 'custom' construction. For a fuller discussion, see Klabbers, note 4.

[40] It took a re-interpretation by Shihata, the Bank's long-serving legal counsel, to reconcile the two: see e.g. Ibrahim F.I. Shihata, 'Human Rights, Development, and International Financial Institutions' (1992) 8(1) *American University International Law Review* 27–36.

[41] On the relevance of the mandate, see Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28(4) *European Journal of International Law* 1133–1161.

for something that is out of its reach at any rate, at we will see below, as the relocation decision is not UNHCR's to make.

Something similar is visible with respect to the Lesotho Highlands Water Project. Here, discussions revolved around the right to water which, obviously, should be a basic human right, but is not always recognized as such, and where it is, tends to be conceptualized as a bundle of procedural rules.[42] Moreover, whether precisely the World Bank would be under an international law obligation to guarantee the right to water, and would be so under exclusion of the other project participants and funders, is questionable. Surely, if the World Bank can be said to be under an international legal obligation to guarantee the right to water, then the same applies at the very least to Lesotho and South Africa, and most likely to the other multilateral development banks involved as well.

Interestingly, while it is equally uncertain whether there exist international legal rules prohibiting displacement of people while offering compensation, nonetheless this too became an issue with the Lesotho Highlands Water Project. Expropriation for public purposes is usually considered acceptable, provided it is accompanied by compensation.[43] The same logic appeared to be at work here: people were displaced for public purposes, and compensated. The point is not to defend the World Bank or to praise it; the point, instead, is to suggest that the Bank is under few international legal obligations, other than those it has taken on itself through internal procedures and directives. The same applies to the affected populations' call that their consent is needed: there is no international legal rule to that effect in existence, much less one that would be opposable to international organizations. This may be deplorable,[44] but deplorability alone does not make for applicable law.

Discussions on obligation in the context of the responsibility of international organizations are mostly discussions of opportunity: participants and stakeholders do not aim to identify international legal obligations, as the ARIO suggest they should, but instead invoke a mixture of vaguely moral arguments and political sensibilities, regardless of whether international legal obligations can be identified. And obviously, it could hardly be otherwise: there are very few international legal obligations incumbent on international organizations — too few to make the ARIO workable.

Other examples from legal practice confirm much the same point, with a prominent example being the discussion surrounding the outbreak of cholera in Haiti. Regardless of whether the outbreak can be

[42] See UN Committee on Economic, Social and Cultural Rights, 'General comment no. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (2003) UN Doc. E/C.12/2002/11.

[43] Jan Klabbers, *International Law*, 2nd edn (Cambridge: Cambridge University Press, 2017), pp. 307–308.

[44] Note that an absolute right to protection for group *A* will typically come at the expense of groups *B* and *C*. There are probably circumstances where absolute protection is morally justified, but it is doubtful whether national development projects fit that category.

attributed to the UN, it is clear that something happened on the UN's watch;[45] but it is considerably less clear how to capture this in terms of legal rules. Most of the discussion concentrates on two issues. On the one hand, there is the suggestion that the UN was guilty of negligence. On the other hand, the UN has been deemed at fault for not creating an arbitration mechanism, something apparently in violation of Section 29 of the 1946 General Convention on Privileges and Immunities of the UN[46]. Setting up arbitration for complaints of a private nature, some suggest, was the price to pay for wide-ranging immunities from suit and prosecution.

Regardless of the merits of this point about arbitration mechanisms (and those appear to be slender, as historical evidence for such a bargain is lacking[47]), it is noticeable that the point has very little to do with the spreading of cholera as such. An argument about the UN violating a substantive international legal obligation thus becomes an argument about the absence of a procedural device; it is the absence of this procedural device that is eventually considered a violation of an international legal obligation. Put differently, even if the UN would have established an arbitration mechanism, it cannot fill the void left by the absence of a substantive rule.

That leaves the negligence argument: in deploying peacekeepers carrying cholera, the UN is thought to be guilty of negligence. Much here depends on the precise factual circumstances, but the argument presupposes that the UN is under an obligation not to be negligent, and for this, the best one can hope for is that a court would conclude that negligence falls within the rubric of general principles of law. Such is, prima facie, not an eccentric argument to make, but either way, negligence cannot translate into an obligation of result. If the UN can show that it took reasonable precautions, then it cannot be held responsible for negligence.[48]

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[45] Just for the record, the failure of the UN to apologize for something happening on its watch and for its subsequent inactivity is morally highly problematic, but that is not to say the UN should incur legal responsibility for spreading cholera.

[46] Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15 (adopted 13 February 1946, entered into force 17 September 1946).

[47] And the UN, lest it be forgotten, is not a party to the 1946 General Convention. While it benefits from the Convention's existence, it is questionable whether any obligation can be said to rest on the UN, and there is no evidence for the existence of that bargain.

[48] The facts on this point are contested, but it seems that peacekeepers were tested prior to deployment in Haiti and tested negative: they may have contracted cholera after being tested, but before being deployed. The time-frame between testing and deployment has traditionally been set at three months, and seems to have worked well for more than half a century. For more detail, see Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26(1) *European Journal of International Law* 9–82, especially at 66–68.

In short, it is easy to blame international organizations (and the blame is sometimes very well-deserved), but considerably less easy to pinpoint with some precision whether an organization has actually violated an international legal obligation incumbent upon it. And lest this is considered facetious, it is actually the threshold set by the ARIO. What matters is not moral failure; what matters is, instead, the violation of an international legal obligation.[49]

IV. ATTRIBUTION

It proves to be difficult to attribute political action to international organizations. Scholars of public administration, familiar with collective decision-making, refer to the 'problem of the many hands': where many take part in the same activity, it is difficult to identify who is at fault if things go sour.[50] In the Namibia example, it is clear that while the refugee camp was run by UNHCR, UNHCR could not by itself decide on relocation — such was the prerogative of the Namibian government. It also seems clear that not even the idea for relocation stemmed from UNHCR; instead, it resulted from intense lobbying by commercial farmers. Nor did UNHCR have much to do with the chosen site for relocation, which seemed to have been a governmental proposition.

The one remarkable characteristic of the Lesotho scenario suggests similar issues: the World Bank may have provided a huge loan, but this was still dwarfed by the project's total budget, of which the World Bank loan possibly made up a mere three per cent.[51] There were two governments involved, a handful of other international financial institutions, plus a number of commercial operators — in such a setting, the World Bank's role was relatively small, too small perhaps to blame it for all the project's ills. That said, numbers can be deceptive. A World Bank report confirms that while the Banks' financial contribution was limited, most of its financing went to 'key strategic components' of the project, and the Bank exercised something of a supervisory function, 'providing comfort to other lenders' who relied on Bank assessments and evaluations.[52] Moreover, the Bank has an important role in fighting corruption:

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[49] See Articles 3 and 4 ARIO.

[50] Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge: Cambridge University Press, 1998).

[51] Different sources present different figures, but all suggest the Bank's financial contribution was relatively small.

[52] Lawrence J.M. Haas, Leonardo Mazzei and Donald T. O'Leary, *Lesotho Highlands Water Project: Communications Practices for Governments and Sustainability Improvement*, World Bank Working Paper No. 200, 2010, at xiv (http://documents1.worldbank.org/curated/pt/672401468056329045/pdf/558400PUB0REPL11public10BOX0349457B.pdf).

if the Bank does not trust a potential partner, then that partner is effectively debarred — others adopt the Bank's judgment in these matters.[53]

Important as the role of the Bank is, then, it is not immediately obvious that all of the project's mishaps should be laid at its feet. The original project, it will be recalled, was based on an agreement between South Africa and Lesotho, and while they were dependent on outside financing and may on occasion have been cajoled into accepting things, it remains the case that little would have happened against their strongly-felt wishes. The two States involved, moreover, set up a Joint Permanent Technical Commission by means of their 1986 agreement to carry out the work and manage the project; this Commission was itself a (small) international organization with a number of competences and a certain measure of autonomy.

The picture emerges of an octopus-like operation, made up of two States, a number of financial institutions (including the World Bank), the Joint Permanent Technical Commission, and a number of private institutions providing financing and therewith, we may presume, also imposing conditions, at least concerning repayment. In those circumstances, it will be difficult to trace with some precision which of the partners bears responsibility for which precise part of the operation.[54]

Similar issues arise from the otherwise very different Namibia scenario. At issue here was not a project implemented and financed by a conglomerate brought together for the occasion, but instead something of a disagreement between a number of actors, one of them an international organization (UNHCR). In the circumstances, it seems UNHCR was mostly a by-stander. It managed the refugee camp at Osire, but did not campaign for its relocation. Nor was it seemingly very much involved in identifying possible new sites, and the decision to re-locate or not (and if so, where to) was left to the Namibian authorities.

And yet, Hitchcock presents the story in part as being about the UNHCR doing wrong, noting for instance that some of the relevant actors considered suing UNHCR before Namibia's courts, only to find that UNHCR, as an international organization, was immune from suit.[55] And Hitchcock's own analysis

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[53] Several multilateral development banks have concluded a debarment agreement, mutually enforcing each other's debarment decisions. As the World Bank is by far the biggest of these banks, investigations are often entrusted to it. See further http://lnadbg4.adb.org/oai001p.nsf/.

[54] One hypothesis, to be tested in any given case, is that even where the World Bank contributes little in financial terms, it may nonetheless have the final word about the participating States' policy options. If so, then attribution to the Bank seems more plausible. See Cristina Rojas, 'Governing through the Social: Representations of Poverty and Global Governmentality' in Wendy Larner and William Walters (eds.), *Global Governmentality: Governing International Spaces* (Abingdon: Routledge, 2004), pp. 97–115, p. 108.

[55] Hitchcock, note 22, p. 178.

suggests between the lines that at least some of the responsibility should be shouldered by UNHCR: he chides its local officials for instance for rarely setting foot outside their offices, and for being more concerned about their career prospects than for speaking truth to power. It is possible that this is merely a single author voicing his disappointment, which may owe more to his possibly inflated hopes or expectations than to what UNHCR actually stands for — and there is probably some truth in this.[56] But the same thing happens also with the respect to the Lesotho Highland Waters Project, where the World Bank plays a relatively small role but comes to symbolize the project.

This then suggests that matters of attribution owe much to pragmatic considerations. Attribution, like water, flows to the lowest point: the point where a legal rule is available, or an actor can be blamed, or something of a legal process can be started. If this is accurate, then an important consideration for those complaining about the Lesotho project is that the World Bank offers a quasi-judicial redress procedure in the form of its Inspection Panel — this is the big difference between the Bank and most other participants in the project.[57] The commercial banks put up much more money than the World Bank did, but they lack a quasi-judicial process. The regional development banks put up considerable amounts, but they lack an Inspection Panel. Hence, the only plausible addressee for complaints was the World Bank, not because the project's flaws could obviously be attributed to it, but because it has a procedure available to address the project flaws.

In a different way, much the same happened in the Namibia scenario. Here it was not the availability of judicial process that influenced things, nor the availability of a legal rule which would make it attractive to castigate UNHCR, but instead the circumstance that UNHCR is a single-issue entity, with responsibility for only one thing: taking care of refugees. UNHCR, in other words, does not have to balance different interests and indeed, it would be strange and disorienting if it were to do so. The most obvious culprit, by contrast, the government of Namibia, cannot afford such luxury: it has to balance the interests of commercial farmers in Osire and the interests of local communities in M'Kata, and in the process take those of the refugees into account as well. Put differently, the Namibian government has a readily available excuse to justify its decisions (namely, the interests of others); UNHCR, by contrast, does not have such an excuse available, and can at best only point to furthering

[56] Traditionally, international organizations have always been seen as being involved with the 'salvation of mankind', and this applies even more so to organizations with a clear humanitarian mandate, such as UNHCR. Discovering that such an organization is eventually but an ordinary bureaucracy may magnify the observer's disillusionment. On this image of organizations, see generally Klabbers, note 48.

[57] It is, on this line of reasoning, no coincidence that further legal proceedings were started where such proceedings were plausibly available, i.e. in the courts of Lesotho.

the interests of the refugees. And it is this circumstance that makes UNHCR an attractive target for political (and perhaps legal) action.

But if this is the case, then attribution is highly unstable. The ARIO provisions addressing attribution are premised on the thought that conduct is broken down in smaller pieces, so that it can be determined which actor was implicated in which part of a composite act — whether an organization was acting for a State or group of States, or whether State organs were acting as agents of the organization or under their 'overall' or 'effective' control. And yet, the two examples discussed above show nothing of the sort. They suggest that attribution does not follow from conduct, but is actually far more opportunistic. And on reflection, it could hardly be otherwise. In much the same way as Georgia and Ukraine have to cast their grievances against Russian aggression in terms of racial discrimination before the ICJ because that might be the only way in which the ICJ can find jurisdiction,[58] and in much the same way as an addressee of UN Security Council sanctions can only go the court in the EU,[59] so too will social actors seek out where there are rules or processes, and possibilities for success, available.

Much the same arbitrariness of attribution emerges from the scarce case law on the topic, such as the decision of the Dutch Supreme Court in *Mothers of Srebrenica*. As is well known, in 1995 a Dutch battalion had been charged with protecting an UN-proclaimed safe area in Bosnia, near Srebrenica, and failed to do so. The Court decided to break up the event in two stages: one stage ran until 23.00 on 11 July 1995; during this stage, it held the camp was still under overall UN control. After 23.00, however, this was no longer the case, and the Dutch were considered solely responsible. During the Dutch time frame, those in the camp still had a chance of escaping from Serbian troops, a chance estimated at 10 per cent. As a result, the Dutch were held responsible to the extent of 10 per cent.[60]

At first blush, it is tempting to interpret this as a finding of 10 per cent attributability, but that is not what this is.[61] Instead, what the Court calculated was the chance of escape, estimated at 10 per cent, but during a time frame in which behaviour was considered fully attributable to the Dutch. While on the ground, one might say, the UN and the Dutch were engaged in a joint operation and thus, one might

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[58] Jan Klabbers, *International Law*, 3rd edn (Cambridge: Cambridge University Press, 2020), p. ?.

[59] This refers to the *Kadi* saga before the Court of Justice of the EU: see *Kadi and Al Barakaat International Foundation* v. *Council and Commission ('Kadi I')* (Joined Cases C-402/05 P and C-415/05 P) EU:C:2008:461 [2008] ECR I-6351, 3 September 2008 (Grand Chamber).

[60] See Supreme Court of the Netherlands (Hoge Raad), *Mothers of Srebrenica et al.* v. *State of the Netherlands*, Judgment of 19 July 2019, 17/04567.

[61] In a similar vein, see Nollkaemper, d'Aspremont, Ahlborn, Boutin, Nedeski and Plakokefalos, note 16, p. 37, noting with respect to indivisible injury that 'cumulative contributions to the injury cannot be distinguished using a factual test of causation'.

suggest, each would be responsible for their own share (however calculated), this is not how the Court construed the events: instead, it posited something of a sequential attribution, a division not over space, but over time. And what it then calculated was not the Dutch share of authority (that would be 100 per cent, after 23.00 on 11 July 1995) but the chance of escape. Why this was set at 10 per cent remains itself mysterious, as well as why the chance of escape would be a relevant factor to take into account when determining the responsibility of the Dutch.

V. CAUSATION

It is generally accepted that legal reasoning entertains a different conception of causality than scientific reasoning does, and for good reason.[62] Legal reasoning is a form of practical reasoning (as are historical and ethical reasoning[63]), where the quest is usually about finding a particular that may have caused some other particular. Scientific reasoning, by contrast, is usually seen as a quest to find generalities: general causes explaining (causing) general consequences. The two can overlap: Hart and Honoré give the example that while one would not normally, in law, think that a fire was caused by oxygen, even if scientists are agreed that no fire can start without it. Instead, fires are usually said to be caused by a lit match, or a carelessly thrown cigarette stub. Still, in some cases oxygen may be the main cause, for instance if an industrial process goes wrong because oxygen enters the picture.[64] Thus, it is too facile merely to suggest that the general cannot explain a particular result (the burning down of that factory at that moment) — sometimes it can.

But the overall point remains: typically, in legal reasoning, causality enters the picture as the particular trigger of a particular result, sometimes quite literally so — this is why the metaphor of the 'smoking gun' is so powerful. The question then is whether the acts that are attributable to international organizations can also be said to have caused the problematic effects that are being complained of. The problem that then arises is that often enough, effects may be caused by several causes at once, all conspiring to produce a problematic result; and if that is the case, singling out one of these causes as 'the' cause is bound to remain unsatisfactory.

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[62] Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); and Friedrich Kratochwil, *Praxis: On Acting and Knowing* (Cambridge: Cambridge University Press, 2018).

[63] Note that different forms of practical reasoning may use different evidentiary standards: historians, e.g., are allowed to use hearsay, or the testimony of direct relatives, in ways that are not always considered acceptable or desirable in legal argument. See Stephen E. Toulmin, *An Examination of the Place of Reason in Ethics* (Chicago: University of Chicago Press, 1986 [1950]).

[64] H.L.A. Hart and Tony Honoré, *Causation and the Law*, 2nd edn (Oxford: Clarendon Press, 1985), p. 11.

The Haiti cholera affair offers a sobering illustration. It is an established fact that cholera was brought by Nepalese peacekeepers. On this line of thought, the peacekeepers caused the cholera. This construction simplifies things considerably: if Nepalese peacekeepers caused the cholera, then the obvious next step is to attribute the action (most likely to either the UN or Nepal) and find an applicable legal rule. While neither of these is straightforward, as noted above, the picture is nonetheless considerably simplified.

But things may not be quite this simple. Another reasonably well-established fact is that the waste disposal system was malfunctioning: a local Haitian company, selected in a competitive process, did not do a particularly good job, and there have also been reports of a broken PVC pipe: the excrements of Nepalese peacekeepers were reportedly floating in the river. In a political climate of cost-consciousness, the company was probably selected not only because it promised to deliver a high quality waste management system, but also because it promised waste management at relatively low costs. It would not be inaccurate to characterize this as the direct cause either: the bacteria cannot reach further victims if potential victims do not get exposed. On this line of thinking, one could lay causality at the feet of the local waste management company.

But here further complications may arise. One might suggest, e.g., that enlisting cheap waste management may be asking for trouble; so why was this company selected? If it was selected largely for financial reasons, then the Member States of the UN, insisting on frugality, may have something to answer for: their cost-consciousness cost several thousands of Haitians their lives. That too would be too simplistic, obviously, for had none of the peacekeepers carried cholera, then nothing dramatic would have happened. The point is that all these factors conspired to create a human tragedy: they operated together, in a highly unfortunate constellation. Had the Member States been less frugal, then nothing would have happened. Had the company been better equipped, then too, nothing would have happened. And had the peacekeepers not carried cholera, likewise nothing would have happened.

Likewise, although with far less dramatic consequences, in the Namibia scenario sketched above. The proposed relocation was the result not of UNHCR pushing anything, but of farming lobbyist trying to push through the re-relocation. Perhaps this was partly inspired by the camp at Osire being overpopulated, but the relocation was also welcomed by some sensing business opportunities at M'Kata. It was sponsored by the Namibian government, perhaps in response to the farming lobby, perhaps for other reasons as well. It is by no means clear which part of the constellation of facts and influences could be said to have caused the disadvantaging of the M'Kata communities. Again, the real world is complicated — more complicated than ideas about legal causation in international organizations law can carry.

Something similar also applies to the Lesotho Highland Waters Project. As noted, a little under 600 people were displaced as a result of the project, and that is straightforward enough — the causality

is clear. But mention was also made of some 20,000 who would be less directly affected, through disruption of traveling routes or even, more distant still, the rising price of water affecting people in Johannesburg. These issues may be very real, yet are difficult to capture in legal causation terms.

Such problems can be circumvented by placing causality not in material circumstances, but in the mindset of the perpetrator. This helps explain the relevance of *mens rea* in individual criminal responsibility, mitigated by doctrines about 'double effect'.[65] But this is difficult to apply with collective actors, so naturally the focus comes to rest on objectively determinable fact, i.e. the violation of an applicable international legal obligation. This comes with at least two problems though. First, it presupposes de-contextualization: what matters is not *why* State *X* violates obligation *O*, but merely *that* it does so. This is problematic because the law cannot fully ignore context: using force against foreign aggression, e.g., is qualitatively different from using force in order to achieve self-determination, even though on its face both look the same, and both are difficult to reconcile with prohibitions of the use of force. And second, it can only work if there are international legal obligations that can be violated.

What is more, the effects may be offset by other developments that are even more difficult to capture: a different travel route, e.g., may be inconvenient, but if the building of the dam results in more bountiful harvests, then perhaps that is, from a macro-perspective, a price worth paying. The problem then is not so much causation, but distribution: the people confronted with more difficult travel routes are not the people who benefit from the more bountiful harvests, especially not in open economies where the harvest may be mostly for export. And different stakeholders will typically approach the same act differently, and with different standards in mind.[66] The United States Treasury expects different things from the International Monetary Fund than the people of Bangladesh. Those, in turn, may even expect things that their own government is not particularly interested in.[67] And this does not even take into account the interests of engineering and consultancy companies or the Non-Governmental Organizations community, or possible differences among Bangladeshi government sections. Yet, these are the force fields in which international organizations typically operate.

[65] This refers to actors behaving with an intent to do *A*, while being aware that an additional effect *B* is likely or certain to happen, even if unintended. Placing a bomb in a car transporting a high-level politician will also affect the driver (unless the politician is driving herself), even if the intention is only to get at the politician.

[66] Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29–43.

[67] On the relationship between the United States Treasury and the International Monetary Fund, see Randall Stone, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge: Cambridge University Press, 2011).

TO CONCLUDE

A common trope underlying much scholarly work on the responsibility or accountability of international organizations suggests that there is an accountability gap or deficit, largely because organizations can claim immunity before domestic courts, and few corresponding mechanisms exist on the international level.[68] The observation is accurate, even if the conclusion is not. The observation is accurate in that indeed, organizations can usually claim immunities before domestic courts, and indeed, the institutional possibilities for complaining about organizational behaviour are well-nigh absent at the international level. While there is an accountability deficit, I have suggested that it is overly optimistic to expect that the deficit will vanish once there are more or better institutions available. The problem is not only institutional in nature, but also inheres in the international law on the responsibility of international organizations.[69]

The most authoritative body of rules, the ILC's Articles on the Responsibility of International Organizations, is deficient in various ways. The three main elements of responsibility applicable in this context (obligation, attribution and causation) all miss the target, and instead invite political opportunism. Organizations are blamed not for their conduct, but because they tend to be targets of opportunity; and as the ICJ has suggested in the different context of self-defense, a focus on targets of opportunity is not very commendable.[70] The underlying *topos*,[71] while not discussed by the Court, must be one of autonomy, deriving its force from a liberal framework in which individual autonomy plays a central role.[72] Much the same applies in the setting of responsibility more generally: picking targets for blame and opprobrium merely because they are available is difficult to reconcile with fundamental ideas about the autonomy of political actors.

At the end of the day, the call for legal responsibility is often not so much a call for legal responsibility, but rather for adopting different political agendas, setting different political priorities. Organizations are often faced with difficult policy choices, some dilemmas, sometimes perhaps even veritable tragic choices, where no matter what they do, someone will be worse off. This cannot be helped

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[68] Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford: Oxford University Press, 2017); Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010).

[69] And perhaps in the very concept of responsibility: see Michael Harmon, *Responsibility as Paradox: A Critique of Rational Discourse on Government* (Thousand Oaks, CA: Sage, 1995).

[70] *Oil Platforms (Iran* v. *United States of America)* [2003] ICJ Rep. 161, paras. 76–77.

[71] The importance of such *topoi* cannot be emphasized enough: see Kratochwil's works, note 62.

[72] See generally Louis Dumont, *Essais sur l'Individualisme* (Paris: Seuil, 1983).

by creating tribunals, or enacting more rules, or enacting more detailed rules. A decent responsibility regime will have to start with the realization that in the real world in which international organizations operate, difficult policy choices and dilemmas exist, which cannot be addressed by opportunism alone.