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# Securing the Accountability of International Organizations



*August Reinisch*

**T**he shift of government/governance tasks from states to nonstate actors is a complex, multidimensional, simultaneously upward and downward process. On the one hand, there are large-scale transfers of state functions to private entities in the former Communist countries as well as in Western democracies. These range from core economic matters to prisons and security services.<sup>1</sup> On the other hand, there is a tendency to move such tasks to inter- or supranational entities like the UN, the World Trade Organization, and the European Communities/European Union (EU). For present purposes, only the transfer of such functions to international organizations—that is, interstate or intergovernmental organizations—should be analyzed more closely. With the increase of tasks that are fulfilled by international organizations or, in particular, by supranational organizations like the European Communities, it becomes more likely that not only interests but also rights and even fundamental rights of individuals may be impaired.<sup>2</sup> Because of the severity of the latter type of violations, this article focuses on fundamental rights violations by international organizations as the most serious kind of rights infringements.

Note that European Communities or Communities is a collective term for the European Coal and Steel Community (ECSC), founded in 1951, the European Economic Community (EEC), and the European Atomic Energy Community (EURATOM), founded in 1957. The European Communities form the institutional framework of the EU. The Maastricht Treaty of 1992 officially changed the name of the European Economic Community (EEC) to European Community (EC).

To raise the issue of the fundamental rights accountability of international organizations may seem odd at first. Traditionally, international organizations have been viewed as guarantors of human rights rather than as potential perpetrators of human rights abuses. Indeed, one primarily conceives of the UN, the Organization of American States, and the Council of Europe as the prime actors responsible for supervision and monitoring of the human rights performance of states on a global and regional

level. They do this through various of their organs, suborgans, and other treaty-based institutions.<sup>3</sup> However, it is exactly the increased direct involvement of international organizations in aspects of global governance through “quasi” or immediate legislative, administrative, and judicial tasks that has turned the tables and led to situations where international organizations may violate fundamental rights of individuals and where the ancient query of *quis custodiet ipsos custodes?* (who guards the guardians?)<sup>4</sup> demands renewed attention.

There is a wide range of potential individual rights abuses by international organizations. The increase of UN activity in the field of peace and security provides examples of potential fundamental rights infringements that are directly attributable to the world organization: UN peacekeeping or—more likely—peace enforcement troops might unlawfully destroy or confiscate civilian property in the course of operations.<sup>5</sup> The administration of territories by the UN from Cambodia and East Timor to parts of the former Yugoslavia provides ample opportunity for individual acts to encroach on the human rights of persons affected by the international administration.<sup>6</sup> The criminal tribunals for Rwanda and Yugoslavia, set up within the institutional framework of the UN, might in specific situations violate fundamental due process guarantees of those standing trial.<sup>7</sup> The UN Security Council might disregard fundamental rights standards in decreeing sanctions programs.<sup>8</sup>

Potential fundamental rights abuses by the UN find their counterpart in discussion of the accountability of multilateral financial organizations. The World Bank and the International Monetary Fund (IMF) have been repeatedly challenged for disregarding fundamental social and economic rights of peoples affected by the implementation of their projects.<sup>9</sup>

Regional organizations at a higher level of integration, such as the supranational European Communities, exercise on a daily basis governance tasks that reach into the sphere of fundamental rights of individuals. This clearly accounts for the fact that the necessity of fundamental rights protection against international organizations was first identified in this context.<sup>10</sup> It is only too apparent that the EC Commission might violate procedural guarantees in conducting competition law investigations or in taking antidumping measures. Similarly, the abusive potential of the legislative acts of the EC has reached enormous proportions because of the massive shift of regulatory powers from the member states to the Community. It is only increased by the fact that a considerable part of Community law directly applies to individuals and even prevails over national law in case of conflict.<sup>11</sup> Even outside the EC framework proper, concern about the potential violation of fundamental rights is a recurrent theme. The lack of judicial control by the European Court

of Justice (ECJ) in large areas of the second and third pillars of the EU—that is, in the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters—has given rise to general criticism.<sup>12</sup> Recently, the broad immunity accorded to Europol and its officials has spurred a heated debate in some member states over the threat of possible fundamental rights violations by an international organization entrusted with the highly sensitive tasks of collecting and sharing information and data about individual citizens in an attempt to coordinate the fight against transborder crime in Europe.<sup>13</sup>

This latter example also highlights why the legal accountability of international organizations is of particular interest. International organizations are frequently not subject to the domestic law of states, and they normally escape the jurisdiction of national courts. This clearly sets them apart from other nonstate actors like nongovernmental organizations (NGOs) and transnational corporations. The relevant constituent agreements of international organizations, as well as other treaty law and customary international law, form the “proper law of international organizations.”<sup>14</sup> This is in large part to the exclusion of national legal rules, which are then applied only in a subsidiary fashion. These rules—almost without exception—accord international organizations immunity from suits before national courts.<sup>15</sup>

Thus, at first impression, it seems that only international law and international forums may be able to substantively limit the freedom of international organizations to engage in any acts of global governance and to safeguard this restraint procedurally. However, these protections sometimes prove to be very weak. In the case of certain international organizations, express treaty-based constitutional provisions have even led to questions of whether or not the respective organizations are bound by “extraconstitutional” legal standards at all. This has resulted in serious doubts about whether any forum has the power to assess this issue.<sup>16</sup> It therefore appears crucial to develop theories to argue why international organizations should be bound to respect fundamental rights in the discharge of “governance” tasks and to investigate which forums should be competent to safeguard this obligation.

Such a purely “legal” analysis does not ignore the fact that there may be other safeguards, other than legal responsibility, to protect the rights and interests of the “governed” and potentially injured parties.<sup>17</sup> In particular, in the case of international organizations that are highly dependent upon their member states, the political accountability of their organs toward their member constituency serves as an effective restraint and internal control mechanism that precludes even the mere possibility of harm to third parties. Furthermore, member states of an international

organization may secure the organization's accountability through their voting behavior (either when deciding substantive issues or when electing officials), by disbursing or withholding financial contributions or, even more fundamentally, by limiting an organization's scope of powers in its founding documents. However, this kind of internal control or restraint is premised on a certain degree of mutual control, if not "distrust," among an organization's member states. Where states cooperate well and use an international organization as a vehicle to carry out activities that they themselves may be prevented from engaging in, either under their domestic law or under international law, the lack of substantive and procedural restraint may pose serious problems. This is where the lawyers' interest in protecting against worst-case scenarios begins. It is not the 99 percent of cases where the rules are followed, but rather the 1 percent where they are violated that deserves closer scrutiny. In particular, the consequences of such breaches merit attention, to determine whether the rules were legal ones (the breach of which involved the infringing party's responsibility) and whether there are legal remedies available to the injured party to invoke such breach.

Consequently, it does not appear to be accidental that there is such an increased scholarly interest in issues concerning the accountability of international organizations. Rather, the fact that, among others, the American Society of International Law<sup>18</sup> and the International Law Association<sup>19</sup> have made it part of their academic agenda seems to bear witness that these problems form part of a crucial question to be addressed—the development and refinement of alternative forms of non-state governance while protecting the achievements of fundamental rights guarantees acquired in an era of state-dominated governance.

### **Legal Basis of a Fundamental Rights Obligation**

In order to state with some reasonable certainty that international organizations are bound by fundamental rights standards, as they are embodied in international instruments and national (frequently constitutional law) provisions, two main problems have to be addressed. Note that the most obvious way to arrive at that result is excluded because, as a rule, international organizations are not parties to human rights treaties. The first problem concerns whether fundamental rights are part of general unwritten international law. The second concerns whether such international law is binding on international organizations.

The status of human rights in general international law is a sufficiently contentious field in itself. Suffice it to say that U.S. scholars, more readily than others, tend to assume a customary law basis for quite a number of human rights,<sup>20</sup> whereas a more cautious view would ascribe the status of general principles of law to only some of them.<sup>21</sup> Interestingly, and contrary to the rather vast literature on the status of human rights as unwritten international law, the second issue has rarely been dealt with in depth. While a majority of authors seem to be ready to accept that general international law is binding on international organizations in principle, they tend to qualify this assumption by adding that this binding force relates to rules only insofar as they can practically be complied with by international organizations.<sup>22</sup> The traditionally state-centered, Westphalian system of international law, and the relatively late recognition of international organizations as subjects of international law, may have contributed to the still problematic issue of whether international organizations are bound by general international law.<sup>23</sup>

### *The European Community's General Principles Approach*

The most sophisticated treatment of the problem of international organizations respecting fundamental rights can be found within the framework of the EC. In EC law, the awareness is probably best articulated that an organization as a "legal community" refers to the protection of the legal position not only of its members, the states, but also of individuals potentially affected by EC action. The ECJ recently acknowledged that issues of the accountability of international organizations, vis-à-vis individuals for infringements of their fundamental rights, go to the core of an organization's "constitutional" problems.<sup>24</sup> Starting in the early 1970s, the ECJ developed a case-law according to which the fundamental rights, as they are contained in the European Convention on Human Rights (ECHR) and as they can be found in the constitutional law of EC member states, may be regarded as general principles of law binding on the organs of the Communities.<sup>25</sup> Via this general principles detour, in the absence of a direct treaty obligation to follow the rules of the ECHR, the ECJ effectively manages to protect against fundamental rights abuses by institutions of the Communities.<sup>26</sup>

It seems, however, that this jurisprudence is specifically tailored to the needs and circumstances of the European Communities and its member states. Other international organizations have followed the general principles approach only sparingly. Where they have, as in decisions

made by administrative tribunals, the use of general principles is normally limited to (internal) staff disputes.<sup>27</sup>

### *Customary International Law*

It appears to be widely accepted that, in principle, international organizations are bound by customary international law.<sup>28</sup> In particular, the practice of the UN observance of customary principles of the laws of warfare in the course of its peacekeeping and enforcement operations, especially during the Korean War and the Congo crisis, contributed strongly to the relevant organizational practice in this respect.<sup>29</sup> From a theoretical point of view, however, such a result is not undisputed. An early "positivist" commentator deduced from the sweeping and almost unlimited powers of the Security Council that the UN is not bound by general international law when it acts under Chapter VII of the UN Charter.<sup>30</sup> This argument is based on a literal and systematic reading of the charter provisions, which do not expressly declare custom or general principles binding for the Security Council. However, even a strictly charter-based interpretation may lead to the opposite conclusion. The majority view is probably that the UN has a duty to observe general international law. Article 24, para. 2 of the UN Charter requires the Security Council to act "in accordance with the Purposes and Principles of the United Nations," among which Article 1, para. 1 lists the maintenance of peace and security "in conformity with the principles of justice and international law." Beyond these interpretative intricacies of UN Charter law, strong arguments in favor of an obligation to observe customary law may be derived from more general reflections concerning the status of the UN as an organization enjoying legal personality under international law. It has been forcefully stressed that the Security Council is "subject to" international law because the UN itself is a "subject of" international law<sup>31</sup> and this reasoning may be applied more generally to other international organizations.<sup>32</sup> Furthermore, the assumption that the UN member states could have succeeded in collectively opting out of customary law and general principles of law by creating an international organization that would no longer be bound by what restricted its founding members appears rather unconvincing.<sup>33</sup>

### *Unilateral Declarations*

It is generally accepted that unilateral acts of international organizations may also create binding obligations for them.<sup>34</sup> For instance, UN Force Regulations according to which UN troops "shall observe the principles

and spirit of the general international Conventions applicable to the conduct of military personnel,” or at least the affirmation of that proposition in a letter of the UN secretary-general to the International Committee of the Red Cross,<sup>35</sup> were viewed as internationally binding unilateral declarations of that organization<sup>36</sup>—even if serious doubts could be raised as to the clear intention of the organization to be unequivocally bound vis-à-vis other subjects of international law by virtue of an internal, quasi-disciplinary regulation.<sup>37</sup> Similarly, it was argued that the adoption of two UN General Assembly resolutions that called upon all parties to any armed conflict to observe humanitarian rules could be regarded as an implicit acceptance of these rules for the armed forces of the organization.<sup>38</sup>

A comparable debate was triggered by two “unilateral” EC/EU acts: the 1977 EC Joint Declaration,<sup>39</sup> which proclaimed the “attachment” of the Parliament, the Council, and the Commission to “the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,” as well as Article 6 (former Article F, para. 2) of the Treaty on European Union, according to which “the Union shall respect fundamental rights, as guaranteed by the European [Human Rights] Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Their relevance has been assessed in different ways. While some authors interpret them as unilaterally binding the EU’s organs to comply with the convention’s provisions,<sup>40</sup> others maintain that this did not change the law according to which the EU/EC only voluntarily ensured the guarantees of the convention without being bound by it.<sup>41</sup>

### *“Functional” Treaty Succession*

It seems worthwhile to investigate whether an alternative legal basis can be developed. One promising road—particularly in light of the transfer of “governance” tasks to international organizations—appears to be a discussion of something like a “functional” treaty succession by international organizations to the position of their member states.<sup>42</sup>

This could be modeled after the concept of the EC’s functional succession to the General Agreement on Tariffs and Trade (GATT) obligations of its member states before formally becoming a contracting party to the World Trade Organization (WTO)/GATT after the completion of the Uruguay Round. As a result of the EC’s assumption of tariff- and trade-related functions from its member states, it was treated as a de



facto contracting party bound by the provisions of GATT, both within GATT<sup>43</sup> and the EC legal order.<sup>44</sup> With regard to the ECHR, the ECJ has been careful not to regard it as (formally) binding for the EC. The European Commission, however, seems prepared to accept a legal reasoning similar to the EC's functional succession to the GATT obligations.<sup>45</sup>

### *De lege ferenda: Accession to Human Rights Treaties*

Against this background of legal controversy and insecurity, a formal treaty accession to human rights instruments by international organizations would carry with it obvious advantages. And, indeed, it has been discussed in various contexts, the most prominent ones involving a potential accession of the UN to the special human rights treaties concerning armed conflict, the Geneva Conventions, and of the EC/EU to the ECHR. However, with the recent rejection of the latter option by the ECJ,<sup>46</sup> arguing that this would involve a change of the EC legal order of a "constitutional dimension," which in turn requires an amendment of the EC Treaty, this plan received a major setback.

### **The Concomitant Issue of Jurisdiction**

There is an increasingly important discussion on the compliance/surveillance problems following the affirmation of substantive limitations. The question of the appropriate judicial or quasi-judicial forums competent to scrutinize the activities of international organizations is of course linked to, and has become most relevant in, organizations that engage in activities that might infringe on the rights of member states or even individuals. The debate involving the UN has probably attracted the most controversy and interest. It mainly revolves around the issue of "judicial review" of Security Council decisions,<sup>47</sup> which lies at the heart of the still pending ICJ case *Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States)*.<sup>48</sup> Also, the claim of Bosnia-Herzegovina in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>49</sup> originally included a request that Security Council resolutions imposing an arms embargo on all former republics of Yugoslavia be construed as not impairing Bosnia's right of individual or collective self-defense. This request amounted to a challenge of the legality of Security Council decisions.

### *Courts and Arbitration Panels*

As a rule, international courts have no jurisdiction to adjudicate claims against international organizations. In this regard, Article 34 of the Statute of the ICJ, according to which only states may appear before it, is a topical example. The *Lockerbie* and *Genocide* cases illustrate this fact since, in both cases, the contested UN resolutions form only incidental questions in two sets of interstate disputes. The legal impossibility to sue an international organization before the ICJ also accounts for the fact that, in its recent application directed against the NATO bombing campaign, the Federal Republic of Yugoslavia instituted individual proceedings against nine member states of NATO.<sup>50</sup> The ECJ's power to adjudicate claims brought against organs of the European Communities by member states, and, under certain conditions also by individuals,<sup>51</sup> is the exception to the rule and by no means representative of the vast majority of international organizations.

National courts are also usually unavailable for potential claimants, since organizations regularly enjoy sweeping immunity as a matter of either treaty law or domestic legislation. In the rare cases where immunity would not bar lawsuits against international organizations before national courts, the latter are likely to employ other judicial "abstention" doctrines in order to avoid adjudicating such disputes.<sup>52</sup>

The alternative avenue of arbitration, a frequent mode of dispute settlement resorted to by individuals against states, regularly depends on a mutual agreement between the parties either in advance or in the form of an ad hoc *compromis*. While some procurement contracts of international organizations with private parties may contain the required clauses,<sup>53</sup> recourse to arbitration after a dispute has already arisen totally depends on the willingness of the organization to submit to arbitration and seems to be unsuited for determining the occurrence of fundamental rights violations.

### *International Human Rights Organizations*

When searching for a judicial or quasi-judicial forum to adjudicate claims concerning the abrogation of fundamental rights of individuals by international organizations, international human rights organs would seem to be the most "convenient" forums.<sup>54</sup> Such treaty-based institutions have gradually gained respect and acceptance for scrutinizing the human rights record of states parties to the respective treaties. Both regional and universal institutions entrusted with supervising the application of

the ECHR, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights (ICCPR), have interpreted their constituent agreements, both as a matter of substance and concerning procedural aspects (including jurisdictional reach), in a dynamic and “evolutive” fashion.<sup>55</sup> However, since their jurisdiction is treaty-based and usually requires an additional act of acceptance by the states parties to the agreement,<sup>56</sup> only acts that are attributable to states that have expressed such consent are subject to the jurisdiction of international human rights institutions.

Contrary to the elaborate efforts to find a legal basis for the claim that international organizations may be bound by human rights treaty obligations, even where they are not treaty parties, the accompanying jurisdictional obligations have not been interpreted to “devolve” on international organizations. Equally, claims against member states of organizations allegedly having violated human rights were rejected. It is well settled that the Strasbourg institutions do not consider themselves competent to decide on human rights complaints against international organizations that are not parties to the ECHR, even if all or some of its member states are.<sup>57</sup> It is also still rather predictable that the European human rights organs would not allow claims instituted against an organization’s member states, either individually or collectively.<sup>58</sup> In a similar way, the UN Human Rights Committee denied the admissibility of a complaint alleging a violation of the ICCPR by an international organization.<sup>59</sup>

### *International Criminal Tribunals*

The two ad hoc criminal tribunals for the former Yugoslavia and for Rwanda, established as subsidiary organs of the UN Security Council in 1993<sup>60</sup> and 1994,<sup>61</sup> and the proposed permanent criminal court to be set up in accordance with the Rome Statute of 1998,<sup>62</sup> are intended and limited to secure the responsibility of individuals for certain crimes under international law. They clearly lack jurisdiction over states or international organizations. And, with the increasing likelihood that the concept of international crimes committed by states will disappear from the draft articles on state responsibility currently elaborated by the International Law Commission,<sup>63</sup> it also becomes unlikely that any international criminal tribunals to be established will encompass a jurisdiction over subjects of international law, let alone over international organizations. However, the existing tribunals may in an important though indirect way contribute to securing the accountability of international organizations (as well as of states) by making the individuals acting on their behalf directly responsible for alleged criminal acts. An interesting

preview of what might be expected in the future can be seen from the recent International Criminal Tribunal for the Former Yugoslavia (ICTY) report concerning the 1999 NATO bombing campaign. Although the final report to the prosecutor recommended not to investigate the alleged serious violations of international humanitarian law by senior NATO officials as a result of insufficient evidence,<sup>64</sup> the preparation of the report clearly confirms that the jurisdiction of the Yugoslavia tribunal extends over any individual accused of committing war crimes and other specifically mentioned serious international crimes in the territory of the former Yugoslavia,<sup>65</sup> including individuals acting for non-Yugoslav states or international organizations.

### *Subsidiary Human Rights Jurisdictions*

The lack of judicial recourse mechanisms against activities of international organizations seems to be a negligible affair, as long as organizations are not in a practical position to infringe on individual human rights. However, with an ever growing number of traditionally core governmental tasks transferred to international organizations, this premise has radically changed. One of the organizations where this change has already taken place is the EC/EU. It is interesting to observe how the challenge of a potential lack of accountability—in the sense of an absence of an institutional framework to hold the organization answerable for its harmful behavior—has been met there.

Parallel to its emerging case law on a substantive obligation to respect the provisions of the ECHR as expressions of general principles of law, the ECJ began to base its jurisdiction to review the human rights conformity of Community acts, *inter alia*, on its general competence, according to Article 220 (formerly 164) of the EC Treaty, to ensure that “the law” is observed when interpreting and applying the treaty. In other words, without an express jurisdictional authorization, the European Court stepped in to fill the jurisdictional void. It should not be overlooked that one of the driving political forces behind this exercise of subsidiary jurisdictional powers on the part of the ECJ was the growing uneasiness of some members’ constitutional courts with the emerging lack of accountability of the Community. Since they in fact proposed to resume their own jurisdiction over fundamental rights issues—even if the alleged source of violations was European instead of national—the ECJ had to react in order to prevent a fragmentation of the standard of fundamental rights protection within the EC. The underlying rationale of the national constitutional courts to exercise their jurisdiction was based on their perceived duty to guarantee the effective enjoyment of

fundamental rights of its citizens. Already with a view to establishing a “transjudicial” dialogue,<sup>66</sup> courts like the Karlsruhe Constitutional Court of Germany hinted at their willingness to exercise judicial self-restraint by holding that they would engage in fundamental rights scrutiny of acts of the EC only “as long as” the EC did not possess its own mechanisms.<sup>67</sup>

All this belongs to the well-known and often told story of fundamental rights protection within the EC/EU.<sup>68</sup> What is less known, though very important in the present context, is the fact that this line of argument—with a grain of salt—was espoused by international human rights organs and should thus come to the fore more prominently. When declaring individual applications against international organizations inadmissible, the ECHR has not always merely addressed the formal jurisdictional issue; recently it has qualified its decisions, adding that the “transfer of powers [to international organizations did] not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of the transferred powers.” In the commission’s view, such transfer of powers would be incompatible with the ECHR if within the organization fundamental rights would not receive an “equivalent protection.”<sup>69</sup>

In the more recent cases of *Beer and Regan*<sup>70</sup> and *Waite and Kennedy*,<sup>71</sup> the European Court of Human Rights expressly endorsed this view, stating that “it would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby [by establishing international organizations in order to pursue or strengthen their cooperation in certain fields of activity and by attributing to these organizations certain competencies and according them immunities] absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.”<sup>72</sup> The court refrained from finding a violation of the convention in these cases because it considered the alternative legal remedies available to the complainants to provide an “equivalent legal protection.” It did, however, render a groundbreaking judgment in the Gibraltar voting case<sup>73</sup> decided on the same day. For the first time, the court found a violation of the convention by a member state of the European Communities resulting from the member’s failure to ensure that its obligations under EC law did not violate the ECHR. Although the challenged act violating the fundamental rights of the complainant was an EC Council decision, and thus clearly an act of the European Communities, the court held that the Communities’ member states remained responsible for violations of the conventions if, having transferred powers to the organization, they failed to secure the continued enjoyment of the convention’s rights.<sup>74</sup>

## Conclusion

Building on the reasoning used by national constitutional courts, and more recently also by international human rights organs, one can infer a duty of states that intend to transfer some of their powers to international organizations to make provision that a potential jurisdictional gap concerning the control of the exercise of such transferred powers does not arise. Stated less politely, one could say that states should not be allowed to escape their human rights obligations by forming an international organization to do the "dirty work." Given the fact that much of the currently *en vogue* "outsourcing" serves exactly this purpose, one should become alert and make sure that the transfer of state tasks to international organizations in the name of efficiency does not lead to a sacrifice of accountability.

What is really necessary are legal safeguards ensuring that whenever state tasks are transferred to nonstate actors, the power to exercise governance activities is made conditional on the existence of an effective mechanism of accountability. In the absence of direct jurisdiction over international organizations, human rights organs should use their present leverage to hold member states liable for not preventing human rights infringements by international organizations. ☉

## Notes

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1. Susan Strange, *The Retreat of the State* (Cambridge: Cambridge University Press, 1996); Christoph H. Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" *European Journal of International Law* 4 (1993): 447–471.

2. Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993), p. 138.

3. See Philip Alston and James Crawford, eds., *The Future of UN Human Rights Monitoring* (Cambridge: Cambridge University Press, 2000).

4. Decimus Junius Juvenal, *Satires* VI, 347. See also Mahnoush H. Arsanjani, "Claims Against International Organizations—*Quis custodiet ipsos custodes*," *Yale Journal of World Public Order* 7 (1980/81): 131–176, specifically addressing problems of the responsibility of international organizations both under public international and national law. See also David P. Forsythe, "Who Guards the Guardians: Third Parties and the Law of Armed Conflict," *American Journal of International Law* 70 (1976): 41–61, on the system of protective powers under the Geneva Conventions.

5. The best-known claims of this type concerned damage as a result of activities carried out by UN forces in the Congo in the early 1960s. After having been unsuccessfully sued before Belgian courts, *Manderlier v. Organisation des Nations Unies and État Belge (Ministre des Affaires Étrangères)*, Tribunal Civil de Bruxelles, 11 May 1966, UNJYB (1966), 283, 45 ILR (1972), 446–455, Cour d'appel de Bruxelles, 15 September 1969, UNJYB (1969), 236, the organization assumed responsibility and agreed to make compensation to the aggrieved individuals. Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals, New York, 20 February 1965, UNJYB (1965), p. 39ff.

In the more recent American case of *Abdi Hosh Askir v. Boutros Boutros-Ghali, Joseph E. Connor, et al.*, 933 F.Supp. 368 (S.D.N.Y. 1996), it was ultimately the immunity from suit of the defendants that precluded the individual plaintiff from recovering damages for unauthorized and unlawful possession of his property in Somalia during the UN's peacekeeping activities in 1992. While one might indeed doubt whether national courts are the appropriate forums for such claims, the lawsuit demonstrates the problem of holding the UN accountable for property rights infringements.

6. See Special Issue on Peace-Maintenance Operations, *Global Governance* 4, no. 1 (1998): 1–122.

7. See August Reinisch, "Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. UN-Menschenrechtspaktes," *Austrian Journal of Public and International Law* 47 (1995): 173–213.

8. See R. Provost, "Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait," *Columbia Journal of Transnational Law* 30 (1992): 577–639; W. Michael Reisman and Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes," *European Journal of International Law* 9 (1998): 86–141.

9. Ibrahim F. I. Shihata, *The World Bank Inspection Panel* (Oxford: Oxford University Press, 1994).

10. See note 24.

11. See T. C. Hartley, *The Foundations of European Community Law* (Oxford: Oxford University Press, 1998), p. 187ff.

12. See Paul Craig and Gráinne de Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), p. 43.

13. See Andreas Fisahn, "Europol—Probleme der Kontrolle," *Kritische Justiz* 31 (1998): 358–371; Kay Hailbronner, "Die Immunität von Europol-Bediensteten," *Juristenzeitung* (1998): 283–289.

14. Cf. C. Wilfred Jenks, *The Proper Law of International Organizations* (Dobbs Ferry, N.Y.: Oceana Publications, 1962).

15. Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (The Hague: Martinus Nijhoff, 1995), p. 1007.

16. For instance, whether the UN Security Council acting under Chapter VII of the UN Charter is bound by general international law and whether the ICJ has jurisdiction to decide on a transgression of the Security Council's powers. See note 48.

17. See Ngai Woods, "Good Governance in International Organizations," *Global Governance* 5 (1999): 39–61.

18. The 1998 annual meeting of the American Society of International Law (ASIL), devoted to the topic "The Challenge of Nonstate Actors," included a panel on the accountability of international organizations to nonstate actors. Similarly, the 2000 annual meeting presented a panel on an ASIL/Ford Foundation project on accountability of international institutions as well as a working panel on accountability of intergovernmental organizations.

19. See the newly formed International Law Association's Committee on Accountability of International Organizations, which first met at the 1998 ILA Conference in Taipei, ROC. ILA, ed., *Report of the 68th Conference* (1998), p. 584ff.

20. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), pp. 96ff., 34.

21. Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles," *Australian Yearbook of International Law* 12 (1992): 103.

22. Felice Morgenstern, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986), p. 4.

23. Albert Bleckmann, "Zur Verbindlichkeit des allgemeinen Völkerrechts für Internationale Organisationen," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 37 (1977): 107, 110ff.

24. Cf. *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, ECJ, 28 March 1996, ECR [1996 I] 1759–1790, where the ECJ considered that despite the current practice of guaranteeing the core of the fundamental rights contained in the ECHR, a formal accession of the Community would imply a change of Community law of a "constitutional dimension" that could be achieved only by treaty revision.

25. *Nold v. Commission*, Case 4/73, ECJ, 14 May 1974, ECR [1974] 491.

26. See also the succinct formulation of this jurisprudence in Article 6 (former Article F, para. 2) of the Treaty on European Union. For the wording of this article, see note 39.

27. See C. F. Amerasinghe, *The Law of the International Civil Service (as Applied by International Administrative Tribunals)*, vol. 2 (Oxford: Oxford University Press, 1994).

28. See Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (The Hague: Martinus Nijhoff, 1995), p. 824.

29. See Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Dordrecht: Martinus Nijhoff, 1995), p. 31ff.

30. Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: London Institute of World Affairs, 1950), p. 294ff.



31. Cf. Judge Fitzmaurice in his dissenting opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports* (1971), pp. 16, 294, speaking of territorial sovereignty: "This is a principle of international law that is as well established as any there can be—and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are."

32. See also the statement of the World Court in *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, *ICJ Reports* (1980), p. 90, that "international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."

33. See the ILC commentary on the *jus cogens* provision of Article 53, *Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations* 1986, stating that "peremptory norms of international law apply to international organizations as well as to States. . . . International organizations are created by treaties concluded between States . . . despite a personality which is in some aspects different from that of States parties to such treaties, they are none the less the creation of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating organizations." *YBILC* (1982), vol. 2, part 2, p. 56.

34. Michel Virally, "Unilateral Acts of International Organizations," in M. Bedjaoui, ed., *International Law: Achievements and Prospects* (Paris: UNESCO and Martinus Nijhoff, 1991), p. 241.

35. Reprinted in *International Review of the Red Cross* (January 1962): 29.

36. Derek W. Bowett, *United Nations Forces: A Legal Study* (New York: Praeger, 1964), p. 511ff.; Yves Sandoz, "The Application of Humanitarian Law by the Armed Forces of the United Nations Organization," *International Review of the Red Cross* (1978): 274–284.

37. Christoph H. Schreuer, "Die Bindung Internationaler Organisationen an völkerrechtliche Verträge ihrer Mitgliedstaaten," in Konrad Ginther et al., eds., *Völkerrecht zwischen normativem Anspruch und politischer Realität: Festschrift Zemanek* (Berlin: Duncker & Humblot, 1994), p. 243. See also the cautious view expressed in Legal Opinion of the Secretariat of the UN, Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims, in *UNJYB* (1972), p. 153.

38. Henry G. Schermers and Niels M. Blokker; see note 15, p. 987.

39. O.J. C 103/1 (27 April 1977).

40. L. B. Krogsgaard, "Fundamental Rights in the European Community After Maastricht," *Legal Issues of European Integration* (1993/1): 108.

41. T. C. Hartley, "Constitutional and Institutional Aspects of the Maastricht Agreement," *International and Comparative Law Quarterly* 42 (1993): 214.

42. Cf. Henry G. Schermers and Niels M. Blokker; see note 15, p. 983, stating that—analogueous to state succession principles—one might argue that international organizations should be bound by the obligations of its members states when they transferred powers to the organization.

43. Since the Dillon Round (1960–1961), the EC has participated in all GATT bodies except the Budget Committee; since the mid-1970s it has been a direct party to GATT dispute settlement proceedings. Cf. Ernst-Ulrich Petersmann, “The EC as a GATT Member—Legal Conflicts Between GATT Law and European Community Law,” in Meinhard Hilf et al., eds, *The European Community and GATT* (Deventer, Netherlands: Kluwer, 1986), p. 23, at 73.

44. In *International Fruit Company v. Produktschap voor Gruenten en Fruit*, the ECJ held that “in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.” Joined Cases 2124/72, [1972] ECR 1219, 1227.

45. In *Watson and Belmann*, it submitted that “following ratification by the Member States, the Convention is now legally binding upon the Community.” Case 118/75, [1976] ECR 1185, at 1194.

46. *Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, 28 March 1996, ECR I-1753.

47. José E. Alvarez, “Judging the Security Council,” *American Journal of International Law* 90 (1996): 1; Thomas M. Franck, “The ‘Powers of Appreciation’: Who Is the Ultimate Guardian of UN Legality?” *American Journal of International Law* 86 (1992): 519; W. Michael Reisman, “The Constitutional Crisis in the United Nations,” *American Journal of International Law* 87 (1993): 83; Karl Zemanek, “Is the Security Council the Sole Judge of Its Own Legality?” in E. Yakpo and T. Boumedra, eds., *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague: Kluwer Law International, 1999), p. 629.

48. ICJ, 14 April 1992, Provisional Measures, Order, *ICJ Reports* (1992), pp. 3, 114, ICJ, 27 February 1998, Preliminary Objections, Order.

49. ICJ, 8 April 1993, Provisional Measures, Order, *ICJ Reports* (1993), p. 3.

50. *Legality of Use of Force (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. The Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. Spain) (Yugoslavia v. United Kingdom) (Yugoslavia v. United States)*, ICJ, Orders 2 June 1999, online at <http://www.icj-cij.org>.

51. Article 230 (former 173), EC Treaty.

52. Cf. August Reinisch, *International Organizations Before National Courts* (Cambridge: Cambridge University Press, 2000), p. 35ff.

53. See Panayotis Glavinis, *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées* (Paris: Travaux et Recherches Pantheon-Assas Paris II, 1990).

54. According to the common law jurisdictional doctrine of *forum non-conveniens*, a national court should abstain from exercising its adjudicative jurisdiction if it finds that another (state’s) court would be a more convenient forum for determining the questions at issue. While this usually relates to practical issues (such as the ability to conduct evidence gathering) or to procedural issues (such as the reach of a national court’s [long-arm] jurisdiction over foreign parties and things), one might also speak of a convenience offered by a forum specialized and thus competent in the legal subject matter of a dispute.

55. Cf. the European Human Rights Court's judgment in *Tyler*, ECtHR, 25 February 1978, Series A, No. 26, para. 31, stating that "the [European Human Rights] Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."

56. See art. 25 ECHR; arts. 45 and 62 American Convention on Human Rights; art. 41 and Optional Protocol to the ICCPR.

57. See *Confédération Française Démocratique du Travail v. European Communities, Alternatively Their Member States (a) Jointly and (b) Severally*, European Commission on Human Rights, Application No. 8030/77, 10 July 1978, p. 13; Decisions and Reports, p. 231.

58. Concerning the European Communities, see *M(elchers) & Co. v. Federal Republic of Germany*, ECommHR, Application No. 13258/77, 9 February 1990, p. 64; Decisions and Reports (1990), p. 138; concerning the European Patent Organization, see *Heinz v. Contracting Parties Who Are Also Parties to the European Patent Convention*, ECommHR, Application No. 12090/92, 10 January 1994, 76-A Decisions and Reports (1994), p. 125. See note 70 for potential exceptions.

59. See *H.v.d.P. v. The Netherlands*, UN Human Rights Committee, Communication No. 217/1986, 8 April 1987, 9 HRLJ (1988), p. 254.

60. Established by UN Security Council Resolution 827 (1993).

61. Established by UN Security Council Resolution 955 (1994).

62. Rome Statute of the International Criminal Court, 17 July 1998, reprinted in *International Legal Materials* 72 (1998): 999.

63. Cf. Symposium: "State Responsibility," *European Journal of International Law* 10 (1999): 339-460.

64. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, available online at <http://www.un.org/icty/pressreal/nato061300.htm> (21 June 2000).

65. Art. 8 of the Statute of the International Tribunal for the former Yugoslavia provides that "the territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

66. Anne-Marie Slaughter, "A Typology of Transjudicial Communication," in Thomas M. Franck and Gregory H. Fox, eds., *International Law Decisions in National Courts* (Irvington, N.Y.: Transnational Publishers, 1995), p. 37.

67. Cf. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel (Solange I)*, German Federal Constitutional Court, 29 May 1974, BVerfGE 37, 271 [1974] 2 C.M.L.R. 540. After the ECJ had assumed its role as protector of fundamental rights, the German court reversed and held that it would abstain from exercising its human rights scrutiny over acts of EC organs "as long as" an equal human rights protection is guaranteed by the ECJ. *In re application of Wünsche Handelsgesellschaft (Solange II)*, Federal Constitutional Court, 22 October 1986, BVerfGE 73, 339 [1987] 3 C.M.L.R. 225.

68. See only Hartley, note 11, p. 130ff.

69. *M(elchers) & Co. v. Federal Republic of Germany*, ECommHR, Application No. 13258/77, 9 February 1990, Decisions and Reports (1990), pp. 64, 138, at 145.

70. *Karlheinz Beer and Philip Regan v. Germany*, ECommHR, Application No. 28934/95, 2 December 1997; ECtHR, available online at <http://www.dhcour.coe.fr/hudoc> (18 February 1999).

71. *Richard Waite and Terry Kennedy v. Germany*, ECommHR, Application No. 26083/94, 2 December 1997; ECtHR, available online at <http://www.dhcour.coe.fr/hudoc> (18 February 1999).

72. *Karlheinz Beer and Philip Regan v. Germany*, ECtHR, 18 February 1999, Judgment, par. 67.

73. *Denise Matthews v. United Kingdom*, Application No. 24833/94, ECtHR, available online at <http://www.dhcour.coe.fr/hudoc> (18 February 1999).

74. In the particular case, the court held that an EC Council decision, exempting residents of Gibraltar from the right to vote for the European Parliament, violated the right to free and regular legislative elections as guaranteed by art. 3 of the First Additional Protocol to the ECHR.

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