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INTERNATIONAL ORGANISATIONS AND ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES: OBSTACLES CAUSED BY JURISDICTIONAL IMMUNITY

Abstract

The proliferation of international organisations has increased their power to affect the lives of many people and their human rights. Whether they authorise and deploy missions to conflict-ridden areas to create conditions for stability and peace or fund projects to improve people's lives, international organisations are believed to be critical in addressing global issues. Coincidentally, there is now considerable evidence of international law violations and human rights abuses arising out of these organisations' decisions and conduct. However, the jurisdictional immunity granted to these organisations has made it difficult, if not impossible, to address the issue of holding those organisations accountable for human rights violations. Therefore, this article aims to assess the content of jurisdictional immunities to illustrate the necessity for reducing the immunities of international organisations.

Annotasiya

Beynəlxalq təşkilatların sayının artması onların daha çox insanın həyatına və hüquqlarına olan təsir gücünü artırmışdır. İstər münaqişə zonasında sülh və sabitliyi təmin etmək məqsədilə əməliyyatları qanuniləşdirmək və həyata keçirməklə, istərsə də insanların həyat şəraitini yaxşılaşdırmaq üçün layihələri maliyyələşdirməklə beynəlxalq təşkilatlar qlobal problemlərin həllində mühüm rol oynayır. Bununla birlikdə, hazırda həmin təşkilatların qəbul etdikləri qərarlar və həyata keçirdikləri fəaliyyət nəticəsində ortaya çıxan beynəlxalq hüquq və insan hüquqlarının pozulmasına dair kifayət qədər sübutlar mövcuddur. Buna baxmayaraq, həmin təşkilatlara verilən yurisdiksiya immuniteti onların insan hüquqlarının pozulmasına görə məsuliyyətə cəlb edilməsi məsələsinin həllini çətinləşdirmiş, hətta mümkünsüz etmişdir. Bu səbəblə də məqalə beynəlxalq təşkilatların immunitetlərinin azaldılması zərurətini göstərmək üçün yurisdiksiya immunitetinin məzmununu araşdırmaq məqsədi daşıyır.

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Introduction

The importance of international organisations in the contemporary international community cannot be overstated. They have evolved into critical components of the international legal order as institutionalised collaboration has expanded to almost every sector. However, it cannot be disputed that despite these institutions' significant accomplishments, their track record is far from faultless.[1] History is replete with convincing evidence that, in many instances, international organisations have harmed the people they were deployed to protect.

The activities of international organisations may harm third parties and violate human rights in various situations. There is an increased likelihood of such harm occurring when international organisations exert direct operational command or wield power.[2] This is the case, for instance, in peacekeeping operations, humanitarian interventions, or provisional territorial administration in post-conflict settings. It is well acknowledged that post-conflict operations by the United Nations (hereinafter the UN), for instance, have occasioned grave human rights violations.[3] Notable examples include the UN peace mission to Mozambique, where the soldiers working for the mission lured underage girls into prostitution.[4] In the Central African Republic, where the UN peacekeepers were deployed to dispel conflict, they reportedly sexually abused local women and children.[5] Similarly, the

[1] Frédéric Mégret, Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Human Rights Quarterly 314, 336 (2003).
[2] Jan Wouters, et al., Accountability for Human Rights Violations by International Organisations, 16 (2010).
[3] Ved P. Nanda, *Accountability of International Organizations: Some Observations*, 33 Denver Journal of International Law and Policy 379, 382 (2005).
[4] United Nations, Promotion and Protection of the Rights of Children: Impact of armed conflict on children: note / by the Secretary-General, A/51/306 (1996), https://sites.unicef.org/graca/a51-306_en.pdf (last visited Nov. 14, 2022).
[5] UN Human Rights Council, Report of the Independent Expert on the Situation of Human Rights in the Central African Republic: note / by the Secretariat, A/HRC/33/63 (2016),

peacekeeping mission run by the African Union with the approval of the UN Security Council in Somalia has been accused of sexual violence against the local population.[6] Furthermore, a number of reported cases of the UN police abuse (some of which have resulted in the deaths of "suspects"),[7] accusations of excessive force employed by NATO forces[8] and many other cases involving gross negligence, national and international crimes[9] suffice to show that international organisations are not immune to human rights violations. The irony of the fact is that the harm in many of these instances was caused through actions intended to spread, foster, and protect the rule of law.[10]

Nevertheless, the means available to hold these organisations accountable for violating human rights are still in their infancy. Claims brought against international organisations have been rejected in various forms, principally by virtue of a broad interpretation of the doctrine of functional necessity, which will be explored below.[11]

It is noteworthy that the current accumulated legislation on the immunities of international organisations emerged in the 1920s and 1930s and was codified in the 1940s for the United Nations.[12] It did not undergo substantive changes thereafter and was largely replicated for successive organisations. The emergence and application of the concept of immunity were attributed to the importance of preserving a space for international organisations to exercise their powers and control in different domains through isolating them from their members' interference. This necessarily entailed an exemption from the jurisdiction of the national courts: the idea was that if states could subject international organisations to their courts' jurisdiction, it would allow them to overly interfere with the affairs of these organisations.

At present, national law establishes the rules on the treatment of international organisations at the domestic level, including the rules

https://digitallibrary.un.org/record/848572?ln=en (last visited Nov. 14, 2022); *See also* Sophia Genovese, *Prosecuting U.N. Peacekeepers for Sexual and Gender-Based Violence in the Central African Republic*, 43 Brooklyn Journal of International Law 609, 617-619 (2018).

[6] "The Power These Men Have Over Us" Sexual Exploitation and Abuse by African Union Forces in Somalia, Human Rights Watch (2014), https://www.hrw.org/report/2014/09/08/power-these-men-have-over-us/sexual-exploitation-and-abuse-african-union-forces (last visited Nov. 14, 2022).

[7] Amnesty International, Federal Republic of Yugoslavia (Kosovo), Setting the Standard? UNMIK and KFOR's Response to the Violence in Mitrovica, AI Index EUR 70/13/2000, 9 (2000), https://www.amnesty.org/fr/documents/eur70/013/2000/en/ (last visited Dec. 1, 2022).

[8] Country Reports on Human Rights Practices: Report Submitted to the Committee on Foreign Affairs, U.S. House of Representatives and Committee on Foreign Relations, U.S. Senate by the Department of State in Accordance with Sections 116 (d) and 502B (b) of the Foreign Assistance Act of 1961, as Amended, Volume 1, 1575 (2005).

[9] José Alvarez, *International Organisations and the Rule of Law*, 14 New Zealand Journal of Public and International Law 3, 6 (2016).

[10] *Ibid*.

[11] Niels Blokker, *International Organisations: The Untouchables?* 10 International Organizations Law Review 259, 259 (2013).

[12] *Id*., 14; *See also* Tiina Pajuste, *The Evolution of the Concept of Immunity of International Organisations*, Tallinn University: Open Journal Systems, 11-18 (2018).

governing their immunity.[13] Prominent examples include the International Organizations Immunities Act of the United States of America[14] or the International Organisations Act 1968 of the United Kingdom. Internationally, applicable provisions[15]on immunity are mentioned in multilateral treaties,[16] or the constituent instruments of international organisations,[17] or derived from customary international law.

Thus, from the time of their development till now, the immunities granted to international organisations under international law are conventionally seen as vital to safeguard these institutions' independent functioning.[18] However, it is worth bearing in mind that member states of an international organisation are under a duty to respect the rights of individuals (who are subject to their jurisdiction) access to a court and their right to a remedy. In case these individuals' rights are violated by international organisations, the application of the jurisdictional immunities by national courts may contradict the duty in question.[19] As Young has phrased: "*Inherent in any grant of immunity is the risk of potential abuse.*"[20]

Several scholars, therefore, see the lack of accountability of international organisations as evidence strongly calling for reducing their immunities.[21] This article likewise contends that, despite universal consensus on their merits, jurisdictional immunities of international organisations generate a paradoxical situation where the very institutions involved in promoting the rule of law cannot be called to account under the rule of law.

The evaluation begins with a discussion of factors that necessitate jurisdictional immunities for international organisations, as well as obstacles to justice they cause when applied in practice. Several examples of human rights violations committed by international organisations are provided therein, to demonstrate the challenges they create in justifying those immunities.

The next section picks up in 1996, when the International Law Association (hereinafter ILA) started exploring ways to hold international organisations accountable for their wrongful acts and introducing recommendations in this regard in their reports. Attention is then drawn to another pivotal moment in the history of international law, when the International Law Commission

[13] Tom Obokata, Transnational Organised Crime in International Law, 108 (2010).
[14] International Organizations Immunities Act (1945).
[15] International Organisations Act (1968).
[16] *See* Convention on the Privileges and Immunities of the United Nations (1946).
[17] *See* Charter of the Organisation of American States, art. 133-35 (1948).
[18] Jan Klabbers, An Introduction to International Organizations Law, 130-139 (3rd ed. 2015).
[19] Luca Pasquet, *Litigating the Immunities of International Organizations in Europe: The "Alternative- Remedy" Approach and its "Humanizing" Function*, 36 Utrecht Journal of International and European Law 192, 192 (2021).
[20] Carson Young, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 Texas Law Review 889, 906 (2017).
[21] Blokker, *supra* note 11, 260.

(hereinafter ILC), created by the UN General Assembly, drafted a set of articles on the accountability of international organisations. The section also includes a summary of the practical application of ILC's draft articles and the challenges arising thereof.

Lastly, the final section examines the existing frameworks, as well as their virtues and deficiencies. It is concluded by proposing three options for limiting the extent of the immunities of international organisations.

I. Jurisdictional immunities: necessity or obstacle?

As already noted, jurisdictional immunity has long been viewed as a mechanism required to ensure the independence of international organisations from their member states and to protect them against judicial interference in their affairs. It helps shield international organisations against undue external influence and pressure they are particularly vulnerable to. Indubitable is the fact that attempts to utilise international organisations as appendages to member states' foreign policies undermine these organisations' independent action and negatively impact their growth.[22] Immunity as a guarantee of independence ensures that the international organisation does not become a tool of individual member states' foreign policy, aimed against other member states' policies and national interests.

External pressure can also be exercised by placing international organisations under indirect control through subjecting them to the member states' judiciary.[23] Immunity is necessary in this case, as it prevents national courts from acquiring the power to determine the legal effects of the international organisation's acts. Put simply, if the domestic court declares an organisation's act illegal and therefore non-applicable within the member state's domestic legal order, it may substantially impair the functioning of an international organisation.

The law of immunities is thus based on a logical process, following the ultimate goal to ensure the independence of these subjects and secure their ability to effectively carry out their functions.[24] The notion that an international organisation must have some level of immunity in order to carry out its mandate is also enshrined in Article 105 of the UN Charter: "*The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes*".[25]

This provision is in line with the functional necessity doctrine. It is worth noting, however, that the doctrine entitles the organisation only to the immunity from the jurisdiction that is strictly required to fulfill the

[22] Clive Archer, International Organisations, 70 (2002); *See also* Sonu Trivedi, A Handbook of International Organisations, 12 (2005).
[23] August Reinisch, *Privileges and Immunities*, Jacob Katz Cogan, Ian Hurd, and Ian Johnston, The Oxford Handbook of International Organizations 1048, 1054 (2016).
[24] Pasquet, *supra* note 19, 195-196.
[25] Charter of the United Nations, art. 105 (1945).

organisation's purposes without undue interference. Defining the organisation's purposes and the actions it needs to take to fulfil those purposes is the key to delimiting the scope of the respective organisation's immunity from legal process. Therefore, the key question for deciding immunity should be whether subjecting the international organisation to the member state's jurisdiction will impair its ability to perform its institutional functions in line with its constituent. There is no need for granting immunity to an international organisation if its ability to carry out its tasks is not affected and a possible judicial review does not disrupt its working order. As voiced by Muller in 1995, there is no functional necessity to deprive "*… private parties dealing with the organisation of all forms of judicial protection*".[26]

Nonetheless, it is now clear that in practice, the immunity from suit has been interpreted as absolute immunity. It has effectively excluded human rights issues and isolated the organisations from accountability through a judicial review undertaken by national courts.[27] The uncontrolled use of immunity begets a set of circumstances in which individuals are deprived of the option to seek justice and safeguard their rights.[28] This sequentially causes a severe sense of powerlessness in the people who are unable to have their voices heard in a court of law.[29] Such an obstacle in accessing justice contradicts the definition of the right to a court advanced by the European Court of Human Rights (ECtHR) in its Golder decision: "*… Article 6 para. 1 [of the European Convention] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal*".[30]

The principle upheld in this judgement is at odds with the concept that the court could declare its lack of jurisdiction due to the defendant's immunity. Namely, if the accusations concerning "civil rights and obligations" are aimed against an international organisation, the judge would have to choose between two scenarios: (a) rejecting immunity to safeguard the right to a court, or (b) restricting access to justice in order to fulfil the duty to grant immunity.

The moral quandary in this scenario is even more difficult if the accusations concern not just private law rights and obligations, but also human rights abuses. A rejection of justice would thus indicate a breach of human rights both substantively and procedurally. To be precise, while immunities represent procedural barriers on the jurisdiction that do not alter substantive rights, access to justice is critical for safeguarding substantive rules on human

[26] A. Sam Muller, International Organizations and Their Host States: Aspects of Their Legal Relationship, 271 (1995).
[27] Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 International Organizations Law Review 277, 277 (2010).
[28] Dinah Shelton, Remedies in International Human Rights Law, 50 (2015).
[29] *Supra* note 19, 196.
[30] Golder v. UK, No. 4451/70, § 36 (1975). Available at: https://hudoc.echr.coe.int/rus?i=001-57496 (last visitied Dec. 15, 2022).

rights. Hence, immunities impede the law's effective implementation and make it virtually impossible to enjoy human rights. This double breach is especially heinous in the event of atrocities perpetrated during wars, as it means that people who have formerly been exposed to violent and distressing incidents are also denied the right to seek redress.[31]

There is abounding evidence of incidents from history to support this claim. To illustrate, the human cost of NATO's military intervention in Libya has been documented and is believed to have amounted to deaths of more than seventy civilians.[32] Yet, NATO has denied these charges, insisting that its personnel employed all feasible methods to minimise civilian casualties.[33]

In 2013, allegations ensued that a thousand person Nepalese the UN force was responsible for a cholera outbreak in Haiti, which had not experienced any such outbreaks for three centuries, resulting in the deaths of thousands of people.[34] Following the victims' attempt to sue the organisation, the UN asserted that it was immune from international lawsuits. The same scenario occurred in Kosovo in 1999 when Roma people were relocated to the temporary UN run camps due to the conflict with Serbia and were poisoned by lead in those camps.[35]

In these situations, international organisations effectively evaded accountability by invoking immunity for their actions.[36] This suffices to show that, regardless of how noble the motive behind the grant of immunity may be, the result is that no domestic court or arbitration body has jurisdiction over it until the organisation relinquishes its immunity.[37]

II. Existing accountability framework

In recent decades, the international legal community has given more consideration to the issue in question. This is clearly demonstrated by the significant projects done by the ILA and the ILC, which will be discussed below.

[31] *Supra* note 19, 194.
[32] Unacknowledged Deaths: Civilian Causalties in NATO Campaign in Libya, Human Rights Watch (2012), www.hrw.org/sites/default/files/reports/libya05l2webwcover.pdf (last visited Oct. 20, 2022).
[33] Statement by the NATO Spokesperson on Human Rights Watch Report, NATO (2012), http://www.nato.int/cps/en/natolive/news_87171.htm (last visited Oct. 20, 2022).
[34] Adam Houston, *UNstoppable: How Advocates Persevered in the Fight for Justice for Haitian Cholera Victims*,19 Health and Human Rights Journal 299, 299 (2017).
[35] Sarah Stevens, *The United Nations' Immunity to Cholera in Haiti*, 8 Harvard International Review 13, 13-14 (2017).
[36] Jennifer Murray, *Note: Who Will Police Peace-Builders? The failure to Establish Accountability for the Participation of U.N. Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 Columbia Human Rights Law Review 473, 505 (2003); *See also supra* note 3, 386.
[37] Engela C. Schlemmer, *International Organisations, the Rule of Law and Immunity*, South African Law Review 21, 25 (2013).

A. Reports of ILA's Committee on Accountability of International Organisations

The ILA began its scrutiny of the wrongful acts of international organisations in 1996, with the establishment of the Committee on Accountability of International Organisations (hereinafter CAIO).[38] The Committee was tasked with evaluating possible measures (legal or otherwise) which could be taken to guarantee international organisations' accountability to third parties or their members. Thus, it was designed to develop recommended rules and best practices on good governance, as well as to identify primary and secondary rules on responsibility.[39]

In its reports, CAIO did not explicitly define accountability, although it famously linked the concept to international organisations' power and authority: "*Power entails accountability, that is the duty to account for its exercise*".[40] In view of this, the Committee categorised accountability into four forms, namely legal, administrative, political, and financial, noting that the form of accountability that will ensue would depend on specific circumstances in which the acts or omissions of the international organisation took place.[41] CAIO went on to note that the likelihood of obtaining the necessary degree of accountability would be increased if the four forms of accountability combined or overlapped.[42]

The extension of the concept of accountability to include administrative, political, and financial aspects is what is noteworthy in ILA's work. Since legal accountability most often means judicial review, individuals' inability to launch legal processes against international organisations due to the latter's immunity raises the need to seek alternative forms of accountability. The problem is, however, that there is no uniform understanding of how exactly these forms would be practised. An example of financial responsibility could perhaps be the death and disability compensation program established by the UN, which allows contributing states to seek compensation on behalf of their nationals in the event of the latter's death or disability, if these incidents are attributable to service in a UN peacekeeping mission.[43] Nonetheless, the UN does not accept liability for the off-duty acts of its peacekeepers.[44] It follows that the UN can effectively evade financial (or legal) responsibility for sexual or other types of violence on behalf of its peacekeepers. In this regard, one can hardly disagree with Nigel D. White's argument that "UN does not act

[38] Committee on Accountability of International Organisations, Final Report, International Law Association, Berlin Conference, 4 (2004).
[39] Lorenzo Gasbarri, The Concept of an International Organization in International Law, 184 (2021).
[40] *Supra* note 38, 5.
[41] *Ibid*.
[42] *Ibid*.
[43] United Nations General Assembly, Resolution 49/223A, A/RES/49/233 (1995).
[44] Memorandum to the Director, Office for Field Operational and External Support Activities, United Nations Juridical Yearbook, 300 (1986).

diligently to prevent human rights violations when it has the power to do so, then it would be responsible and accountable to those suffering harms as a result of those violations."[45]

Furthermore, administrative accountability seems more ambiguous: it could refer to systems of supervision and control internal to the organisation, such as the ombudsmen, audit offices, inspectors general, and anti-fraud offices.[46] One can think of the World Bank's Inspection Panel (will be explored below) or the UN's Joint Inspection Unit.[47]

Political accountability, on the other hand, has been interpreted as the accountability of the organisation's legislative organs, as well as its secretariats, to groups affected by the organisation's decisions and conduct.[48] It may be exercised, *inter alia*, through reducing the democratic deficit. This could be exemplified by the fact that there are no identifiable decision-makers who could be held accountable for the wrongful decisions or actions of the international organisation.[49] It could be proposed, therefore, that nation states (as representatives of their citizens) could form a link between their citizens and international organisations. Thus, citizens should become the ultimate accountability form for international organisations. However, in practice, it is rather complicated to develop direct democratic links between individuals and international organisations. Two arguments would suffice to demonstrate this point:

1) International organisations have limited competences and lack a territory of their own. It seems controversial to regard nationals of the member states as 'indirect' citizens of the organisations themselves. Furthermore, without a directly elected global government, international organisations are not democratically accountable to the people.

2) Such international democracy would require internal democracy in the member states. Strictly speaking, if a member state is not democratic itself, it cannot legitimately claim to act on behalf of its citizens.

One way to address international organisations' lack of accountability to the nationals and/or inhabitants of their member states is to ascertain that organisations are subject to the rule of law and are required to uphold human rights. At present, the degree to which international organisations are bound

[45] Nigel D. White, *In Search of Due Diligence Obligations in UN Peacekeeping Operations: Identifying Standards for Accountability*, 23 Journal of International Peacekeeping 203, 206 (2020).
[46] Eugénia C. Heldt, *Lost in internal evaluation? Accountability and insulation at the World Bank*, 24 Contemporary Politics 568, 574 (2018).
[47] *See* Statute of the Joint Inspection Unit, art. 5: The Inspectors have "...the broadest powers of [independent] investigation in all matters having a bearing on the efficiency of the services and the proper use of funds" (1976).
[48] Michael Fowler, Sumihiro Kuyama, Accountability and the United Nations System, 3 (2007).
[49] Michael Zurn, *Global Governance and Legitimacy Problems*, 39 Government and Opposition 260, 260 (2014).

by human rights obligations is still unclear,[50] as the great majority are not obliged by any human rights treaties as signatories.[51] Therefore, the binding nature of international human rights law must be evaluated in relation to international organisations. This issue was discussed in CAIO's report, where the Committee called on international organisations to uphold fundamental human rights commitments as well as relevant principles and standards of international humanitarian law when taking actions concerning "… *the use of force, temporary administration of territory, imposition of coercive measures, launching of peacekeeping or peace-enforcement operations*".[52]

Another crucial enabling factor for accountability is the transparency of governance.[53] This is why, in addition to the forms of accountability, CAIO identified three levels of accountability and distilled them into a set of recommended rules and practices (RRPs).[54]

The first level of accountability concerned internal and external scrutiny and monitoring that international organisations should be subject to, regardless of possible liability and/or responsibility that would ensue.[55] International organisations, in this case, were to be called to account for the fulfillment of functions laid down in their constituent instruments. RRPs on this level included principles common to all international organisations: the one that stood out was the principle of good governance.[56] The mentioned principles encompass, *inter alia,* transparency and democratic participation in the decision-making process, access to information, and sound financial management.[57] Other principles included, *inter alia*, the bona fide principle, the principle of supervision and control, objectivity, and impartiality. CAIO, furthermore, argued in its report that international organisations must, as a separate principle, provide reasons for their decisions or specific courses of action.[58]

The second level addressed issues of tortious liability and responsibility for adverse consequences of acts or omissions of international organisations that do not *ipso facto* violate international and/or institutional law.[59] This would

[50] Maurizio Ragazzi, Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 111 (2013).
[51] Pierre Schmitt, Access to Justice and International Organisations: The Case of Individual Victims of Human Rights Violations, 53 (2017); *Supra* note 3, 385.
[52] *Supra* note 38, 23.
[53] Jan Klabbers, Anne Peters, Geir Ulfstein, The Constitutionalization of International Law, 266 (2009).
[54] *Supra* note 38, 5-6.
[55] *Id.*, 8.
[56] Committee on Accountability of International Organisations, International Law Association, Taipei Conference, 878 (1998).
[57] Committee on Accountability of International Organisations, International Law Association, New Delhi Conference, 2 (2002).
[58] *Supra* note 38, 13-14.
[59] *Id*., 5.

include instances where, for example, an organisation's space activity would damage the environment but not constitute an illegal act.[60]

Finally, the third level of accountability involves acts or omissions that do violate international and/or institutional law.[61] Breaches of international law include, *inter alia*, cases of human rights abuse or gross negligence, while *ultra vires* acts of an institution's organs would constitute a breach of institutional law.[62]

At face value, such RRPs appeared to be potentially substantial. It must be borne in mind, however, that unlike the ILC, which is a body of experts operating as an organ of the UN General Assembly, ILA is simply an academic organisation, hence its works are non-binding and only offer academic insight into various domains of international law.[63]

B. ILC's Draft Articles on the Responsibility of International Organisations

The ILC, *à son tour*, began working on rules concerning the accountability of international organisations in 2002, based on the recommendations of its working group.[64] The task was concluded in 2011, with the adoption of Draft Articles on the Responsibility of International Organisations (hereinafter Draft Articles).[65]

The ILC's Draft Articles were a significant milestone, as this was the first attempt to establish a legal framework for holding international organisations accountable for committing wrongful acts. It should be noted at the outset that despite defining key points of international organisations' responsibility, the Draft Articles still lack a conclusive legal status and are non-binding.[66] Neither states nor international organisations have acknowledged them, and it remains unclear if they reflect or form part of the customary international law, owing to their insufficient practical application. Nonetheless, they have been referred to in several cases concerning the responsibility of international organisations,[67] where they are figured as authoritative documents. This is a positive sign, implying that the Draft Articles can, at the very least, function as a type of soft law and assist in clarifying international organisations' responsibility guidelines.

[60] *Ibid*.
[61] *Ibid*.
[62] *Supra* note 38, 5.
[63] Ademola Abass, Complete International Law: Text, Cases, and Materials, 187 (2014).
[64] Mirka Möldner, *Responsibility of International Organizations - Introducing the ILC's DARIO*, 16 Max Planck Yearbook of United Nations Law 281, 284 (2012).
[65] Draft Articles on the Responsibility of International Organizations, the International Law Commission, 63rd Session, U.N. Doc. A/66/10 (2011).
[66] Helmut Philipp Aust, Complicity in Violations of International Humanitarian Law, in Heike Krieger, Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region, 448 (2015).
[67] *See* Al-Jedda v. The United Kingdom, No. 27021/08, § 55-57 (2011). Available at: https://hudoc.echr.coe.int/eng?i=002-426 (last visited Dec. 15, 2022).

While a complete study of the Draft Articles' contents is beyond the scope of this Article, it is useful to list some of the merits and issues. Foremost, the primary importance of the Draft Articles lies in the fact that they reflect the fundamental principle of international responsibility, according to which "*every internationally wrongful act entails international responsibility*".[68] Recognising international organisations as subjects of international law, the Draft Articles laid down that an international organisation bears responsibility when: 1) the conduct (consisting of an act or omission) represents a breach of the organisation's international obligations and 2) the conduct is attributable to the international organisation in question.[69]

To summarise, according to the ILC, for an international organisation to be considered accountable under international law, the following conditions must be met cumulatively:

1) An obligation under international law, whether conventional or general,[70] is breached. The ILC has also specified that international obligations can be drawn from any source of international law,[71] as well as from the organisation's rules if the particular norm qualifies as an international legal obligation.[72]

2) This breach is committed by the international organisation, and attributed to it. General rules on attribution are discussed below.

3) No circumstances mentioned in the Draft Articles that would preclude the wrongfulness of the conduct in question are present.[73]

Draft Articles were also significant for establishing general rules on attribution applicable to international organisations. Addressing the question of attribution, they emphasised the principle of effective control to determine which entity is responsible for the conduct: the international organisation or the contributing state. Although the term "effective control" is not explicitly defined in the Draft Articles, ILC's previous report provided an outline: "(…) *the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organisation's disposal.*"[74]

[68] *Supra* note 65, art. 3.
[69] *Id.*, art. 4.
[70] *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, para. 37: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."
[71] Sources of international law are traditionally regarded as those listed in Article 38 of the Statute of International Court of Justice, namely: international conventions, international custom, general principles of law, and if the parties are bound by the decision in a particular case: judicial decisions and the teachings of the most highly qualified publicists.
[72] Commentaries to the Draft Articles, 53 (2011). Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (last visited 19 Nov. 2022).
[73] *Supra* note 65, art. 20-25: consent, self-defence, countermeasures, force majeure, distress, necessity.
[74] Report of the International Law Commission, UN General Assembly Official Reports, Supplement No. 10, UN Doc. A/59/10, 111, para. 3 (2004).

The provisions concerning attribution raise a few issues, however. Firstly, although the Draft Articles refer to the notion of effective control, they do not specify how to determine which entity exactly exercises it. In terms of peacekeeping, for instance, it is evident that the entity in effective command and control of the operation is liable for combat-related harm in breach of international humanitarian law.[75] In this case, it would be the entity that issued the order that led to harm to third parties. However, in the human rights context, it is insufficient to simply evaluate who issued the order: human rights violations are committed by foot soldiers, without any order from either the international organisation or the relevant state. One possible answer is that, while peacekeepers serve on behalf of their states as well as the organisation that authorised their mission, it is the relevant state that maintains disciplinary authority over the forces.[76] Nonetheless, the entity that did not issue the direct order might have a veto authority, which means it could have prevented the conduct, and, by extension, the harm caused by it. Are both entities accountable in this case?

The Draft Articles do not provide definitive and comprehensive answers to this and other questions related to effective control. This explains why the concept of effective control has been interpreted inconsistently in case law. To name a couple of instances, Dutch national courts took a different approach than the European Court of Human Rights (hereinafter ECtHR) when determining the contours of the criterion for attribution. In 2008, Hasan Nuhanovic, whose brother and father were killed by Bosnian Serb forces (because they were not permitted by the Dutch UN peacekeepers to leave Srebrenica together with them), argued that the peacekeepers' failure to save his relatives constituted a wrongful act, attributable to the Netherlands.[77] The Hague District Court concluded that the actions of the Dutch battalion should be solely imputed to the UN, since if state "A" places its organs under the direction and control of state "B" – or, by analogy, an international organisation – whichever action these organs take will be attributed to the state "B" or the international organisation.[78] This decision mirrored the

[75] Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters: Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation — Financing of the United Nations Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/51/389, 6, para. 19 (1996).

[76] Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 Harvard International Law Journal 113, 155 (2010).

[77] For facts of the case, *see* Mehida Mustafic-Mujic and Others v. the Netherlands, No. 49037/15, paras. 29-31 (2015). Available at: https://hudoc.echr.coe.int/eng?i=001-167040 (last visited Jan. 13, 2023).

[78] Rechtbank's-Gravenhage (District Court), HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs), Judgement LJN: BF0181/265615; ILDC 1092 (2008),

ECtHR's approach in the joined cases *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[79] which determined that the alleged wrongful act was exclusively attributable to the UN, concluding that the Court, therefore, lacked competence *ratione personae* to rule on conduct taken on behalf of the UN by the respondent states.[80] This line of reasoning, however, was not sustained by the Dutch appeal and Supreme courts. *A contrario,* the latter backed the notion of the possibility of dual attribution, affirming the Netherlands' responsibility along with the UN's.[81]

Although the concept of dual attribution has been recognised by the ILC in its report,[82] the Draft Articles leave little room for dual attribution based on dual (or joint) control of the conduct in question. If an organ is placed at the international organisation's disposal, then its conduct is attributable to the latter (Article 7), while if the state exercises effective control over the conduct, it is to be called to account for it.[83] It appears that the latter rule for attribution excludes the former.

On a positive note, another peculiarity of the Draft Articles is how they addressed the scenarios of a member state attempting to escape (one of) its international commitments through an international organisation.[84] This clause ensures that states parties to the human rights conventions (*inter alia*) cannot simply abdicate their obligations by transferring competence to international organisations. Draft Articles also acknowledge the converse situation, where an international organisation violates its international legal commitments by authorising its member states to carry out decisions that would be illegal if carried out by the organisation itself.[85]

Equally important rules were also included in the Draft Articles' reparation provisions. Articles 34 to 40 lay down that international organisations must

https://opil.ouplaw.com/display/10.1093/law:ildc/1092nl08.case.1/law-ildc-1092nl08?prd=OPIL (last visited Jan. 13, 2023).

[79] The cases dealt with the responsibility of States (namely France, Norway and initially Germany) for the actions of their troops serving as part of NATO's Kosovo Force (KFOR), established by a resolution of the UN Security (1244). The Behrami case involved accusations against French troops of KFOR, who, despite being in charge of mine and ordnance clearing operations, allegedly failed to de-mine the region, which resulted in the killing of one boy and injuring of another (paras. 5-7). Mr. Saramati, on the other hand, claimed that he had been subjected to extrajudicial detention by KFOR troops (and later UN Interim Administration Mission) without access to court (para. 62).

[80] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, No. 71412/01, §143-152 (2007). Available at: https://hudoc.echr.coe.int/fre?i=002-2745 (last visited Jan. 13, 2023).

[81] The State of the Netherlands v. Hasan Nuhanović, Case No. 12/03324, Supreme Court of the Netherlands, 22-23, para. 3.11.2 (2013).

[82] *Supra* note 56, 101.

[83] *Supra* note 65, art. 7; *See also* Stian Øby Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, 6 Oslo Law Review 178, 186 (2019).

[84] *Id.*, art. 61: "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".

[85] *Id.*, art. 17 (1) and (2).

pay full reparation for material and moral harm caused by their actions or omissions.[86] Interestingly, reparation in this case appears to be an obligation of the wrongdoer, in contrast to the right of the injured party. It follows that the obligation will arise regardless of whether the injured party makes a claim. Moreover, in its commentary, the ILC noted that the lack of adequate financial means to pay full reparation would not exempt an international organisation from this obligation.[87] The ILC asserted that the international organisation could not use its internal regulations to justify its failure to comply with its obligations.[88] While the provision is *ipso facto* ambitious and promising, the reality remains that international organisations are still guided by their own internal rules and procedures. Hence, a claim brought against the international organisation will be a part of its *lex specialis*, which, in turn, will take precedence over the obligation to make full reparation.

Another defect of these Draft Articles is the provisions concerning the invocation of responsibility. Although the victims of international human rights law violations are private persons, only states and international organisations can invoke the responsibility of international organisations.[89] In accordance with Article 43, the responsibility of an international organisation can be invoked by a state or international organisation if the breached obligation is owed directly to them or to a group they belong to, or to the international community.[90] Although Draft Articles do recognise that other actors (including private persons) may be entitled to invoke international organisation's responsibility, they only cover the implementation of the responsibility of international organisations by states or by other organisations.[91] They thus leave little possibility for individuals to directly hold international organisations accountable. This demerit is extant despite the ILC's acknowledgement that there are international obligations owed to individuals that international organisations could breach.[92] Article 33 (2) of the Draft Articles clarifies the scope of these obligations as extending to "*any right, arising from the international responsibility*[93] *of an international organisation, which may accrue directly to any person or entity other than a State or an international organisation*".[94] This provision implies the violations which may

[86] *Id.*, art. 34-40.
[87] Report of the International Law Commission, UN General Assembly Official Records, Supplement No. 10, UN Doc. A/64/10, 112, no. 3 (2009).
[88] *Id.*, 113, no. 1.
[89] *Supra* note 65, art. 43.
[90] *Ibid*.
[91] *Id.*, art. 50.
[92] *Id.*, art. 10.
[93] International responsibility is a legal institution by which a subject of international law is called to account for the breach of an obligation under international law against another subject of international law.
[94] *Supra* note 65, art. 33 (2).

occur directly in relation to individuals, yet the Draft Articles do not cover the consequences of such violations.[95]

It is also important to mention that the provisions of the Draft Articles make no mention of accountability mechanisms.[96] They do not contain any attempt to tackle the impediments preventing individuals from holding international organisations accountable.[97] Without adequately addressing the issues concerning the absence of available judicial forums for individuals to bring claims against international organisations or immunity-related procedural barriers, it would be safe to state that the ILC's normative exercise is lacking a logical conclusion.[98]

C. *Mutatis mutandis* applicability

Owing to the lack of authoritative documents or consistent and comprehensive case law on the matter, analogous application of the principles of international responsibility of states to international organisations has steadily gained more consideration.[99] This should not come as a surprise since the rules applicable to states under the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA) are, in essence, *mutatis mutandis* applicable to international organisations. Article 58 of the Draft Articles is a prominent illustration of how ARSIWA Article 16 applies to the issue of international organisations.[100] Nonetheless, even this approach paves the way to inconsistent decisions in case law, as illustrated above. Binding, authoritative documents are needed to address the problem, provide answers to the issues of attribution of responsibility, and further clarify the notion of "effective control".

III. Established mechanisms and way forward

A. Alternative remedy approach

Thus far, two major approaches have been used to tackle the issue in question: the alternative remedy approach and the judicial approach.

[95] Armin von Bogdandy and Mateja Steinbrück Platise, *DARIO and Human Rights Protection: Leaving the Individual in the Cold*, 8 International Organizations Law Review 67, 67 (2012).
[96] Vanessa Richard, *International Organizations between Responsibility and Accountability: Is the Regime Drafted by the ILC Appropriate for International Organizations?* 46 Revue Belge de Droit International 190, 191-192 (2013).
[97] Jan Wouters, Jed Odermatt, Are All International Organizations Created Equal? Reflections on the ILC's Draft Articles of Responsibility of International Organizations, Leuven Centre for Global Governance Studies, 3-4 (2012).
[98] Kibrom Teweldebirhan, *Outsourcing Accountability: States, International Organizations and Accountability Deficit in International Law*, 20 Southwestern Journal of International Law 313, 321 (2015).
[99] Kjetil Mujezinovic Larsen, The Human Rights Treaty Obligations of Peacekeepers, 100 (2012).
[100] Article 16 of ARSIWA concerns "Aid or assistance in the commission of an internationally wrongful act", while Article 58 of the Draft Articles deals with "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization".

Alternative remedy approach was initially adopted by the ECtHR[101] and subsequently used by domestic jurisdictions in Europe.[102] It entails direct action through internal accountability systems. In other words, the grant of immunity to an international organisation could constitute a violation of individuals' right to a court, if the claimants do not have recourse to another remedy ("alternative" to national courts) to protect their rights.[103] Thus, before granting immunity, a national court must first determine if an alternative remedy is available. Several merits of this approach can be noted:

Firstly, it gives legal significance to the status of individual claimants through reinstating the normative contradiction between organisational immunity and human rights. This enables the court to lift immunity if it finds that there was no alternative remedy available to the plaintiffs.[104]

Secondly, it recognises that procedures other than those made available under the domestic legal systems may meet the conditions of the right to a court of law, thus helping courts avoid conflict. In other words, immunity may be provided while not infringing on human rights because the international organisation has established internal systems or provides the option of instituting an arbitration. This appears to be a fair balance between an international organisation's right to be immune from jurisdiction and an individual's right to seek jurisdictional protection.[105]

This approach, therefore, focuses on a local solution via setting up organisational-level remedial mechanisms, used *inter alia* to handle third-party claims.[106] It has become an increasingly appealing option.[107] Such instruments safeguard the autonomy of an international organisation but simultaneously guarantee its accountability, thus fulfilling the organisation's commitment to providing adequate methods of settlement in return for jurisdictional exemption. Prominent examples include the inspection panel model introduced by the World Bank in 1993 in response to increased accountability demands.[108] The Inspection Panel (hereinafter the Panel), which is now housed by the World Bank Accountability Mechanism, consists of three members and serves as an impartial platform for individuals and

[101] Waite and Kennedy v. Germany, No. 26083/94 (1999). Available at: https://hudoc.echr.coe.int/eng?i=001-58912 (last visited Jan. 13, 2023).
[102] *See* Federal Supreme Court of Switzerland, X. v. ICRC, Case No. 5A_106/2012, para. 7.2.1 (2012).
[103] Waite and Kennedy, No. 26083/94.
[104] *See* Charitos Stavrinou v. United Nations and Commander of the UN Force in Cyprus, Supreme Court of Cyprus, Civil Appeal № 8145, 10 (1992); *See also* Siedler v. Western European Union, Brussels Labour Court of Appeal (2003).
[105] *Supra* note 17, 196.
[106] Teweldebirhan, *supra* note 98, 322.
[107] Karel Wellens, *Accountability of International Organizations: Some Salient Features*, Proceedings of the Annual Meeting, 97 Cambridge University Press 241, 245 (2003).
[108] International Bank for Reconstruction and Development, International Development Association, Resolution No. IBRD 93-10, Resolution No. IDA 93-6, The World Bank Inspection Panel (22 Sep. 1993).

communities who have been or may be affected by the Bank's policies and the projects it finances.[109] After the Panel has reviewed the requests for investigation and determined that they are eligible, the complainants have two options: to have their complaint referred to the Dispute Resolution Service, where they can try to reach an agreement,[110] or have the Panel launch a compliance investigation.[111]

In the human rights context, a representative case would be the Panel's consideration of human rights concerns in its inspection in the Chad-Cameroon and Pipeline Project.[112] The investigation report mentioned a number of alleged violations of the Bank's social and environmental policies, including involuntary resettlement and health damage associated with the project financed by the Bank.[113]

Another potentially useful instrument for ensuring, or at least improving, responsibility for violations of individual rights under international law would be the ombudsman model. The concept of an ombudsman has been successfully applied in the European Union law, where the institution was established by the 1992 Maastricht Treaty.[114] The purpose of the Ombudsman is to receive and examine complaints from the citizens and residents of the Union, concerning maladministration by the institutions, bodies, offices and agencies of the Union. In case the claim of maladministration is confirmed, the Ombudsman refers it to the entity concerned along with a report, which is also forwarded to the European Parliament.

As illustrated, these mechanisms provide an accountability forum for communities or individuals that are or may be damaged by the organisation's decisions and actions and promote the rule of law within the institutions themselves. However, it is important to recognise the flip side of this coin. The following issues of the internal remedial mechanisms stand out:

1) The construction of such a structure is subject to the organisation's disposition in all cases.[115]

[109] *Id.*, para. 2, 12.
[110] International Bank for Reconstruction and Development, International Development Association, Resolution No. IBRD 2020-0005, Resolution No. IDA 2020-0004, The World Bank Accountability Mechanism, para. 11 (2022).
[111] International Bank for Reconstruction and Development, International Development Association, Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003, The World Bank Inspection Panel, para. 34 (2020).
[112] World Bank Inspection Panel, Investigation Report: Chad-Cameroon Petroleum Development and Pipeline Project (loan no. 4558-CD); *See also* Petroleum Sector Management Capacity-Building Project (credit no. 3373-CD) and Management of the Petroleum Economy Project (credit no. 3316-CD) (2002).
[113] *Id.*, para. 34-37, 210-217 (2002).
[114] Consolidated Version of the Treaty on the Functioning of the European Union, O.J. C 326/47, art. 228 (2012).
[115] *Supra* note 98, 323.

2) It constitutes a structural component of an international organisation, and the outcome of the process is the organisation's decision.[116] The fact that the international organisation itself staffs and finances this mechanism casts doubt on the latter's independence.[117] The internal administrative processes of the UN, for instance, the organisation is entirely in charge of the investigation, processing, and final adjudication of claims.[118]

3) No less debatable is the issue regarding third-party access to these processes. International organisations not seldom operate as sentries to decide if individuals can make use of the organisation's internal mechanisms.[119] Consider the Inspection Panel of the World Bank, in which a claim may only be submitted by a group of two or more persons, not by an individual.[120]

4) Uncertainty remains over the question as to what exactly constitutes a "reasonable" alternative to national courts. ECtHR considers any means provided by the organisation itself sufficient.[121] The position advanced in the *Mothers of Srebrenica* case[122] is notably perplexing – namely, that a remedy directed against a subject other than the organisation itself can be seen as a reasonable substitute for a remedy against the latter.[123] This interpretation entirely disregards international organisations' accountability and deviates from the concept that an organisation should "compensate" for its immunity by offering appropriate remedies.[124] The perils of such a position are furthermore evident in cases where states and international organisations share responsibility (e.g. peacekeeping operations), where international organisations may be granted immunity since the Contributing State may be sued instead, while the State can place all responsibility on the organisation.[125]

Moreover, although the alternative-remedy approach has achieved some traction, in practice it remains dismally infrequent.[126] Courts appear to be

[116] Matteo Tondini, *The "Italian Job": How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States*, Accountability for Human Rights Violations by International Organisations 169, 174 (2010).
[117] Devika Hovell, *Due Process in the United Nations*, 110 American Journal of International Law 1, 43 (2016).
[118] Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, UN Doc. A/51/389, para. 10, 20 (1996).
[119] *Supra* note 98, 324.
[120] Inspection Panel at the World Bank, Operating Procedures, para. 11 (a) (2021).
[121] *Supra* note 19, 197.
[122] The case concerned the failure of the Dutch battalion operating as the UN peacekeeping force to protect Bosnian civilians from the massacre committed against them by Bosnian-Serb forces in Srebrenica, a village in Bosnia and Herzegovina. The relatives of the victims of the massacre tried to call the UN to account for its peacekeepers' actions through Dutch courts. The decision confirmed UN's total immunity from prosecution.
[123] Mothers of Srebrenica and others v. the Netherlands, No. 65542/12, § 167 (2012). Available at: https://hudoc.echr.coe.int/fre?i=002-7604 (last visited Jan. 13, 2023).
[124] *Supra* note 19, 197; *See also* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese Journal of International Law 285, 285 (2008).
[125] *Ibid*.
[126] *Id*., 199.

cautious about lifting immunity by reason of deficiencies of the procedural nature of international organisations' internal dispute settlement mechanisms.[127] To illustrate, the Brussels Court of Appeals upheld NATO's immunity in a case involving the repercussions of NATO bombardment in Libya in 2011, which led to civilian casualties.[128] The Court, furthermore, ventured to state that the claimants could bring the proceedings before Libyan courts, or sue the member states of the organisation, or alternatively may have sought diplomatic protection. This was a rather confusing argument on behalf of the Court: it is questionable if the Libyan courts would have been effective or accessible in spite of the civil war, or if they would have had jurisdiction over this issue in the first place.

Lastly, no such mechanism holds significance if judicial or quasi-judicial measures provide more appropriate remedies. Dissatisfaction with these systems has in numerous cases prompted new legal action in human rights courts, which could be claimed to operate as last-resort courts for matters concerning international organisations' accountability. One example would be *Gasparini v. Italy and Belgium* case, which revolved around a labour dispute between NATO and its employee.[129] After taking action before the NATO Appeals Board and having his appeal dismissed, Mr. Gasparini alleged before the ECtHR that NATO's internal labour dispute settlement mechanism breaches the fundamental provisions and the fair-hearing requirements under the ECHR.[130] ECtHR could not identify any "manifest inadequacy" in NATO's internal dispute resolution mechanism and subsequently dismissed the case.[131]

Furthermore, the alternative-remedy approach does not hold up due to revisionist decisions such as the one in the *Mothers of Srebrenica* case, in which the ECtHR ruled that the absence of an alternative remedy does not *ipso facto* constitute a violation of the right of access to a court.[132] The Waite and Kennedy doctrine[133] is effectively invalidated through interpretations like this one, which is especially troubling from the human rights standpoint. Arguing that an international organisation's immunity should be prioritised, regardless of the availability of an alternative remedy, is essentially

[127] *Ibid*.
[128] El Hamidi and Chlih v. North Atlantic Treaty Organization (NATO) and Belgium (intervening), Appeal decision, ILDC 3043, JT 6772 (BE 2017).
[129] Gasparini v. Italy and Belgium, No. 10750/03 (2009). Available at: https://hudoc.echr.coe.int/eng?i=001-92899 (last visited Jan. 13, 2023).
[130] *Ibid*.
[131] *Ibid*.
[132] Mothers of Srebrenica and others, No. 65542/12, § 164.
[133] The doctrine promotes the idea that an international organisation should, in theory, only be immune from being challenged before domestic courts if it offers an alternate method of dispute resolution to persons seeking recourse against it.

equivalent to arguing that it must be upheld regardless of the organisation's impact on individuals.[134]

B. Judicial approach

Under the other approach, (human rights) courts have been turned to as a last – resort forum in case there are no internal remedial mechanisms available. It is thus a judicial approach and involves recourse to arbitration and human rights courts.

In relation to the issue of who determines the accountability of international organisations, one may be tempted to look for an independent court with universal jurisdiction and the authority to issue binding decisions.[135] However, in the contemporary international legal order, the search for such a court is destined to fail.[136] International law is a decentralised legal system devoid of courts with mandatory jurisdiction over all subjects. There is no single regime capable of hosting international organisations and no legally mandated system of dispute settlement (e.g., the proliferation of international courts and tribunals) that they can consent to.[137]

In practice, individuals often resort to human rights courts. However, this approach likewise cannot be sustained for a number of reasons. First, the classic state-individual approach underpins the majority of human rights regimes. As already mentioned, international organisations are, in their majority, not bound by human rights conventions as signatories. Claims brought against them may accordingly be dismissed by the courts due to the lack of standing.[138]

One may argue hereby that the codification and near-universal adoption of human rights norms laid down, *inter alia,* in the Universal Declaration of Human Rights (UDHR)[139] has developed them into customary international law, recognising them as legally binding rules.[140] Customary international law is presumed to be applicable to all subjects of international law – it follows from this point that international organisations are likewise bound by

[134] *Supra* note 19, 201.
[135] José M. Beneyto, Accountability of International Institutions for Human Rights Violations, Introductory Memorandum, Council of Europe, Committee on Legal Affairs and Human Rights, para. 38 (2013).
[136] Antonios Tzanakopoulos, *Strengthening Security Council Accountability for Sanctions*, 19 Journal of Conflict and Security Law 409, 418 (2014).
[137] *Supra* note 98, 339.
[138] *See* Behrami and Behrami v. France and Saramati v. France, Germany and Norway, No. 71412/01 (2007). Available at: https://hudoc.echr.coe.int/fre?i=002-2745 (last visited Jan. 13, 2023); *See also* Caitlin A. Bell, *Reassessing Multiple Attribution: The International Law Commission and The Behrami and Saramati Decision*, 42 New York University of International Law and Politics 501, 507-508 (2010).
[139] UN General Assembly, Resolution A/217 (III), Universal Declaration of Human Rights, UN Doc. A/RES/3/217 A (1948).
[140] Hurt Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Georgia J. International & Comparative Law 287, 322 (1995); *See also* Christian Tomuschat, Human Rights: Between Idealism and Realism Actors, 4 (2003).

customary human rights norms.[141] This point is hardly contentious, however, we run into the accountability dilemma again: even if international organisations are obliged to observe human rights norms, there is no forum for victims to bring claims and exercise remedies.[142]

Another complication would be that an individual petition procedure is required in a human rights regime, in order to make a claim admissible in a human rights court.[143] For this reason, a claim against an international organisation as a defendant can only be heard in a human rights court if individual applications are permitted under the relevant human rights framework, or if it is brought by the state.[144]

A further challenge is posed by the fact that these courts lack jurisdiction over claims regarding operations which were conducted outside their geographical confines.

In this regard, one may raise the question regarding the role of national courts. Some opine that in order to be sufficiently effective, recourse to arbitration might necessitate the involvement of national courts.[145] However, this method would be rather problematic and largely cumbersome. To commence with, national courts lack the necessary expertise in public international law to rule on such issues. Moreover, they do not appear to be the appropriate forum for conducting the legal assessment of the peculiarities of the dispute settlement systems established by international organisations.[146]

In addition, allowing the national courts to decide whether or not to lift the immunity of international organisations may have adverse consequences. Namely, this may pave the way for contradictory rulings by courts of different member states, undermining the uniform application of regulations and subsequently causing ambiguity and tensions.[147] This would jeopardise the organisation's capacity to function properly.[148]

Next, an international organisation's independence in carrying out its objectives may be endangered if the national judiciary is allowed to interfere

[141] Henry G. Schermers, Les Bases Juridiques de l'Action des Organisations Internationales, in: R. Dupuy (ed.), A Handbook on International Organisations, 402 (1998); *See also* Niels Blokker, *International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?* 14 International Organizations Law Review 1, 2 (2017).
[142] *Supra* note 41, 53.
[143] *Supra* note 98, 326-327.
[144] *Ibid*.
[145] Emmanuel Gaillard, Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass*, 51 International and Comparative Law Quarterly 1, 12 (2002).
[146] *Supra* note 2, 12.
[147] Rosa Freedman, Nicolas Lemay-Hébert, Siobhán Wills, The Law and Practice of Peacekeeping: Foregrounding Human Rights, 49 (2021).
[148] U.S. Court of Appeals for the District of Columbia Circuit, Marvin R. Broadbent et al., Appellants, v. Organization of American States et al., 628 F.2d 27 (D.C. Cir. 1980).

in the organisation's activities.[149] Equally questionable is the issue regarding the enforcement of the national decision. Even in the event an individual obtains a decision convicting the organisation, it is uncertain how the individual would be able to enforce this decision.[150]

Thus, the above-mentioned arguments suffice to show that neither the alternative-remedy approach nor the judicial approach is efficient on its own. This illustrates the necessity to introduce a framework of restricted immunity for international organisations.

C. Proposed mechanisms

There are two feasible methods for narrowing down the scope of jurisdictional immunities.[151] The first option would be to resort to a multilateral treaty that would apply to all types of organisations. As already mentioned, there is (at the time of writing) no such document. The Draft Articles were thus far the only real attempt, but ultimately failed to gain formal acknowledgement from the international community. The reason behind the Draft Articles' failure could have been their uniform standards, which would be impractical to apply to all international organisations.[152] A more comprehensive document, which would include an all-inclusive set of standards for the diverse range of international organisations would be preferable.

Another one would be relying on a headquarters agreement, or other instruments similar to the treaty governing the UN's immunities.[153] At present, many constituent instruments or bilateral headquarters agreements provide jurisdictional immunity to international organisations. Oftentimes, however, this is stated in such an imprecise way that the immunity is interpreted to be absolute and limitless. It should go without saying that an international organisation could never have intended to claim absolute immunity from suit. This necessitates the drafting and adoption of more precise and detailed provisions on jurisdictional immunities and their restriction, which would effectively eradicate the lack of accountability of international organisations.

A more effective practical approach in the present state of international law would be to consider dual attribution and shared responsibility in courts. For instance, the air campaign conducted by NATO on the territory of former

[149] Frédéric Mégret, *The Vicarious Responsibility of the United Nations for 'Unintended Consequences of Peace Operations'*, United Nations University Press, 250-267 (2008).
[150] *Supra* note 146.
[151] *Supra* note 145, 8.
[152] Möldner, *supra* note 64, 323-324.
[153] *Supra* note 25; *See also* General Convention on the Privileges and Immunities of the United Nations, United Nations Treaty Series, vol. 1, 15 (1946).

Yugoslavia in 1999[154] is perhaps the greatest illustration of a situation in which both the member states and the international organisation may have been held jointly accountable. The conduct in this case could be attributed to NATO and to those of its member states that participated in the execution of the military action, or otherwise contributed to it.

The importance of this is especially evident when one considers the legal vacuum (in terms of human rights protection in peacekeeping missions mandated by international organisations such as the UN) generated or perpetuated by the court decisions such as the one in Behrami and Saramati.[155] Excluding the rare exceptions, till now most cases involving the accountability of troop contributing states and international organisations have attributed the conduct to the international organisation and beendismissed on the grounds of the immunity of these organisations.[156] Dual attribution would at least partially solve the accountability gap, deter contributing states from irresponsible actions and encourage international organisations to more closely monitor the actions of the individuals working under their mandate. Furthermore, particularly from the standpoint of victims, binding rules for attributing and apportioning responsibility for human rights breaches to and among several actors would serve as a guarantee that the burden of determining who is responsible and to what extent is not placed on the individual whose human rights were violated.

It must be noted that the concept of dual attribution has been previously confirmed in ECtHR's case law concerning the responsibility of states. In particular, in the *Ilascu and Others v. Moldova and Russia* case,[157] ECtHR found both state parties (Russia and Moldova) responsible for the conduct, although for different aspects of it. Namely, Russia was found accountable for the acts of the authorities over whom it allegedly exercised effective control (or influence),[158] while Moldova was held accountable for failing to "discharge its positive obligations" to take measures to protect the applicants' rights under the European Convention on Human Rights.[159]

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[154] *See generally* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, International Criminal Tribunal for the Former Yugoslavia (2000).
[155] *Supra* note 99, 154.
[156] *See* Bankovic and others v. Belgium and others, No. 52207/99 (2001). Available at: https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-22099&filename=BANKOVI%C4%86%20AND%20OTHERS%20v.%20BELGIUM%20AND%20OTHERS.docx&logEvent=False (last visited Jan. 13, 2023).
[157] The case concerned the arrest and subsequent sentencing of four Moldovans in the Moldovan enclave of Transdnestr, which is under effective control of Russia. Upon their release, two of the arrested Moldovans initiated a trial against Russia for the infringement of their rights while in custody, and Moldova for attempting to breach the applicants' right of individual application to the Court.
[158] Ilascu and Others v. Moldova and Russia, No. 48787/99, § 392-93 (2004). Available at: https://hudoc.echr.coe.int/eng?i=001-61886 (last visited Jan. 13, 2023).
[159] *Id*., para. 352.

Furthermore, dual attribution has been applied in relation to both the international organisation and the member state. This is evidenced by the *Nuhanovic* case, discussed in the previous section. However, cases like these are not common occurrences. There is a substantial scarcity of case law and the concept has not gained much popularity over the years.

Regardless of which approach is to be taken, reducing immunities would remove the accountability gap in international law and improve the effectiveness of these organisations through increased accountability.[160]

Conclusion

This article reckons the lack of accountability mechanisms for international organisations as a significant legal issue in international law, which both policymakers and scholars need to weigh into and handle. The merits of immunity are indisputable: international organisations would be unable to complete their objectives if they were subject to the jurisdiction of courts for all their activities. This argument, however, only concerns disputes that may jeopardise the execution of the organisation's core prerogatives. Consequently, setting limits on the jurisdictional immunities of international organisations is appropriate if the functioning and/or independence of the organisations are not at stake.[161] There can be no reason why international organisations cannot or must not be held accountable for the harmful consequences of their actions. As Dr. Pasquet rightfully puts it: "*Denial of justice is itself an injustice; even a double injustice when it concerns the victims of human rights violations*".[162] Contending otherwise would mean prioritising the organisation's protection over human rights, in particular, the right of access to justice, which is guaranteed to all private persons.

In fact, absolute immunity is ruled out under the functional necessity theory itself.[163] The latter presents a rather narrow definition of "necessity", according to which the international organisation can only be entitled to immunity if the latter is paramount for organisational purposes.[164] The restriction of immunities, therefore, is consistent with international law principles (principles of good faith, rule of law, as well as general international humanitarian law principles of proportionality and of necessity when using force, accountability for wrongful acts, among others).[165]

This article considered three principal ways of obviating the "denial of justice": access to effective alternative remedies, recourse to arbitration and,

[160] *Supra* note 20, 913.
[161] *Supra* note 145, 5; *See also* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Virginia Journal of International Law 5, 53 (1995).
[162] *Supra* note 19, 201.
[163] *Supra* note 20, 902.
[164] Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnational Law Review 484, 519 (2007).
[165] *Supra* note 45, 5-15.

lastly, the option to restrict jurisdictional immunities granted to international organisations. The first two were shown to be feeble in practice, making the last option needful. Additionally, the possibility of dual attribution was evaluated.

Thus, although there has been an increase in demand to ensure the accountability of international organisations in recent decades, much work remains to be completed. The paramount goal is to see justice served, which can only be accomplished if international organisations can be held to account - which, in turn, can work only if their immunities are restricted.