The third-party liability of international organisations: towards a 'complete remedy system' counterbalancing jurisdictional immunity

Henquet, T.S.M.

2 THE INTERNATIONAL ORGANISATIONS LAW FRAMEWORK GOVERNING THIRD-PARTY REMEDIES

2.1 Introduction

For present purposes, the international organisations law framework governing third-party remedies has three core aspects: the legal personality of international organisations; how international organisations are bound by international law; and the primary and secondary human rights law obligations of international organisations. This chapter discusses each of these aspects succinctly, with brief references to literature and practice. The law with respect to each of these aspects is in development and the main purpose of this chapter is to describe the law as it stands at present.

In sum, as to the first aspect of the framework, under treaty provisions like Article 104 of the UN Charter, states are required to confer legal personality on international organisations under *domestic law*. This is to enable these organisations to conduct their day-to-day operations, including to contract, acquire goods and institute legal proceedings.[72] Simultaneously, treaty provisions like Article 105(1) of the UN Charter, complemented by the General Convention in the case of the UN, confer privileges and immunities on international organisations. These aim to protect the independent functioning of international organisations, by excluding the application of domestic laws (privileges) and exempting international organisations from legal process (immunity from jurisdiction) and enforcement (immunity from execution).[73]

As it is international law—through privileges and immunities—that puts up barriers to international organisations being held accountable at the domestic level, the question arises as to the international law remedies of private parties against international organisations. The starting point is the international legal personality of international organisations—international organisations typically have such personality, as per the will of their member states. A corollary of international legal personality is that where an international organisation breaches an international obligation, according to the ARIO, it commits an internationally wrongful act for which it incurs international responsibility. However, whilst international organisations may incur such responsibility towards private parties, the ARIO do not elaborate on the legal consequences of such personality.

Moreover, the international personality of international organisations is normatively empty: it merely means that such organisations are *capable* of possessing international rights and duties. This leads to the framework's second aspect, that is, the question as to how international organisations are bound by

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[72] Cf. Art. 1, Section 1 of the General Convention.
[73] The term 'privilege', in contradistinction to 'immunity', may be understood to refer to 'all cases in which local legislation is not, or is differently, applicable'. Schermers and Blokker (2018), para. 323.

international law. As will be seen, international human rights obligations may be said to be binding on international organisations as general principles of law. For the UN, in addition, human rights obligations, as specified in the Universal Declaration of Human Rights and the 1966 Covenants, may be said to flow from the UN Charter as the UN's constitution.

As to the third aspect of the framework, in light of the void under the ARIO as to the consequences of international responsibility towards private parties, it is frequently asserted that there exists under international human rights law a 'right to a remedy', with a procedural and a substantive component. It will be concluded in this chapter that the former right arises under Article 2(3) of the ICCPR, which is binding on the UN under its constitution. Conversely, the latter right has yet to mature.

In discussing the international organisations law framework governing third-party remedies, this chapter is structured as follows. It begins by discussing the legal status of international organisations in domestic legal orders and the international legal order (Section 2.2). It next considers how international organisations, and the UN in particular, are bound by international law (Section 2.3). This is followed by a discussion of the primary and secondary obligations of international organisations, and the UN in particular, towards private parties under international human rights law (Section 2.4).

2.2 The Legal Status of International Organizations in Domestic Legal Orders and the International Legal Order

The legal status of international organisations largely revolves around their legal personality. The concept of legal personality developed at the domestic level. Humans are the original legal persons, from which the personality of legal persons, like companies, is derived.[74] International organisations often enjoy domestic legal personality, which may be conferred on them in a variety of ways. The status of international organisations at the domestic level is moreover determined by their privileges and immunities, which shield them from the application of laws and from legal process insofar as necessary to protect against interference.

At the international plane, states may be considered to be the original legal persons, from which the personality of international organisations is derived.[75] Whilst there is no centralized international authority that prescribes the conditions and process for acquiring international personality, international organisations often enjoy such personality. However, as discussed in this section, pursuant to the ARIO, the consequences of that personality as regards private parties are limited.

[74] Ibid., para. 1565.
[75] Ibid.

This section begins by discussing the domestic legal personality of international organisations and their privileges and immunities (subsection 2.2.1). It then turns to the international legal personality of international organisations and its legal consequences according to the ARIO (subsection 2.2.2).

2.2.1 Domestic legal personality, and privileges and immunities

International organizations need to operate at the domestic level, for example, to lease buildings, buy vehicles and office equipment, contract cleaning and catering services, and bring suit in national courts. They could not do so without domestic legal personality. Such personality is typically foreseen in one or more treaties, including notably the constituent instrument of an international organization. For example, according to Article 104 of the UN Charter: 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'.

Domestic legal personality may also be foreseen in a separate multilateral treaty. For example, Article 1 ('Juridical personality'), Section 1, of the General Convention provides: 'The United Nations shall possess juridical personality. It shall have the capacity: (a) To contract; (b) To acquire and dispose of immovable and movable property; (c) To institute legal proceedings.'

Domestic personality may moreover be foreseen in a bilateral treaty, such as a headquarters agreement. For example, according to Article 2 of the 1999 Agreement concerning the Headquarters of the Permanent Court of Arbitration ('PCA Headquarters Agreement'):[76] 'The PCA shall possess full legal personality. In particular, it shall have the capacity to contract, to acquire and dispose of immovable and movable property; and to institute legal proceedings.'

States parties to treaties like the foregoing are under an international law obligation to endow the relevant international organisation with legal personality under domestic law.[77] The actual conferral of such personality is governed by domestic law.[78]

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[76] 2304 UNTS 101. Headquarters agreement concluded between the Netherlands and international organisations typically provide for domestic legal personality. See, e.g., Art. 2 of the 1997 OPCW Headquarters Agreement; Art. 3(1) of the IRMCT Headquarters Agreement.

[77] R. Higgins et al. *Oppenheim's International Law: United Nations* (2017), para. 11-22. According to Reinisch, it does not seem generally accepted that customary international law requires states to recognise the domestic personality of international organizations. A. Reinisch, *International Organizations before National Courts* (2000), at 45-46. Nor does it seem generally accepted that international organizations have legal personality within domestic legal systems as a consequence of their international legal personality. Ibid., at 50, fn. 75. But see A.S. Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship* (1995), at 116 ('The national legal personality of international organizations is perhaps best described as an extension to the national level of the international organization's capacity to act on the international plan. It is implied in the possession of international legal personality').

[78] Higgins et al. (2017), paras. 11-21.

In the Netherlands, for example, such conferral may occur automatically on the basis of the treaty. Article 93 of the Dutch Constitution provides that self-executing provisions of treaties, once published, are directly applicable.[79] Whether a treaty rule is self-executing depends on its nature, notably whether it imposes obligations or confers rights, and whether it is unconditional and sufficiently precise to be applied by the courts.[80] The aforementioned treaty provisions concerning the domestic legal personality of the UN and the PCA would have such a direct effect.[81]

Other jurisdictions confer domestic legal personality on international organizations pursuant to national legislation. Well-known examples are the UK International Organisations Act 1986 and the US International Organizations Immunities Act 1945.[82]

Where an international organisation has domestic legal personality, it is capable of availing itself of domestic law.[83] And, *vice versa*, as explained by Schermers and Blokker: 'Most rules of national law are applicable to international organizations in the same way as to other subjects within the national jurisdiction.'[84] However, the application of domestic law is excluded where it would affect the proper functioning of the international organisation.[85] Exclusions apply by virtue of privileges and immunities, which are conferred on an organisation by treaty. For example, under Article 14(1) of the IRMCT Headquarters Agreement, concluded between the UN and the Netherlands, the Mechanism is exempt from taxes, including 'all direct taxes . . . import and export taxes'.[86]

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[79] An earlier version of this provision was first included in the constitution in 1953. <denederlandsegrondwet.nl/9353000/1/j9vvkl1oucfq6v2/vgrnd9dqjxze> accessed 21 December 2021.

[80] M. Chébti, 'Rechterlijke Toetsing aan een Ieder Verbindende Internationale Verdragsbepalingen. De Bijdrage van de Nederlandse Rechter aan het Bevorderen van de Internationale Rechtsorde en de Noodzaak dit te Kunnen Blijven Doen', in T. Gerverdinck et al. (eds.), *Wetenschappelijk Bijdragen: Bundel ter Gelegenheid van het 35-Jarig Bestaan van het Wetenschappelijk Bureau van de Hoge Raad der Nederlanden* (2014), 83 at 102, fn. 55, referring to Kamerstukken II 2007/08, 29861, nr. 19, at 3 ff.

[81] In an early Dutch case, UNRRA sued an individual before the District Court of Utrecht, the Netherlands, to recover sums allegedly paid in error under his contract of employment. In the absence of an explicit provision conferring domestic personality on UNRRA, the defendant argued that the organisation lacked such personality. The courts rejected this argument. See *UNRRA v. Daan*, Cantonal Court, Amersfoort, 16 June 1948. For references to the judgment, and the subsequent judgments on appeal, see UN Doc. A/CN.4/SER.A/1967/Add.1 (1967), at 207, para. 2, and at 216, para. 41, fn. 24; and Reinisch (2010), at 85.

[82] 22 U.S.C 288. See generally Schermers and Blokker (2018), para. 1592 ff.

[83] Another question is whether the international organisation is competent to do so. That question is governed by the organisation's internal law. See Schermers and Blokker (2018), para. 1599 ('*capacity* does not entail *competence*'. Emphasis in original).

[84] Schermers and Blokker (2018), para. 1610.

[85] Ibid., para. 1608, referring to 'a general rule of international institutional law to the effect that national laws should not be applied to international organizations if they could affect the proper functioning of the organization'. See also ibid., para. 1610, fn. 260 ('As a general rule laws will apply when not excluded.').

[86] See also, e.g., Art. 7(2) of the IRMCT Headquarters Agreement: 'Except as otherwise provided in this Agreement or the General Convention, the laws and regulations of the host State shall apply on the premises.'

Insofar as the application of tort law is not excluded, the obligations thereunder apply to international organisations, including the obligation to pay compensation.[87] Importantly, however, the implementation of liability through legal proceedings is precluded by virtue of immunities. In particular, as discussed in greater detail in chapter 4 of this study, international organisation typically enjoy immunity from jurisdiction. That immunity aims to preclude international organisations from being held to account at the domestic level. Like the non-application of certain domestic rules as a matter of privilege, the rationale of immunity from jurisdiction (and, separately, immunity from execution) is to protect international organisations from interference.

Articles 104 and 105 of the UN Charter, taken together, sum up the position with respect to the UN: insofar as necessary for the fulfilment of its purposes, the organisation simultaneously enjoys domestic personality *and* privileges and immunities.[88]

2.2.2 International legal personality

There is no equivalent provision to Article 104 of the UN Charter when it comes to the UN's international legal personality.[89] The drafters 'considered it superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter as a whole'.[90] That was indeed what the ICJ did in its landmark advisory opinion in the *Reparation for Injuries* case.

The case arose in connection with the killing of a UN mediator in the Middle East, following unrest in connection with the establishment of the State of Israel.[91] The UNGA requested the ICJ for an advisory opinion on whether the UN could bring an international claim against the responsible state for the injury caused to its agent.[92] The ICJ held that this turns on whether the UN has international personality.[93] Its

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[87] Art. 6:162(1) of the Dutch Civil Code.

[88] The symmetry in formulation between Arts. 104 and 105(1) of the UN Charter underscores their close conceptual linkage. The beginning and ending of these provisions are identical: 'The Organization shall enjoy in the territory of each of its Members such . . . as . . . necessary for the . . . fulfilment of its purposes'. Art. 104 complements the text with 'legal capacity' ('as may be necessary for the exercise of its functions and the fulfilment of its purposes'). Art. 105(1) complements the text with 'such privileges and immunities' ('as are necessary for the fulfilment of its purposes').

[89] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 178 ('not settled by the actual terms of the Charter').

[90] United Nations Conference on International Organization Documents (1945), Vol. XIII, at 710, quoted in Schermers and Blokker (2018), para. 1565.

[91] For a factual background, see K. Marton, *A Death in Jerusalem* (1994).

[92] According to the ICJ in *Reparation for Injuries*: 'The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State"'. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 177.

[93] Ibid., at 178 ('in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire . . . does the Organization possess international personality?').

conclusion that the UN has such personality is based on four main grounds which are largely derived from the UN Charter. That is, as explained by Schermers and Blokker:

> '(1) to achieve the ends of the UN, the attribution of international personality is indispensable. (2) The organization is equipped with organs and has special tasks. (3) The Charter has defined the position of the member states in relation to the organization, by requiring them to give it every assistance in any action undertaken by it, and to accept and carry out the decisions of the Security Council, by authorizing the General Assembly to make recommendations to the member states, by giving the organization legal capacity, privileges and immunities in the territory of each of its members, and by providing for the conclusion of agreements between the organization and its members. (4) Practice has confirmed this character of the organization, which occupies a position in certain respects in detachment from its member states.'[94]

International legal personality, where it is not granted explicitly to an international organisation, may be implied in the powers conferred on it by its member states, as in the case of the UN.[95] With respect to the UN, the following passage in the *Reparation for Injuries* advisory opinion is key:

> 'In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on the international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.'[96]

According to the ICJ in *Reparation for Injuries*, whilst international legal personality 'is no doubt a doctrinal expression, which has sometimes given rise to controversy',[97] for the UN to be an international person means 'that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'[98]

In its Advisory Opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, the ICJ opined with reference to international organisations generally:

> 'The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with

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[94] Schermers and Blokker (2018), para. 1566.
[95] Ibid., para. 1565. The intention of the member states, as evidenced by the conferral of powers, is central to the prevailing theory on the acquisition of international personality. Schermers and Blokker (2018), para. 1565. According to the ARIO Commentaries: 'The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the United Nations Charter'. ARIO Commentaries, Art. 2, at 73, para. 7.
[96] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 179 (emphasis added).
[97] Ibid., at 178.
[98] Ibid., at 179.

> powers, the limits of which are a function of the common interests whose promotion those States entrust to them.'[99]

According to the ILC in connection with the ARIO, the ICJ has taken a 'liberal view'[100] on the acquisition of international legal personality by international organisations. That is, the ICJ's opinions 'do not appear to set stringent requirements for this purpose.'[101] That being so, according to the ILC: 'The legal personality of an organization . . . needs to be "distinct from that of its member States".'[102] That is reflected in the definition of 'international organization' adopted in Article 2(a) of the ARIO: 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.'[103]

In the end, the matter of the international legal personality of international organisations may be to an extent academic insofar as it is more common nowadays for the constituent instrument of an international organisations to confer explicitly such personality on the organisation.[104] Moreover, as explained by Schermers and Blokker: 'It is generally recognized that organizations have such capacity, unless there is clear evidence to the contrary'.[105]

Lastly, the international legal personality of the UN may be said to be 'objective' insofar as it applies also vis-à-vis non-member states. This results from the ICJ's opinion in *Reparation for Injuries*. According to the Court,

> 'the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.'[106]

However, the question of whether other international organisations can be said to have 'objective' international legal personality remains controversial.[107]

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[99] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 66, para. 25 (emphasis provided).
[100] ARIO Commentaries, Art. 2, at 74, para. 8.
[101] Ibid.
[102] Ibid., para. 10.
[103] Art. 2(a) of the ARIO (emphasis added); ARIO Commentaries, Art. 2, at 74, para. 10.
[104] Schermers and Blokker (2018), para. 1564; Sands, Klein and Bowett (2009), para. 15-004.
[105] Ibid., para. 1569, an example of an exception being the case of the OSCE. The definition of 'international organisation' in this study (see section 1.1 of this study) includes the possession of international legal personality.
[106] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 185 (emphasis added).
[107] Amerasinghe (2005), at 86-91; Sands, Klein and Bowett (2009), paras. 15-014 and 15-015 (commenting with

In sum, whether an international organisation has international legal personality depends on the will of its member states. Nowadays, they more commonly express that will explicitly in the constituent instrument of an international organisation. But the conferral of international legal personality may also be implied, as in the case of the UN. In reality, international organisations typically have international legal personality. In the case of the UN at least, such personality arguably is 'objective' in the sense that it can be invoked also against non-member states.

2.2.2.1 Legal consequences of international legal personality: the ARIO

The question arises as to the legal consequences, if any, of the international legal personality of an international organisation. As explained by Schermers and Blokker: 'The link between international legal personality and responsibility issues was confirmed in the *Reparation for Injuries* Advisory Opinion of the International Court of Justice.'[108] In that case, as seen, the ICJ concluded that the UN, being endowed with international personality, was empowered to bring an international claim. The reverse also applies, that is, as explained by Schermers and Blokker: 'Being an international legal person also implies that claims may be brought against international organizations.'[109]

In its commentary to the 2001 'Draft articles on responsibility of states for internationally wrongful acts (ASR)',[110] the ILC stated: 'It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality.'[111] The ILC continued that approach, a decade later, in the ARIO. However, as will be seen in this subsubsection, the scope of the ARIO, like that of the ASR, does not extend to the contents and implementation of international responsibility owed towards *private parties*.

By way of preliminary observations regarding the ARIO, first, the ILC started its work on the topic of the responsibility of international organisation in 2003,[112] having appointed Giorgio Gaja as its Special Rapporteur.[113] Upon the ILC's adoption of the ARIO in 2011, the UNGA:

> '3. *Takes note* of the articles on the responsibility of international organizations, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends

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reference to the quoted passage from the ICJ's opinion in *Reparation for Injuries*: 'It is far from clear . . . that this reasoning extends to all other international organisations, as it has generally been viewed as a statement of the political and factual importance of the UN, rather than as the formulation of a more general rule or principle of law.').

[108] Schermers and Blokker (2018), para. 1583.

[109] Ibid.

[110] (Draft) Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10 (2001), at 31 ff., para. 1 ff. ('ASR Commentaries').

[111] Ibid., Art. 1, at 34, para. 7.

[112] The ILC conducted the work at the request of the UNGA. UN Doc. A/RES/56/82 (2001), para. 8.

[113] G. Gaja, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532 (2003), para. 1.

> them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action'.
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> 4. *Decides* to include in the provisional agenda of its sixty-ninth session an item entitled "Responsibility of international organizations", with a view to examining, inter alia, the question of the form that might be given to the articles.'[114]

Second, the ARIO 'follow the same approach adopted with regard to State responsibility'[115] and they 'are in many respects similar to the articles on State responsibility'. The ILC was in fact criticized for 'basically replacing the term "State" with "international organization"' in the ASR'.[116] However, according to Special Rapporteur Gaja,

> 'neither the Special Rapporteur nor the Commission has started from a presumption that the solutions adopted with regard to States should also apply to international organizations: I said as much already in my first report. Any question was going to be, and has been, examined on its merits. Only when a question relating to the responsibility of international organizations appeared to be parallel to one that had already been examined with regard to States and there was no reason for stating a different rule was an identical solution adopted.'[117]

Notably, like the ASR,[118] the ARIO

> 'rely on the basic distinction between primary rules of international law, which establish obligations for international organizations, and secondary rules, which consider the existence of a breach of an international obligation and its consequences for the responsible international organization. Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft

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[114] UN Doc. A/RES/66/100 (2011). As Wood notes, the UNGA took a similar action in relation to the ASR and this 'has become a common initial reaction of the Assembly to the Commission's work product'. See M. Wood, '"Weighing" the Articles on Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 55 at 64, fn. 38.

[115] ARIO Commentaries, General Commentary, at 67, para. 3. Regarding the process of law-making with respect to (the responsibility of) international organizations. See generally K. Keith, 'The Processes of Law-Making: the Law Relating to International Organizations as an Example', in M. Ragazzi (ed,), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 15.

[116] G. Gaja, Sixth Report on Responsibility of International Organizations, UN Doc. A/CN.4/597 (2008), para. 5. See likewise G. Gaja, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), para 5. Klein refers to 'significant criticism' against the method used by the ILC in producing the ARIO, as well as the substance of certain provisions. See Klein (2016), at 1027; and the literature cited in fns. 6 and 7.

[117] G. Gaja, Sixth Report on Responsibility of International Organizations, UN Doc. A/CN.4/597 (2008), para. 5 (fn. omitted). A. Pellet, 'International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 41 at 44 ('The Special Rapporteur was reproached for aiming at producing a carbon copy of the [ASR]. However, then a Commission's member, I underlined that there was just one unequivocal notion of responsibility in international law and in law in general, and I took the position that it was not unreasonable to use those Articles as a starting point: the general system of responsibility was similar in both cases'. Fns. omitted). Schermers and Blokker highlight two essential differences between the ASR and the ARIO. First, certain provisions in the ASR relate exclusively to states and were not included in the ARIO. Second, *vice versa*, certain new issues in the ARIO relate specifically to the responsibility of international organisations; these notably concern the relationship between international organisations and their members. Schermers and Blokker (2018), para. 1590B.

[118] ASR Commentaries, at 31, para. 1.

> articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.' [119]

Third, and final, according to the ARIO Commentaries: 'The fact that several of the present draft articles are based on limited practice moves the order between codification and progressive development in the direction of the latter.'[120] And, 'their authority will depend upon their reception by those to whom they are addressed.'[121]

Turning to the substance of the ARIO, the fundamental proposition is set forth in Part Two, which is entitled 'the internationally wrongful act of an international organization' (which corresponds to Part One of the ASR). Under Article 3 of the ARIO: 'Every internationally wrongful act of an international organization entails the international responsibility of that organization.'

According to Article 4 of the ARIO: 'There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.'

The scope of application of Part Two of the ARIO corresponds to the scope of Part One of the ASR. As the ILC commented in the ARIO Commentaries regarding the ASR, it 'concerns any breach of an obligation under international law that may be attributed to a State, irrespectively of the nature of the entity or person to whom the obligation is owed.'[122]

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[119] ARIO Commentaries, General Commentary, at 67, para. 3. The distinction between primary and secondary law was introduced to the ILC by Special Rapporteur Robero Ago, who took over from F.V. Garcia Amador. See A. Vermeer-Künzli, *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument* (2007), at 44.

[120] ARIO Commentaries, General Commentary, at 68, para. 5. G. Gaja, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), at 5-6, para. 6 ('some draft articles are based on limited practice. This could hardly be attributed to the lack of efforts deployed by the Commission to acquire knowledge of the relevant practice and take it into account. Unfortunately, only a few instances of unpublished practice have been contributed by States and international organizations in order to facilitate the Commission's study.') Upon adoption of the ARIO on first reading by the ILC, the UN Secretariat commented as follows: 'Another aspect in which the law of responsibility of international organizations differs from that of States is in the extent of practice that is available from which the International Law Commission can discern the law. In this respect, we note that the Commission has acknowledged in the commentary on a number of draft articles that practice to support the proposed provision is limited or non-existent.' See UN Doc. A/CN.4/637/Add.1 (2011), General Comments, at 5, para. 3.

[121] ARIO Commentaries, General Commentary, at 68, para. 5. Cf. Pellet (2013), at 54; Wood (2013), at 63 ('The most important element for "weighing" any product of the Commission is its reception by States (and in the present case also by international organizations)'). On the authority of ILC studies in general, see D.D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', (2002) 96 *American Journal of International Law* 857. On the 'key role of the commentaries', see D. Bodansky and J.R. Crook, 'Introduction and Overview', (2002) 96 *American Journal of International Law* 773, at 789. See also Wood (2013), at 60 ('The general commentary should be seen as an integral part of the articles.').

[122] ARIO Commentaries, Art. 33, at 124, para. 1 (emphasis added). See also the commentary to Art. 10 (Existence of a breach of an international obligation): 'An international obligation may be owed by an international

This scope includes private parties, as confirmed by the following statement in the ARIO Commentaries:

> 'With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals'.[123]

Both areas concern obligations owed by international organisations to individuals. Of note, the UN Secretariat likewise seemed to be of the view that the UN may incur *international responsibility* towards private parties. This is clear from the comments which the Secretariat submitted to the ILC in connection with the issue of attribution (cf. Article 7 of the ARIO):

> 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.'[124]

In short, the breach of an obligation by an international organisation (insofar as attributable to it) towards a private party would amount to an internationally wrongful act, entailing its international responsibility towards that party. However, the legal consequences of such responsibility under international law remain unclear.

2.2.2.1.1 The limited scope of the ARIO

Like the ASR, the ARIO do not govern the content and implementation of responsibility owed to private parties. The scope of Parts Three ('Content of the international responsibility of an international organization')[125] and Four ('The implementation of the international responsibility of an international organization')[126] of the ARIO is limited.[127] As to the former, according to Article 33:

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organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.' ARIO Commentaries, Art. 10, at 97, para. 3 (emphasis added).

[123] ARIO Commentaries, Art. 33, at 125, para. 5 (emphasis provided). Fn. 242 regarding peacekeeping forces refers to UN Doc. A/RES/52/247 (1998). As discussed below, pursuant to that resolution the UNGA promulgated the UN Liability Rules concerning the UN's third-party liability in connection with UN operations.

[124] UN Doc. A/CN.4/545 (2004), at 17 (emphasis added).

[125] This part notably concerns the obligation to make full reparation for injury, involving restitution, compensation and satisfaction.

[126] This includes the entitlement to invoke responsibility, that is, the making of a claim for compliance with the obligations under Part Three.

[127] The ASR contain similar savings clauses. That is, Art. 33(2) of the ASR in Part Two sets forth a savings clause concerning the content of responsibility. The part concerning implementation does not as such have a savings clause, however, Art. 33(2) of the ASR was apparently intended to concern implementation as well. This results from the ASR Commentaries to Art. 33(2): 'Part Three is concerned with the invocation of responsibility by other States . . . The articles do not deal with the possibility of the invocation of responsibility by persons or entities

> '1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization'.

As seen, the ARIO Commentaries explain with respect to this provision:

> '(4) While the scope of Part Three is limited according to the definition in paragraph 1, this does not mean that obligations entailed by an internationally wrongful act do not arise towards persons or entities other than States and international organizations. Like article 33, paragraph 2, on State responsibility, paragraph 2 provides that Part Three is without prejudice to any right that arises out of international responsibility and may accrue directly to those persons and entities.
>
> (5) With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals. The consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles.'[128]

As to the scope of Part Four of the ARIO, Article 50 of the ARIO provides: 'This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.'

As the ARIO Commentaries explain with respect to this provision:

> 'Articles 43 to 49 above address the implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 33, which defines the scope of the international obligations set out in Part Three by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole.'[129]

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other than States, and paragraph 2 [of Art. 33] makes this clear.' ASR Commentaries, Art. 33, para. 4, at 95. Similarly, in the introduction to Part Three of the ASR (concerning the implementation of responsibility), the ASR Commentaries state: 'Part three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.' ASR Commentaries, Art. 33, at 116 (emphasis added).

[128] ARIO Commentaries, Art. 33, at 125, paras. 4-5 (fns. omitted, emphasis added). Of note, the commentary to the ARIO adopted by the ILC at first reading stated that 'while the consequences of . . . breaches with regard to individuals . . . are not covered by the draft, certain issues of international responsibility arising in these contexts are arguably similar to those that are examined in the draft'. The UN Secretariat recommended the deletion of that passage because 'it may create a misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations'. See G. Gaja, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), at 27, para. 79.

[129] ARIO Commentaries, Art. 50, at 147, para. 1 (emphasis provided).

The limited scope of the ARIO (like that of the ASR) has been criticised. Proulx referred to

> 'the inexistent role and place of individuals in the Commission's text as the potential beneficiary and/or victim of the actions and conduct of international organizations. After all, if one subscribes to the notion that international law seeks primarily to improve and enhance the lives of individuals, its core mission being not to shelter sovereign States but to protect the populations committed to their charge, several difficult questions must be posed. The usual concerns regarding *locus standi* and matters of procedural substance inevitably crop up: what recourse(s) do individuals affected by the (unlawful) acts of international organizations possess? What judicial or arbitral fora exist to vindicate claims that the true victims of unlawful behavior by an organization may legitimately have?'[130]

According to Shelton, the 'main problems for victims of human rights violations seeking accountability of IOs are not solved by the draft articles.'[131]

Why, then, this limited scope of the ARIO? In developing the ARIO, Gaja explained with reference to the ASR:

> 'There are good reasons for taking a similar option with regard to international organizations and thus limiting the scope of [this] Part . . . to obligations that a responsible organization has towards one or more other organizations, one or more States, or the international community. This would not only be a way of following the general pattern provided by the articles on State responsibility, it would also avoid the complications that would no doubt arise if one widened the scope of obligations here considered in order to include those existing towards subjects of international law other than States or international organizations.'[132]

As to the first of these reasons for the limited scope of the ARIO, the preference to follow the 'general pattern of the ASR', the question of why the ASR's scope is limited arises. Article 33 of the ASR, which is identical in material respects to Article 33 of the ARIO, provides:

> 'Article 33. Scope of international obligations set out in this Part
>
> 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.'

According to the ASR Commentaries in connection with that provision:

> '(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the

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[130] V-J. Proulx, 'An Uneasy Transition? Linkages between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 109 at 119 (fns. omitted).
[131] Shelton (2015), at 48. See likewise Ferstman (2017), at 91 ('an unfortunate omission of the ILC').
[132] G. Gaja, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583 (2007), at 12, para. 37 (emphasis added).

> holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights. The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand case*, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".
>
> (4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".'[133]

According to Weiss, the ASR were 'to some extent out-of-date at their inception'[134] and, at least for the 21st century, 'wanting'.[135] The ASR, according to Weiss, 'should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility.'[136] According to Weiss: 'Three areas illustrate the significant role of individuals and nonstate entities in invoking state responsibility before international disputes settlement bodies: human rights, environmental protection, and foreign investor protection.' [137] Specifically:

> 'An article could have confirmed that individuals and nonstate entities are entitled to invoke the responsibility of a state if the obligation breached is owed to them or an international agreement or other primary rule of international law so provides.'[138]

In response, Crawford, the ILC's Special Rapporteur on State Responsibility (1997-2001), stated that

> 'Article 33(1) could not stand on its own, because it would have implied that all secondary obligations were owed to states or collectives of states, and that nonstate entities could not be directly injured by breaches of international law. Avoiding this implication is the function of Article 33(2). In form a saving clause, it nonetheless clearly envisages that some "person or entity other than a State" may be directly entitled to claim reparation arising from an internationally wrongful act of a state . . . Taken

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[133] ASR Commentaries, Art. 33, at 95, para. 3-4 (fns. omitted, underlining added). Para. 3 in the original text, following the sentence 'Individual rights under international law may also arise outside the framework of human rights', contains a fn. referring to *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)*, Advisory Opinion of 3 March 1928, Rep. PCIJ Series B No. 15, at 17-21.
[134] E.B. Weiss, 'Invoking State Responsibility in the Twenty-first Century', (2002) 96 *American Journal of International Law* 798, at 816.
[135] Ibid.
[136] Ibid., at 809.
[137] Ibid.
[138] Ibid., at 816

> together, the two paragraphs of Article 33 emphasize the variety of situations that may be involved, and the subtlety of possible interactions between states as legislators and actors and nonstate entities as beneficiaries and claimants.'[139]

As explained by Crawford with reference to investment treaties, on the one hand, the ICJ in *LaGrand* held that an interstate treaty may create 'individual rights',[140] reaffirming the Permanent Court's opinion in *Jurisdiction of the Courts of Danzig*.[141] But, as Crawford continued:

> 'On the other hand, one might argue that investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the *Mavrommatis* formula, the rights concerned are those of the state, not the investor.'[142]

According to Crawford,

> 'what Article 33 clearly shows is that the secondary obligations arising from a breach may be owed directly to the beneficiary of the obligation, in this case the investor, who effectively opts in to the situation as a secondary right holder by commencing arbitral proceedings under the treaty.'[143]

That being so, the ASR do not address those secondary obligations. As explained by Crawford:

> 'The ILC had a compelling interest in completing the project on time, given that it had dragged on for so many years. In addition, the project certainly did not extend to the responsibility of entities other than states. This is a disparate topic: the ILC has just begun its study of the responsibility of international organizations, but that will leave various other issues untouched. The responsibility of nonstate entities for breaches of international law raises novel and difficult questions, and could have given rise to significant controversy. Diplomatic protection had already been carved off from the articles (likewise not having been treated on first reading). Conceptually, it seems that diplomatic protection should be regarded as a form of invocation of state responsibility; but it is at least a distinct form of invocation, which was being separately treated.
>
> Above all, there was a need not to raise so many new issues that the acceptability of the text as a whole might have been put in question.'[144]

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[139] Crawford (2002), at 887.
[140] Ibid., at 887, referring to *LaGrand Case (Germany v. United States of America)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466.
[141] J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 *American Journal of International Law* 874, at 887, referring to *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)*, Advisory Opinion of 3 March 1928, Rep. PCIJ Series B No. 15, at 17-19.
[142] Crawford (2002), at 887-888 (fn. omitted), referring to *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, Judgment of 30 August 1924, Rep. PCIJ Series A No. 2, at 12.
[143] Crawford (2002), at 888. Then again, according to Tomuschat, 'general international law has not yet evolved an undisputed right of financial compensation for victims of gross human rights violations'. Tomuschat (2014), at 401-402. See also M. Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal', (2006) 24 *Netherlands Quarterly of Human Rights* 641, at 655 ('State practice . . . does not support the proposition that there is an individual right under international customary law to claim a remedy for violations of human rights.'). See also section 2.4.2.2.
[144] Crawford (2002), at 888 (fns. omitted). Of note, as explained by Crawford, the first Special Rapporteur, F.V. Garcia Amador, 'focussed on the substantive rules of injury to aliens and their property. It is generally regarded now as a false start'. Crawford (1999), at 436.

The reason given by Crawford for limiting the scope of the ASR to the responsibility of states seems to resonate in the ARIO Commentaries, in referring to the ASR:

> 'This seems to be because of the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose breaches of international obligations are not covered in Part One.'[145]

In other words, the consequences of international responsibility towards private parties were not considered because the responsibility of such parties themselves was not addressed in the articles. Now, it may be that in assessing the responsibility of a state or international organisation towards a private party, the breaching by such a party of its own legal obligations is legally relevant. However, it is not readily apparent that this warrants the wholesale exclusion of the legal consequences of the international responsibility towards such parties.

As to Crawford's reference to diplomatic protection as a reason for limiting the scope of the ASR, one can speculate as to whether it corresponds to the second, unexplained, reason given by Special Rapporteur Gaja for the limited scope of Part Three of the ARIO, that is, 'the complications that would no doubt arise if one widened the scope of obligations'.[146] Shelton contended regarding the ARIO that 'the omission of individuals and groups is clearly intentional, especially in the light of Article 45 of the draft articles, which contains basic norms of diplomatic protection on nationality of claims and exhaustion of local remedies.'[147]

According to Article 45 of the ARIO, on the 'admissibility of claims', included in part Four of the ARIO (on the implementation of international responsibility):

> '1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.
>
> 2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.'

This provision deals with two aspects related to diplomatic protection: nationality of claims (paragraph 1) and exhaustion of local remedies (paragraph 2).[148]

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[145] ARIO Commentaries, Art. 33, at 124, para. 1.
[146] G. Gaja, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583 (2007), at 12, para. 37.
[147] Shelton (2015), at 48.
[148] Regarding the former, according to the ARIO Commentaries: 'Nationality of claims is a requirement applying to States exercising diplomatic protection . . . diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.' ARIO Commentaries, Art. 45, at 137-138, para. 2.

Shelton suggests that the 'intentional' omission of individuals and groups in the ARIO was because of the underlying perception that their rights would be vindicated through diplomatic protection. There is some support for that suggestion in that the ARIO Commentaries emphasise the relevance of diplomatic protection in practice. In this respect, according to the Commentaries, in connection with the obligation of compensation (Article 36 of the ARIO): 'The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo' in the 1960s ('ONUC settlements').[149] As the ARIO Commentaries explain:

> 'Compensation to nationals of Belgium, Switzerland, Greece, Luxembourg and Italy was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States in keeping with the United Nations declaration contained in these letters according to which the United Nations: "stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties". With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France, and also with the International Committee of the Red Cross'.[150]

For reasons discussed elsewhere in this study (paragraph 3.4.3.1.3), diplomatic protection in the case of ONUC was considered to be advantageous to the UN. However, the ONUC settlements are the *only* known example of diplomatic protection in the UN's practice regarding the settlement of third-party claims. To refer to the ONUC settlements as the 'most well-known instance of practice' does not reflect the reality that, as will be seen, third party claims are typically settled directly between the UN and private claimants, without the intervention of states.

Nonetheless, the fact is that diplomatic protection is retained in the ARIO, like in the ASR, and it raises complex questions concerning legal relationships.[151] Such complexities are illustrated by the case of *Manderlier* before the Belgian courts. Mr Manderlier, a Belgian national, claimed compensation from the UN for the loss of property in the Congo due to the actions of ONUC troops. The Belgian government espoused Manderlier's claim and it was part of the ONUC settlement. However, Manderlier was

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[149] ARIO Commentaries, Art. 36, at 126, para. 1. These settlements were reached after protracted negotiations and without recourse to third dispute settlement procedures. See UN Doc. A/CN.4/SER.A/1967/Add.1 (1967), at 219, para. 54.

[150] ARIO Commentaries, Art. 36, at 126-127, para. 1 (fn. omitted). The 1996 Report contains, in fn. 8, the following summary of the procedure for settling the Belgian claims. That procedure 'was described in the Secretary-General's letter of 6 August 1965 to the representative of the Union of Soviet Socialist Republics. Accordingly, the claims submitted were investigated by the competent services of ONUC and United Nations Headquarters. Claims for damage due to military operations or military necessity were excluded, as well as claims for damage caused by non-United Nations personnel. Of approximately 1,400 claims submitted by Belgian nationals, the United Nations accepted 581 as entitled to compensation. Following consultations with the Government of Belgium, a lump-sum payment in the amount of $1.5 million was agreed as a final settlement of the matter. At the same time, a number of financial questions that were outstanding between the United Nations and Belgium were settled. Payment was effected by offsetting the amount of $1.5 million against unpaid ONUC assessments amounting to approximately $3.2 million'.

[151] Cf. Vermeer (2007), at 54 ('The *Mavrommatis Palestine Concessions* case may be the most cited authority on diplomatic protection, but it presents us with a difficulty that is not easily overcome and that has been a source of confusion with respect to the question of whose rights are protected in the exercise of diplomatic protection'.)

dissatisfied with his share under the settlement and he initiated proceedings against both the UN and Belgium before the Belgian courts.[152] The courts declined to hear the case against the UN on account of its jurisdictional immunity.[153] But, if Manderlier had been able to invoke the responsibility of the UN and seek reparation from it, would his rights have been affected due to Belgium having espoused his claim and having entered into the lump-sum settlement with the UN?[154]

2.2.3 Interim conclusions

Domestic law governs the conferral of domestic legal personality on international organisations. But for its privileges and immunities, an international organisation with such personality would be subject fully to domestic law and the jurisdiction of the local courts.

Whether an international organisation has international legal personality depends on the will of the member states. Such personality is often conferred. As to the UN, as opined by the ICJ in *Reparation for Injuries*, it has been endowed with such personality. As a consequence of international legal personality, an international organisation incurs international responsibility for the wrongful act of breaching a primary obligation towards a private party. However, the ARIO clarify neither the content nor implementation of such responsibility. The rights of private parties to remedies against international organisations under international law require closer examination.

2.3 How Are International Organisations, and the UN in Particular, Bound by International Law?

In its 1980 Advisory Opinion concerning the *Interpretation of the WHO-Egypt Agreement*, the ICJ stated 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, under their constitutions or under international agreements to which they are parties'.[155]

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[152] According to the correspondence from the UNSG to the Belgian Minister for Foreign Affairs, the Belgian Government was responsible for distributing the settlement sum. UN Doc. A/CN.4/SER.A/1967/Add.1 (1967), at 219, para. 54.
[153] *Manderlier v. United Nations and Belgian State*, Brussels Court of First Instance, Judgment of 11 May 1966, United Nations Juridical Yearbook 1966, 283 at 283; *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236 at 237.
[154] That would likely have been the position of the UN. According to the 1996 Report, 'the lump-sum compensation . . . would be in full and final settlement of all claims (whether by the Government or its nationals)'. 1996 Report, para. 35 (emphasis added). This touches on some of the complexities concerning diplomatic protection.
[155] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 73, at 89-90.

This statement is often cited in support of the proposition that international organisations are subject to international law,[156] notably general international law.[157] However, as explained by Daugirdas, the ICJ did not substantiate its statement as regards general international law.[158] In any event, the Court's statement is ambiguous as it does not clarify what obligations are 'incumbent upon' international organisations.[159]

As stated by Daugirdas in the context of the accountability of international organisations:

> 'The sources of states' international law obligations are well known: they include treaties, customary international law, and general principles. But whether and when these sources bind IOs is mired in uncertainty. If we do not know what IOs' international obligations are, we do not know when IOs have violated them.'[160]

Upon an extensive enquiry, Daugirdas concluded:

> 'IOs are not categorically more or less bound by international law than states are. *Jus cogens* norms bind IOs. Customary international law and general principles do, too-but only as a default matter. Treaties do not bind IOs without their consent.'[161]

Against the backdrop of that conclusion, which will be explained further below, the present section enquires—to the extent necessary for purposes of this study—how international organisations, and the UN specifically, are bound by international law. The section first considers treaty law, followed by general international law and *jus cogens* (subsection 2.3.1).[162] It then considers the sources of international law that are specifically applicable to the UN (subsection 2.3.2).

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[156] See, e.g., Schermers and Blokker (2018), para. 1574; Sands, Klein and Bowett (2009), para. 14-034 ('As an international person an international organization is subject to the rules of international law, including in particular conventional and customary rules').

[157] Daugirdas (2016), at 332 ('A single sentence in the ICJ's 1980 WHO-Egypt advisory opinion supplies the foundation for many analyses of I0 obligations under general international law.'). See, e.g., the sources cited in Daugirdas (2016), fn. 34. See also Johansen (2020), at 51 ('It is clear that, as subjects of international law, IOs are bound by "any obligations incumbent upon them under general rules of international law.'). See also, without reference to ICJ case law: Hirsch (1995), at 31 ('International customary law is applicable *mutatis mutandis* to intergovernmental organizations.'); ibid. at 37 ('International organizations are bound to respect [general principles of law] and they may be held responsible for their violation').

[158] Daugirdas (2016), at 333 ('The ICJ's opinion offers nothing to bolster its statement that IOs, as subjects of international law, are bound by general rules of international law.').

[159] Ibid., adding 'WHO-Egypt thus fails to resolve which international law rules bind IOs, and the question remains unsettled'. Ibid., at 334. Cf. F. Naert, *International law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (2010), at 362, fn. 1611.

[160] Ibid., at 330 (fn. omitted).

[161] Ibid., at 380.

[162] Understood as comprising customary international law (that is, 'international custom, as evidence of a general practice accepted as law', under Art. 38(1)(b) of the ICJ Statute), and general principles of law (that is, 'general principles of law recognized by civilized nations' pursuant to Art. 38(1)(c) of the ICJ Statute). Cf. Daugirdas (2016), at 326 and 331.

2.3.1 Treaty law, general international law and *jus cogens*

2.3.1.1 Treaty law

In considering whether the UN possesses international personality,[163] the ICJ in its *Reparation for Injuries* advisory opinion considered, amongst others, that the UN Charter 'has defined the position of the Members in relation to the Organization . . . by providing for the conclusion of agreements between the Organization and its members.'[164] The Court also referred to '[p]ractice – in particular the conclusion of conventions to which the Organization is a party'.[165] Indeed, the UN regularly concludes treaties with states—for example, status of forces agreements or headquarters agreements—[166] as well as other international organizations.[167]

The Court specifically referred to the General Convention, stating that it 'creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35).'[168] As discussed in chapter 3 of this study, the UN's consent to be bound by the General Convention, in combination with the terms of the treaty, may be deemed to be enshrined in the UNGA approving the convention and proposing it for accession by UN member states. This notwithstanding, there remains discussion as to whether the UN may be deemed to have become a party to the General Convention.

As regards international organisations generally, in discussing the international obligations by which they are bound, Blokker explained:

> 'First, of course, there are treaties, such as the organization's own constitution and treaties to which it is a party, including its host state agreement. In addition, many international organizations have concluded more specific agreements within their fields of competence that may contain obligations for them.'[169]

As explained by Schermers and Blokker: 'There can be no doubt that international organizations generally have the capacity to enter into agreements.'[170] However, that capacity is not unlimited. According to the preamble to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ('1986 VCLT'),[171] 'international

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[163] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 178.
[164] Ibid., at 178-179.
[165] Ibid., at 179.
[166] See, e.g., the MINUSTAH SOFA and the IRMCT Headquarters Agreement, respectively.
[167] See, e.g., the 2001 Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons, UN Doc. A/55/988 (2001), Annex.
[168] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 179.
[169] N.M. Blokker, 'International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?', (2017) 14 *International Organizations Law Review* 1, at 11.
[170] Schermers and Blokker (2018), para. 1748. See also Naert (2010), at 383.
[171] Vienna, 21 March 1986 (not yet in force).

organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'.[172] According to Article 6 of the 1986 VCLT, 'the capacity of an international organization to conclude treaties is governed by the rules of that organization'. Thus, as explained by Schermers and Blokker: 'The treaty-making capacity of international organizations is not the same for each organization, but is related to their competences: an organization may only conclude agreements in those areas in which it is competent to act.'[173]

The issue, therefore, is not so much *whether* an international organization has the capacity to conclude treaties, but rather *what treaties* it can conclude. That is determined with reference to their functions and powers. In contradistinction from states, 'an organization may only conclude agreements in those areas in which it is competent to act'.[174]

Whether an international organization can become a party to a treaty moreover depends on whether the treaty so allows. Certain multilateral treaties are exclusively open to states. This is typically the case, for example, with human rights treaties, such as the ICCPR.[175] Fassbender explained the limited scope of such treaties on the basis that 'traditionally States (i.e. governmental, administrative, legislative and judicial organs) have been regarded as the main potential violators of human rights'.[176]

An unsettled issue is 'whether treaties can bind IOs without their consent'.[177] More specifically, the question is whether international organizations are bound by treaties to which their members are parties. Mégret and Hoffmann assert 'that the United Nations is bound "transitively" by international human rights standards as a result and to the extent that its members are bound.'[178] Insofar as this implies that an international organisation would be bound by the treaty obligations of its members, that is arguably incorrect.[179] International organisations enjoy international legal personality separate from their members.[180] And, under the *pacta tertiis* rule, to incur obligations or rights under a treaty requires

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[172] UN Doc. A/CONF.129/15 (1986), Preamble, para. 11.
[173] Schermers and Blokker (2018), para. 1748.
[174] Ibid.
[175] Under Art. 48 ICCPR. Of note, Art. 6(2) of the 2007 Lisbon Treaty envisages the accession of the EU to the ECHR. As explained by Blokker, 'international organizations are not parties to major law-making treaties such as human rights conventions and the Geneva Conventions. Moreover, the ongoing saga of the accession of the EU to the ECHR has demonstrated how complex this is.' Blokker (2017), at 11. On the ECHR and the European Communities, see generally R.A. Lawson, *Het EVRM en de Europese Gemeenschappen: Bouwstenen voor een Aansprakelijkheidsregime voor het Optreden van Internationale Organisaties* (1999).
[176] Fassbender (2006), para. 3.3.
[177] Daugirdas (2016), at 335.
[178] F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314, at 318.
[179] See generally Naert (2010), at 422 ff.
[180] Cf. Fassbender (2006), para. 3 ('the United Nations being an autonomous subject of international law').

consent.[181] Daugirdas concluded that 'the argument that states should not be able to evade their international obligations by joining with other states to establish an IO . . . fails to establish that member states' treaty obligations automatically bind IOs.'[182]

According to Daugirdas:

> 'Accepting the argument that the common treaty obligations of an IO's member states automatically bind the IO at the moment of its establishment would diminish the very wide discretion that states have under the VCLT to shape and revise their treaty obligations. When the same group of states first enters into a treaty and subsequently creates an IO that is unbound by the obligations in the earlier treaty, those states are not evading anything. They are modifying their obligations, in the same way that states might modify otherwise applicable customary international law by creating *lex specialis*. Because such modifications are wholly compatible with international law, there is nothing impermissible or even especially troubling about states choosing to establish an IO that is unbound by treaty obligations to which those same states previously agreed.'[183]

This notwithstanding, treaties may reflect general principles of law which, as will be seen next, arguably bind international organizations as such:[184]

> 'Whether a particular treaty contains such a general principle may be indicated by its mode of establishment. The number of states that participated in its drafting is important, and also whether the text has been unanimously – or almost unanimously – adopted. It will also be relevant to determine how long the treaty has been open to ratification and how many ratifications have been deposited. References in other treaties or public statements may also reinforce the view that a particular treaty contains general principles of law, binding not only on states but also on international organizations.'[185]

2.3.1.2 General international law

As explained by Blokker, it is

> 'increasingly accepted that international organizations are bound by obligations under customary international law. Such obligations concern, for example, international human rights law and international humanitarian law. The practical relevance of this is clear if we ask whether . . . UN . . . peacekeeping forces are fully bound by customary human rights and humanitarian law, knowing that it is unlikely that many international organizations will become parties to human rights and

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[181] Cf. Art. 34 of the VCLT ('A treaty does not create either obligations or rights for a third State without its consent.'). The same rule is laid down in the 1986 VCLT (not yet in force); however, that treaty has not entered into force and 'a number of scholars disagree with [it]'. Daugirdas (2016), at 335.
[182] Daugirdas (2016), at 357.
[183] Ibid., at 352. Otherwise put, 'there is no rule of treaty law that prohibits states from entering into treaties and becoming members of 1Os that work at cross-purposes. Except for treaties that violate *jus cogens*, the VCLT *never* prescribes invalidity of a treaty as the consequence of a treaty conflict. Under the VCLT, then, states are perfectly free to create IOs that do not share their member states' pre-existing treaty obligations-although states that do so could face responsibility for violating those obligations.' Ibid., at 354 (emphasis in original).
[184] Daugirdas formulates a further, though 'rare', exception to the conclusion that treaties do not bind international organisations without their consent, namely, 'when IOs succeed or displace states in the performance of governmental functions.' Ibid., at 372.
[185] Schermers and Blokker (2018), para. 1577.

> humanitarian law conventions in the near future. Therefore: customary international law is relevant for international organizations, at times even essential.'[186]

More specifically, according to Blokker,

> 'it is increasingly recognized that international organizations are bound by customary international law. Not just "in certain cases", but in general. Of course, many rules of customary international law simply do not apply to international organizations, as they normally have no territory, no territorial waters, no nationals, etc. But in the areas in which powers have been given to international organizations, it is increasingly recognized that these organizations are bound by the relevant rules of customary international law that are applicable in these areas.'[187]

According to Schermers and Blokker: 'In principle, international custom will apply as much to international organizations as it does to states. However, while this is generally recognized, much is also uncertain.'[188] That uncertainty is due to a variety of unsettled issues. These include the legal basis for applying customary law to international organisations, and the extent to which international organisations may contribute to developing customary international law further.[189]

Regarding the former—the legal basis for the application of customary international to international organisations—according to Daugirdas:[190]

> 'As members of the international community, then, when IOs emerge they are bound by *jus cogens* and by general international law as a default matter, just as new states are. The states establishing the

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[186] Blokker (2017), at 2, see extensive literature references in fn. 2 (omitted), following the first sentence in the quoted passage. See also A. Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', (2001) 95 *American Journal of International Law* 851, at 855 (referring to the 'apparently widespread acceptance of the proposition that international organizations are largely bound by general international law.') See also Naert (2010), at 449 (referring to the 'appearance of general agreement in doctrine and jurisprudence that international organizations are bound by (general) international law, at least in their external relations and inasmuch as the rules are relevant to their competences and are compatible with their proper nature'.)

[187] Blokker (2017), at 10. With reference to the examples of international human rights law and international humanitarian law in the first-quoted passage, Blokker explained: 'The examples given demonstrate that rights and duties derived from customary international law may be important for the successful performance of their functions.' Ibid., at 12. These examples, which were provided in the opening lines of the article, concern international human rights law and international humanitarian law. Ibid., at 2.

[188] Schermers and Blokker (2018), para. 1579. See also ibid., para. 1574 ('there seems to be general agreement on the basic assumption that international organizations "are bound by any obligations incumbent upon them under general rules of international law", this does not resolve numerous uncertainties emerging in the practice of individual organizations.'). Cf. Naert (2010), at 393 ('the basis for this apparently obvious binding nature is rarely mentioned or examined in detail and the scholars who have studied this matter more extensively come to different conclusions.'). Daugirdas (2016), at 331 ('Scholars have taken a range of positions about whether and how general international law binds IOs. Some hesitate to stake out a position at all, considering it a hard question. Others argue that only a subset of general international law binds 1Os. Still others suggest not only that the entire corpus of general international law binds 1Os, but also that these rules constitute mandatory rather than default rules for 1Os.')

[189] Schermers and Blokker (2018), para. 1579, referring also to the suitability of such rules for international organisations, given that these rules have developed on the basis of practice and *opinio juris* of states; and the reticence of international organizations to accept obligations under customary international law.

[190] Naert submitted that 'the better basis for holding that international organizations are bound by (relevant) customary international law (subject to any necessary modifications) is the argument that this simply derives from their international legal personality'. Naert (2010), at 394.

> IO might, by means of the IO's charter, alter the general international law rules that would otherwise apply between themselves and the IO. But the states establishing the IO cannot alter the general international law rules that govern their own and the IO's relationship to nonmember states. In other words, the states creating the IO cannot create a new "white spot" on the map when they establish an IO. Over time, IOs, like states, will be bound by new general international law rules as they coalesce, except to the extent that individual lOs have and exercise the authorities to contract around those default norms.'[191]

That is, with respect to general international law more broadly:

> 'When it comes to an IO's interactions with its member states, general international law binds the organization except to the extent that the member states have made clear their desire to diverge from it. This conclusion accords with the ordinary rule in treaty interpretation that treaties are presumed not to contract around general international law unless they do so expressly.'[192]

Thus, member states, *inter se*, may diverge from general international law where they make clear a 'desire' to this effect.

As a corollary of the application of general international law to international organisations 'as a default matter',[193] that application is not contingent on the consent of such organisations. Absent a clearly expressed desire to deviate from such rules, international organisations are bound by such rules insofar as relevant to their operations.[194] Put plainly, the default mechanism explained by Daugirdas is 'opt-out' (not 'opt-in').

In a similar vein, Schraga states in regard to the application of the ARIO to the UN, that

> 'the absence of an organization specific practice, as such, is not conclusive to the determination of the customary international law nature of the secondary norm or its applicability to the international organization. Where States' practice has already been crystallized into a customary secondary norm, it may be applicable to the Organization as a subject of international law, by analogy and *mutatis mutandis*, unless the political nature and organizational structure of the Organization are not conducive to the emergence of a similar practice, or to the applicability of the rule. The principle that international organizations are bound by the customary international law norm-creating process to which they did not contribute, and "irrespective of [their] will", was the legal basis for the applicability of international humanitarian law and human rights law to United Nations peacekeeping operations, and, long before they were articulated in international conventions and the Commission's

[191] Daugirdas (2016), at 367-368 (fns. omitted).
[192] Ibid., at 348 (emphasis added).
[193] Ibid., at 380.
[194] According to Daugirdas, the extent to which international organisations are bound by general international law is not limited to their functions: 'some rules of international law might seem completely irrelevant to some 1Os. Is there really reason to consider WIPO bound by, say, the law of the sea? I argue that there is, in part because there is always a possibility that 1Os will engage in ultra vires conduct . . . The principle of speciality does mean that particular IOs might be especially unlikely to contravene some general international law rules. But the principle of speciality does not render violations impossible. For that reason, it does not justify limiting 1Os' international obligations to match their limited authorities.' Ibid., at 367.

> articles, for the applicability *mutatis mutandis* of the laws of treaties, diplomatic protection and international responsibility.'[195]

The opt-out mechanism seems to contrast with the contention by Fassbender, in the context of targeted anti-terrorism sanctions, that

> 'due process rights may today be a part of customary international law, as far as States are the addressees of those obligations. But because of a lack of relevant practice and *opinio juris*, the same can presently not be said for international organizations in general, or the United Nations in particular.'[196]

To require practice and *opinio juris* on the part of international organisations would rather amount to an opt-in mechanism. States may be the addressees of the obligations referred to by Fassbender because they traditionally exercised the powers that require legal controls. Where states have been exercising such powers and the UN takes over, as it did in the case of targeted sanctions, practice and *opinio juris* on its part are necessarily lacking at that point in time.[197] Under the *opt-out* approach, the UN would be bound by due process rights unless its member states expressed a 'desire' otherwise.

Where there *is* practice and *opinio juris* on the part of an international organisation, this may be relevant when it comes to the other issue mentioned above: the extent to which international organisations may contribute to the further development of customary international law. In critically appraising the ILC's work on the topic 'Identification of customary international law', Blokker contended that

> 'if international organizations are not to carry out their increasing number of activities in limbo, in a vacuum, unbound by law, then customary law is an important source of law to fill this void. But if we agree these activities of international organizations should be governed by the rule of law, then we must also accept that they can contribute in a serious way to the development of customary international law. If they are not taken seriously in the identification of customary international law, why should they take customary international law seriously?'[198]

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[195] D. Shraga, 'ILC Articles on Responsibility of International Organizations: The Interplay between the Practice and the Rule (A View from the United Nations)', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 201 at 210 (fns. omitted). Shraga referred to, *inter alia*, Zwanenburg, who stated as to whether IHL is binding on international organizations: 'Strictly speaking, the theory under which the organization is bound by international humanitarian law as an international person acting in a particular field does not require the international organization in question to contribute to the rules of customary international law concerned. The organization is directly bound.' M. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (2004), at 170 (fn. omitted).

[196] Fassbender (2006), para. 5.3 (fn. omitted, emphasis provided).

[197] As explained by Fassbender, 'the founders of the United Nations did not expect the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected.' Fassbender (2006), para. 6.2.

[198] Blokker (2017), at 11.

2.3.1.3 Jus cogens[199]

As to the limited class of peremptory norms of general international law, or *jus cogens*, as explained by Crawford: 'Their key distinguishing feature is their relative indelibility.'[200] A frequent point of reference is Article 53 of the 1969 Vienna Convention on the Law of Treaties ('VCLT'),[201] which provides in relevant part:

> 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[202]

In 2015, the ILC included the topic '*Jus cogens*' in its programme of work and appointed Dire Tladi as Special Rapporteur for the topic.[203] In 2019, having received four reports from the Special Rapporteur,[204] the ILC adopted, on first reading, 'Draft conclusions on peremptory norms of general international law (*jus cogens*)*'*, together with commentaries.[205]

The ILC debates illustrate that the concept of *jus cogens* gives rise to complex questions.[206] This is further underscored by the title of a book edited by Tladi,[207] in which he commented with reference to said draft conclusions:

> 'While many of the provisions were not contested, several issues in the proposals attracted fierce debate and disagreement within the Commission (and also beyond the Commission). The so-called characteristics of peremptory norms – i.e. the notion that peremptory norms reflect and protect the fundamental values of the international community, are universally applicable and hierarchically superior – attracted particularly strong reactions from a few members of the Commission (but equally strong support from the vast majority of the member [*sic*] of the Commission). But there were other issues that caused disagreement: to refer or not to Security Council decisions as an example of obligations invalidated by *jus cogens*; to qualify or not the *erga omnes* consequences of *jus cogens* by the word serious; to provide or not an illustrative or non-exhaustive list of *jus cogens* norms; and

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[199] The inclusion of *jus cogens* under a separate heading here is not intended to reflect its classification in relation to other sources of international law. The matter is outside the scope of present study, as none of the rights central to it (notably, immunity from jurisdiction and the right of access to court) have attained the status of *jus cogens*.
[200] Crawford (2012), at 594.
[201] 1155 UNTS 331.
[202] At the time of writing, the topic 'Peremptory norms of general international law (*Jus cogens*)' was under consideration by the ILC. See <legal.un.org/ilc/guide/1_14.shtml> accessed 21 December 2021.
[203] UN Doc. A/70/10 (2015), para. 286. The topic was subsequently renamed 'Peremptory norms of general international law (*jus cogens*)'. UN Doc. A/72/10 (2017), para. 146.
[204] UN Doc. A/CN.4/693 (2016); UN Doc. A/CN.4/706 (2017); UN Doc. A/CN.4/714 (2018); and UN Doc. A/CN.4/727 (2019).
[205] UN Doc. A/74/10 (2019), para. 52 ff.
[206] See, e.g., UN Doc. A/CN.4/727 (2019), para. 5 ('During the seventieth session, the third report elicited an intense debate spanning seven days with a total of 27 members of the Commission taking the floor. Nearly all members expressed agreement with the Special Rapporteur that the subject of the third report was particularly complicated and sensitive.').
[207] D. Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations* (2021).

> the question of a decision-making procedure in the event of a dispute. These were some of the other issues on which agreement was not easy.'[208]

Important questions regarding *jus cogens* moreover arise with respect to international organisations. Article 53 of the VCLT—which according to the Special Rapporteur's first rapport 'provides a framework for the nature of *jus cogens* as presently understood'[209]—refers to a 'norm accepted and recognized by the international community of States as a whole' (emphasis added). Considering the reference to 'states' in that provision, can international organisations be deemed to be part of such international community for purposes of *jus cogens*? And, what role, if any, do international organisations play in the formation of *jus cogens*?

Such questions warrant an enquiry into the assertion by Daugirdas that international organisations are bound by *jus cogens* and that, contrary to general international law, member states may not 'opt out' of such norms.[210] Such an enquiry, however, would fall outside the scope of the present study.[211]

2.3.2 Sources of obligations specific to the UN

2.3.2.1 'Constitutional' obligations

The UN Charter contains several references to human rights. For example,[212] Article 1(3) of the UN Charter states as one of the purposes of the UN: 'To achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Under Article 55(3) of the UN Charter, the UN is charged to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

The UN Charter does not explicitly oblige the UN *itself* to respect human rights. As Fassbender explained in the context of targeted sanctions,

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[208] Ibid, at 1.
[209] UN Doc. A/CN.4/693 (2016), para. 28.
[210] Daugirdas (2016), at 380 ('Jus cogens norms bind IOs. Customary international law and general principles do, too-but only as a default matter.'). See also ibid., at 346 ('Jus cogens norms bind IOs because states cannot, by treaty, establish IOs that are authorized to violate jus cogens norms. . . . When it comes to customary international law and general principles, the analysis is more complicated. States are not categorically prohibited from entering into treaties that derogate from general international law. To the contrary, it is well established that states can enter into treaties to either elaborate or modify the general international law rules that would otherwise govern.').
[211] Of note, according to De Wet and Nollkaemper, 'it may be argued that at least in the context of criminal prosecution the core elements of a right to a fair hearing have . . . acquired *jus cogens* status.' E. de Wet and P.A. Nollkaemper, 'Review of Security Council Decisions by National Courts', (2002) 45 *German Yearbook of International Law* 166, at 183.
[212] See also the preamble and Arts. 13, 62, 68 and 76 of the UN Charter.

> 'the founders of the United Nations did not expect the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected. Accordingly they did not find it necessary to make human rights directly binding on the Organization.'[213]

This notwithstanding, there seems to be broad support in the literature that, in connection with the UN Charter, the UN is bound to observe human rights.[214]

There is a particular focus in the literature on the UNSC. This is understandable since, as explained by Higgins et al., the UNSC 'in particular has the potential to come into conflict with international law obligations, including human rights, in performing its role.'[215] In exploring whether the UNSC is bound by human rights in the context of economic sanctions,[216] Reinisch contended: 'Put into perspective, it appears plausible to regard the United Nations as having violated its duty to promote respect for and observance of human rights if it disregards these rights itself'.[217]

According to Fassbender,

> 'the principal source of human rights obligations of the United Nations is the UN Charter. All UN organs are bound to comply with the rules of the Charter as the constitution of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.'[218]

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[213] Fassbender (2006), para. 6.2. Likewise, Reinisch (2001, 'Developing Human Rights and Humanitarian Law Accountability'), at 857.

[214] See, e.g., Higgins et al. (2017), paras. 12.16-12.29; Reinisch (2001, 'Developing Human Rights and Humanitarian Law Accountability'), at 856; Naert (2010), at 390.

[215] Higgins et al. (2017), para. 12.17.

[216] According to De Wet and Nollkaemper, 'the Security Council is bound by fundamental human rights for two separate, albeit closely related, reasons. First, it concerns norms which constitute elements of the purposes of the United Nations. In addition, the United Nations has committed itself to these norms in a fashion that has created a legal expectation that it will honor them when authorizing (quasi-)judicial measures as a mechanism for restoring international peace and security. Any behavior to the contrary would violate the principle of good faith to which the organization is bound in terms of Article 2 para. 2 of the Charter.' De Wet and Nollkaemper (2002), at 175 (fns. omitted).

[217] Reinisch (2001, 'Developing Human Rights and Humanitarian Law Accountability'), at 857, drawing additional support from the ICJ's *Effect of Awards* advisory opinion, in which the Court affirmed the competence of the UN to establish an administrative tribunal for staff disputes. Suggesting that the UN had a duty to do so, the Court opined that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.' *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep. 47 (July 13) (*Effect of Awards*), at 57.

[218] Fassbender (2006), chapter c, summary of findings, para. 8. The final words in the quoted passage ('to the greatest possible extent') may be taken to qualify the UN's obligation to comply with human rights. This wording is repeated, for example, in para. 8.6 of Fassbender's study, fn. 78: 'For discussion, with special emphasis on the Security Council, see Reinisch [(2001, 'Developing Human Rights and Humanitarian Law Accountability')], at 853 et seq.' In that publication, Reinisch explored the legal constraints, if any, of the Security Council, particularly in imposing economic sanctions. Fassbender's study, for its part, concerned: 'The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter' (Fassbender (2006), sub-title). In that light, it may be that any

As a 'living instrument',[219] the UN Charter must be interpreted and applied in light of changing circumstances. In this respect, Fassbender described a

> 'dual process - the coming into existence of a firmly recognized body of human rights in international law, promoted by the United Nations, and the expansion of functions of the UN into new areas resulting in acts with a direct impact on the rights of individuals.'[220]

As a consequence of that 'dual process',

> 'the mentioned references of the UN Charter to human rights have developed into rules embodying direct human rights obligations of the organs of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent. The United Nations cannot attain its purpose of achieving "international co-operation … in promoting and encouraging respect for human rights and fundamental freedoms for all" (Article 1, paragraph 3 of the UN Charter) if it disregards these rights when exercising jurisdiction over individuals. In the absence of a specification of such rights and freedoms in the Charter itself, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights serve, first and foremost, as a relevant standard.'[221]

Building on the UN Charter, the UDHR was originally drawn up as a 'political instrument',[222] which was concretised, in a legally binding manner, in the 1966 covenants.[223] Jointly, the UDHR and the 1966 covenants form the 'International Bill of Human Rights'.[224]

Higgins *et al*. referred to the view that 'the UN . . . is bound by those rights that are proclaimed in instruments adopted within the organization',[225] which 'are to be regarded as an elaboration of the rights

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nuance in the UN's human rights obligations suggested by Fassbender in the quoted passage relates to the UNSC, rather than the UN as a whole. This would be supported by the following passage from the summary of findings: 'When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent.' Ibid., chapter c, summary of findings, para. 11.

[219] Ibid., para. 8.3.

[220] Ibid., para. 8.6.

[221] Ibid., para. 8.6 (fns. omitted). According to Fassbender, a further argument why the UN is required to respect human rights is based on the maxim *venire contra factum proprium*. That is: 'The United Nations would contradict itself if, on the one hand, it constantly admonished its Member States to respect human rights and, on the other hand, it refused to respect the same rights when relevant to its own action.' Ibid., para. 6.6, arguing that that maxim ('no one is allowed to act contrary to, or inconsistent with, one's own behaviour') is a general principle of law in the sense of Art. 38(1)(c) of the ICJ Statute. Furthermore, according to Fassbender, the UN's main human rights instruments 'have become part of the constitutional foundation of the international community.' Ibid., para. 8.4. That argument is to be distinguished from what Fassbender considers 'a development which in the future may also be of importance to other international organizations, including the United Nations – namely the development of a legal technique through which constitutional traditions and international obligations of member states are integrated into the legal order of the organization itself.' Ibid., para. 4.2.

[222] C. Tomuschat, *Human Rights: Between Idealism and Realism* (2014), at 35.

[223] Ibid., at 35.

[224] Ibid., at 36. The ICCPR and the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[225] Higgins et al. (2017), para. 12.19.

provided for in the UN Charter.'[226] It is in that sense that the UN's human rights obligations may be said to emanate from the UN Charter as its 'constitution'.

2.3.2.2 Kosovo under UNMIK administration

In addition to the foregoing legal bases for the UN's human rights obligations, there may be other such bases. A notable example concerns UNMIK in Kosovo.[227] In effectively acting *in lieu* of a state,[228] UNMIK was subject to international human rights obligations pursuant to a decision of the Special Representative of the Secretary-General ('SRSG'). According to Section 2 of UNMIK/REG/1999/1 of 25 July 1999:

> 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.'

This was further specified in UNMIK/REG/1999/24, 12 December 1999, Section 1.3 of which states:

> 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in: (a) The Universal Declaration on Human Rights of 10 December 1948; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; (c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; (d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; (e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; (f) The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979; (g) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and (h) The International Convention on the Rights of the Child of 20 December 1989.'

This corresponds to the subject matter jurisdiction of the Human Rights Advisory Panel ('HRAP'),[229] which was created by UNMIK/REG/2006/12 of 23 March 2006 to examine claims of human rights violations by UNMIK.[230]

2.3.3 Interim conclusions

There are good arguments that international organisations, including the UN, are bound by treaties to which they have consented. Furthermore, they arguably are bound by general international law, that is,

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[226] Ibid., para. 12.19, fn. 65.
[227] Another example concerns the UN Transitional Authority in East Timor (UNTAET). See UNTAET/REG/1999/1, 27 September 1999, Section 2 of which is largely identical to UNMIK/REG/1999/24, 12 December 1999, Section 1.3.
[228] See further paragraph 2.4.2.1.1.
[229] Art. 1.2 of UNMIK/REG/2006/12, 23 March 2006. Furthermore, UNMIK was the first UN operation to have submitted to human rights oversight by the Human Rights Committee. See Higgins et al. (2017), para. 12.29.
[230] Also, Section 1.4 of UNMIK/REG/1999/24 *inter alia* prohibits discrimination by anyone 'undertaking public duties or holding public office in Kosovo', whereas Section 1.5 of said regulation abolished capital punishment.

customary international law and general principles of law. However, the Member States, *inter se*, may 'opt out' of such obligations by clearly expressing a 'desire' to that effect. Further enquiry is required when it comes to *jus cogens* norms, including in relation to international organisations.

Regarding the UN specifically, in addition to human rights obligations under general international law, in terms of treaty law, as discussed in detail in chapter 3*,* it incurs obligations under the General Convention. The UN may moreover be considered bound to respect human rights under the UN Charter, as its constitution, which rights are specified in the International Bill of Rights. As to the UN operation in Kosovo, UNMIK, it is moreover bound by a wide range of international human rights obligations, as per its own decision.

2.4 International Human Rights Law

Having concluded how international organisations, and the UN in particular, are bound by international law, the present section enquires into concrete obligations arising under international human rights law. The section begins by considering the primary rules of international human rights law (subsection 2.4.1). The subsequent discussion of secondary rights concerns the purported 'right to a remedy (subsection 2.4.2), which has a procedural and a substantive component.

2.4.1 Primary rules

As explained by Tomuschat,

> 'it may be safely said that in the circumstances of today the individual human being takes centre stage within the international system, and that human rights, which define the core legal status of the individual human being, have at the same time advanced to the highest level of the rules and principles making up the international legal order.'[231]

By way of background, the international protection of human rights has largely developed in response to the atrocities during World War II.[232] As Tomuschat explained: 'Never again could it be credibly maintained that human beings were placed, by law, under the exclusive jurisdiction of their home state . . . The fate of the individual had definitively become a matter of international concern.'[233]

This was exemplified by the adoption of the Universal Declaration on Human Rights (UDHR) on 10 December 1948. As Tomuschat explained:

> 'For the first time in the history of mankind, a document had come into being which defined the rights of all human beings, independently of their race, colour, sex, language, or other condition. A new chapter of human history began on that day, notwithstanding the fact that the UDHR was not

[231] Tomuschat (2014), at 2.
[232] On the history of human rights, see generally Tomuschat (2014), at 12 ff.
[233] Ibid., at 27-28.

> binding—and still has not reached that status. It characterizes itself as a 'common standard of achievement' (Preamble, last paragraph).'[234]

The adoption of the Universal Declaration was followed by the adoption of, amongst others, the 1966 Covenants, which are legally binding on their states parties. Typically, as seen, (human rights) treaties are open to states only; international organisations cannot become parties.

Certain human rights norms arguably have become part of general international law.[235] That being so, the extent to which human rights obligations are part of *customary international law* is a 'hotly debated question'.[236] For such obligations to qualify as customary international law, they must meet the requirements regarding 'general practice accepted as law' under Article 38(1)(b) of the ICJ Statute. As the ICJ opined in the *North Sea Continental Shelf* cases,[237] and as reflected in its case law since:[238]

> 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough'.[239]

Customary international law is complex, not to say problematic.[240] In 2012, the ILC decided to include in its programme of work the topic 'Formalities and evidence of customary international law', subsequently re-named 'Identification of customary international law'.[241] The ILC's Special

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[234] Ibid., at 29.
[235] Regarding customary international law, see, e.g., the literature cited in O. De Schutter, 'Human Rights and the Rise of International Organisations: the Logic of Sliding Scales in the Law of International Responsibility', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51 at 68, fn. 48. See also Johansen (2020), at 47 and 53, submitting that a 'core' set of human rights has become part of general international law.
[236] Johansen (2020), at 51, adding 'scholarly positions vary, from enthusiastic inclusion of virtually all human rights, to more or less complete rejection of human rights as customary international law.'
[237] With respect to international customary law developing on the basis of a specific rule of treaty law, the Court stated: 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are particularly affected should have been both extensive and virtually uniform in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.' *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands)*, Merits, Judgment of 20 February 1969, [1969] ICJ Rep. 3, para. 74.
[238] See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99 (*Jurisdictional Immunities of the State*), para. 55.
[239] North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands*), Merits, Judgment of 20 February 1969, 1969 ICJ Rep. 3, para. 77.
[240] De Schutter referred to a 'general identity crises of custom as a source of international law'. De Schutter (2010), at 70. Charlesworth contended: 'Custom is an increasingly controversial source of law in the late twentieth century'. H. Charlesworth, 'Customary International Law and the Nicaragua Case', (1991) 11 *Australian Yearbook of International Law* 1, at 1 (fn. omitted).
[241] UN Doc. A/68/10 (2013), chapter VII, para. 65.

Rapporteur, Sir Michael Wood, recognised the complexities surrounding the topic,[242] as did other ILC members.[243] In 2018, the ILC adopted, on second reading, 'Draft conclusions on identification of customary international law, with commentaries'.[244] The 'basic approach' under the ILC draft conclusions, according to the commentaries, is that 'determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*).'[245]

According to the ILC's General Commentary:

> '(2) The present draft conclusions concern the methodology for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.
>
> (3) Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law.'[246]

In 2018, the UNGA, amongst others: 'Welcome[d] the conclusion of the work of the International Law Commission on identification of customary international law and its adoption of the draft conclusions and commentaries thereto'.[247]

The draft conclusions and commentaries do not specifically concern human rights law, though the latter do include references to human rights.[248] It has moreover been commented that

> 'the work of the ILC is meant to be a generally available legal kit for the ascertainment of customary rules by judges, practitioners and scholars. It seems no less appropriate in relation to a heavily value-loaded field of international law, such as human rights.'[249]

Whilst the identification of customary international law is complicated as it is, the requirement of 'state practice' raises particular difficulties with respect to human rights obligations.[250] According to one

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[242] Ibid., e.g., para. 68.
[243] Ibid., e.g., para. 75.
[244] UN Doc. A/73/10 (2018), para. 65.
[245] Ibid., at 124.
[246] Ibid., General Commentary, at 122, para. 2-3.
[247] UN Doc. A/RES/73/203 (2018), para. 1.
[248] Ibid., at 150, para. 4.
[249] L. Chiussi, 'Remarks on the ILC Work on the Identification of Customary Law and Human Rights: Curbing "Droit de L'hommisme"?', (2018) 27 *Italian Yearbook of International Law* 163, at 174 (emphasis added).
[250] Johansen (2020), at 51 ('Many of the rights that enthusiastic scholars see as having customary status are negative rights. Apart from the general difficulty in proving negative facts, it is also well known that states violate even the most basic among these rights, sometimes systematically.' Fn. omitted).

commentator,

> 'the extent to which human rights law forms part of customary international law must be said to be unclear as the law presently stands . . . it is difficult to argue that more than a limited set of human rights . . . can be regarded as part of customary international law.'[251]

The complexities arising under customary international law have led commentators to contend that human rights may rather be understood to form part of general principles of law.[252] In support of that proposition, De Schutter refers to, amongst others, ICJ opinions.[253] De Schutter argued that the UDHR has in its entirety become part of the general principles of international law.[254] Arguably, then, international organisations are bound by international human rights obligations insofar as such obligations reflect general principles of law.

Human rights norms may be part of *jus cogens*. An example is the prohibition to commit genocide. Care is required, however, to ascertain the precise obligations that arise. This is illustrated by *Mothers of Srebrenica*, concerning the UN's alleged responsibility in connection with the 1995 genocide. As explained by Ventura and Akande, with reference to the proceedings concerning the UN's immunity from jurisdiction before the Dutch courts and the ECtHR:

> 'In the underlying proceedings in the Dutch Courts, the complainants did not seek to hold the UN responsible for the *commission* of genocide, but rather for the failure, in the applicant's view, of the UN's duty to *prevent* genocide . . . The decisions of the Dutch courts and the ECtHR are unsatisfactory in one respect. They all ignore an important issue: the exact status of the obligation to *prevent* genocide in international law. These courts simply assumed that just as the obligation *not to commit genocide* is a rule of *jus cogens*, the obligation to prevent genocide is also a norm of *jus cogens* . . . However to suggest that a *jus cogens* norm is involved simply because the prohibition of genocide is a *jus cogens* norm is a big legal leap that simply cannot be assumed . . . To come to that conclusion, careful analysis was required as it is a proposition that is not at all clear from international law as it presently stands . . . Because the UN is not a party to the Genocide Convention (and indeed cannot be as it is only open to states as per Article XI), it therefore cannot be bound to the duty to prevent genocide as per Article I as treaty law. This simple fact raises another question: if the prevention of genocide is not a *jus cogens* norm, then is the UN actually obliged at all to prevent genocide, and if so, on what basis?'[255]

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[251] Ibid., at 53.
[252] De Schutter (2010), at 71-73. See also B. Simma and P. Alston, 'The Sources of Human Rights Law : Customs, Jus Cogens, and General Principles', (1988) 12 *Australian Yearbook of International Law* 82, at 102-108.
[253] For example, *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, and *United States Diplomatic and Consular Staff in Tehran*, Merits, Judgment of 24 May 1980, [1980] ICJ Rep. 3. While De Schutter accepted that the meaning of the term 'principles' in ICJ opinions is not always clear, he contended that it is 'at least arguable that these statements qualify human rights among the "general principles of law recognized by civilized nations" mentioned by Article 38(1)(c) of the Statute of the International Court of Justice'. On this source of law, see J. Crawford and I. Brownlie, *Brownlie's Principles of Public International Law* (2012), at 34 ff.
[254] De Schutter (2010), at 72-73. One recent commentator concludes that 'it seems that a substantial range of human rights obligations – including perhaps most of the rights recognized in the UDHR– have acquired the status of general principles of international law.' Johansen (2020), at 58.
[255] M. Ventura and D. Akande, 'Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention' (*EJIL: Talk!* 2013) <ejiltalk.org/ignoring-the-elephant-in-the-room-

In the case of the UN, its human rights obligations under general principles of law and *jus cogens* (subject to the aforementioned need for further enquiry) coincide with its obligations under the UN Charter (as its constitution), as specified in the ICCPR.[256]

In the case of UNMIK, as seen, Section 1.3 of UNMIK/REG/1999/24 of 12 December 1999, is a further source of human rights obligations for the UN.[257] The opinions of the HRAP illustrate how, in concrete cases, the UN's (in)actions can be scrutinised in light of those obligations. In the case arising out of the Kosovo lead poisoning, following procedural developments discussed elsewhere in this study (subsubsection 3.3.3.2), the HRAP issued its opinion on 26 February 2016. As summarized by HRAP, the complaint was as follows:

> '99. The complainants complain that UNMIK violated their human rights by placing them in IDP camps on land known to be highly contaminated, by not providing them with timely information about the health risks or the required medical treatment, as well as by failing to relocate them to a safer location. In particular, they allege that UNMIK violated its positive obligations to protect the right to life, as envisaged by Article 2 of the ECHR, their right to be free from inhuman and degrading treatment (Article 3 ECHR), their right to respect for private and family life (Article 8 ECHR), their right to a fair hearing (Article 6 § I ECHR) and to an effective remedy (Article 13 ECHR). They also claim that UNMIK's decision to place the RAE IDPs in the contaminated camps and its failure to move them to a safer environment constituted discrimination against the complainants as members of the RAE community in violation of Article 14, ECHR, taken in conjunction with the provisions mentioned above.
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> 100. The complainants further claim that the unhealthy and unhygienic conditions in the camps constituted a violation of their right to adequate housing, health and sanitation (Article 25 of the Universal Declaration of Human Rights (UDHR)), Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and that the rights of women and children under several provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) have also been violated.
>
> 101. Complainants N.M. (no. 1) and S.M. (no. 2), parents of D.M., complainant S.M. (no. 8), husband of R.M., and complainant I.I. (no. 20), wife of V.S., also complain, insofar as their complaints have been declared admissible, that no investigation was launched regarding the deaths in the camp of their family members, in violation of the procedural obligation under Article 2, ECHR.'[258]

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in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/> accessed 21 December 2021, italics in original, underlining added.

[256] The UN's human rights obligations under its Constitution may extend beyond those under general principles of law and *jus cogens*. For example, whilst it remains to be determined whether the obligation to prevent genocide is a *jus cogens* norm (see Ventura and Akande (2013)), the Genocide Convention arguably is binding on the UN under the UN Charter as its constitution. See Fassbender (2006), para. 8.4. The implication would be that the UN is bound by the obligation to prevent the commission of genocide pursuant to Art. I of said convention.

[257] Section 2 of UNTAET/REG/1999/1, 27 September 1999, in regard to the UN Transitional Authority in East Timor (UNTAET) is largely identical.

[258] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), paras. 99-101.

The HRAP concluded that there had been violations of various international instruments, including notably the ECHR, but also the ICCPR.[259] As to the right to life under Article 2 of the ECHR, for example, the HRAP recalled that

> 'the European Court has held that Article 2 not only imposes an obligation on authorities to refrain from taking life intentionally but also lays down a positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction.'[260]

Under ECtHR case law, according to the HRAP

> 'the positive obligation to take all appropriate steps to safeguard the right to life for the purposes of Article 2 entails a primary duty on authorities to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.'[261]

Applied to the facts, the HRAP concluded that 'UNMIK did not comply with its obligations under Article 2 of the ECHR as it did not take all measures that one could have reasonably expected from it to protect the life of the complainants.'[262]

In connection with these and other violations of human rights obligations, the HRAP recommended several remedies, including the payment of compensation for material and moral damages.[263] However, as discussed below, UNMIK's recommendations remain to be implemented. In fact, according to the HRAP's final report: 'By far, the biggest limitation of the entire HRAP experience was the fact that UNMIK did not follow any of the Panel's recommendations.'[264] That raises questions about HRAP's effectiveness as a procedural remedy in light of the purported 'right to a remedy'.

2.4.2 Secondary rules: the 'right to a remedy'

Petitioners in connection with the Haiti cholera epidemic case alleged extensive human rights violations by the UN through its operation in Haiti, MINUSTAH. That is:

> 'The UN and MINUSTAH acted in violation of petitioners' fundamental human rights. These rights include:
>
> a. The right to life, as articulated in Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 4(1) the American Convention on Human Rights ("ACHR"), Article 2(1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), and Article 3

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[259] Ibid., para. 349.
[260] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, decision of 5 June 2009, para. 194.
[261] Ibid., para. 195.
[262] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), para. 223.
[263] Ibid., para. 349.
[264] M. Nowicki, Ch. Chinkin and F. Tulkens, 'Final Report of the Human Rights Advisory Panel: Executive Summary', (2017) 28 *Criminal Law Forum* 77, para. 64. According to the HRAP, its 'main legacy lies in its contribution towards the progress of human rights jurisprudence'. Ibid., para. 22.

> of the Universal Declaration on Human Rights ("UDHR"). The right to life is non-derogable and must be protected in a time of public emergency, such as after the earthquake. Human Rights Committee, General Comment No. 6: The Right to Life, art. 1.
>
> b. The right to health, as articulated in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Article 25 of the UDHR, Article 24 of the Convention on the Rights of the Child ("CRC"), Article 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").
>
> c. The right to an adequate standard of living, as articulated in Article 11 of the ICESCR and Article 25 of the UDHR.
>
> d. The right to clean water and sanitation, recognized as a separate right by the General Assembly, U.N. Doc. A/RES/64/292, and UN Human Rights Council, U.N. Doc A/HRC/15/L.14, and derived from the right to an adequate standard of living. The right to clean water and sanitation are inextricably related to the right to the highest attainable standard of physical and mental health, as well as to the rights to life and human dignity.'[265]

The claimants contended that customary international law entitled them to a remedy.[266] They claimed that

> 'this right to a remedy must be substantiated through adjudication of their claims within a reasonable time by a body that is independent, impartial and competent to hear a human rights violation . . . The Petitioners therefore assert that the establishment of an independent commission is necessary to hear this claim in accordance with the victims' right to a remedy'.[267]

Furthermore, as contended by the claimants: 'The right of victims of human rights violations to adequate, effective and prompt reparation is an important corollary to the right to a judicial remedy'.[268]

The contention that the purported 'right to a remedy' has a procedural and substantive aspect corresponds to the explanation given by Shelton:

> 'The word 'remedies' contains two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant'[269]

Wellens contended that the right to a remedy is

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[265] Petition for relief to Chief, Claims Unit, MINUSTAH, 3 November 2011, para. 83.
[266] Ibid., para. 86.
[267] Ibid., para. 92.
[268] Ibid., para. 95, adding: 'Under international law, full and effective reparations for victims of grave human rights violations are expansive.' Ibid., para. 96.
[269] Shelton (2015), at 16. See likewise V. David, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court', (2014) 3 *British Journal of American Legal Studies* 259, at 261.

> 'a norm of customary international law, and therefore also directs international organisations in their dealings with . . . non-state entities . . . ; the right would include both the "procedural right of effective access" and "the substantive right to a remedy".'[270]

According to Shelton:

> 'The right of access to judicial remedies is widely guaranteed in international human rights treaties and can be considered as part of the corpus of the customary international law of human rights . . . The nature and scope of remedies is generally consistent throughout the world. The notion of remedial justice, of wiping out the consequences of the wrong, is a general principle of law on which there is broad consensus.'[271]

As to human rights treaties referred to, these are numerous. For example, Article 8 of the UDHR provides: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

Article 2(3) of the ICCPR provides (emphasis added):

> 'Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.'[272]

Those provisions are supplemented by provisions on remedies in other international instruments, including the 1965 Convention on the Elimination of Racial Discrimination,[273] and the 1984 Convention

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[270] Wellens (2002), at 17. Cf. International Law Association (2004), at 266 ('the right to a remedy is widely considered to be a general principle of law'). Cf. Schmitt (2017), at 119 ('there are in my view sufficient arguments to assert that the core requirements of the right of access to justice are progressively developing into customary international law applying to international organizations. Hence, I submit that international organizations are under an obligation to establish dispute settlement mechanisms meeting the core institutional requirements of independence and impartiality').

[271] Shelton (2015), at 432. See ibid., at 81 ('there are many common aspects to the approach to reparations of UN treaty bodies. All of the monitoring groups strongly affirm the right of access to justice. They also adhere to the view that substantive reparations are a right of victims, but that the kind and scope of the reparations will vary according to the nature of the violation and needs of the victims.')

[272] Contrary to Art. 8 of the Universal Declaration of Human Rights, UN Doc. A/RES/217(III)A (1948), the remedial rights under the ICCPR are linked to rights and freedoms under the convention. In addition, according to Art. 9(5) the ICCPR: 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' And, according to Art. 14(6) of the ICCPR: 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.' (emphasis added).

[273] 660 UNTS 195. See Art. 6: 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.' (emphasis added).

against Torture.[274] International political declarations, often called 'soft law', similarly refer to remedies.[275]

Regional human rights treaties also typically address remedies for human rights violations. For example, Article 13 of the ECHR ('Right to an effective remedy') provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'[276]

Similar provisions are included in the Charter on Fundamental Rights of the European Union,[277] the 1969 American Convention on Human Rights,[278] and the 1981 African (Banjul) Charter on Human and Peoples' Rights.[279]

The issue is whether these instruments, and related practice, support the contention by Wellens and Shelton that the right to a remedy, including both its procedural and substantive prongs, has become part of general international law. That contention is not generally accepted.[280] Johansen recently argued that

> 'neither the access nor outcome component of the right to remedy appears to have been elevated to the status of general international law. Outside of human rights courts and treaty bodies, little practice exists which could potentially shed light on how the right to remedy under general international law is to be understood. That being said, the right to remedy seems to have a significant common core

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[274] 1465 UNTS 85. See Art. 14: '1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.' (emphasis added).

[275] Thus, for example, according to the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993), para. 27: 'Every State should provide an effective framework of remedies to redress human rights grievances or violations.' (emphasis added). The 1999 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (1999), Art. 9, provides in relevant part: '1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights. 2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay'. (emphasis added).

[276] The provision is complemented by Art. 41 ('Just satisfaction'): 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

[277] [2012] OJ C326/391, Art. 47 ('Right to an effective remedy and to a fair trial').

[278] 1144 UNTS 123. See Art. 25 ('Right to Judicial Protection').

[279] 1520 UNTS 217. See Art. 7(1).

[280] According to Daugirdas and Schuricht: 'Numerous international human rights treaties expressly require States to afford effective remedies to victims of human rights violations. There is a plausible, albeit not uncontested, argument that over the past several decades this obligation has—in at least some contexts—ripened into a norm of customary international law.' Daugirdas and Schuricht (2021), at 63.

> across the different human rights systems. But this does not in itself provide sufficient support for the proposition that the access component of the right to remedy has attained the status of general international law.'[281]

Fassbender concluded upon a thorough enquiry, focussed on targeted UNSC sanctions:

> 'Generally recognized due process rights include . . . the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ Statute.'[282]

It appears that Fassbender's study concerned the procedural prong of the right to a remedy.[283] The term 'effective remedy' is used, amongst others, in Article 2(3) of the ICCPR, to which Fassbender attributed particular significance.[284] As discussed below, that provision seems to be limited to conferring procedural rights. Aside from arguably being reflected in general international law, the obligations under Article 2(3) of the ICCPR, and the ICCPR generally, bind the UN under its constitution.

The remainder of this section will enquire more closely into the procedural and substantive components of the right to a remedy, respectively, with particular reference to Article 2(3) of the ICCPR.

2.4.2.1 Procedural obligations

In interpreting Article 2(3) of the ICCPR, guidance is provided by the Human Rights Committee's General Comment no. 31, which states the following:

> 'The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.'[285]

As explained by Taylor:

> 'A preference for judicial remedies under Article 2(3)(a) is indicated by the obligation in Article 2(3)(b) "to develop the possibilities of judicial remedy', even though the same provision refers more

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[281] Johansen (2020), at 94 (emphasis added).
[282] Fassbender (2006), para. C.1, at 6.
[283] Fassbender's study was commissioned by the UN Office of Legal Affairs to consider the following question: 'Is the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process, or 'fair and clear procedures', are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?'. Fassbender (2006), at 3.
[284] Fassbender (2006), para. 1.11.
[285] UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004), para. 15 (emphasis added).

> broadly to 'competent judicial, administrative or legislative authorities". That description generally rules out decisions made solely by political and subordinate administrative organs, or those which are otherwise not independent and free of political constraint.'[286]

Similarly, according to David:

> 'The wording of article 2(3) of the ICCPR as well as the *travaux préparatoires* of this provision indicate that the institutions entrusted with the power to declare whether a violation has taken place and to offer redress may be of a judicial, administrative or political nature. These procedures involving 'competent authorities' have been understood broadly as encompassing different kinds of mechanisms, including administrative courts, inquiries by parliamentary commissions, inspectors and ombudsmen, informal preventive measures and judicial proceedings.
>
> The variety of possibilities for ensuring an adequate remedy is a consequence of the requirement of effectiveness. The appropriate form of procedural remedy may depend upon what will be 'effective' in the particular circumstances of the case. An effective remedy will be one which in practice brings the violation to an end and/or provides redress for a particular violation . . .
>
> Notwithstanding the above, judicial remedies are considered the ideal, as is evident from the explicit agreement between the States to "develop the possibilities of judicial remedy."'[287]

Therefore, under Article 2(3) of the ICCPR, the 'effectiveness' of a remedy is key. Under that provision, *judicial* remedies are aspired to, but they are not required.[288]

Article 13 of the ECHR, on which Article 2(3) of the ICCPR is based,[289] is similarly broad. It confers the right to an 'effective remedy before a national authority' (emphasis added). As explained in the ECtHR's Guide on Article 13: 'According to the travaux préparatoires in respect of the European Convention on Human Rights, the national authority before which a remedy will be effective may be a **judicial or nonjudicial body**.'[290]

Of relevance for purposes of the present study, according to the ECtHR's Guide on Article 13:

> 'Article 6 § 1 of the Convention is *lex specialis* in relation to Article 13. In many cases where the Court has found a violation of Article 6 § 1 it has not deemed it necessary to rule separately on an Article 13 complaint. Thus, where the Convention right asserted by the individual is a "civil right"

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[286] P.M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (2020), at 78-79 (fn. omitted, emphasis added).
[287] David (2014, 'The Expanding Right'), at 264 (fns. omitted, emphasis added). Cf. Daugirdas and Schuricht (2021), at 68 ('the procedural component of the remedy . . . depends on the circumstances of a given case.' fn. omitted).
[288] Cf. Fassbender: 'It is not universally accepted that there exists a right to a *judicial* remedy against any administrative act of a State organ or agency. In many states, all or certain "acts of state (or government)" (*actes de gouvernement*, *Regierungsakte*) and legislative acts (acts of Parliament) are exempt from judicial review.' Fassbender (2006), para. 1.10 (emphasis in original, fns. omitted).
[289] David (2014, 'The Expanding Right'), at 264.
[290] Council of Europe/European Court of Human Rights, 'Guide on Article 13 of the European Convention on Human Rights – Right to an Effective Remedy' (2021), para. 24 (all emphasis in original). According to the Watson report, that 'appears to grant more room for non-judicial remedies', that is, 'an ombudsman, administrative or other nonjudicial procedures may also qualify as long as they constitute *effective* remedies.' Watson report (2006), at 15 (emphasis in original).

> recognised under domestic law – such as a property right – the protection afforded by Article 6 § 1 will also be available . . . In such circumstances the safeguards of Article 6 § 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13'.[291]

That 'full panoply' under Article 6(1) of the ECHR, applies '[i]n the determination of his civil rights'. It notably involves: 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Article 6(1) of the ECHR corresponds to Article 14(1) of the ICCPR:

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'[292]

That is a higher standard than the one under Article 2(3) of the ICCPR, notwithstanding the aspiration expressed in the latter for a remedy that is judicial in nature. When it comes to the 'determination of . . . civil rights', under the UN Charter, as its constitution, the UN would be bound by the standard under Article 14(1) of the ICCPR, as *lex specialis* in relation to Article 2(3) of the ICCPR.[293]

Returning to the latter provision, as *lex generalis*, it results from the Human Rights Committee's General Comment no. 31 that the requirement of 'effectiveness' of a remedy encompasses independence and impartiality.[294] Furthermore, under ECtHR case law with respect to Article 13 of the ECHR, effectiveness depends, amongst others, on 'the powers' of the authority.[295] In particular, it seems relevant whether the authority has binding powers, that is, whether its decisions are to be complied with.

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[291] Council of Europe/European Court of Human Rights, 'Guide on Article 13 of the European Convention on Human Rights – Right to an Effective Remedy' (2021), para. 140 (underlining added).

[292] The question arises as to the status of those rights under general international law. In this respect, according to the Dutch Supreme Court in *Mothers of Srebrenica*, the Netherlands no longer contested that the right of access to court is part of customary international law. Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.1.

[293] See further the discussion in paragraph 3.4.3.1.2.

[294] See also Taylor (2020), at 78-79; Fassbender (2006), para. 12(d) (referring to an 'effective remedy against an individual measure before an impartial institution or body previously established'). See also, ibid., para. 12.11 ('For the criterion of impartiality of the reviewing body or mechanism, reference can be made to the "Basic Principles on the Independence of the Judiciary", adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985 and endorsed by UN General Assembly resolutions 40/32 and 40/146 of 29 November 1985 and 13 December 1985, respectively.') As to the criterion of 'effectiveness', Fassbender listed a number of factors, including: 'due process concerns (does each party have a fair opportunity to put forward its case and permit full consideration of disputed issues of fact and law so that credible and persuasive decisions result?) . . . quality of decision-making (does the decision of the reviewing body clearly indicate the reasoning on which any finding is based, and indicate the appropriate remedy?) . . . compliance with the decision . . . follow-up (does the reviewing body have effective procedures to monitor whether its decision has been carried out?).' Fassbender (2006), para. 12.10 (fns. omitted, emphasis added).

[295] *Klass and Others v. Germany*, Judgment of 6 September 1978, ECHR (Ser. A no. 28), para. 67. The effectiveness test may be met by the aggregate of available remedies. *Leander v. Sweden*, Judgment of 26 March 1987, ECHR (Ser. A no. 116), para. 84.

Independence and compliance are central with respect to the effectiveness of remedial measures developed in UN practice, namely targeted UNSC anti-terrorism sanctions, and UNMIK's territorial administration of Kosovo.

2.4.2.1.1 UN practice

UNSC anti-terrorism sanctions: The Ombudsperson

An informal working paper conveyed by the UNSG to the UNSC enumerated 'basic elements for fair and clear procedures' concerning the inclusion of individuals and entities on anti-terrorism sanction lists.[296] The paper stated that persons who are the subject of anti-terrorism measures have, amongst others, 'the right to review by an effective review mechanism (the effectiveness which [*sic*] depends on impartiality, degree of independence, and ability to provide effective remedy).'[297]

On 17 December 2009,[298] the UNSC established the Office of the Ombudsperson for Al-Qaida and ISIL Sanctions.[299] According to the information provided by the Office itself:

> 'The Office of the Ombudsperson was established by Security Council resolution 1904 (2009). Its mandate was extended by resolution 1989 (2011), resolution 2083 (2012), resolution 2161 (2014), resolution 2253 (2015) and resolution 2368 (2017). The current mandate expires on 17 December 2021.
>
> Individuals, groups, undertakings or entities seeking to be removed from the Security Council's ISIL (Da'esh) and Al-Qaida Sanctions List can submit their request for delisting to an independent and impartial Ombudsperson who has been appointed by the Secretary-General.
>
> The Ombudsperson's mandate is contained in Security Council resolution 2368 (2017). The Ombudsperson is mandated to gather information and to interact with the petitioner, relevant States and organizations with regard to the request. Within an established time frame, the Ombudsperson will then present a comprehensive report to the Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee. Based on an analysis of all available information and the Ombudsperson's observations, the report will set out for the Committee the principal arguments concerning the specific delisting request. The report will also contain a recommendation from the Ombudsperson to the Committee on the delisting request. The Committee may overturn the recommendation of the

[296] The informal working paper was based on the analysis in Fassbender (2006). See letter dated 15 June 2006 from the UNSG to the President of the UNSC, 'Targeted individual sanctions: fair and clear procedures for listing and delisting'. Cited in Watson report (2009), at 12.
[297] UN Doc. S/PV.5474 (2006). De Wet and Nollkaemper concluded 'that the freezing of assets of those appearing on the list of the Sanctions Committee in accordance with Resolution 1333, can trigger the rights protected by Article 14 ICCPR. As a result, the Security Council is obliged to provide or allow for an independent, impartial and even-handed review of the Sanctions Committee's decisions vis-a-vis the affected individuals.' De Wet and Nollkaemper (2002), at 181. This is based on a broad reading of the term 'suit at law' under Article 14(1) of the ICCPR. Ibid., at 177-178.
[298] UN Doc. S/RES/1904 (2009), para. 20ff.
[299] Prior to that, in UN Doc. S/RES/1730 (2006), the UNSC had established a 'focal point' to receive de-listing requests.

> Ombudsperson under certain circumstances (which has not happened to date). The decision of the Committee on the delisting request will be communicated to the Petitioner by the Ombudsperson.'[300]

In 2015, outgoing Ombudsperson Kimberly Prost expressed concerns over the institutional arrangements concerning the Office of the Ombudsperson, as these 'threaten the independence and sustainability of the mechanism.'[301] The same message is echoed in the Ombudsperson's twentieth report:

> 'Ultimately, the situation demonstrates what the Ombudsperson himself as well as both his predecessors have emphasized at length: that the way the Office is integrated into the Secretariat, the Ombudsperson's contractual arrangement and the resultant working conditions are not appropriate for the function of the Ombudsperson as an independent reviewer. The Ombudsperson invites the Council to address the inappropriate contractual arrangement and the lack of institutional independence afforded to the Office.'[302]

Another concern seems to be the lack of full-fledged remedial powers of the Ombudsperson. On 12 November 2015, a 'Group of Like-Minded States on targeted sanctions' submitted proposals to the UNSC concerning 'fair and clear procedures for a more effective UN sanctions system'.[303] They stated, amongst others:

> 'In Europe, both the European Court of Human Rights as well as the Court of Justice of the EU confirmed in judgments – regarding the Al-Qaida sanctions regime but also with regard to a country-related sanctions regime – that in the implementation of UN measures, actions of Member States remain subject to full judicial review as to their conformity with fundamental norms of due process. Those fundamental norms include, among others, respect for the right to be heard and other rights of the defense (right to have access to the file, subject to legitimate interests in maintaining confidentiality; right to ascertain the reasons of a decision) and the right to an effective remedy.'[304]

Concretely, amongst others, the proposal was to empower 'the Ombudsperson to decide, on the basis of her comprehensive report, whether to maintain a listing or to delist an individual or entity.' That is,

> 'the Ombudsperson should be given decision-making powers with regard to delisting requests through a new provision in the forthcoming update of Security Council resolution 2161 (2014). The comprehensive reports of the Ombudsperson should be accepted as final by the Committee, otherwise

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[300] <un.org/securitycouncil/ombudsperson> accessed 21 December 2021.
[301] Letter of outgoing ombudsperson to UNSG, 13 July 2015 <un.org/securitycouncil/ombudsperson> accessed 21 December 2021.
[302] UN Doc. S/2021/122 (2021), para. 45.
[303] Letter dated 12 November 2015 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/867 (2015).
[304] Ibid., at 5 (fn. omitted, emphasis added). Fn. 1 in the above-quoted passage (following 'country-related sanctions regime') reads as follows, in part: 'See European Court of Human Rights (Grand Chamber), *Nada v. Switzerland*, Application No. 10593/08, 12 September 2012; European Court of Human Rights (Chamber), *Al-Dulimi v. Switzerland*, Application No. 5809/08, 26 November 2013; Court of Justice of the European Union, *European Commission and UK v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013'.

> it would retain the possibility of acting as the judge in its own cause, which is not in conformity with the right to an effective remedy.'[305]

The Ombudsperson was not given such decision-making powers. This notwithstanding, according to the above-quoted information provided by the Ombudsperson, the Committee has not, to date, overturned the recommendations of the Ombudsperson. However, the potential for such overturning remains.

The January 2021 Report of the 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' to the Human Rights Committee raised concerns over the sanction regimes' fairness under international law:[306]

> 'Through multiple Security Council resolutions, a United Nations infrastructure has developed, namely, sanctions committees which administer the "blacklists" of individuals and entities listed. The absence of adequate and comprehensive legal oversight of sanctions regimes has been the subject of sustained concern for national courts, regional courts and human rights actors, including holders of this mandate. Responding in part to those concerns, the Security Council adopted resolution 1904 (2009) establishing the Office of the Ombudsperson to receive, consider and make recommendations on requests for names to be removed from the sanctions list. All holders of the office of the Ombudsperson have been recognized jurists of integrity, yet, despite their best efforts to work within the constraints of the procedures provided, disquiet remains about listing on rule of law grounds. Persons are targeted often on unclear or non-independent grounds. The basis of the information provided has been rightly critiqued by those who see it, specifically the Ombudsperson. The process is highly politicized, and the rights of the targeted individuals and their families play no meaningful role in the outcomes or deliberations concerning listing. Notwithstanding the fact that the Office of the Ombudsperson undertakes important and valuable work to delist, the process provides neither a fair process nor a fair remedy to those who are subject to it, as is required by international law.'[307]

The fundamental concerns raised by the Special Rapporteur regarding UNSC anti-terrorism sanctions seem to go beyond the issues of independence and mandatory powers of the Ombudsperson.

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[305] Ibid., at 6.

[306] The 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' stated in 2012 that 'the Ombudsperson's comprehensive reports should be accepted as final by the Committee and that the decision-making powers of the Committee and Council should be removed. To reflect this modification, the Special Rapporteur invites the Security Council to consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator.' UN Doc. A/67/396 (2012), para. 35. The Special rapporteur endorsed the statement by the UN High Commissioner for Human Rights to the UNSC in 2010 that the Council must explore 'every avenue of possibility' for establishing 'an independent quasi-judicial procedure for review of listing and delisting decisions'. UN Doc. A/HRC/16/50 (2010), paras. 27 and 44.

[307] UN Doc. A/HRC/46/36 (2021), para. 15 (fns. omitted, emphasis added). The reference to international law regards: 'Concerns include breach of article 10 of the Universal Declaration of Human Rights and articles 2 and 14 of the International Covenant on Civil and Political Rights and incompatibility with the Basic Principles on the Independence of the Judiciary'. Ibid., fn. 66.

UNMIK: The Human Rights Advisory Panel

UNSC resolution 1244 (1999) signalled the end of the NATO bombing campaign in Serbia and Kosovo.[308] In addition to authorizing member states and relevant international organizations to establish an international security presence (KFOR), the UNSC authorized the UNSG,

> 'with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'.[309]

Para. 11 of the resolution set out UNMIK's extensive responsibilities:

> '(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);(b) Performing basic civilian administrative functions where and as long as required; (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities; (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648); (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement; (g) Supporting the reconstruction of key infrastructure and other economic reconstruction; (h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo; (j) Protecting and promoting human rights; (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo'.

In sum, as the HRAP would explain:

> 'All legislative and executive authority, including control over the judiciary, was vested in the Special Representative of the Secretary-General (SRSG). Thus UNMIK, as a surrogate state, had essentially the same powers as a state.'[310]

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[308] The United Nations Mission in Kosovo (UNMIK) is an example of the UN assuming responsibility for the temporary administration of a territory. Contemporaneously, in UN Doc. S/RES/1272 (1999), the UNSC established the United Nations Transitional Authority in East Timor (UNTAET). Endowed with full executive and legislative powers, UNTAET operated like a government for about almost three years, during which authority was gradually transferred to the East Timorese institutions. The new state achieved independence on 20 May 2002 under the name 'Timor-Leste' and it joined the UN on 27 September 2002. For a discussion of UNTAET, see E. De Brabandere, 'Human Rights Accountability of International Administrations: Theory and Practice in East Timor', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 331. On international territorial administrations generally, see, e.g., C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (2008); R. Wilde, 'The United Nations as Government: The Tensions of an Ambivalent Role', (2003) 97 *American Society of International Law Proceedings* 212.

[309] UN Doc. S/RES/1244 (1999), para. 10.

[310] Nowicki, Chinkin and Tulkens (2017), para. 4.

UNMIK's vast powers were temporary in nature. As the HRAP would recall in *S.C. v. UNMIK*:

> 'UNMIK's responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law . . . Likewise, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo'.[311]

In exercising its broad executive powers, UNMIK, like states, was capable of violating human rights.[312] UNMIK enjoys immunity from the jurisdiction of the Kosovar courts.[313] On the back of an Ombudsperson Institution, established in 2000,[314] the Council of Europe's 'Venice Commission' recommended the establishment of an independent Advisory Panel regarding human rights complaints against UNMIK.[315]

The Special Representative of the UNSG established the Human Rights Advisory Panel (HRAP) in UNMIK/REG/2006/12 (HRAP Regulation). As the HRAP stated a decade later in its final report, its

> 'establishment constitutes an unprecedented development in the context of United Nations missions. In this respect, the Panel is a pioneer and unique mechanism concerning the imputability and the responsibility, with regard to human rights, for actions by international organisations.'[316]

The HRAP's members were appointed in January 2007 and the Panel started to function in November 2007.[317] Pursuant to Section 1.2 of the HRAP Regulation, the HRAP's jurisdiction covered 'complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights'.[318] As seen, under the same provision, the appliable law covered a broad range of international

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[311] *S.C. v. UNMIK*, Opinion of 6 December 2012, HRAP, Case No. 02/09, para. 113.
[312] As seen, Section 2 UNMIK/REG/1999/1 of 25 July 1999 provides: 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.' See generally R. Istrefi, 'Should the United Nations Create an Independent Human Rights Body in a Transitional Administration? The Case of the United Nations Interim Administration Mission in Kosovo (UNMIK)', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 355, chapter II ('UNMIK's mandate as a cause of human rights violations').
[313] UNMIK/REG/2000/47, 18 August 2000, Section 3.
[314] UNMIK Regulation No. 2000/38 'On the Establishment of the Ombudsperson Institution in Kosovo', 30 June 2000.
[315] European Commission for Democracy through Law (Venice Commission), 'Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms' (No. 280/2004, 11 October 2004), para. 159ff. See generally Istrefi (2010), proposing the establishment of a specialised human rights commission for Kosovo.
[316] Nowicki, Chinkin and Tulkens (2017), para. 1.
[317] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo' (No. 545/2009, 21 December 2010), para. 2.
[318] The ECtHR does not have jurisdiction over UNMIK. The case *N.M. v. UNMIK*, concerning the Kosovo lead poisoning came before the HRAP after the claimants had moved before the ECtHR and the Court had denied its own jurisdiction. See <errc.org/article/european-court-of-human-rights-has-no-jurisdiction-in-kosovo-lead-poisoning-case/2568> accessed 21 December 2021 ('On 20 February 2006, the European Roma Rights Centre

human rights instruments, including notably the International Bill of Rights and the ECHR. Pursuant to Section 2 of the HRAP Regulation, the HRAP had temporal and territorial jurisdiction over

> 'the whole territory of Kosovo and over complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights.'

Under Section 5 of Administrative Direction 2009/1, the cut-off date for the submission of claims to the HRAP was 31 March 2010.[319]

To return to the aforementioned case arising in connection with the Kosovo lead poisoning, as seen, the HRAP concluded in its 2016 opinion that UNMIK had violated several of its international human rights obligations. The HRAP recommended extensive remedies, including compensation. The website of the UN High Commissioner for Human Rights summarises the developments regarding the case since then:

> 'In April 2016, the Human Rights Advisory Panel (HRAP) of the United Nations Interim Administration Mission in Kosovo (UNMIK) released an opinion on the case. The opinion concluded that numerous articles of the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child were violated by UNMIK. Among the human rights identified by the Advisory Panel as being violated were the rights to life, freedom from inhuman and degrading treatment, health, respect for private and family life, an adequate standard of living, and suffered discrimination. Numerous violations of the UN Convention on the Rights of the Child were identified, including exploitation.
>
> The HRAP found that for many years, UNMIK failed to make sufficient efforts to relocate the displaced families despite awareness of serious risk to the internally displaced community's health and wellbeing from the toxic contamination present in the camps.
>
> HRAP recommended that UNMIK make a public apology to the victims and their families, as well as take appropriate steps towards payment of adequate individual compensation for both material and moral damage to 138 members of the Roma, Ashkali and Egyptian (RAE) communities who resided in the camps from 1999, among other recommendations.
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> The Trust Fund
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> In 2017, the Secretary General of the UN established a Trust Fund charged with implementing community-based assistance projects, primarily in North Mitrovica, South Mitrovica and Leposavić,

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filed an application with the European Court of Human Rights in Strasbourg on behalf of 184 Romani residents of camps for Internally Displaced Persons (IDPs) in northern Kosovo. On 21 February 2006, the Court faxed a letter to the ERRC declining to review the case stating that it did not have jurisdiction to do so. Specifically, the Court claimed it was not competent to review the case since the United Nations Mission in Kosovo (UNMIK) is not party to the Convention. Furthermore, in *Behrami and Saramati*, the ECHR held that 'the impugned acts and omission of KFOR and UNMIK cannot be attributed to the respondent States . . . As such, their actions were directly attributable to the UN'. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01) (*Behrami and Saramati*), para. 151. The Court declared the applications inadmissible for lack of jurisdiction *ratione personae*.

[319] According to HRAP: 'This provision must be read in the context of UNMIK's reconfiguration, due to the difficulties it is facing in exercising its mandate under Security Council Resolution 1244 (1999).' HRAP Annual report (2009) <media.unmikonline.org/hrap/Eng/Documents/annual_report2009.pdf> accessed 21 December 2021, para. 45.

> which would benefit the affected communities. Contributions to the Fund were to be made on voluntary basis and the Trust Fund is not intended to offer any individual compensation to the victims, contrary to HRAP recommendation.
>
> The Trust Fund has never been operational due to lack of resources. On 5 October 2018, in response to a letter addressed by the UN Special Rapporteur on Toxics, the Under-Secretary General for Peacekeeping Operations confirmed that despite targeted outreach and resource mobilization campaigns by a UN Task Force encouraging contributions to the Trust Fund, "no contribution has yet been received from the international community in response to these appeals." In response to a subsequent letter by the Rapporteur, no concrete details on plans to mobilize resources were provided.
>
> In November 2018, the European Parliament adopted a resolution calling on the UN "to swiftly deliver the necessary support to the victims." In January 2019, fifty five members of the European Parliament wrote to UN Secretary General Antonio Guterres urging him to "take long overdue steps to ensure that the victims of widespread lead poisoning at UN-run camps in Kosovo receive individual compensation, adequate health care and educational support.'[320]

At the time of writing, as far as known, the situation has not changed. This seems to be exemplary of the fate of HRAP's recommendations. According to the HRAP's final report of 2016:

> 'By far, the biggest limitation of the entire HRAP experience was the fact that UNMIK did not follow any of the Panel's recommendations. Despite the lengthy process of the Panel collecting information from the complainants and UNMIK, issuing admissibility decisions, opinions and recommendations, essentially nothing tangible came from this activity, as UNMIK failed to ever take any meaningful action in relation to the Panel's recommendations.'[321]

When it comes to the effectiveness of the HRAP as a procedural remedy, that assessment speaks for itself.[322]

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This brief description of two procedural remedies in the practice of the UN relate to very different situations. Each raises distinct human rights concerns. In the case of UNSC sanctions, 'negative' human rights obligations are at play, that is, obligations to refrain from interfering in the enjoyment of human rights. Conversely, the case of Kosovo concerns primarily UNMIK's compliance with 'positive' human rights obligations, that is, obligations to take action to ensure the enjoyment of human rights.

If there is a common theme amongst the foregoing remedies in UN practice, it is that they seem to be in a state of development. Regarding targeted UNSC anti-terrorism sanctions, this is illustrated by the proposals made by like-minded states, critical reports by the Ombudsperson and by the Special Rapporteur on the 'promotion and protection of human rights and fundamental freedoms while

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320 <ohchr.org/EN/Issues/Environment/SRToxicsandhumanrights/Pages/LeadContaminationKosovo.aspx> accessed 21 December 2021 (fns. and hyperlinks omitted).
321 Nowicki, Chinkin and Tulkens (2017), para. 64 (emphasis added).
322 However, when it comes to the non-implementation of HRAP's recommendations to pay compensation, HRAP's effectiveness cannot be assessed in isolation from the underdeveloped state of the law on substantive remedies, as discussed below.

countering terrorism'. As regards the UN's territorial administration of Kosovo, the same is suggested by the HRAP's final report and, with respect to the Kosovo lead poisoning case, the developments as summarised by the UN High Commissioner for Human Rights.

The understanding that the Ombudsperson and the HRAP reflect a developing practice is underscored by Daugirdas and Schuricht:

> 'This practice by international organizations could contribute to the development of customary international law rules regarding effective remedies that apply to states and international organisations alike—but it may also, or alternatively, contribute to the development of rules that apply only to international organizations, or only to subsets of them. There is room for the emergence of such particularized rules with respect to international organizations' obligations to provide effective remedies.'[323]

2.4.2.2 Substantive obligations

As seen, in the case concerning the Kosovo lead poisoning, the HRAP found extensive violations of the ECHR as well as other international human rights instruments. The HRAP recommended, amongst others, that 'UNMIK . . . takes appropriate steps towards payment of adequate compensation'.[324] Apart from stipulating that the compensation was for both material and moral damages,[325] the HRAP did not elaborate on its recommendation.

As the HRAP drew heavily on ECtHR case law, its recommendation on compensation may have been inspired by Article 41 of the ECHR ('Just satisfaction'). That provision reads as follows:

> 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

As explained by Tomuschat regarding the ECtHR's power under that provision:

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[323] Daugirdas and Schuricht (2021), at 71.
[324] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), para. 349.
[325] Ibid. As to UNMIK's specific refusal to pay compensation for moral damages, UNMIK reportedly invoked the following argument: 'Current UN General Assembly resolutions do not allow the Organization or its Missions to pay compensation other than for material damage or physical harm. UNMIK therefore is not in a position to pay any compensation for human rights violations that may have occurred. UNMIK will, however, continue to address the issue with the United Nations Headquarters in New York with the aim of drawing the attention of the General Assembly to this problem, also taking into account of the human rights standards that prevail in the context in which UNMIK is operating.' See SRSG's (undated) comments on HRAP opinion in case no. 08/07. The reference to 'UN General Assembly resolutions' is not specified. However, the reference may be to UN Doc. A/RES/52/247 (1998), which excludes the payment of moral damages. However, that resolution implements Section 29 of the General Convention, regarding the settlement of disputes of a private law character. Such disputes are excluded from the jurisdiction of the HRAP (see para. 9(b)). Conversely, UN Doc. A/RES/52/247 (1998) has no bearing on cases that do not qualify for dispute settlement under Section 29 of the General Convention and are adjudicated before the HRAP, like the case concerning the Kosovo lead poisoning.

> 'This is a discretionary power . . . Examination of the case law of the Court shows many inconsistencies . . . More recently. . . the ECtHR has begun awarding financial damages on a more regular basis, even in cases where proceedings were unduly delayed by national courts, although maintaining that "the awarding of sums of money is not one of the Court's main duties but is incidental to its task of ensuring observance by States of their obligations" . . . the states parties . . . gave their implicit approval to the restrictions inherent in Article 41. We have to note, therefore, that the system which in the field of human rights can boast of being ahead of all other regional and universal systems does not acknowledge a right to financial compensation in all instances of violations of human rights, irrespective of the gravity of the relevant breach. Therefore, it would be erroneous to contend that any breach of the ECHR entails a right of financial reparation for the victim; in any event, such a right to financial compensation depends on a corresponding determination by the ECtHR.'[326]

As to 'general treaties for the protection of human rights treaties', according to Tomuschat, they 'are in the main extremely discrete regarding the 'secondary' rights which should accrue to victims of breaches of the rights they set forth'[327] As seen, two specific provisions of the ICCPR explicitly concern substantive remedial rights: Articles 9(5) and 14(6) of the ICCPR accord a right to compensation in the specific contexts of unlawful arrest ('enforceable right to compensation') and wrongful conviction ('compensated according to law'), respectively. Otherwise, according to Tomuschat, a former member of the Human Rights Committee,

> 'there is no general provision governing the issue of reparation. According to Article 2(3), everyone whose rights under the CCPR have been violated shall have an 'effective remedy'. Seen in context, this provision addresses remedies as a procedural means to obtain redress, but does not say anything about the substance of redress owed to the victim of a violation. This construction of Article 2(3) is confirmed by the other linguistic versions of the text. In French, the word '*recours*' is employed, and the Spanish text uses the word '*recurso*'. Both terms designate procedural devices but do not connote substantive remedial rights to which an aggrieved individual may be entitled.
>
> Notwithstanding this lack of clear indications as to the way in which human rights violations should be made good, the HRCee has had no doubt as to the obligation of a wrongdoing state to provide relief. Generally, it observes that compensation should be paid to the victim in case physical harm has been sustained by it . . .
>
> With regard to procedural irregularities, in particular, the HRCee may confine itself to finding that an appropriate remedy should be afforded to the victim. Likewise, the HRCee may refrain from recommending compensation when religious or political rights have been breached and where, primarily, symbolic rehabilitation is required. Generally, not much attention is devoted to the issue of compensation, no specification regarding the amounts considered appropriate as moral reparation is set out. It has become almost a routine proviso in the operative part of final views that compensation

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[326] Tomuschat (2014), at 405-405 (emphasis added). With reference to both the ECHR and the Inter-American Court of Human Rights, Tomuschat stated 'as explicitly laid down in the clauses governing the power of the two international tribunals to grant reparation, it is left entirely to their discretion to award financial compensation or to refer the winning party to the moral value of a judgment that finds a violation to have been perpetrated. Given this strong discretionary element, it is hard to speak of a true right to financial compensation of aggrieved individuals, a right which arises directly under the relevant treaty law. It is true, though, that the two regional courts have come a long way from their first steps to where they stand now. In their current practice, financial compensation appears to be almost the rule, whereas denial of such compensation constitutes rather an exception.' Tomuschat (2014), at 408-409 (emphasis added).

[327] Ibid., at 403.

> should be paid— with the unavoidable consequence that states parties do not pay much heed to such unspecific demands.'[328]

As to general international law, according to Tomuschat,

> 'it is clear that international law has not yet evolved to a point where it could be said that, just as with states under the regime of state responsibility, individuals enjoy a full (secondary) right to reparation, including financial compensation, where their (primary) rights have been infringed . . . no such right exists under the most highly elaborated treaties for the protection of human rights at the universal level as well as at the regional level. While the CCPR, with the exception of two provisions which refer to national law, remains silent with regard to reparation, confining itself to the ominous reference to an 'effective remedy' in Article 2(3), the two comprehensive human rights treaties at regional level, the ECHR and the ACHR, leave the granting of financial compensation to the discretion of the competent courts. If no unequivocal individual entitlement exists under these treaties, no such entitlement can exist under general international law. Customary law does not go further in scope than the most advanced treaties on that same subject matter.[329]

Lastly, the question arises as to the international law status of the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', adopted by the UNGA in A/RES/60/147 (2006). The HRAP referred to this resolution, for example, in *S.C. v. UNMIK*, a case concerning enforced disappearances and arbitrary killings:

> 'The Panel . . . considers it appropriate that UNMIK: . . . In line with . . . A/Res/60/147, 21 March 2006 . . . takes appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and non-governmental organisations, for the realisation of a full and comprehensive reparation programme, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-

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[328] Ibid., at 403-404 (fns. omitted, underlining added), referring to the 'flawed literal construction of Article 2(3) CCPR'. Ibid., at 404. Cf. likewise Taylor (2020), at 82 ('The Committee does not have power to order reparation. It instead draws to the attention of States their binding obligation to provide victims with an effective remedy, with an indication of which ones it considers appropriate.'). Cf. David (2014, 'The expanding Right'), at 280-282 ('the ICCPR, unlike the ACHR and the ECHR, does not contain a provision concerning reparation for violations of the rights set forth in that covenant. There is no equivalent to article 63 of the ACHR or article 41 of the ECHR in the JCCPR or its First Optional Protocol . . . despite the silence of the ICCPR and its OP, the HRC has interpreted article 2(3), the right to an effective remedy, as the normative source for requesting States parties to repair the violations established in its views on individual communications. The HRC adopted this position very early in its practice, although it was not self-evident that the HRC's mandate could go beyond finding violations and extend to recommending reparations. However, the position taken by the HRC on this issue must be viewed in light of the type of violations that it examined during its first period of activity, that is, gross human rights violation committed in the context of dictatorships . . . The remedial practice of the HRC has been consolidated and is formally accepted by the majority of States parties. However, there are still some important challenges to be addressed by the HRC. Firstly, the HRC's practice on reparations has not been entirely coherent and systematic. Moreover, the ambiguity in the formulation of reparations and the underdevelopment of guarantees of non-repetition are problematic aspects that need to be rectified. Lastly, the HRC's development as described above has not been accompanied by the adoption of an adequate system to monitor the implementation of its requests for reparations.' [fns. omitted]).

[329] Tomuschat (2014), at 415-416 (emphasis added). See also Daugirdas and Schuricht (2021), at 69 ('Because the requirements of an effective remedy vary by context, and because States have significant discretion in shaping such remedies, it is difficult to discern consistent patterns in the type, amount, or frequency of reparations awarded.').

> repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict'.[330]

The unanimous adoption by the UNGA of said 'Basic Principles and Guidelines', also referred to as the 'Van Boven/Bassiouni Principles', was the culmination of a lengthy process that goes back as far as 1989. At that time, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted professor Theo van Boven, as Special Rapporteur, with the task of conducting a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms with a view to exploring the possibility of developing relevant basic principles and guidelines.[331] Van Boven produced a set of draft principles in 1997,[332] which the Sub-Commission transmitted to the Commission on Human Rights. The commission appointed professor Cherif Bassiouni as an expert to revise the draft principles. In 2000, Bassiouni produced a report including a set of draft principles.[333] Upon a broad consultative process, this eventually led to the adoption of the aforementioned UNGA resolution, on 16 December 2005.[334]

In terms of substance, Principle 18 of the Van Boven/Bassiouni Principles provides:

> 'In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation . . . which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.'

The wording of this provision neither imposes an obligation ('should') nor specifies the applicable law on point ('In accordance with domestic law and international law').[335] Indeed, according to Tomuschat, 'the document has in its central passages no more than a hortatory function'.[336] The stipulation, in Principle 18, that reparation includes 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition',[337] reflects secondary rules in the context of state responsibility, and the

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[330] *S.C. v. UNMIK*, Opinion of 6 December 2012, HRAP, Case No. 02/09, at 19.
[331] Resolution 1989/13 of 31 August 1989 (referenced in Sub-Commission on Human Rights resolution 1993/29, 25 August 1993).
[332] UN Doc. E/CN.4/Sub.2/1997/104 (1997).
[333] UN Doc. E/CN.4/2000/62 (2000).
[334] For the background of the process and assessment of the Van Boven/Bassiouni Principles, see Zwanenburg (2006); Shelton (2015), at 73-76.
[335] Zwanenburg (2006), at 652-653, discussing the use of the verbs 'shall' and 'should' in the Van Boven/Bassiouni Principles.
[336] Tomuschat (2014), at 416.
[337] Principle 20 stipulates as regards compensation that it 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services'.

responsibility of international organizations. Indeed, as explained by Van Boven: 'From the outset the Principles and Guidelines were based on the law of State Responsibility as elaborated over the years by the International Law Commission' in the ASR.[338] However, as seen in paragraph 2.2.2.1.1 of this study, the ASR, like the ARIO, do not concern the content of international legal personality in the relations of states and international organizations, respectively, with private parties. This may reflect a lack of relevant state and international organization practice.[339]

In any event, the scope of the Van Boven/Bassiouni Principles is limited to particularly serious violations, namely, 'gross violations of international human rights law and serious violations of international humanitarian law'.[340] As to violations that do not meet that gravity threshold, Van Boven contended that 'it is generally acknowledged that in principle all violations of human rights and international humanitarian law entail legal consequences'.[341] Nonetheless, Principle 26 of the Van Boven/Bassiouni Principles merely contains a savings clause (emphasis added): 'It is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law.'

Thus, in the case of violations that are not 'gross' or 'serious', respectively, the Van Boven/Bassiouni Principles at most deem it conceivable that a right to a substantive remedy exists. That does not go much further than the savings clause in Article 33(2) of the ARIO.[342] According to Shelton, as seen, the 'main problems for victims of human rights violations seeking accountability of IOs are not solved by the draft articles.'[343] Whilst Ferstman argued that '[i]nternational organizations are obligated to afford injured

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[338] T. van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2010) <un.org/law/avl> accessed 21 December 2021, at 1-2.
[339] Zwanenburg (2006), at 655 ('State practice . . . does not support the proposition that there is an individual right under international customary law to claim a remedy for violations of human rights'); Tomuschat (2014), at 401-402 ('general international law has not yet evolved an undisputed right of financial compensation for victims of gross human rights violations'). Tomuschat is critical of the Van Boven/Bassiouni Principles' analogy with the rules of state responsibility. Tomuschat (2014), at 416. See also Johansen (2020), at 97 ('it seems necessary to conclude that the *lex lata* is at best unclear. General international law, as it now stands, does not seem to provide for a right to an effective remedy in cases where IOs have caused human rights violations. Such a right may be in the process of crystallizing but further developments are needed for the right to fully emerge.' [fn. omitted]).
[340] There is debate as to the meaning of 'gross'. Zwanenburg (2006), at 649-650. As explained by Van Boven: 'The authors had in mind the violations constituting international crimes under the Rome Statute of the International Criminal Court'. Van Boven (2010), at 2. As to the HRAP referring to the Van Boven/Bassiouni Principles in its opinion in *S.C. v. UNMIK*, that case concerned enforced disappearances and arbitrary killings.
[341] Van Boven (2010), at 3.
[342] Concerning Part 3 of the ARIO ('Content of the international responsibility of an international organisation'), that provision states: 'This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.' See paragraph 2.2.2.1.1 of this study.
[343] Shelton (2015), at 48. See also Ferstman (2017), at 91 ('an unfortunate omission of the ILC').

individuals with full reparation which corresponds to the harm suffered,'[344] this may not in fact correspond to the current state of the law.[345]

2.4.3 Interim conclusions

International organisations may be said to owe human rights obligations to private parties under general international law, more specifically, general principles of law. This arguably includes the obligation to provide an effective remedy, which is procedural in nature. That obligation arises under Article 2(3) of the ICCPR, which, as part of the International Bill of Rights, is moreover binding on the UN pursuant to the UN Charter, as its constitution.

The right to an effective remedy entails the review of impugned measures by an authority, which may take various forms and need not be judicial. Whilst the precise contents of the right to a procedural remedy remain unsettled, what matters under Article 2(3) of the ICCPR is that the remedy is 'effective'. Various factors are relevant in determining this, including whether the authority in point is independent and whether its findings are complied with. When it comes to the UN, the Ombudsperson for Al-Qaida and ISIL Sanctions, and the HRAP above all illustrate the developing state of the law in this respect.

Article 14(1) of the ICCPR is *lex specialis* in relation to Article 2(3) of the ICCPR. As will be submitted in chapter 3 of this study, the former informs the interpretation of Section 29 of the General Convention. This means that the settlement of disputes of a 'private law character' involves 'a fair and public hearing by a competent, independent and impartial tribunal established by law'. Where disputes lack a 'private law character', a procedural remedy in accordance with Article 2(3) of the ICCPR, the *lex generalis*, would nonetheless be due. This applies, for example, to the disputes arising out of the Haiti cholera epidemic, that is, if the UN were right that the disputes fall outside the scope of Section 29 of the General Convention.

As to a substantive right to a remedy for violations of international human rights, the ECHR and its American counterpart, as interpreted and applied by the respective regional human rights courts, are at the forefront of the development of the law. The Van Boven/Bassiouni Principles may be of particular importance in 'structuring the material' that is emanating from a 'broad corpus of law on the subject of reparations'.[346] Nonetheless, human rights treaties, including the ICCPR, do not generally confer a right to reparation for human rights violations. Neither may it be possible to conclude that such a right has

[344] Ferstman (2017), at 91.
[345] Johansen (2020), at 95 ('It is particularly uncertain whether there is a right to substantive redress for all human rights violations, or only for violations that are gross or of a fundamental character.').
[346] Zwanenburg (2006), at 667.

crystallized under general international law, at least as far as non-gross human rights violations are concerned.

2.5 Conclusions

This chapter discussed, what are for present purposes, the three core aspects of the international organisations law framework governing third-party remedies.

First, the domestic legal personality of international organisations goes accompanied by the privileges and immunities of international organisations. These entitlements arise under international law and they are designed to preclude the scrutiny of the activities of international organisations by domestic courts under domestic law.

This raises the question as to what remedies international law bestows on third-parties *vis-à-vis* international organisations. The UN, and other international organisations, typically possess international legal personality. However, such personality is normatively empty.

Second, international obligations arise for international organisations under treaties to which they consent. And, whilst further enquiry is required with respect to *jus cogens*, such obligations arguably arise for international organisations under general international law except insofar as the member states determine otherwise. The UN may moreover be considered to be bound by the International Bill of Rights pursuant to the UN Charter, as its constitution.

Third, international organisations may be said to be bound by international human rights obligations under general principles of law. Where an international organisation breaches such an obligation, it commits an internationally wrongful act towards the individual in point, for which it incurs international responsibility.

Whereas the ARIO do not address the legal consequences of such responsibility towards private parties, the obligation to provide a procedural remedy arguably arises under general international law. As to the UN, it is in any event obliged to provide an 'effective remedy' under Article 2(3) of the ICCPR pursuant to its constitution. The meaning of 'effective remedy' is undergoing development, as illustrated notably by UN practice. When it comes to the 'determination of . . . civil rights', the higher procedural standard under Article 14(1) of the ICCPR arguably applies to the UN as a constitutional obligation.

Conversely, a substantive right to a remedy for human rights violations seems to have developed insufficiently as of yet, even as regards the UN.

The limited remedies for international human rights violations contrast starkly with both the procedural and substantive remedies of third-parties under Section 29 of the General Convention. As explained by Daugirdas and Schuricht with specific reference to that provision:

> 'One important way that international organizations' obligations may differ from those of States concerns the *scope* of international organizations' obligations to provide effective remedies. Specifically, international organizations' obligations may be broader than States' obligations in that they apply not only to violations of human rights, but also to other instances where international organizations cause harm to private individuals.'[347]

This underscores the importance of the proper interpretation and implementation of Section 29(a) of the General Convention.

[347] Daugirdas and Schuricht (2021), at 72 (fn. omitted, emphasis in original).