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Bordin, F.L.

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The Public International Law of International Organizations

Inaugural lecture by

Prof. dr. Fernando Lusa Bordin



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The Public International Law of International Organizations

Inaugural lecture by

Prof. dr. Fernando Lusa Bordin

on the acceptance of his position as Professor of
International Institutional Law (Schermers Chair)
at Leiden University
on Monday, 14 September 2026



**Universiteit
Leiden**

*Mevrouw de Rector Magnificus, uwe excellenties, zeer
gewaardeerde collega's en toehoorders,*

You are honouring me by attending the second Inaugural Lecture for the Schermers Chair in International Institutional Law. I should start by addressing “the elephant in the room”. It is undeniable that the ideals of multilateralism in global governance are facing a serious challenge, and that this may well be an inflection point for international organizations.

We have, of course, had moments of crisis before. World War II was followed by the creation of the United Nations (UN), the Specialised Agencies, and key regional organizations such as the Organization of American States and the Council of Europe, but the optimism of that period was soon dampened by the eruption of the Cold War, during which competition between the American and Soviet blocs led to institutional paralysis. When the Cold War ended, another “golden age” for multilateralism started, with a renewed burst of activity within the UN System and the creation of new international organizations such as the World Trade Organization and the International Criminal Court (ICC). But even that “golden age” was mired in turbulence stemming from the dissolution of the former Yugoslavia, the 9/11 terrorist attacks, the Iraq War, and armed conflict in various parts of the world.

Yet, to those reflecting on post-World War II history from the vantage point of 2026, those may look like times of relative institutional innovation and ingenuity, which contrast with a present juncture that feels more ominous. Canadian Prime Minister Mark Carney captured the Zeitgeist in his blockbuster speech in Davos last year, when he claimed that we are going through a “rupture in the world order”.¹ If that is indeed the case, the future of international organizations seems especially uncertain and precarious.

Which does not mean, however, that the future holds no role for international organizations or for international institutional law as an academic discipline. I would venture to suggest that the present juncture provides a fruitful occasion to take stock of the contours and import of a series of distinctive legal technologies² that have taken shape over the past several decades and are here to stay in one form or another. As we wait to see in which directions the winds of international politics will blow, our time is not being wasted if we reflect on how the law of international organizations has developed and coalesced.

In the formative stages of the discipline, the focus was – and had to be – on the architecture of the new institutions being established: how they dealt with constitutional issues such as membership, division of labour and

decision-making, financing, and powers. That was the focus of the work of Professor Schermers himself, as he mapped out the emerging subfield of international institutional law.³ After this comparative groundwork on constitutional issues was done, the focus could shift to other fundamental issues, such as the relations between international organizations and their members, the “tug of war dynamic” that characterises collective action through international institutions and shapes the resulting law. In fact, my predecessor, Professor Blokker, dedicated the first Inaugural Lecture of this Chair to the topic,⁴ which has also been a linchpin for some recent seminal work on the theory of functionalism.⁵

Alongside those doctrinal and theoretical endeavours, an avenue of inquiry that has been receiving more attention concerns the rules that apply when international organizations relate to the wider world.⁶ It is in this domain that I propose to situate the present lecture, offering some reflections on the *public international law of international organizations* that is taking clearer shape through the accumulation of practice and scholarship over the decades.

A question that arose with the emergence of international organizations concerns how those organizations fit within the system of public international law that preceded them, in other words, the system of sovereign states.

What is the legal character of institutions that states create by treaty to act collectively? What capacities, rights, and obligations do those institutions possess? What is the relationship between the rights and obligations of organizations and the rights and obligations of their members? How does the internal legal order of those institutions relate to the rules that apply on the international plane? Turning to those questions became more pressing as the practice of resorting to international organizations for collective action became more entrenched and varied – in other words, as international organizations came of age.

There are, I think, at least four inter-related features of international organizations as legal constructs of public international law worth pondering: (i) the attribute of international legal personality opposable to the international community at large; (ii) the bundle of default international capacities, rights, and obligations that international organizations possess as a category of legal subjects; (iii) the legal separation between international organizations and members that we find under the law of treaties and the law of international responsibility; and (iv) the possession of an internal legal system grounded in but relatively autonomous from public international law. In the remainder of the lecture, I propose to cover those four features in sequence.

I. (Objective) international legal personality

The first feature is international legal personality, which stands as a basic requirement for international organizations to be subjects of public international law in their own name. After all, international law cannot apply to international organizations directly unless they are focal points for international rights, obligations, and capacities under the system.

The emergence of international organizations contributed to laying to rest the once orthodox position that only states could be subjects of international law. The shift in thinking was cemented by the second advisory opinion that the International Court of Justice gave to the UN General Assembly, in 1949, on the issue of whether the United Nations could make an international claim against a non-member state for injuries suffered by a UN official. The Court began by stating, quite sensibly, that “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and [that] their nature depends upon the needs of the community”.⁷ It went on to conclude that the UN exercised functions and rights that could only be explained by possession of “a large measure of international legal personality and the capacity to operate on the international plane”.⁸

The proposition that international organizations can be international legal persons has become well established. But a question has remained regarding the character of that legal personality. Does it exist for the members of the organization alone or is it opposable to non-members? In other words, is the legal existence of international organizations ‘relative’ or ‘objective’? That is one of those international law quirks that colleagues specialising in fields of domestic law may find particularly strange, because domestic legal systems hardly conceive of legal persons that are ‘relative’ in character. But international law is a decentralised legal system where questions of this kind bloom, and even the legal existence of states was once theorised as ‘relative’ in the sense that it would formally depend on the recognition of other states.⁹

In the *Reparation for Injuries* advisory opinion, the ICJ said that the fifty states that had created the UN, “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”. The Court thus asserted that international organizations may enjoy “objective” personality. But the Court’s reasoning, which is remarkably terse, begs the question. What would be the source of the “power... to bring into being an entity

possessing objective international personality”? Can this power only be exercised by “a vast majority of the members of the international community” – that is, does it essentially depend on numbers?

Those are questions that have never been conclusively settled in scholarship or in practice. The emerging position, however, seems to be that any number of states have the power to establish an international organization with objective personality. States typically act as though international organizations exist and do not adhere to a practice of according or denying recognition to those organizations.¹⁰ The International Law Commission itself, which is often circumspect when it comes to issues relating to the status of international organizations, has proceeded from the assumption that their legal personality is objective in its recent work on the responsibility of international organizations and settlement of disputes to which international organizations are parties.¹¹

In a recent judgment, the International Criminal Court had the occasion to pronounce on the character of its own legal personality. The ICC Prosecutor had proposed to investigate alleged international crimes committed against the Rohingya population in Myanmar. In response, Myanmar expressed the view that the ICC had no jurisdiction because Myanmar was not a party to

the Rome Statute and the Rome Statute could not, therefore, affect Myanmar’s legal position. In dismissing this objection, the Pre-Trial Chamber of the ICC ruled that the ICC possessed objective legal personality.¹² The reasoning it offered is interesting. Roughly two thirds of existing states have ratified the Rome Statute, and so the Chamber was able to draw on *Reparation for Injuries* and say that a vast majority of states had the power to bring into being an entity possessing objective international personality. But the Chamber also stated that “the existence of the ICC [was] an objective fact”.¹³

Saying that the existence of an international organization is an objective fact does not quite add up as a legal justification.¹⁴ But the language reflects an understanding that states are entitled under international law to create – and act through – entities the legal existence of which non-members cannot fully disregard. In other words, international organizations are not to be viewed as mere treaty transactions between their members, but rather as subjects of public international law in a proper sense. It seems to be the case, then, that the participation of international organizations in the system of public international law has become secure, as the system has come to comprise a rudimentary “rule of incorporation”. The contours of that “rule of incorporation” are well worth studying and refining as practice and precedent continue to develop.

II. A bundle of default international capacities, rights, and obligations

The second feature of international organizations under public international law is the bundle of default international capacities, rights, and obligations that accrue to them as a category of international legal subjects.

It is often said, correctly, that from the standpoint of its internal law, every international organization is unique. Each organization has its own set of members, its own set of organs, its own set of functions, and its own set of competences. That notion is captured by the phrase “the principle of speciality”, which the ICJ employed in an advisory opinion in 1996.¹⁵

At the same time, however, we have come to think of international organizations as forming a category of subjects from the perspective of public international law. We see that characterisation not only in textbooks but also in the case law of the ICJ and in the work of the International Law Commission. The ILC has indeed completed codification projects identifying rules in fields like the law of treaties and the law of international responsibility that are meant to apply to international organizations in general.¹⁶

What does the default bundle of capacities, rights, and obligations that attach to members of the category of international organizations

comprise? This has been the subject of diverging scholarly approaches, both at the conceptual level and at the level of detail, but the mainstream approach is that existing rules of customary international law apply to international organizations. In the *Reparation for Injuries* advisory opinion, the ICJ found that the UN had the capacity to act on the international plane and, specifically, to bring international claims just like states do.¹⁷ Similarly, the ILC has for the most part extended to international organizations the rules from the Vienna Convention on the Law of Treaties and the Articles on the Responsibility of States for Internationally Wrongful Acts.¹⁸ In a study on the identification of customary international law completed in 2018, the ILC concluded that international organizations may even contribute to the formation of international custom directly, that is, through their own practice (and not merely by serving as a platform for the practice of the member states).¹⁹

That said, there remains much to uncover when it comes to the question of how general international law applies to international organizations. A somewhat fraught subfield is the law of immunities from domestic jurisdiction. Members typically grant immunity to international organizations by treaty, through constituent instruments, headquarters agreements, and sometimes special conventions. That means that there have not been too many judicial cases where the question of whether

international organizations enjoy immunity under customary international law has been posed, at least in ways that were decisive for the outcome. Yet several domestic courts have pronounced on the issue *in obiter*, and there one finds a real difference of opinion, with some courts affirming a default immunity for international organizations and others concluding the opposite on the grounds that international organizations are different from states.²⁰

At the same time, if international organizations are entities with objective legal personality operating on the international plane, it seems reasonable that they should be placed under a default legal regime similar to that applying to states.²¹ The reason is twofold. On the one hand, third parties should not be entitled to ignore obligations that states owe to one another under customary international law just because a group of states has decided to act jointly through an international organization. On the other hand, that group of states acting jointly through an international organization should not be able to ignore the rights of third parties by setting up a separate legal person.

In this sense, the content of the bundle of capacities, rights, and obligations of international organizations appears not only as a matter of coherence but also as a matter of accountability. The notion of accountability provides a reason to regard with circumspection attempts by

international organizations to claim preferential treatment at the level of general international law.²² For example, the European Union tried to convince the ILC to adopt a special rule of attribution of conduct whereby acts performed by EU member states in application of EU law should be imputed to the EU alone.²³ But why should third parties accept a solution that might deprive them of the opportunity to make claims against EU member states under the existing rules of state responsibility? Likewise, several international organizations have questioned the appropriateness of extending to them the principle of full reparation for injury caused by internationally wrongful acts because of the financial constraints under which they operate.²⁴ But why should an injured party renounce the right to obtain compensation for the sake of the functioning of an international organization of which it is not a member?

The stakes here are well illustrated by the case law of the ICC on the immunity of high-ranking officials from states that are not party to the Rome Statute. The Appeals Chamber held, in the case against the former President of Sudan Omar Al-Bashir, that “there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary law vis-à-vis an international court”.²⁵ While one can sympathise with the desire to bring to justice individuals accused of horrific international crimes, this line of reasoning is problematic.²⁶

I would suggest that the law of international organizations offers the clearest perspective on what is wrong with it. As an international organization, the ICC is bound to respect the rights of third parties on the international plane. To suggest that the ICC may ignore the immunity of heads of state of non-members amounts to suggesting that any group of states can come together and circumvent the law of immunity by creating a separate legal person in the form of an international court. That is an argument with profoundly serious systemic implications.²⁷ One of those implications is an opening for non-member states seeking to derange the work of the ICC to argue that there is neither State practice nor *opinio juris* supporting the existence of the immunity of ICC officials.²⁸

III. Legal separation between international organizations and members

On the topic of systemic implications, the third feature of the public international law of international organizations concerns the legal separation between international organizations and their members that has prevailed under the law of treaties and the law of international responsibility.

Under general international law, treaty rights and obligations and the liability for international wrongs are specific to each state. That is why it is a fundamental principle of the law of treaties

that “[a] treaty does not create either obligations or rights for a third State without its consent”.²⁹ That is also why the law of state responsibility is underpinned by “the principle of independent responsibility”, according to which a state is only liable for its own conduct.³⁰

Collective action on the international plane through a separate legal person complicates the picture. If an international organization concludes a treaty, should its members be viewed as third parties in relation to that treaty? If all the members have concluded a treaty, should the organization be viewed as a third party in relation to that treaty? If an organization commits an international wrong, are the members liable for it?

The position that has coalesced over the decades is that there is a legal separation between organizations and their members from the point of view of public international law – that they are distinct legal persons with no automatic spillover between their respective treaty obligations and liabilities. That is the position stated in Article 34 of the 1986 Vienna Convention, which purports to codify rules applicable to treaties to which international organizations are parties.³¹ That is the position expressed in Article 62 of the Articles on the Responsibility of International Organizations, which provides that member states are not in principle responsible for wrongs committed by their organization.³²

This idea of a legal separation between international organizations and members raises pressing questions, both doctrinal and normative. A common assumption that deserves some pushback is that legal separation flows logically from the fact that international organizations have their own legal personality. In the ILC debates, Special Rapporteur Giorgio Gaja suggested that “[i]n principle, member States were not... responsible for the act of a separate legal entity”, that being “the logical argument also underlying the position in practice”.³³

But is this solution really dictated by logic? In this respect, I find some reflections that Professor Schermers offered in the second edition of his *opus International Institutional Law* particularly lucid. Professor Schermers noted that:

“Under national legal systems, companies can be created with restricted liability. An express provision thus enables natural persons to create... a new legal person in such a way that they are no longer personally liable for the acts of the new person.

In international law no such provisions exist. It is therefore impossible to create international legal persons in such a way as to limit the responsibility of the individual members. Even though international organizations, as international persons, may

be held liable under international law for the acts they perform, this cannot exclude the secondary liability of the member states themselves...”³⁴

In the ILC debates, a similar sentiment was expressed by Ian Brownlie, who thought that insisting on the legal separation between organizations and members would be “contrary to existing general international law... because its application could allow States to circumvent their obligations by concluding a multilateral treaty establishing an international organization”.³⁵ He thought it was “unreasonable that States should be able to limit their liability by acting through an international organization or by forming such an organization”.³⁶

Yet the notion of legal separation has seemingly prevailed. The reason is not one of legal logic but rather that this appears to be the solution that states favour. In the codification of the law of treaties, the premiss of legal separation was never properly questioned, either at the ILC or at the 1986 Vienna Conference.³⁷ In the codification of the law of international responsibility, the question of member state responsibility was the most consequential issue posed before the ILC and one would have expected states opposing a rule of limitation of liability to be very vocal about it; in the end, however, the states and international organizations commenting on the issue were supportive of the ILC’s approach.³⁸

Those are cases where the codification exercise itself sheds light on where states stand in areas where practice and precedent remain incipient.

Why would states favour legal separation? The resolution of the *Institut de droit international* on the responsibility of member states adopted in 1995 identifies some relevant policy considerations. The resolution states that “[i]mportant considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member States to third parties”.³⁹ Essentially, it seems to be the case that legal separation is essential to enable the organization to act with a minimum degree of independence from the members. The greater the prospect that members will be held individually liable, the greater the incentive to micro-manage the organization in ways that would hinder collective action. Relatedly, the opportunity to launder responsibility may well be one of the crucial reasons why states agree to take ambitious collective action in the first place.⁴⁰

That is an understandable approach, but one must remain alert to the ensuing risks. Legal separation can indeed provide the occasion for

the circumvention of international obligations and put the victims of international wrongs in a worse position. The ILC has proposed a couple of provisions aiming at mitigating those effects. According to the first, a member state will be liable in exceptional circumstances where it has taken advantage of the fact that the organization has separate legal personality to circumvent one of its own international obligations.⁴¹ According to the second, the members must take all appropriate measures required under the internal law of the organization to enable the organization to provide reparation for any wrongs that it commits.⁴²

But those are modest mitigations. Showing that a member has unduly caused an international organization to commit an internationally wrongful act will be challenging in most circumstances, and the obligation to ensure that the organization has funds to pay compensation will depend on the content of the organization’s internal law. Therefore, the approach that has prevailed in the work of the ILC is effective in allowing member states to limit their liability by acting through international organizations, which will not necessarily be given the funds to compensate victims of international wrongs. While the current law has the merit of enabling ambitious collective action, that comes with the price tag of a potential accountability deficit.

IV. Autonomous internal legal orders

Let me turn to the fourth feature of the public international law of international organizations: the possession of relatively autonomous internal legal orders rooted in international law.

International organizations have become engines of international law-making.⁴³ On the one hand, they facilitate and often strengthen traditional law-making by treaty and customary law. Many organizations are given the function of enabling the drafting and adoption of treaties, offering a stable institutional framework, well-tested procedural rules, and technical support from secretariats and expert bodies. One only needs to turn to major human rights treaties adopted under the auspices of the United Nations and regional international organizations for illustration.

Similarly, the impact that international organizations have had on how rules of customary international law develop can hardly be overstated. By structuring debates on various international issues, international organizations have served as platforms where state practice and *opinio juris* can amalgamate not only more quickly but also more deliberately. Those organizations that possess courts and expert bodies have produced a wealth of materials which, though technically described as mere “subsidiary means” for the identification of rules of law,⁴⁴

have had an undeniable influence in shaping the law. Moreover, as mentioned above, it has been progressively accepted that the practice of the organizations themselves can contribute to the emergence of customary rules.

On the other hand, and most significantly, international organizations have allowed their members to engage in forms of law-making that are much more dynamic, robust, and ambitious than the treaty-making and custom-forming processes of public international law. That is because, as personified entities on the international plane, international organizations possess their own internal legal orders.⁴⁵ How full-fledged those orders are will vary from organization to organization, but what organizations share is this potential to create “pockets of centralisation” that stand out from the decentralised character of public international law. Indeed, the “secondary law” stemming from the organization’s organs can be adopted by majority vote instead of consensus. It can also dispense with the need to go through the cumbersome processes of ratification by the members’ governments.

It is thus the case that a robust legal regime to fight international terrorism, including obligations to criminalise terrorist acts and procedures for imposing sanctions on terrorists, has been put in place by a series of resolutions of the Security Council, a body

comprising only fifteen UN member states.⁴⁶ It is likewise the case that the World Health Assembly, the plenary organ of the World Health Organization, can adopt, by majority, sets of international health regulations that become binding upon the member states unless any of them expressly rejects or makes reservations to those regulations.⁴⁷ We can point to the European Union and the exceptionally wide-reaching and intricate system of EU law for an example of how far international organizations can go when it comes to law-making. While the EU remains unmatched in this respect, other regional organizations pursuing economic integration have also engaged in law-making to a considerable degree.⁴⁸

While the possession of an internal legal order results in greater international law-making, it may pose challenges to the wider system of public international law in which those legal orders are embedded. The internal law of international organizations is part of international law in the sense that it finds its source of validity in treaties or equivalent agreements concluded by their members on the international plane. But international law remains very permissive as regards the content of that internal law – the only limits that it imposes come from peremptory norms of general international law (*jus cogens*), which are few and far between. That means that the members of an international organization can make the internal

law of the organization almost as autonomous from the system of public international law as they wish. The application of that internal law may be entrusted to institutions whose loyalty lies with the organization itself rather than with the wider system – in particular, secretariats and courts. That creates the risk that the internal law of the organization becomes aloof in relation to the rules that bind states, both members and non-members, on the international plane.

This risk is exemplified by the ICC's case law on the immunity of high-ranking officials of non-member states mentioned earlier. The most fascinating example, however, remains the doctrine of autonomy of EU law articulated by the Court of Justice of the European Union.⁴⁹ The CJEU initially framed the doctrine to shield EU law from the domestic legal systems of the members, but it soon pitched the doctrine against the system of public international law itself. A well-known example of the doctrine being applied in a way that makes EU law appear rather solipsistic is the *Kadi* case, where the CJEU annulled regulations giving effect to Security Council resolutions in the field of terrorism on the grounds that they were incompatible with fundamental principles of EU law.⁵⁰ Another is Opinion 2/13, where the CJEU blocked a draft agreement that would have enabled the accession of the EU to the European Convention on Human Rights, which has for decades bound all EU member states.⁵¹

The outcomes of cases like *Kadi* may have their merits,⁵² but the relevant point here is that, from the perspective of public international law, they expose the risk of prioritising the consistency and uniformity of the internal legal system of the organization over anything else,⁵³ in ways that may have a detrimental effect on the rights of third parties. Sometimes the CJEU comes across as more dualistic and defensive than many domestic constitutional courts, which is somewhat ironic given that it is a body deriving its jurisdiction from instruments of public international law.

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We are speaking here, of course, of the risk of fragmentation of international rights and obligations, a topic that captured the imagination of international lawyers in the first decade of the 21st century, when it was the subject of a much-discussed ILC study.⁵⁴ It has always struck me as odd how absent international organizations were in the debates on fragmentation. In part, that was due to the ILC's decision not to address the institutional aspects of fragmentation, focusing rather on substantive principles of conflict resolution and the overarching ideal of achieving harmonization through interpretation. Even so, it remains the case that the most effective way to establish a so-called "self-contained regime" is to create a thriving international organization filled with organs where the member states themselves do not sit. Public

international law is in a weak position to address institutional fragmentation because it does not purport to deprive "secondary law" that breaches international obligations of its validity.

Institutional fragmentation is further enabled by the features of objective legal personality and legal separation between organizations and members discussed earlier. If international organizations enjoy an "objective" legal existence, and if obligations and liabilities of international organizations do not spill over to the members, then it becomes easier to make the internal law of an international organization hermetically sealed – or at least hermetically sealed whenever it truly matters.

V. Concluding remarks

In this lecture, I have explored four features of international organizations under public international law: possession of objective legal personality; the proposition that they form a category of legal subjects to which a bundle of default capacities, rights, and obligations attaches; the legal separation between organizations and members under the law of treaties and the law of responsibility; and possession of relatively autonomous internal legal orders. Allow me to conclude with a few words about why further reflection on those features is warranted in the years to come.

Though it may be hard to predict what will happen to existing international organizations, I would venture to suggest that this technology that states have employed and perfected will continue to be used in one form or another. What may happen is that, if the UN System continues to lose ground, some of the pieces will be picked up by regional international organizations. If the middle powers are to join forces, as Prime Minister Carney suggested – as may other sectors of the international community that do not quite fit that description – doing so through new or reformed regional organizations may well be one of the most attractive and effective options on the table. If there is a turn to regional organizations, the public international law of international organizations will have a greater role to play in governing the relations between those organizations and the wider world. Many of the concerns that the current law poses, as I sought to describe in this lecture, will come into sharper relief. That is why those working on the law of international organizations should continue to reflect on those doctrinal structures and normative issues and strive for a law that enables collective action but is also mindful of the rights and interests of third parties.

Before I conclude, I would like to thank everyone who has made my appointment to this Chair possible: the Board of the University, in particular the Rector Magnificus; the Faculty Board; and the director of the Grotius Centre, Professor Daniëlla

Dam. I am equally grateful to Sidney Sussex College for having agreed to my taking up this Chair alongside my Cambridge appointment. I would also like to thank the Schermers family for their invaluable support in endowing this Chair, and my predecessor, Professor Niels Blokker, for his support and the warmest welcome possible; it is a real honour to hold a Chair with such a special history.

Finally, I would like to thank my parents and my brother. It is a long way from a small town in Southern Brazil to Leiden, and I could never have embarked upon this journey without their love and support.

Ik heb gezegd.

Notes

- 1 Mark Carney, 'Principled and Pragmatic: Canada's Path' (World Economic Forum Annual Meeting, Davos, 20 January 2026): <https://www.pm.gc.ca/en/news/speeches/2026/01/20/principled-and-pragmatic-canadas-path-prime-minister-carney-addresses>.
- 2 I borrow the term "technologies" from GF Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (OUP 2017) 11.
- 3 HG Schermers, *International Institutional Law* (1st edn, AW Sijthoff 1972), alongside the successive editions, five of which were co-written with Niels Blokker. Indeed, Schermers' Inaugural Lecture at the University of Amsterdam was dedicated to delineating the emerging discipline of "international institutional law": HG Schermers, 'De studie van het internationale institutionele recht' (openbare les, University of Amsterdam, 19 February 1963).
- 4 An English version of the lecture, with just a few adjustments and updates, has been published as N Blokker, 'International Organizations and their Members' (2004) 1 *International Organizations Law Review* 139.
- 5 Most notably: J Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9.
- 6 Alongside the seminal volume C Brölmann,

The Institutional Veil in Public International Law: International Organisations and the Law of Treaties (Hart 2007), a couple of recent volumes interested in this perspective are L Gasbarri, *The Concept of an International Organization in International Law* (OUP 2021) and OC Tassinis, *A Theory of International Organizations in Public International Law* (CUP 2025).

- 7 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178.
- 8 Ibid, 179.
- 9 See generally J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006), ch 1.
- 10 See e.g. CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005) 87; P d'Argent, 'La personnalité juridique internationale de l'organisation internationale' in E Lagrange and J-M Sorel (eds), *Droit des organisations internationales* (LGDJ 2013) 452, paras 881–882; C Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 86–88.
- 11 See ILC, *Articles on the Responsibility of International Organizations* [ARIO] (2011) II(2) YILC 40, 50 and ILC, 'Draft Guidelines on Settlement of Disputes to Which International Organizations Are Parties' (adopted on first reading) (2026) UN Doc A/81/10, 246 (commentary to Guideline 2(a)).
- 12 *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*

- (ICC–RoC46(3)–01/18–37, Pre–Trial Chamber I, 6 September 2018) para. 48.
- 13 Ibid.
 - 14 The description of international organizations as an “objective reality” can be found in R Higgins, ‘The Legal Consequences for Member States of the Non–fulfilment by International Organizations of their Obligations toward Third Parties: Preliminary Exposé and Draft Questionnaire’ (1995) 66–I *Annuaire de l’Institut de droit international* 251, 276. Special Rapporteur Gaja has likewise suggested that “the characterization of an organization as a subject of international law thus appears as a question of fact”: ‘First Report on Responsibility of International Organizations’ (2003) II(1) YILC 105, 111, para. 19. It can be said that international organizations constitute “institutional facts” in the sense explored by Neil MacCormick in his *opus Institutions of Law: An Essay in Legal Theory* (OUP 2007), that is, a social reality that is institutional when interpreted with reference to a body of (legal) rules (11–14). Providing an explanation of the relevant rule(s) that justify the description is an essential step of the reasoning.
 - 15 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para. 25.
 - 16 In particular, the set of draft articles that served as the negotiation text for the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [VCLT 1986] and the ARIO.
 - 17 *Reparation for Injuries* (note 7) 179. That lays down the premise for the ILC’s ‘Draft Guidelines on Settlement of Disputes to Which International Organizations Are Parties’ (note 11).
 - 18 Compare the 1969 Vienna Convention on the Law of Treaties with VCLT 1986 and the Articles on Responsibility of States for Internationally Wrongful Acts with the ARIO.
 - 19 ILC, ‘Conclusions on Identification of Customary International Law’ (2018) II(2) YILC 89, conclusion 4(2).
 - 20 For a discussion of the practice, see M Wood, ‘Do International Organizations Enjoy Immunity Under Customary International Law?’ (2013) 10 *International Organizations Law Review* 287, 300–308.
 - 21 For a long–form discussion, see FL Bordin, *The Analogy between States and International Organizations* (CUP 2018) ch 2.
 - 22 The possibility remains, of course, that bespoke rules be adopted by treaty between international organizations and the entities that they relate. The principle *lex specialis* provides ample flexibility to depart from the default rules of general international law whenever appropriate, expedient, and agreed.
 - 23 See the commentary to art. 55 ARIO (2011) II(2) YILC 40, 94–95.
 - 24 ILC, ‘Responsibility of International Organizations: Comments and Observations Re–

ceived from International Organizations' (14 February 2011) UN Doc A/CN.4/637, 161.

- 25 *Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (ICC-02/05-01/09-397-Corr, Appeals Chamber, 6 May 2019), para. 113.
- 26 For a general discussion, see SMH Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities' (2019) 78 *Cambridge Law Journal* 596.
- 27 It should be noted, however, that a sound legal basis to disregard Al-Bashir's immunity, also noted in the Appeals Chamber's reasoning, lies in the fact that the UN Security Council had referred the situation in Sudan to the ICC through UNSC Res 1593 (2005), adopted under Chapter VII of the UN Charter, which has the effect of making the Rome Statute applicable to Sudan. Thus, the outcome of the Chamber's decision is correct even if some of the reasoning begs the question.
- 28 Consider, for example, the recent sanctions imposed by the United States against ICC judges, prosecutors and other officials pursuant to Executive Order 14203. Shortly after the Order was issued, nine UN Special Rapporteurs and one Independent Expert characterised such measures as "a violation of their privileges and immunities, under public international law": UN Special Procedures,

Joint Allegation Letter to the United States, AL USA 3/2025 (10 February 2025).

- 29 VCLT 1969, art. 34.
- 30 See commentary to Part One ARSIWA, ch IV, in (2001) II(2) YILC 31, 64, para. 1.
- 31 VCLT 1986, art. 34: "A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization."
- 32 ARIO, art. 62: "A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act; or (b) it has led the injured party to rely on its responsibility."
- 33 ILC, '2891st Meeting, 11 July 2006' (2006) I YILC 145, 153.
- 34 HG Schermers, *International Institutional Law* (2nd edn, Sijthoff & Noordhoff 1980) 780.
- 35 ILC, '2892nd Meeting, 12 July 2006' (2006) I YILC 157, para. 16.
- 36 ILC, '2803rd Meeting, 18 May 2004' (2004) I YILC 88, para. 22.
- 37 See e.g. the discussion in Higgins (note 14) 406-408.
- 38 G Gaja, 'Seventh Report on Responsibility of International Organizations' (2009) II(1) YILC 73, UN Doc A/CN.4/610, para. 84.
- 39 Institut de droit international, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties' (1995)

66–II *Annuaire de l’Institut de droit international* 445, art. 8.

- 40 For a general discussion of “laundering” – the notion that “activities that might be unacceptable in their original state-to-state form become acceptable when run through an independent, or seemingly independent, IO” – as an element of the independence of international organizations, see KW Abbott and D Snidal, ‘Why States Act through Formal International Organizations’ (1998) 42 *Journal of Conflict Resolution* 3, 18–19.
- 41 ARIО, art. 61(1): “[a] State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.”
- 42 ARIО, art. 40(2): “The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this chapter.”
- 43 For a seminal analysis: JE Alvarez, *International Organizations as Law-Makers* (OUP 2005).
- 44 Statute of the International Court of Justice, art. 38(1)(d).
- 45 For a discussion of the character of the inter-

nal law of international organizations, see C Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ (2011) 8 *International Organizations Law Review* 397.

- 46 See especially UNSC Res 1373 (2001).
- 47 Constitution of the World Health Organization (1946) 14 UNTS 185, arts. 21–22.
- 48 For a comparative analysis, see ILA Study Group on the International Law of Regional Organizations, *The International Law of Regional Organizations: Final Report* (ILA 2024).
- 49 For a discussion of the relationship between the legal autonomy of IOs in public international law and the doctrine of the autonomy of EU law, see M Konstantinidis, ‘Demystifying Autonomy: Tracing the International Law Origins of the EU Principle of Autonomy’ (2024) 25 *German Law Journal* 94.
- 50 *Kadi and Al Barakaat International Foundation v Council and Commission* (Joined Cases C-402/05 P and C-415/05 P) EU:C:2008:461, [2008] ECR I-635.
- 51 *Opinion 2/13 (Accession of the European Union to the ECHR)* EU:C:2014:2454.
- 52 Indeed, the *Kadi* litigation contributed to reforms of the Security Council’s terrorist-listing regime, including the establishment of the Office of the Ombudsperson: UNSC Res 1904 (2009).
- 53 For a discussion of the CJEU’s ambivalence on customary international law, see P Gragl, ‘Customary International Law in the Europe–

an Union Legal System: The Substantive Rules Invoked and Applied by the Court of Justice of the European Union' in FL Bordin, AT Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (CUP 2022) 240.

- 54 ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) II(2) *YILC*.



PROF. DR. FERNANDO LUSA BORDIN

Fernando Lusa Bordin is Professor of Institutional Law (Schermers Chair) at the Grotius Centre for International Legal Studies at Leiden University, a position he combines with his role as College Associate Professor at Sidney Sussex College, University of Cambridge. He is also a Fellow of the Lauterpacht Centre for International Law. He was a Rapporteur for the International Law Association Study Group on the International Law of Regional Organizations and is a member of the Board of Editors of the *International Organizations Law Review*. He worked as an assistant at the UN International Law Commission and as a Judicial Fellow at the International Court of Justice, and has also acted as counsel or adviser in proceedings before international courts and tribunals. He was a Visiting Professor at the University of Turin in 2024 and at Paris 1 Panthéon-Sorbonne in 2025.

Fernando Lusa Bordin is a general international lawyer whose research interests include the law of international organizations, international legal theory, international dispute settlement, and international investment law. His monograph *The Analogy between States and International Organizations* (Cambridge University Press, 2018) received the 2020 Certificate of Merit in a Specialized Area of International Law from the American Society of International Law. His articles have appeared in journals including the *European Journal of International Law*, the *International and Comparative Law Quarterly*, and the *Leiden Journal of International Law*. He holds an LL.B. from the Federal University of Rio Grande do Sul (Brazil), an LL.M. from New York University, the Diploma of Public International Law from The Hague Academy of International Law, and a PhD from the University of Cambridge, for which he received the Yorke Prize.