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### Member States' Due Diligence Obligations to Supervise International Organizations

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#### Publication Information & Recommended Citation

Daugirdas, Kristina. "Member States' Due Diligence Obligations to Supervise International Organizations." In *Due Diligence in the International Legal Order*. Edited by Heike Krieger, Anne Peters, and Leonhard Kreuzer. Oxford: Oxford University Press, 2021.

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# Due Diligence in the International Legal Order

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**OXFORD**  
UNIVERSITY PRESS

# Member States' Due Diligence Obligations to Supervise International Organisations

*Kristina Daugirdas\**

## 1. Introduction

There are two reasons to consider obligations to supervise international organisations as a distinct category of due diligence obligations. First, due diligence obligations typically require states to regulate third parties in some way. But it is harder for states to regulate international organisations unilaterally than to regulate private actors within their own territories. International law protects individual states' authority to regulate people and activities within their territories through a variety of mechanisms, including through the prohibition on intervention. To be sure, international law also imposes some constraints; human rights law is an especially important example here. But states retain significant discretion about whether and how to regulate third parties within their territory.

By contrast, international law protects the autonomy of international organisations, in part by limiting the authority of individual member states to unilaterally influence international organisations. The charters of international organisations typically prohibit states from issuing instructions to international civil servants.<sup>1</sup> International organisations also usually have comprehensive immunities from national legal process, in part to shield them from the influence of individual states.<sup>2</sup> When an organisation's member states act collectively through the governance mechanisms established in that organisation's charter, however, they exercise broad authorities over such organisations and their officials.

Second, due diligence obligations with respect to international organisations also merit attention because they may compensate for the dearth of mechanisms to hold international organisations accountable when they cause harm. These

\* For their excellent comments and suggestions, I am grateful to Monica Hakimi, Leonhard Kreuzer, Heike Krieger, Anne Peters, and the other participants in the workshop on Due Diligence in International Law hosted by the Max Planck Institute in Berlin.

<sup>1</sup> See, e.g., Charter of the United Nations, 26 June 1945, art. 100.

<sup>2</sup> See, e.g., Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15; Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS 261.

accountability concerns are especially acute when it comes to private individuals who are harmed by such organisations' activities.<sup>3</sup> Immunity from legal process in national courts bolsters international organisations' autonomy—but it also closes down national courts as a venue for victims to seek recourse. Individuals and entities with pre-existing contractual relationships may have access to alternative venues—but tort victims generally do not.<sup>4</sup>

The chapter turns next to elaborating on this latter point: Section 2 explains why the possibility that international organisations might incur responsibility for violations of international law does not solve the problem of international organisations' accountability to tort victims. Section 3 describes some specific examples of due diligence obligations that states have under current law. Section 4 shows how the International Law Commission's Draft Articles on the Responsibility of International Organizations (the ARIO), adopted in 2011, establish some more general, cross-cutting obligations on states to act (or refrain from acting) in particular ways vis-à-vis international organisations. None of these provisions is explicitly labelled a due diligence obligation—but they have some features that characterise due diligence obligations. Section 5 critiques the ARIO for framing these obligations too narrowly. Section 6 argues in favour of establishing a due diligence obligation on member states to prevent international organisations from abusing their immunities.

## **2. The Problem: Limitations of the Responsibility of International Organisations**

The possibility that international organisations might incur responsibility for violations of international law offers, at best, only a partial and incomplete solution to the problem of international organisations' lack of accountability to tort victims. These limitations result partly from the scope of the ARIO and partly from practicalities related to implementation.

To start, for states and international organisations alike, the law of international responsibility kicks in only where there is a violation of international law. But key aspects of the sources and content of international organisations' international obligations remain unsettled and controversial. Some obligations are clear: international organisations are bound by their own charters and by treaties to which they are parties. But the extent to which customary international law binds

<sup>3</sup> See, e.g., Anne Peters, 'International Organizations and International Law,' in Jacob Katz Cogan/Ian Hurd/Ian Johnstone (eds), *The Oxford Handbook on International Organizations* (Oxford: OUP 2017), 33–59.

<sup>4</sup> Individuals employed by international organisations will usually have access to an administrative tribunal.

international organisations remains contested. Scholars have taken different positions on the question.<sup>5</sup> International organisations themselves have said relatively little.

Another limitation of responsibility is that international organisations can harm individuals without violating any international obligations. An international organisation official driving a car might get into an accident that causes injuries or deaths. Or an international organisation that is a party to contracts under national law might fail to pay its creditors. In fact, the incident that galvanised concerns about the accountability of international organisations involved exactly this problem. The International Tin Council (ITC) had been created to keep the price of tin within an agreed range. To achieve this goal, the ITC's buffer stock manager bought tin when the price dipped below the agreed range and sold tin when the price exceeded it.<sup>6</sup> On 24 October 1985, the ITC's buffer stock manager announced that the ITC lacked sufficient funds to honour its contracts. The ITC had accumulated a stockpile of more than 100,000 tons of tin—and £900 million of debt.<sup>7</sup> The ITC's inability to pay its creditors caused them significant financial harm, though it does not appear that the ITC or its officials violated any international obligations. The buffer stock manager had broad authority to buy and sell tin under the international agreement that established the ITC, and the contracts between the ITC and its creditors were ordinary commercial contracts under English law.<sup>8</sup> Without a violation of international law, there is no international responsibility.

Where international organisations do have international obligations, the victims of breaches may encounter problems seeking recourse when those obligations are violated. If the victim is a state or international organisation, then that state or organisation can directly pursue the claim against the breaching organisation through diplomatic channels. If the victim is an individual, however, this route is unavailable. In theory, a state could pursue such a claim against an international organisation on behalf of its nationals. In practice, governments may be reluctant to do so—especially if they rely on the international organisation for various types of assistance. For example, in 2010 United Nations peacekeepers inadvertently brought cholera to Haiti. The resulting epidemic has sickened hundreds of thousands of Haitians and killed more than nine thousand.<sup>9</sup> There are strong arguments

<sup>5</sup> Kristina Daugirdas, 'How and Why International Law Binds International Organizations', *Harvard International Law Journal* 57 (2016), 325–381; August Reinisch, 'Sources of International Organizations' Law: Why Custom and General Principles Are Crucial', in Jean d'Aspremont/Samantha Besson (eds), *Oxford Handbook of the Sources of International Law* (Oxford: OUP 2018), 1007–1024; Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability', in *ibid.*, 987–1006.

<sup>6</sup> Eric J. McFaddon, 'The Collapse of Tin: Restructuring a Failed Commodity Agreement', *American Journal of International Law* 80 (1986), 811–830.

<sup>7</sup> *Ibid.*, 812–813.

<sup>8</sup> Romana Sadurska/Christine Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?', *Virginia Journal of International Law* 30 (1990), 845–890, at 858–859, 865.

<sup>9</sup> United Nations, Report by the Secretary-General, A New Approach to Cholera in Haiti, A/71/620, 25 November 2016.

that the United Nations has a treaty obligation to develop a mechanism for providing redress to these victims.<sup>10</sup> Yet the United Nations has denied any such obligation. The Haitian government has not seriously challenged this position,<sup>11</sup> and the United Nations successfully invoked its immunity when the victims sued it in a US court.<sup>12</sup> There are some isolated cases where international organisations have established special institutions to hear individuals' claims.<sup>13</sup> On the whole, however, the ARIO remain 'underinstitutionalised,' and injured individuals are only rarely able to enlist courts or other dispute settlement bodies to hear their claims.<sup>14</sup>

Even if it were clear that an international organisation was responsible for a particular violation of international law, that international organisation may lack the capacity to take the steps that the ARIO would require. These include ceasing the wrongful conduct and making full reparation for the injury caused, which may involve paying compensation.<sup>15</sup> Although international organisations are independent from their member states as a formal legal matter, as a practical matter they remain quite dependent on their member states for financial and other resources. Even when international organisations are willing to make full reparation, they may lack the ability to do so without the support of their member states.

Finally, the status of the ARIO as customary international law remains doubtful, at least for now. When the International Law Commission (ILC) adopted the ARIO in 2011, it acknowledged that a number of the articles 'are based on limited practice' and thus the Commission's work reflected more progressive development and less codification than the corresponding Draft Articles on State Responsibility (ARSIWA).<sup>16</sup> Since then, evidence that more of the ARIO's provisions have ripened into customary international law remains rather scant.<sup>17</sup>

<sup>10</sup> Convention on UN Privileges and Immunities, 1946 (n. 2), art. VIII sec. 29; Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du Choléra', *Revue belge de droit international* 46 (2013), 161–189; Kristen E. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility', *Chicago Journal of International Law* 16 (2016), 341–385, at 354–362.

<sup>11</sup> Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations', *European Journal of International Law* (2014), 991–1018, at 1004; Kristina Daugirdas, 'Reputation and Accountability: Another Look at the United Nations' Response to the Cholera Epidemic in Haiti', *International Organizations Law Review* 16 (2019), 11–41, at 32.

<sup>12</sup> Kristina Daugirdas/Julian Davis Mortenson, 'U.S. Federal Court of Appeals Upholds United Nations' Immunity in Case Related to Cholera in Haiti', *American Journal of International Law* 111 (2017), 155–196, at 168–169.

<sup>13</sup> One example is the Kosovo Human Rights Advisory Panel.

<sup>14</sup> Niels Blokker, 'Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion?', *International Organizations Law Review* 12 (2015), 319–332.

<sup>15</sup> United Nations, International Law Commission (ILC), Draft Articles on the Responsibility of International Organizations, with Commentaries, in Report on the Work of Its Sixty-Third Session, A/66/10, 2011 [hereinafter ARIO], art. 31.

<sup>16</sup> *Ibid.*, cmt. 5.

<sup>17</sup> United Nations, Report of the Secretary-General, Responsibility of International Organizations: Comments and Information Received from Governments and International Organizations, A/72/80, 26 April 2017; United Nations, Report of the Secretary-General, Responsibility of International Organizations: Compilation of Decisions of International Courts and Tribunals, A/72/81, 26 April 2017.

Thus, the further development of the law of international organisations responsibility in recent years is not, by itself, enough to close the accountability gap created by international organisations immunity. Under these circumstances, the appeal of due diligence obligations with respect to international organisations becomes clearer. If member states policed international organisations more carefully, those organisations may be less likely to cause harm, or be more likely to provide recourse when they do.

It is necessary to specify, however, what any possible due diligence obligations might require states to do. To what end should states be obliged to act? Firstly, states could have due diligence obligations to prevent international organisations from engaging in activities that would violate their own international obligations. Secondly, states could have due diligence obligations to prevent international organisations from violating the organisations' own international obligations—and to ensure that the ARIO's requirements are satisfied in the event that such violations occur. Finally, states could have due diligence obligations to prevent international organisations from causing harm to third parties regardless of whether that harm results from a violation of international law.

### 3. Existing Due Diligence Obligations

There are some examples of states having international obligations that extend to their interactions with international organisations of which they are members. All of these examples fall within the second category outlined above—they involve obligations on member states to take steps to assure that international organisations do not engage in activities that would violate the member states' obligations. In other words, these obligations are designed to ensure that states do not exploit international organisations to evade their own international obligations.<sup>18</sup>

One example is expressly codified in the UN Convention on the Law of the Sea (UNCLOS). UNCLOS requires states parties to ensure that activities within the Area—i.e., the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'<sup>19</sup>—are undertaken consistently with requirements set out in the UNCLOS.<sup>19</sup> This obligation applies to activities carried out by states themselves, as well as to activities carried out by their nationals or others within their effective control.<sup>20</sup> But that is not all—UNCLOS also requires states parties 'that are members of international organizations [to] take appropriate measures to ensure the implementation of this article with respect to such organizations.'<sup>21</sup>

<sup>18</sup> This apprehension corresponds to a particular view of international organisations as vehicles through which states operate; see Daugirdas, 'How and Why' (2016) (n. 5), at 328.

<sup>19</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 183 UNTS 397, art. 139(1).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, art. 139(3).

Another example comes from the International Covenant for Economic, Social and Cultural Rights (ICESCR). Article 2(1) of the ICESCR requires each state party 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.<sup>22</sup> The Committee on Economic, Social, and Cultural Rights has encouraged certain states 'to do all [they] can to ensure that the policies and decisions' of the International Monetary Fund and the World Bank 'are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in Article 2.1 concerning international assistance and cooperation'.<sup>23</sup>

A third example comes from the case law of the European Court of Human Rights (ECtHR). On several occasions, the court has concluded that states did violate—or would violate—their obligations under the European Convention on Human Rights unless they assured that international organisations in which those states participated protected rights enumerated in the European Convention on Human Rights. For example, the court rejected an argument that Germany had violated its obligation to guarantee a right of access to courts by according comprehensive immunities from legal process to the European Space Agency (ESA).<sup>24</sup> The court emphasised that 'a material factor' in its decision was the availability of a 'reasonable alternative means to protect effectively [the challengers'] rights under the Convention'.<sup>25</sup> Specifically, the ESA had established an independent body to adjudicate employment disputes with the organisation.<sup>26</sup> The court did not frame its analysis in due diligence terms—indeed, the ECtHR focused on the result (the existence of an alternative mechanism for resolving disputes) rather than on Germany's efforts to establish such a mechanism. If Germany had tried but failed to establish such a mechanism, it seems likely that the ECtHR would have found a violation. Still, the court's opinion surely created an incentive for Germany to ensure that the ESA and other international organisations heeded the rights protected by the European Convention.<sup>27</sup>

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, art. 2.

<sup>23</sup> United Nations, Committee on Economic, Social and Cultural Rights, Concluding Observations (Belgium), E/C.12/1/Add.54, 1 December 2000, para. 31; see also United Nations, Committee on Economic, Social, and Cultural Rights, Concluding Observations (Morocco), E/C.12/Add.55, 1 December 2000, para. 38: 'The Committee strongly recommends that Morocco's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions (...) to ensure that economic, social and cultural rights, particularly of the most vulnerable groups of society, are not undermined'; Ana Sofia Barros, 'Member States and the International Legal (Dis)order', *International Organizations Law Review* 12 (2015), 333–357, at 351 (collecting additional examples of such comments).

<sup>24</sup> ECtHR, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, Application No. 26083/94.

<sup>25</sup> *Ibid.*, para. 68.

<sup>26</sup> *Ibid.*, para. 69.

<sup>27</sup> Pierre Klein, 'The Attribution of Acts of International Organizations', in James Crawford/Alain Pellet/Simon Olleson (eds), *The Law of International Responsibility* (Oxford: OUP 2010), 297–315, at

#### 4. Due Diligence Obligations in the Draft Articles on the Responsibility of International Organizations

Some scholars have suggested the desirability of going further and establishing cross-cutting due diligence obligations on states to supervise international organisations.<sup>28</sup> This section maps the steps that the ARIO take in this direction. Although the Commission has described the ARIO as a set of secondary rules, the ARIO include a number of primary obligations.<sup>29</sup> These provisions supplement the discrete due diligence obligations described in section 3, though, as noted earlier, they do not (yet) reflect customary international law.

##### 4.1 Preventing Circumvention: Member State Responsibility for Contributing to Acts of International Organisations Internationally Wrongful if Committed by the Member State Itself

The ARIO delineate several ways that a state might incur international responsibility for contributing to conduct by an international organisation that would be internationally wrongful if the state had engaged that conduct itself. Two provisions closely track provisions of the ILC's ARSIWA that give effect to the principle that 'a State should not be able to do through another what it could not do itself'.<sup>30</sup> A state will incur international responsibility if it aids or assists an international organisation in engaging in conduct that violates an international obligation that binds both the state and the international organisation.<sup>31</sup> Likewise, the ARIO provide that a state will incur international responsibility if it directs and controls such an act by an international organisation.<sup>32</sup> Direction and control requires more forceful conduct than providing aid and assistance, where the assisting state plays 'a mere supporting role'.<sup>33</sup> But even aid and assistance requires some affirmative,

311 (describing other cases of the ECtHR suggesting that states parties to the European Convention on Human Rights have due diligence obligations with respect to international organisations to which they have transferred the exercise of certain competences).

<sup>28</sup> Sadurska/Chinkin, 'Collapse' 1990 (n. 8), 887 ('[A]lthough we argue for the existence in international law of a duty on member States of an organization to supervise its functioning in order to prevent damage to third parties, it must be admitted that such a duty is not firmly established.'). Ian Brownlie, 'The Responsibility of States for the Acts of International Organizations', in Maurizio Ragazzi (ed.), *International Responsibility Today* (Leiden: Martinus Nijhoff 2005), 355–362.

<sup>29</sup> André Nollkaemper/Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', *Michigan Journal of International Law* 34 (2013), 359–438, at 409–412.

<sup>30</sup> United Nations, ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report on the Work of Its Fifty-Third Session, A/56/10, 2001, [hereinafter ARSIWA], art. 17 cmt. 8.

<sup>31</sup> ARIO, 2011 (n. 15), art. 58.

<sup>32</sup> *Ibid.*, art. 59.

<sup>33</sup> ARSIWA, 2001 (n. 30), ch. IV cmt. 6.

concrete action. An omission is not enough to trigger responsibility under these provisions<sup>34</sup> (nor even is incitement of wrongful conduct, provided that it's not accompanied by concrete support).<sup>35</sup> Thus, the obligations in these provisions do not establish an affirmative obligation on member states to supervise international organisations.

The ARIO also address circumvention: Article 61 provides that '[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.'<sup>36</sup> The act need not be internationally wrongful for the international organisation concerned.<sup>37</sup> To incur responsibility under this provision, the state must intend to avoid compliance, and the organisation must have competence in relation to the subject matter of the state's international obligations.<sup>38</sup> The Commission does not elaborate much on what kind of conduct on the part of a state would qualify as causing an organisation to act in a particular way, saying only that there must be a 'significant link between the conduct of the circumventing member state and that of the organization.'<sup>39</sup>

#### 4.2 Contributing and Responding to Violations of International Organisations' Obligations

The ARIO also address member states' obligations in connection with conduct by international organisations that violates the international obligations of the latter but not the former. Strikingly, under the ARIO, member states have no cross-cutting obligations to refrain from aiding and assisting or directing and controlling acts by an international organisation that violate an international obligation of the organisation without simultaneously violating an international obligation of the state providing aid or assistance.<sup>40</sup>

The result differs in the more extreme case of a member state coercing action by an international organisation that violates the organisation's international

<sup>34</sup> ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, 43, paras 420 and 432.

<sup>35</sup> ARSIWA, 2001 (n. 30), ch. IV cmt. 9.

<sup>36</sup> ARIO, 2011 (n. 15), art. 61.

<sup>37</sup> *Ibid.*, art. 61(2).

<sup>38</sup> *Ibid.*, art. 61 cmt. 6.

<sup>39</sup> *Ibid.*, art. 61 cmt. 7.

<sup>40</sup> This situation is not covered by ARIO, 2011 (n. 15), arts 58 or 59 because states engaging in aid or assistance or direction and control incur responsibility only where 'the act would be internationally wrongful if committed by that State'. *Ibid.*, art. 58(1)(b), art. 59(1)(b).

obligations.<sup>41</sup> Where a state coerces such conduct, it is the state rather than the international organisation that incurs responsibility. The idea is that the state is the real actor, while the coerced organisation is a 'mere instrument'.<sup>42</sup> The threshold for establishing coercion is high: as the Commission explained, the act must have 'the same essential character as *force majeure*'.<sup>43</sup>

Separately, the ARIO impose affirmative obligations on member states to respond to breaches of international law by international organisations in two situations. First, just like the ARSIWA, the ARIO provide that, where an international organisation has committed a serious breach of a peremptory norm, states and international organisations alike 'shall cooperate to bring to an end through lawful means' any such breach.<sup>44</sup> Notably, this obligation is not limited to member states—it applies to states (and international organisations) across the board.

The second provision concerns the consequences of an 'ordinary' breach of international law (i.e., a breach of a norm other than a peremptory norm of international law). Under the ARIO, an international organisation that has violated an international obligation must cease the wrongful act, if it is continuing;<sup>45</sup> it must 'offer appropriate assurances and guarantees of non-repetition, if circumstances so require',<sup>46</sup> and it must 'make full reparation for the injury caused by the internationally wrongful act'.<sup>47</sup> The ARIO addresses member states' obligations only with respect to the last of these requirements, providing that '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 [to make full reparation]'.<sup>48</sup>

Stepping back, then, this is where things stand with respect to the three possible categories of due diligence obligations outlined above. As described in section 3, under existing law, there are some circumstances where states may incur international responsibility for failure to take steps to assure that international organisations act consistently with the state's own international obligations. That is, there are examples where states may incur responsibility for their omissions with respect to supervising international organisations. Whether and when states' obligations extend to their interactions with international organisations will require evaluation on a norm-by-norm basis; the isolated examples described in section 3 do not add up to a general positive obligation of member states to assure that the conduct of international organisations conforms to each state's own international obligations. As described in section 4.1, ARIO adds some general obligations on states

<sup>41</sup> Ibid., art. 16.

<sup>42</sup> Cf. ARSIWA, 2001 (n. 30), art. 18 cmt. 4.

<sup>43</sup> Cf. *ibid.*, art. 18 note (2).

<sup>44</sup> ARIO, 2011 (n. 15), art. 42(1).

<sup>45</sup> Ibid., art. 30(1).

<sup>46</sup> Ibid., art. 30(2).

<sup>47</sup> Ibid., art. 31.

<sup>48</sup> Ibid., art. 40.

not to aid or assist, direct, and control, or cause conduct by international organisations that would violate states' own international obligations.

When it comes to states' obligations to supervise international organisations' compliance with the organisations' international obligations, as section 4.2 describes, the ARIO impose some discrete across-the-board obligations to respond to serious breaches of peremptory norms and to enable international organisations to fulfil their obligations to make full reparations. To a large degree, however, the ARIO allow member states to be quite standoffish when an international organisation of which they're a member state breaches an international obligation. The ARIO do not require states to take any affirmative steps to assure that international organisations comply with their own obligations in the first instance. Even more notably, under the ARIO, member states do not incur responsibility for aiding and assisting or directing and controlling an act by an international organisation that constitutes a violation of the organisation's own international obligations.

Finally, neither the ARSIWA nor the ARIO impose any obligations on states with respect to actions by international organisations that cause harm without violating international law.

## 5. A Missed Opportunity

In developing articles on international responsibility, the ILC had to wrestle with fundamental questions about the ways that states and international organisations do, and should, interact with one another.<sup>49</sup> In my view, the Commission took inadequate account of the differences between state-state relationships and member state-international organisation relationships. As a result, when it comes to the provisions enumerated above, the ARIO track the ARSIWA too closely.

The ARSIWA largely leave states free to ignore other states' international obligations. State A has no obligation to help ensure that state B will comply with state B's obligations. Likewise, if state B has an obligation that state A does not share, then state A has no obligations to refrain from conduct that would undermine state B's ability to comply that obligation.<sup>50</sup> Indeed, the Commission notes, in many cases a state can take affirmative action to incite other states to violate their international obligations without incurring international responsibility.<sup>51</sup> There are exceptions, though, wherever states have taken on international obligations that prohibit such indifference or incitement. The Genocide Convention

<sup>49</sup> David J. Bederman, 'Counterintuiting Countermeasures', *American Journal of International Law* 96 (2002), 817-832 (observing that the state responsibility regime goes 'to the intellectual core of public international law by delimiting the character of states and the nature of their obligations when they interact with one another').

<sup>50</sup> ARSIWA, 2001 (n. 30), art. 16(b) and art. 17(b).

<sup>51</sup> *Ibid.*, ch. IV cmt. 9.

is an important one; it requires states parties to take affirmative steps to prevent genocide extraterritorially.<sup>52</sup> When it comes to responding to violations of international law, the ARSIWA require action only where the violation constitutes a serious breach of a peremptory norm.<sup>53</sup> Taken in in their entirety, the ARSIWA permit states to be indifferent to whether or not other states comply with their international obligations the vast majority of the time.

The Commission offers some explanations for these rules in its commentary. One is the *pacta tertiis* rule, which provides that the obligations that state B has to state C have no impact on the rights or obligations of state A.<sup>54</sup> *Pacta tertiis* is a classic rule of international law, one that reinforces the role of consent in creating international obligations. Separately, the Commission explained that it sought to reduce the burden on states in relation to their interactions with one another: 'States engage in a wide variety of activities through a multiplicity of organs and agencies'; 'a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful'.<sup>55</sup> The international law prohibition on intervention also aligns with the Commission's approach by reinforcing the basic idea that it's appropriate for states to have a *laissez-faire* attitude with respect to other states' choices on key choices about whether and how to govern their territories. As the International Court of Justice (ICJ) explained, states may not engage in coercive acts that bear on 'matters in which each State is permitted, by the principle of sovereignty, to decide freely'. These matters include the 'formulation of foreign policy'.<sup>56</sup>

Whatever the merits and drawbacks of the Commission's approach when it comes to relations between states, it's a mismatch when it comes to relations between member states and international organisations. To start, duties of cooperation and good faith apply to states' interactions with the international organisations of which they are members. As the ICJ explained in its 1980 advisory opinion regarding efforts to move a regional office of the World Health Organization (WHO) away from Alexandria, Egypt, this general obligation of cooperation and good faith generated some concrete requirements in that setting, including an obligation to consult in good faith and to provide a reasonable period of notice in the event that either the WHO or Egypt wished to relocate the office.<sup>57</sup> The court went on to explain that the 'paramount consideration' for both parties

<sup>52</sup> See Larissa van den Herik/Emma Irving, 'Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity', chapter 12 of this book, section 1.

<sup>53</sup> ARSIWA, 2001 (n. 30), art. 40 (defining such a breach as 'serious' 'if it involves a gross or systematic failure by the responsible State to fulfil the obligation').

<sup>54</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 34 ('A treaty does not create either obligations or rights for a third State without its consent').

<sup>55</sup> ARSIWA, 2001 (n. 30), ch. IV cmt. 8.

<sup>56</sup> ICJ, *Military Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, 14, para. 205.

<sup>57</sup> ICJ, *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, 73.

'in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution'.<sup>58</sup>

In addition, international organisations' international obligations have consequences for member states when they act collectively through intergovernmental organs like the UN General Assembly or the World Health Assembly. The reason is that any international obligation that binds an organisation binds its organs as well. The ICJ affirmed as much in a 1954 advisory opinion that addressed whether the General Assembly has a legal right to refuse to give effect to awards made by the United Nations Administrative Tribunal in favour of staff members.<sup>59</sup> The court asserted that the General Assembly had no such right, at least so long as the tribunal was not acting *ultra vires*. The court's analysis was straightforward. It observed that the General Assembly empowered the tribunal to make final judgments that were binding on the United Nations.<sup>60</sup> The court continued:

As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment.<sup>61</sup>

Under these circumstances, it is inappropriate for the organisation's member states to be indifferent as to whether General Assembly's actions accord with this obligation. Member states ought to exercise their governance authorities in a way that allows the organisation to comply with its international obligations.

In developing the ARIO, the ILC did not take adequate account of these features of international organisation-member state relationships. In particular, certain provisions described in section 4.2 are deficient. The Commission should have made clear that member states would incur responsibility by aiding and assisting or directing and controlling acts by international organisations that violate the latter's international obligations. This omission does not matter when an international organisation's obligations coincide with those of its member states. But in some important cases, their obligations diverge. One important example was referenced earlier: the United Nations' treaty obligation to provide for alternative mechanisms of resolving certain categories of disputes that cannot be heard by national courts on account of the immunity of the United Nations or its officials.<sup>62</sup>

<sup>58</sup> *Ibid.*, para. 49.

<sup>59</sup> ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, ICJ Reports 1954, 47.

<sup>60</sup> *Ibid.*, at 53.

<sup>61</sup> *Ibid.*

<sup>62</sup> See Convention on UN Privileges and Immunities, 1946 (n. 2), art. VIII sec. 29.

Separately, the Commission's enumeration of member states' obligations is too narrow when it comes to the consequences of violations by international organisations. As noted in section 4.2, the ARIO instructs member states to take affirmative steps to ensure that organisations will be able to implement their obligation to make full reparation.<sup>63</sup> Surely the capacity of international organisations to pay compensation is an especially salient concern. In its commentary, the Commission explains that 'an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be implied under the relevant rules.'<sup>64</sup> But member states' duty of cooperation is broader than that—and the Commission should have reminded states that this duty extends to assuring international organisations can implement all of the obligations triggered by a violation of international law.<sup>65</sup>

## 6. Wanted: Due Diligence Obligations to Prevent Abuse of International Organisations' Immunities

Keeping in mind the accountability gap described in section 2, there is one place where establishing a due diligence obligation on the part of member states would be especially attractive: a due diligence obligation to ensure that international organisations do not abuse their immunities.

Treaties that accord privileges and immunities to international organisations and international organisation officials often include provisions that are designed to ensure that such immunities are not abused.<sup>66</sup> To take just one example, the Convention on the Privileges and Immunities of the Specialized Agencies sets out a dispute resolution procedure if any state party to the convention 'considers that there has been an abuse of a privilege or immunity conferred by this Convention.'<sup>67</sup>

In addition, there are examples of both international organisations and states taking steps to prevent abuses of immunity by assuring that individuals injured by international organisations are not left without any kind of recourse or remedy. Thus, in 1946, the UN General Assembly adopted a resolution that noted the United Nations' intention to 'prevent the occurrence of any abuse' in connection with its privileges and immunities and instructed the Secretary-General to ensure that 'the drivers of all official motor-cars of the United Nations' are properly insured.'<sup>68</sup> Indeed, the aftermath of the International Tin Council's collapse can be

<sup>63</sup> See ARIO, 2011 (n. 15), art. 30(1).

<sup>64</sup> *Ibid.*, art. 40 cmt. 5.

<sup>65</sup> See *supra* (nn. 43–45).

<sup>66</sup> Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations* (Dordrecht: Martinus Nijhoff 1994), 185–190 (collecting examples); C. Wilfred Jenks, *International Immunities* (London: Stevens and Sons Limited 1961), 41–45 (same).

<sup>67</sup> Convention on Specialized Agencies' Privileges and Immunities, 1947 (n. 2), art. VII sec. 24.

<sup>68</sup> UN, General Assembly, Resolution A/RES/22(I)A-E, part E, 13 February 1946.

seen in these terms. Even after the ITC's creditors lost every one of the multiple lawsuits they brought in UK courts, the ITC reached an out-of-court settlement with them, agreeing to pay just under £200 million, or about 35% of the total amount creditors claimed they were owed.<sup>69</sup> Each of the ITC's member states contributed funds to allow the ITC to make that settlement payment.<sup>70</sup> As these examples illustrate, a due diligence obligation to prevent an abuse of international organisations' immunities would extend to cases where international organisation caused harm without violating international law.

This proposal might be attacked from two sides: that it will do too little and fail to meaningfully address the accountability gap and, from the other side, that it will do too much, and prompt states to micromanage international organisations and destroy their autonomy. This latter objection echoes the objection that Rosalyn Higgins articulated in a 1995 report for the Institute of International Law. In the wake of the ITC's collapse, there were calls to make member states secondarily liable for international organisations' debts, thereby allowing creditors to proceed directly against member states to collect them, at least when procedures directly against the organisation were unavailable. Higgins saw a strong policy argument against such secondary liability:

[I]f members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership.<sup>71</sup>

Heeding this concern, the ARIO set out a rule that, as a baseline matter, rejects such secondary liability.<sup>72</sup>

To be sure, the goal of a due diligence obligation to prevent international organisations from abusing their privileges and immunities would be to prompt states to be more active. The autonomy concern is unfounded or, at a minimum, overstated. First, the due diligence obligation would *not* make states secondarily

<sup>69</sup> Kenneth Gooding, 'Tin Creditors' £182.5m Accord', *Financial Times* (23–24 December 1989), 22; Reuters, 'Tin Council Pays Creditors', *International Herald Tribune* (2 April 1990), 11.

<sup>70</sup> *Ibid.*

<sup>71</sup> Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Toward Third Parties', *Yearbook of the Institute of International Law* 66 (1995), 252.

<sup>72</sup> ARIO, 2011 (n. 15), art. 62 (setting out the baseline rule that 'membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act' as well as exceptions where a member state has accepted responsibility for the organisation's act towards an injured party or of a state has led an injured party to rely on its responsibility, for example by 'lead[ing] a third party reasonably to assume that [it and/or other member states] would stand in if the responsible organization did not have the necessary funds for making reparation').

liable for international organisations' debts, nor would it permit any persons or entities to proceed directly against member states to collect them. Any actions against member states would concern only their individual efforts (or lack thereof) to ensure that international organisations do not abuse their immunity. Indeed, provided they used their best efforts to avoid such abuse, states could avoid responsibility even if the organisation did abuse its immunities. Second, such an obligation would not license states to ignore their international obligations to respect international organisations' independence and autonomy. There's a parallel here to states' obligation to prevent genocide extraterritorially: in implementing that obligation, states must respect international law prohibitions on use of force and intervention.<sup>73</sup>

Separately, it's important to consider the way that such a due diligence obligation would strengthen the position of international organisations vis-à-vis their member states. Consider again the United Nations' response to cholera in Haiti. Although the United Nations has denied any legal obligation to compensate Haitian victims, in 2016 Secretary-General Ban Ki-moon acknowledged the organization had a moral responsibility to act, and proposed a \$400 million 'new approach' that would involve two tracks: (i) renewed efforts to eliminate cholera in Haiti, and (ii) a package of material assistance and support to those individuals and communities most severely impacted by cholera.<sup>74</sup> States roundly endorsed the new approach with their words, less so with their actions: collectively UN member states have supplied only \$9 million to date—some 2% of the amount Ban sought— notwithstanding the many entreaties Ban and his successor António Guterres have made.<sup>75</sup>

Now suppose that the argument was available that member states had a legal obligation to fund the new approach—that failure to do so would constitute a breach of states' due diligence obligation to prevent abuses of immunity. The Secretary-General could deploy the legal argument to support his appeals for funding—and also to bolster efforts to fund the new approach through the regular budget (and assessed contributions) rather than only through voluntary contributions.<sup>76</sup> After all, legal positions taken by the UN secretariat are often quite influential. Scholars of the UN Secretary-General have cited the issuance of legal opinions as one especially important tool for influencing debate and action by member states and others.<sup>77</sup>

<sup>73</sup> ICJ, *Bosnia Genocide* (n. 34), para. 430.

<sup>74</sup> Daugirdas/Mortenson, 'Court Upholds United Nations' Immunity' 2017 (n. 12), 168–169.

<sup>75</sup> UN Haiti Cholera Response Multi-Partner Trust Fund, <http://mptf.undp.org/factsheet/fund/CLH00> (accessed 31 January 2019).

<sup>76</sup> Guterres raised this possibility in 2017. Rick Gladstone, 'After Bringing Cholera to Haiti, U.N. Can't Raise Money to Fight It', *New York Times* (19 March 2017).

<sup>77</sup> Thomas Franck, *Nation Against Nation* (Oxford: OUP 1985), 126–127; Ian Johnstone, 'The Secretary-General as Norm Entrepreneur', in Simon Chesterman (ed.), *Secretary or General?* (Cambridge: CUP 2007), 123–138.

In addition, to the extent that views within individual national governments are mixed, a legal argument could strengthen the position of national government officials who favour funding the new approach over those who oppose it.<sup>78</sup> It is impossible to say precisely how much difference the legal argument would make—but plausible to believe that it would make some.

In the end, due diligence obligations on the part of states to supervise international organisations are not a panacea for deficiencies in international organisations' accountability to individuals who are harmed by the organisations' activities. There are good reasons, however, to believe that further developing such obligations would have positive consequences.

<sup>78</sup> Antonia Chayes/Abram Chayes, *The New Sovereignty* (Cambridge Mass.: Harvard University Press 1995), 4 (describing how compliance with international obligations is the 'normal organisational presumption' within government bureaucracies).