

Introduction

Three categories of questions arise in a study of the accountability of the United Nations (UN) for violations of human rights. The first category is factual and empirical: does the UN violate human rights? If so, how? Which of its activities pose a greater risk of such violations? The second category comprises doctrinal questions: is the UN bound by international human rights law? What legal consequences follow from the breach by the UN of a rule of international human rights law? How can its obligations be enforced and compliance with them improved? The third category of questions is philosophical: how should we ideally limit the *power* of international organisations? Is the power shift from states to international organisations, and the weakening of the state that follows from it, a good thing?

The focus of this book is on the doctrinal questions. I do address some empirical and factual questions but not comprehensively. As for the philosophical ones, for the most part I limit myself to identifying them and stressing their importance.

The main factual argument is that there are at least four categories of UN operations – the provision of humanitarian assistance; peace-keeping; international administration; and the implementation of sanctions – in which the powers of the UN are so extensive that violations of human rights can result, and have resulted, directly from their exercise. To demonstrate this proposition, I draw, at least in part, on the findings of my own empirical research – particularly in relation to the administration of refugee camps.

The main doctrinal arguments are, first, that the UN is bound by international human rights law and international humanitarian law; secondly that, although some confusion persists about particular aspects of the application of the law of institutional responsibility (for

example in relation to attribution), the legal framework governing the responsibility of international organisations is sufficiently clear, and that there is consequently no general or systemic doctrinal constraint on the application of secondary rules of responsibility to international institutions; and thirdly that inadequacies in the legal enforcement of and compliance with human rights produce both a ‘liberty deficit’ and an ‘accountability deficit’. The doctrine of equivalent protection, first developed by the German Constitutional Court and now adopted by international human rights courts, is a welcome attempt to address these two deficits judicially. But it is not enough. Political and administrative solutions must also be found.

As I hinted above, in this book I do not articulate a full position on the philosophical questions relating to the phenomenon of UN power over individuals, but I am certainly not proceeding on the assumption that the UN, and international organisations in general, are inherently good, and that a power shift from states to international organisations is always a positive development. My sketch for an argument on the philosophical issues is that there is a twofold relationship between the state and the principle of liberty (or human rights) that international organisations cannot reproduce or replace: first, the state *embodies* the idea of collective liberty which contemporary international law articulates through the principle of self-determination; secondly, the state *enables* individual liberty by providing the best political space within which it can be exercised and safeguarded.

Origins of this project

I decided to write on the accountability of the UN for violations of human rights in the late 1990s, when I was conducting fieldwork on refugees in East Africa. One of the most disquieting findings to emerge from that research was that many of the violations of human rights inflicted on refugees resulted from the conduct of the Office of the United Nations High Commissioner for Refugees (UNHCR) and of humanitarian non-governmental organisations (NGOs). During one of my first visits to a refugee camp, in north-western Kenya in 1997, I found evidence of the imposition of collective punishment on its entire population on two separate occasions. Refugees, whose survival depended almost entirely on food aid, were subjected to the punitive suspension of food distribution after some had staged a protest against the UNHCR. I, like most people, viewed the UNHCR and NGOs as protectors of human rights. The discovery of their power over individuals came as a surprise.

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Guglielmo Verdirame

Excerpt

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In the course of subsequent fieldwork in Kenya, Tanzania, Uganda, Sierra Leone and Liberia, I confirmed that what had happened in that camp was not an isolated incident and that human rights violations in refugee camps are endemic.

Until not so long ago the proposition that the UN can violate human rights would have been dismissed as merely academic – where the word academic is given the meaning philistines like to give it, that is ‘scholarly to the point of being unaware of the outside world’.¹ Yet, far from being an academic invention, the phenomenon of UN abuse of human rights is real. Why has it been neglected and played down for so long? One reason is distance from the situations where the power of international organisations manifests itself: armed conflicts, post-conflict situations and refugee camps are trodden by only a few academics outside the departments of social anthropology and development studies. It is not a coincidence that the first to observe the phenomenon of UN power in humanitarian crises were anthropologists and journalists.²

My disappointment with the failure of most international law scholarship to observe the UN critically seems to be shared by José Alvarez. He observes that ‘international lawyers have not examined their institutional creations closely enough. The literature on IOs [international organisations] and their impact on law is replete with half-truths, some derived from the continuing hold of legal positivism and others inspired by international lawyers’ idealistic aspirations for multilateral institutions.’³

Another reason, for the paucity of critiques of the UN may be the intellectual hostility to the state and to the idea of sovereignty that grew in the aftermath of the Second World War. For many, international organisations are allies in the struggle against the state, which they see as a hotbed of nationalism, intolerance and conflict. To expose the failures and shortcomings of international organisations is – they fear – to play into the hands of states. To put it in the words used by a former Secretary General to hush criticism about the

¹ *Oxford English Dictionary*.

² E.g. B. E. Harrell-Bond, *Imposing Aid* (Oxford University Press, 1986) and W. Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (London: André Deutsch, 1984).

³ J. E. Alvarez, *International Organisations as Law-Makers* (Oxford University Press, 2005), 586.

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[More information](#)

4 INTRODUCTION

organisation: ‘Everything you say will be used against this organization by the enemies of the United Nations.’⁴

There is something paradoxical about the anti-statist international lawyer – how can one be *for* international law but *against* its makers? Albeit counter-intuitive, anti-statism is a widespread attitude in the field of international law today – often a habit of the mind rather than a properly conceived ideology. The attack on the state does however have a fully respectable philosophical pedigree: from Rousseau’s *Second Discourse*⁵ via Bakunin’s *Statism and Anarchy*⁶ to the various references to the abolition of the state interspersed in Marx’s work (for example in *German Ideology*⁷). The post-war reaction against the nation state is exemplified by Cassirer’s *The Myth of the State*.⁸

The predominant conception of international organisations is that they exist to find solutions to problems that cannot be adequately addressed by states on their own. Seen in this perspective, international organisations are another face of the rise of technocracy. But technocracy breeds bureaucratic power and shuns external control. This predominant managerial and technocratic conception of international organisation has also shored up the ‘assumption that international organisations are, necessarily, a good thing, an assumption which often takes the place of argument’.⁹ All in all, it is hardly surprising that this theoretical approach to international organisations ‘has singularly failed to keep organisations in check’.¹⁰

Ideas about international organisations have somewhat evolved in recent years. Their conduct has now begun to attract some serious critical scrutiny, including by academics. Few would dispute today that there are circumstances where international institutions, and the UN in particular, possess sufficient direct power over individuals to interfere with fundamental rights. International lawyers embraced these

⁴ S. Hazzard, ‘Reflections. Breaking Faith-I’, *The New Yorker*, 25 September 1989, 63 at 63.

⁵ J. J. Rousseau, ‘Discourse on the Origin and Foundations of Inequality Among Men’, in V. Gourevitch (ed.), *Rousseau: The Discourses and other early political writings* (Cambridge University Press, 1997), 111ff.

⁶ M. A. Bakunin, ‘Statism and Anarchy’, in M. Shatz (ed.), *Cambridge Texts in the History of Political Thought* (Cambridge University Press, 2000).

⁷ K. Marx, ‘The German Ideology’, in J. O’Malley (ed.), *Marx: Early Political Writings* (Cambridge University Press, 1994), 119ff.

⁸ E. Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946).

⁹ J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002) 37.

¹⁰ J. Klabbers, ‘Two Concepts of International Organisations’, 2 *International Organisations Law Review* (2005) 277 at 289.

developments somewhat belatedly, but the claim that the UN may be a perpetrator of human rights abuses would no longer shock most of them.¹¹ This awareness has, however, neither allayed uncertainty about the relevant international legal framework, nor remedied problems about the accountability of the UN. Moreover, it is still true that the focus of systematic attention by international lawyers is on the normative dimension of international organisations rather than on their operational side. Notable contributions to the study of the former have appeared in recent years,¹² but there is still a paucity of works on the latter.

My first reaction to the discovery of the other face of international organisations was that the field of international law suffered from a dearth of empirical observation. We had to grasp the phenomenon of human rights violations by international organisations first, in order to be able later to approach critically the legal issues pertaining to their accountability. The book that Barbara Harrell-Bond and I wrote, *Rights in Exile: Janus-Faced Humanitarianism* (2004), sought to fill this gap of empirical knowledge by offering an exposé of the violations of the human rights of refugees. The intellectual and sometimes emotional resistance to the idea that the UN could be committing human rights violations would – we believed – give way in the face of findings based on extensive fieldwork.

We thus set out to produce a scholarly – rather than journalistic or ‘trade’ – exposé, thinking that, although a scholarly exposé might not have the immediate (but often short-lived) impact of a newspaper or an NGO report, it stood a better chance of contributing to a lasting shift of perceptions about the reality of refugee assistance among academics, international and national civil servants, and activists – the key players who over time help mould the discourse and the agenda of international refugee policy. We adopted the Holmesian ‘Experience is the

¹¹ Among the first to analyse the UN’s own human rights problems were: F. Mégret and F. Hoffmann, ‘The UN as a Human Rights Violator?’ 25 *Hum. Rts. Q.* (2003), 314; A. Reinisch, ‘Securing the Accountability of International Organisations’, 7 *Global Governance* (2001), 131; R. Wilde, ‘*Quis Custodiet Ipsos Custodes?*: Why and How UNHCR Governance of “Development” Refugee Camps Should be Subject to International Human Rights Law’, 1 *Yale H. R. Dev. L. J.* (1998), 107. See also: G. Verdirame, ‘Human Rights and Refugees: The Case of Kenya’, 12 *J. Ref. St.* (1999), 54.

¹² In addition to Alvarez, *supra* note 3, see also A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2006), esp. at 108ff.

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Excerpt

[More information](#)

6 INTRODUCTION

life of the law' as a motto for the book (and, more generally, for that particular phase of my research).

While generally well-received, some thought *Rights in Exile* too polemical. Indeed, parts of it probably were, in line with our denunciatory intent. But is an outright rejection of polemics in academic writing not too constraining? Read Bentham's *Anarchical Fallacies*¹³ or Burke's *Reflections on the Revolution in France*¹⁴ to get a sense of the sometimes fiercely polemical tone of past intellectual discourse. Ultimately it is predilection for caution and fear of boldness – neither a virtue – that dictate that scholarly writing must never be polemical.

Rights in Exile did not purport to offer a doctrinal analysis of the law, focusing instead on the dynamics of the violations of the human rights of refugees by both host states and the UNHCR. In my doctoral thesis, I set out to develop such a doctrinal analysis critically. In the following years, my thinking about the phenomenon of international organisation began to move in a more theoretical direction. In addition to the doctrinal challenges, I also saw a dearth of philosophical thinking as a constraint on our discussions of international organisations. The reality of international organisation has in many respects outpaced our thinking about it: the *phenomenon* has grown faster than the *noumenon*. Something similar happened to international human rights law. In *On Human Rights*, Jim Griffin argues there are discrepancies between the philosophy of human rights and international human rights law, with the latter expanding at a steady pace often on the basis of 'nearly criterionless claims about human rights'.¹⁵ Paraphrasing what Alexander Herzen said about the English and liberty,¹⁶ it could be said that the international human rights movement invented international human rights law without having any theories about it.

The study of international organisations, and the field of international law in general, are in my view overdue for a philosophical reflection on the primary questions. We must think about what purposes international institutions serve; how they should be controlled; how to structure the relationship between liberty and human rights, on the one hand, and power of the state and of non-state actors, on

¹³ J. Bentham, 'Anarchical Fallacies', in J. Bowring (ed.), *The Works of Jeremy Bentham* (1843), Vol. 2, 489.

¹⁴ E. Burke, *Reflections on the Revolution in France* [1790] (London: Penguin Classics, 1986).

¹⁵ J. Griffin, *On Human Rights* (Oxford University Press, 2008), 192.

¹⁶ See T. Stoppard, *The Coast of Utopia Part III: Salvage* (London: Faber and Faber, 2002).

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Excerpt

[More information](#)

the other hand; and, more fundamentally, about the impact that these developments have on liberty. We have *few* theories on all of the above and, if those we have are of little practical use, '[t]he fault is that there is *not enough* theory'.¹⁷

This book does not, however, generally address this need for 'more theory' that I have come to regard as central. Tempted as I am to forfeit the Holmesian pragmatist motto ('Experience is the life of the law'), the limits of which I have explored elsewhere,¹⁸ for an overtly (polemically?) anti-Holmesian one ('Ideas are the life of the law'), this is not yet the book in which to do so.

'Experience is the life of the law' and 'Ideas are the life of the law' are not statements that stand in necessary contradiction. Law needs experience and ideas, the real and the abstract, the actual and the normative. Mottoes aside, however, pragmatism did nourish such an aversion to ideas, abstraction and even rules. Combined with its reductionist notion of the truth as 'what works best', this aversion makes Philip Allott's description of pragmatism as an 'unphilosophy' entirely appropriate.¹⁹

A superb distillation of anti-pragmatism is this passage from Keynes's *General Theory*:

'Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.'²⁰

¹⁷ I. Kant, 'On the Common Saying: "This May be True in Theory but it does not Apply in Practice"', in M. J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant in Translation: Practical Philosophy* (Cambridge University Press, 1999), 273.

¹⁸ G. Verdirame, "'The Divided West": International Lawyers in Europe and America', 18(3) EJIL (2007), 553.

¹⁹ See P. Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (London: Cameron May, 2005), 470, fn. 17; see also my article, 'The Divided West', *supra* note 18, esp. at 558–67.

²⁰ J. M. Keynes, *The General Theory of Employment, Interest and Money* (London: Palgrave Macmillan, 1936), 383.

Scope and content

Categorising the variety of operations undertaken by the UN and by its agencies is not an easy task. The development of an operational practice that is not always consistent with institutional mandates complicates matters.

The category of UN operations with which international lawyers have traditionally been familiar is peacekeeping. Peacekeeping operations have evolved beyond the sheer monitoring of a border zone or of military activities within a territory with a view to preventing conflict. They have become, especially since the 1980s, 'multifunctional'. This move towards multifunctional peacekeeping has not been accompanied by more pervasive regulation.

UN agencies have also mounted large field operations outside the framework of peacekeeping – for example the administration of refugee camps and the provision of relief assistance. A specific legal framework for these operations is not normally found in resolutions of the Security Council or the General Assembly. When they do intervene, these organs usually limit themselves to short statements, which commend the work of the UN agencies on the ground, or condemn actions of government or insurgents, particularly those that interfere with the delivery of relief or when they endanger the lives of humanitarian personnel. The paucity of regulation coming from the political organs of the UN has ensured significant operational autonomy, but has also undermined accountability.

In a review of peacekeeping in the 1990s, the then Secretary-General adopted a categorisation of UN interventions in the peacekeeping area that is conceptual rather than legal, and casts little light on the regulation of these various types of operations. He identified six types of intervention: preventive diplomacy and peacemaking; traditional peacekeeping; post-conflict peace-building; disarmament; sanctions; and enforcement action. Of these actions, the first three would require the consent of the affected state(s), while the last three would normally all be undertaken under Chapter VII of the Charter (disarmament can be undertaken either as a consensual operation or as part of an enforcement action). Most of these operations are established under Chapter VI or VII, but, as acknowledged by the Secretary General, some operations are carried out entirely outside the umbrella of the Security Council. This can pose some problems, as '[t]he more difficult situation is when post-conflict (or preventive) peace-building activities are seen to be necessary in a country where the United

Nations does not already have a peacemaking or peace-keeping mandate. Who then will identify the need for such measures and propose them to the Government? If the measures are exclusively in the economic, social and humanitarian fields, they are likely to fall within the purview of the resident coordinator. He or she could recommend them to the Government.' The thematic approach identified by the Secretary General is not entirely satisfactory, but it is preferable to seeking to classify UN operations according to their formal legal basis under the Charter, since institutional practice has developed considerably and for many, if not most, UN operations the only plausible legal basis is an implied power.

In deciding which UN activities would be the focus of this book, the key criterion has been the presence of a significant measure of direct power over individuals other than employees of the organisation. It is this direct power that carries the greatest risk of human rights abuses. The following four categories of UN operations have been selected on this basis: the provision of relief assistance; the international administration of territory; peacekeeping missions; and sanctions. The authorisation to use force under Chapter VII of the Charter is not included in this analysis, although it does raise issues of compliance with both human rights and international humanitarian law. Given the mechanism of delegation, however, wrongful acts committed in the course of those operations would not normally be committed directly by the UN through its institutional bureaucracy. This is not to say that the legal responsibility of the UN is, in principle, excluded in cases of authorisation to use force. As for the treatment of employees, this wasn't included in the book not because their human rights cannot potentially be violated by the UN, but because the focus is on individuals outside the organisations.

Both the World Bank and the International Monetary Fund (IMF) have been accused of adopting policies and running projects in breach of human rights, particularly in developing countries. However, the impact of their activities on individuals, albeit significant, is not normally direct but mediated through the state in receipt of assistance. Indeed, it is the state that implements the fiscal or monetary decisions on which a particular IMF loan is conditional, or builds the particular infrastructural project for which the World Bank made a grant available. Moreover, although as specialised agencies they are closely linked to the UN, the World Bank and the IMF are not part of the UN *stricto sensu*.

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[More information](#)

The book begins with an analysis, in Chapter 1, of key concepts and definitions. In Chapter 2, I deal with the human rights obligations of the UN – an area which has not so far received the attention it deserves, as most doctrinal work has concentrated on the rights side of the legal personality of international organisations rather than on their obligations. Chapter 3 focuses on the law of responsibility of international organisations on which the ILC has now produced a complete set of draft articles.²¹

With Chapter 4 begins the detailed analysis of UN operations in which issues of compliance with human rights arise. Chapter 4 also looks into the provision of humanitarian assistance by the UN, discussing the general international legal framework applicable to relief operations and examining the violations of human rights in the course of such operations through a case study – the UN humanitarian operations in Afghanistan in the 1990s. The second part of this chapter draws on my 2001 article in the *Human Rights Quarterly*. Chapter 5 deals with peacekeeping operations, in respect of which obligations under international humanitarian law must be considered in addition to human rights. Chapter 6 examines the assumption of administrative powers by the UN, distinguishing between *de jure* and *de facto* international administrations, with refugee camps as the main case study of the latter. Much of the recent case law on international institutional activities and human rights has arisen in relation to the implementation of sanctions regimes imposed by the Security Council – the topic of Chapter 7.

Chapter 8 analyses mechanisms for holding the UN accountable when it violates human rights. Their effectiveness is assessed both in the light of existing practice and on the basis of their hypothetical application to some of the situations examined in the previous chapters. The role of courts, both domestic and international human rights ones, is examined, with a special focus on one of the most interesting and potentially very significant legal constructs to have been developed in recent decades: the doctrine of equivalent protection. The implications of this doctrine for the concept of sovereignty and the international legal order are briefly explored.

My conclusions, and in particular my endorsement of the doctrine of equivalent protection, may be regarded as statist – an epithet to

²¹ See ILC, Report on the Work of the Sixty-first Session (2009), UN Doc. A/64/10, paras. 31ff.