GOVERNANCE AS RESPONSIBILITY

This book undertakes a specialised analysis of a topic that is highly significant both theoretically and practically.

At the theoretical level, it discusses questions that have remained insufficiently answered in the fields of international human rights and institutional law. Notably, it clarifies how international human rights law conditions member States' governance role within international financial institutions and how this role is to be accommodated in the regime of international responsibility.

Furthermore, the book's thorough discussion of member States' human rights due diligence duties offers a practical contribution to the understanding of what tools may be used by States to secure their human rights obligations when participating in international financial institutions. Its practical significance also relates to the examination of the various elements that must be demonstrated by an individual wishing to invoke member State responsibility for alleged human rights violations in the context of international financial institution operations.

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Governance As Responsibility

MEMBER STATES AS HUMAN RIGHTS PROTECTORS IN INTERNATIONAL FINANCIAL INSTITUTIONS

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108492867
DOI: 10.1017/9781108675109

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
NAMES: Barros, Ana Sofia, author.
TITLE: Governance as responsibility : member states as human rights protectors in international financial institutions / Ana Sofia Barros.
DESCRIPTION: Cambridge [UK] ; New York, NY : Cambridge University Press, 2019. | Includes bibliographical references and index.
IDENTIFIERS: LCCN 2019008014 | ISBN 9781108492867 (hardback)
SUBJECTS: LCSH: Social responsibility of business – Law and legislation. | International law and human rights. | Financial institutions, International – Law and legislation. | Financial institutions, International – Social aspects. | Human rights – Economic aspects.
CLASSIFICATION: LCC KZ1266 .B37 2019 | DDC 341.4/8–dc23
LC record available at https://lccn.loc.gov/2019008014

ISBN 978-1-108-49286-7 Hardback

I dedicate this book to my mom, my light,
and to my dad, my ground.

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Foreword

A NEW DIMENSION OF INTERNATIONAL RESPONSIBILITY

It is with satisfaction that I write this brief foreword to this book by Dr Ana Sofia Barros, *Governance As Responsibility: Member States As Human Rights Protectors in International Financial Institutions*, for two particular reasons. First, the topicality of the subject requires closer attention in our days, such as that devoted to it by the author in her present work. And second, I have been accompanying the author of the book – at distance, from the World Court here at The Hague – in her earlier years of academic formation and professional work, and I value her vocation and dedication to facing challenges with a humanitarian outlook, so as to safeguard the rights of those more vulnerable.

Since I started reflecting on international responsibility at the University of Cambridge in the seventies, I have deemed it to constitute a most important chapter of international law, ultimately the backbone of the discipline (*The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983). Along the last decades, I have seen the topic gather steam and expand, and have contributed to it. In effect, contemporary international law, as I have been stressing in my own writings, bears witness of the expansion, altogether, of international jurisdiction, of international responsibility, and of international legal personality and capacity.

The expansion of international jurisdiction is evidenced by the co-existing multiple contemporary international tribunals nowadays. The expansion of international responsibility can be seen in their work (as for State responsibility, e.g., in the decisions of the International Court of Justice and of international human rights tribunals, and as to individuals' responsibility, in those of international criminal tribunals), as well as in the work of the UN International Law Commission (e.g., its articles on responsibility of States, 2001, and of international organisations, 2011).

And the expansion of international legal personality and capacity can be examined in the work mainly of international human rights tribunals, and also of international criminal tribunals.

The work of contemporary international tribunals in distinct domains of the law of nations (e.g., also the law of the sea), as well as the work of the International Law Commission in its endeavours of codification, has been contributing to that complex expansion (inter alia, of international responsibility). Despite all advances achieved, there have subsisted points which call nowadays for further examination, such as that of the allocation of the responsibility between international organisations and their member States.

In her present book, Sofia focuses her attention not exactly on the responsibility of international organisations, but rather, and more precisely, and irrespectively of that, on the obligations and responsibility of their member States under international law. In order to clarify this point, already in the first chapter she addresses the distinction between international organisations and member States in their relationship, as subjects endowed with international legal personality.

In dwelling further on the complex topic in the following chapters, Sofia analyses in depth, in logical sequence, the governance role of member States of international financial institutions, concentrated on their own responsibility for conduct performed in the course of the latter's operations. She singles out such international financial institutions as background for her investigation given the fact that they are rarely scrutinised in current discussions on international responsibility. Her book thus comes to fill a gap in expert writing.

Attentive to the human rights impacts of the activity of international financial institutions, Sofia addresses the topic from the perspective of individuals and their needs of protection. In turning attention to the terms in which the responsibility of member States can be invoked, she considers the legal argumentation to render viable the access of individuals to justice. As she comprehensively shows, human needs ought to be taken into account in all steps of the project cycle, calling for effective mechanisms of redress in case of ensuing harm.

In effect, providing effective access to a remedy to the identified victims, or potential victims, of the operations at issue constitutes a basic pillar of the rule of law in a democratic society. In my own trajectory in two international jurisdictions, I have appealed countless times to the pressing need to strengthen the individual's access to international justice, as also expressed in my books (e.g., *The Access of Individuals to International Justice*, 2011; *Le Droit international pour la personne humaine*, 2012).

I am thus very pleased to see that a scholar of the new generation, Sofia, devotes her endeavours to an aspect of a matter calling for development, namely, that of the consideration of the obligations of member States of international financial

institutions, so as to render them amenable in practice, in light of the International Law of Human Rights. The author is duly attentive to the issue of the attribution of conduct to member States of international financial institutions, seeking to contribute to the safeguard of the human rights at stake.

Along her work, the author remains attentive to the attribution of conduct to member States of international financial institutions, which is essential to the understanding of how to distinguish the two subjects of international law. Relying on the role of Executive Directors as State representatives, and their exercise of voting rights as State action, she thus signals an independent locus of international responsibility (of member States), concomitant to the responsibility of the aforementioned international institutions.

Sofia's book constitutes a noteworthy contribution to this effect, in the framework of multilateral development cooperation: in clarifying the terms whereby the responsibility of member States of international financial institutions may be invoked, it puts forward the possibility of a legal claim by individuals before domestic and international courts, against such an allegedly wrongdoing member State.

The already mentioned adoption by the International Law Commission of its Articles on the Responsibility of States (in 2001) and of International Organizations (in 2011) contributed to the systematisation of the matter, but such Articles cannot pretend to be exhaustive, nor the final work on it. While the responsibility of member States was widely discussed, some matters remained somewhat unclear, attribution of conduct having been an illustration to this effect.

Sofia attempts to fill a gap in the debate on attribution of conduct in the context of member State participation in the representative organs of international organisations, with a focus on international financial institutions. It should not pass unnoticed that this focus on member State responsibility may enhance legal accountability, as the author sustains, in that, in her outlook, there are currently more dispute-settlement mechanisms available for complaints against (member) States than for complaints against international organisations themselves.

With her book, Sofia offers an original insight to the ongoing thorny debates around the responsibility of member States of international organisations. In a constructive reasoning, she furthermore sheds light on the application of the International Law of Human Rights to member States of international financial institutions, so as to safeguard the rights of individuals in situations of vulnerability. Her book constitutes a valuable contribution to the matter, and deserves wide readership, also and mainly on the part of the new generation of scholars.

Antônio Augusto Cançado Trindade
The Hague
10 October 2018

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Preface

Over the last two or three decades, international lawyers (and others) have started to realise that while international organisations may still manifest the turning of 'swords into ploughshares' and may still be harbingers of the 'salvation of mankind', nonetheless, as political actors, they merit the same sort of scrutiny that accompanies other political actors. If decisions taken by States can provoke debates in terms of accountability or responsibility, so too can decisions taken by international organisations. Examples may include the activities of the North Atlantic Treaty Organization (NATO) outside its member States, in Serbia, in Afghanistan, off the Somali coast; the involvement of peacekeepers deployed by international organisations such as the United Nations (UN) in sexual abuse, or in torture, or in smuggling; or the way refugee settlements are managed by staff operating on behalf of the UN High Commissioner for Refugees (UNHCR).

Several professional organisations of international lawyers – formal as well as informal – have studied the topic in great depth and have developed methods to try to institutionalise the legal control of acts (and, not unimportantly, omissions) on the part of international organisations. The most authoritative of these, though of limited scope, are the Articles on the Responsibility of International Organizations, adopted by the International Law Commission in 2011: these are authoritative in that they were formulated by the closest body the world has to a legislative preparatory committee, the International Law Commission; but they are limited in scope in that they merely apply in relations between organisations and States or other international organisations. This may cover some of NATO's actions in Afghanistan or Serbia but not all, and does not seriously cover any of the other examples mentioned above.

Less authoritative perhaps, but of broader scope, are the Recommended Rules and Practices adopted by the International Law Association (ILA) in 2004. These aim to address also the situation where the organisation's acts (or omission) affect mostly individuals, such as when UNHCR operates refugee settlements, or UN peacekeepers engage in sexually abusive practices. And a similarly broad scope underpins several large-scale academic projects, such as the Global Administrative

Law approach pioneered at universities in Rome and New York, or the International Public Authority approach emanating from the Heidelberg Max Planck Institute.

Whatever the merits of these projects (and their merits are considerable), they all struggle with one of the central questions in the law of international organisations – the question of legal obligation. Why, and on what basis, can international organisations be said to be bound by international law, to such an extent that their activities can be evaluated against international law? To be sure, there are other unresolved issues, ranging from problems of attribution (if a UN-deployed peacekeeper engages in sexual abuse, is this something that can be attributed to the UN? His home State? The peacekeeper himself? All of these?) to questions of immunity from jurisdiction – domestic courts are notoriously reluctant to pierce the immunity veil covering international organisations. But the question of the basis of legal obligation is a foundational one: if an organisation is not bound by international law to begin with, it cannot be held responsible under international law either, and if international law cannot be the applicable yardstick, then all that rests are subjective conceptions (so the argument goes, however implicitly usually) relating to moral obligations, or proper behaviour, or desirable behaviour.

The International Court of Justice has shed some light on the issue, but not much. In its 1980 advisory opinion on the World Health Organization's regional office in Alexandria, it opined that international organisations are bound by obligations incumbent on them under treaties to which they are parties, under their constitutions, and under 'general rules of international law'. Far from suggesting a proper basis of obligation, this merely states the reasonably obvious (the references to treaties and internal constitutional orders), or begs the question: what is the import of the reference to 'general rules of international law'? Some suggest this is a reference to the entire corpus of customary international law; others feel that such a conclusion is unwarranted – if the Court had wanted to say that international organisations are bound by customary international law, it could simply have said so, without having to resort to obfuscating terminology.

It is this debate about controlling international organisations that Dr Sofia Barros has jumped into, and she has done so with vim, vigour and intelligence, as the book in front of you testifies. Originally defended as a doctoral thesis at the Catholic University of Leuven, the book zooms in on the responsibility of international organisations – in particular the financial institutions – via their member States, and makes a contribution to discussions on State responsibility as well as the responsibility of international organisations. It starts from the *topos* that the law abhors a vacuum: if the financial institutions do something wrong, it seems only fair that somehow someone should incur responsibility. Given the above, it is not all that obvious that organisations can be held responsible in their own right. Hence, perhaps responsibility may rest elsewhere, for instance with the member States.

Earlier work on the responsibility of member States for the acts of international organisations tends either to focus on a responsibility to repair (once a wrongful act

has taken place), or to enable the organisation to repair the organisation's wrongful act, and, while useful, this is but one possible aspect of the *problematique*, if only because it still presupposes that obligations rest on international organisations separately – it is the violation by the organisation of an obligation resting on it that triggers responsibility. But it is precisely this aspect, as discussed above, that is so difficult to demonstrate.

What Dr Barros adds to the literature is an exhaustively researched different approach, concentrating on the behaviour of member States when they decide on acts of questionable legality. The member States, after all, do not leave their sovereignty and their own obligations behind when they enter the headquarters of the World Bank or the International Monetary Fund: they play an important role in the governance of those institutions, and for that role (and within the limits of that role), Dr Barros investigates whether those member States may incur responsibility under international law. She does so with elegance and understanding, in a study brimming with useful insights and, importantly, without conflating the obligations of member States and those of their organisations. Instead, the member States are held responsible for acts committed in breach of their own obligations, as members of the organisations concerned.

Like all legal arguments, this one too raises questions and possible rebuttals, and in raising such issues Dr Barros provides new impetus to long-standing debates. As noted, the responsibility of international organisations has been on the agenda for quite some time, and quite a few studies have been devoted to the human rights obligations (*vel non*) of the international financial institutions. Some of those suggest, not entirely persuasively perhaps as a matter of legal analysis, that the financial institutions are bound to respect human rights because human rights are inherently worthy of respect, and it would be unacceptable that public actors could disrespect human rights with impunity. Others suggest, also not entirely persuasively perhaps legally speaking, that the obligation resting on the World Bank and the IMF to respect human rights derives from customary international law. Yet others focus (and again, in law not entirely compellingly perhaps) on the internalisation of those norms by the organisations themselves. In the established chorus of opinions it was difficult to imagine that a new and original voice could make itself heard, but Dr Barros's work proves otherwise: this is an excellent, highly accomplished and innovative legal analysis of an issue that has been puzzling various generations of international lawyers, approaching it from an unexpected but fruitful angle, and doing so with intelligence and diligence.

Jan Klabbers
Helsinki
5 October 2018

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Acknowledgements

Acknowledgements allow us to look back in time and revive moments. The process of writing this book, which is based on my PhD thesis, was built by uncountable, little moments: the legal discussions at a coffee bar; the shoulder to lean on when the mind got lost; the dinner that was prepared for me so that I could keep on working; the sharing of an ideal and, with it, of plans to make the world a better place. What seemed little turned out to be precious on its own.

Prof. Cedric Ryngaert, who supervised my thesis, deserves my first and foremost ovation, for my gratitude to him is boundless. His support was unwavering from the beginning; his remarks prompt and wise; his engagement genuine. Above all, I thank Cedric for his enduring trust in my work and for encouraging its publication. Prof. Geert de Baere became my supervisor along the way, and I must thank him wholeheartedly for having accepted this task. If my thesis bettered, it was certainly also due to his thorough reviews.

My infinite gratitude extends to Professors Jan Klabbers, Pierre Klein and Niels Blokker, for their guidance and support, very insightful comments, trust and friendship. This book would possibly not exist today if it were not for them. I am likewise infinitely grateful to Judge Antônio Cançado Trindade, above all, for inspiring belief. To Judge Trindade and Prof. Klabbers I owe special thanks, for giving me the honour of writing this book's foreword and preface, respectively.

My book is in the end an accomplishment of many hands. I thank unreservedly Prof. Jan Wouters and all the dear administrative staff and colleagues from the Leuven Centre for Global Governance Studies for allowing my research to flourish in such an enriching and vivid environment. Discussions with my cherished colleagues proved very fruitful along the way – be it in seminars, in the corridors or in the park. Inspiring academic insights came from other places as well. I thank wholeheartedly the GLOTHRO group for the opportunities granted to me within this project, in particular Prof. Wouter Vandenhole and Arne Vandenbogaerde. I owe a fantastic research stay at the Lauterpacht Centre for International Law (Cambridge) to the bright and nice colleagues I found there and, of course, the

administrative staff who made it all so easy-going. A big thanks must also be extended to all those who accompanied me at the Erik Castrén Institute of International Law and Human Rights (Helsinki), including Prof. Marti Koskenniemi, for reading and commenting a text included in this book. I moreover owe a debt of gratitude to Dr Mota Pinto for providing me an outstanding research experience at the World Bank, and to all members of Executive Director Office 21 for their very warm welcoming. Access to the life of international financial institutions proved invaluable for this research and I must thank wholeheartedly all the member State representatives, their legal advisors, general counsels and jurists from such organisations for their time and explanations provided during interviews or more informal talks.

This book would of course not exist without the support of Cambridge University Press. I am particularly grateful to Prof. Jean D'Aspremont, to Tom Randall and Gemma Smith for making it all a reality and also for their kindness and patience.

Engaging in such an academic roller coaster would not have been possible without the love of my family and friends. They filled the whole process of writing this book, and the thesis on which it is based, with their warm support and encouragement, their smiles, their stories, their care. From being roots to being sky, they meant, and mean, everything to me, in all their big and little ways of manifesting and shaping moments.

Abbreviations

ACHR	American Convention on Human Rights
AfDB	African Development Bank
AIIB	Asian Infrastructure Investment Bank
AOBs	Absence of Objection Basis
AOI	Arab Organization for Industrialization
ARIO	Articles on the Responsibility of International Organizations
AsDB	Asian Development Bank
ASR	Articles on the Responsibility of States for Internationally Wrongful Acts
BMZ	Federal Ministry for Economic Cooperation and Development
BSTDB	Black Sea Trade and Development Bank
CAO	Compliance Advisor and Ombudsman
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	UN Committee on Economic, Social and Cultural Rights
CFI	EU Court of First Instance
CFSP	Common Foreign and Security Policy
CIEL	Center for International Environmental Law
CJEU	Court of Justice of the European Union
CESCR	Committee on Economic, Social and Cultural Rights
COREPER	Committee of Permanent Representatives
CSO	Civil Society Organisation
DFID	Department for International Development (UK)
EBRD	European Bank for Reconstruction and Development
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
ECtHR	European Court of Human Rights

EDS	Executive Director's Office
EEC	European Economic Community
EGC	EU General Court
EIA	Environmental Impact Assessment
EIB	European Investment Bank
ESC	Economic, Social and Cultural (rights)
ESM	European Stability Mechanism
ESF	Environmental and Social Framework (World Bank)
EU	European Union
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
G7	Group of Seven
G11	Group of Eleven
G20	Group of Twenty
GAL	Global Administrative Law
HRIA	Human Rights Impact Assessment
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IDB	Inter-American Development Bank
IDI	Institut de Droit International
IEG	Independent Evaluation Group (World Bank)
IEO	Independent Evaluation Office (IMF)
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMFC	International Monetary and Financial Committee
IRM	Immediate Response Mechanism
ITC	International Tin Council
JICA	Japan International Cooperation Agency
KFOR	Kosovo Force (Kosovo)
MIGA	Multilateral Investment Guarantee Agency
NATO	North Atlantic Treaty Organization

NGO	Non-Governmental Organisation
NIB	Nordic Investment Bank
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PRGT	Poverty Reduction and Growth Trust
SCM	Subsidies and Countervailing Measures
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UK	United Kingdom
US	United States
WB	World Bank
WHL	Westland Helicopters Ltd
WTO	World Trade Organization