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INTRODUCTION

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1

Introduction

International organizations (IOs)[1] have become increasingly powerful. Since the end of the Second World War, states have conferred more and more powers upon IOs in order to solve transnational problems and to provide global public goods. As a consequence of their increasing powers, IOs are affecting the lives of individuals across the globe – directly and indirectly. Throughout the twentieth century, this internationalization was generally seen as a positive development, the "assumption [being] that international organisations are, necessarily, a good thing, an assumption which often takes the place of argument."[2]

Recently, however, the ever-expanding powers of IOs and their subsequent capacity to affect individuals has captured the imagination of legal scholars. They began studying, often under the heading of *accountability*, whether and to what extent IOs are internationally responsible for human rights violations. These studies have generally found that IOs do have human rights obligations, that IOs sometimes do act in contravention of such obligations, and that, if and when they do so, IOs are responsible toward individuals.[3] As a matter of

[1] In the context of this study, an IO is understood as an organization established by agreement under international law, with at least one organ with a will of its own (*volonté distincte*), and which possesses international legal personality. See generally, on the definition of an IO: Chittharanjan Félix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed., CUP 2005) 10–11; Jan Klabbers, *An Introduction to International Organizations Law* (3rd ed., CUP 2015) 6–14; Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (6th ed., Brill Nijhoff 2018) 33–51.

[2] Klabbers, *An Introduction to International Organizations Law* (n 1) 34. See also Karel Wellens, *Remedies against International Organisations* (CUP 2002) 132; Michael N Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) viii–ix; Kelly-Kate S Pease, *International Organizations* (5th ed., Routledge 2015) ix.

[3] See Chapter 2, and the sources cited therein.

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substantive international law, there has, in other words, been significant clarification and development.

However, "there remain major procedural obstacles to obtaining effective remedies for the wrongdoing of an international organization."[4] This has received markedly less attention than the substantive issues, even though the time appears to be ripe for a turn to procedure – to accountability mechanisms. Indeed, it is crucial for the accountability of IOs that we not only develop the rules and principles of responsibility, but also mechanisms that may implement their responsibility.[5] "Unless a duty is somehow enforced, it risks being seen as a voluntary obligation that can be fulfilled or ignored at will."[6]

Although the accountability mechanisms of IOs are under-explored, they are not completely unexplored. A few theoretical studies have mapped the general issues that arise when attempting to hold IOs to account for human rights violations, often voicing the concern that IOs are not sufficiently accountable.[7] From the mid-2000s to the late 2010s, some studies on the human rights accountability of particular IOs have, while emphasizing the substantive issues, also included discussions of the mechanisms of accountability.[8] Moreover, there have been several comprehensive studies on jurisdictional immunities – a particular procedural obstacle for using domestic courts as IO accountability mechanisms.[9]

[4] Dinah Shelton, *Remedies in International Human Rights Law* (3rd ed., OUP 2015) 46.

[5] Dapo Akande, "International Organizations" in Malcolm Evans (ed.), *International Law* (5th ed., OUP 2018) 246; Wellens (n 2) 63.

[6] Shelton (n 4) 17.

[7] E.g.: August Reinisch, "Governance without Accountability?" *German Yearbook of International Law*, 44 (2001), 270; Gerhard Hafner, "Accountability of International Organizations – A Critical View" in Ronald St John Macdonald and Douglas M Johnston (eds.), *Towards World Constitutionalism* (Brill 2005); Matthew Parish, "An Essay on the Accountability of International Organizations," *International Organizations Law Review*, 7 (2010), 277.

[8] Several contributions of this kind are found in the important edited book Jan Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010), see in particular the contributions of De Brabandere (UN territorial administration in East Timor), Istrefi (UNMIK), Murati (UNMIK, with focus on the Ombudsperson), and Schmitt (IMF). See also e.g.: Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Lang 2004); Florian Hoffmann and Frédéric Mégret, "Fostering Human Rights Accountability: An Ombudsperson for the United Nations?" *Global Governance: A Review of Multilateralism and International Organizations*, 11 (2005), 43; Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks," *Michigan Journal of International Law*, 27 (2005), 177; Ole Kristian Fauchald, "Hardening the Legal Softness of the World Bank through an Inspection Panel," *Scandinavian Studies in Law*, 58 (2013), 101.

[9] E.g.: August Reinisch, *International Organizations before National Courts* (CUP 2000); August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013); Niels M Blokker and Nico Schrijver (eds.), "Special Issue on

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On the issue of accountability mechanisms specifically, there have been very few studies. Some organization-specific articles have been published.[10] But only three book-length studies are devoted, at least in part, to the human rights accountability mechanisms of IOs.[11] All three are important contributions that help map the contours of an under-explored field. Yet, neither of them attempts to properly define and delimit the phenomenon of IO accountability mechanisms or to establish a typology of such mechanisms. Moreover, they are characterized by a certain lack of focus since they have a broader scope than the present study. Only Schmitt's book focuses solely on accountability mechanisms, but his analysis extends, in principle, to all IOs.

Building on the existing literature, this study attempts to take the academic debate on the accountability mechanisms of IOs one step further. Its aim is to identify, analyze, and assess the mechanisms through which individuals may hold IOs to account for their human rights violations. In particular, I aim to shed light on the problematic aspects of the law and procedure of the current amalgam of IO accountability mechanisms. To achieve this aim, I will first establish a framework for the definition, identification, analysis, and assessment of IO accountability mechanisms, and then apply the framework to three case studies.

1.1 RESEARCH DESIGN: A FRAMEWORK AND THREE CASE STUDIES

1.1.1 *The Research Question*

In light of the stated aims, the research question of this study is whether the existing human rights accountability mechanisms are sufficient in the following cases:[12]

- peacekeeping and peace-building missions under the EU's Common Security and Defense Policy;

the Immunities of International Organizations," *International Organizations Law Review*, 10 (2014), 255.

[10] E.g. Mark Pallis, "The Operation of UNHCR's Accountability Mechanisms," *New York University Journal of International Law and Politics*, 37 (2005), 869; Otto Spijkers, "Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica," *Human Rights & International Legal Discourse*, 1 (2007), 231.

[11] Wellens (n 2); Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar 2017); Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (OUP 2017).

[12] The case selection rationale is explained in section 1.1.3.

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- refugee camp administration under the auspices of the UN High Commissioner for Refugees;
- detention at the Detention Centre of the International Criminal Court.

It follows from this research question that the study is limited to human rights accountability mechanisms. The beneficiaries of human rights are individuals. For the purpose of this study, individuals are understood as natural persons.

This study is only concerned with the accountability of IOs toward third party individuals. The accountability of IOs toward individuals in their capacity as staff, agents, and contractors of the organization thus falls outside its scope. The reason for this distinction is, firstly, that the accountability of IOs toward their personnel raises issues unique to their particular context. Second, there are often entirely separate accountability mechanisms available to staff, such as international administrative tribunals. Although the human rights accountability of IOs toward their personnel is an important and under-explored issue, I have for the sake of brevity chosen to leave it aside.

1.1.2 *A Framework*

The research question at hand asks for an assessment of the accountability mechanisms of (certain) IOs. A natural first step toward answering this research question is to properly conceptualize accountability, which I will do in section 1.4. There I clarify the meaning of accountability in the context of this study, including how it applies to the relations between IOs and individuals.

Since my focus is on the mechanisms of accountability, it is not a priority to search high and low for particular instances of human rights violations caused by IOs. However, a study of accountability mechanisms cannot ignore the underlying issues of responsibility. Responsibility is a precursor to accountability.[13] If there is no realistic chance that an IO may breach its human rights obligations, thus incurring responsibility, there is no need for accountability mechanisms. Before one can say anything about the sufficiency of IO accountability mechanisms, it is therefore necessary to identify the contours of the human rights responsibility of IOs. This is done in Chapter 2.

Moreover, in order to conduct a principled assessment of IO accountability mechanisms it is necessary first to (a) define what constitutes an IO accountability mechanism; (b) develop a typology of IO accountability mechanisms;

[13] See section 1.4.1.

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and (c) establish the normative yardsticks against which to assess them. I therefore establish a framework for the identification, classification, and assessment of IO accountability mechanisms in Chapter 3. In the case studies conducted in Chapters 4–6, I use this general framework to identify, classify, and assess the accountability mechanisms relevant to each case.

1.1.3 *Three Case Studies*

There is a vast number of IOs, and their activities, functions, and sizes vary enormously.[14] It is therefore difficult to study them as a single, abstract phenomenon. So is it, by extension, to assess IO accountability mechanisms in the abstract. Moreover, it would be unfeasible in practice to assess the accountability mechanisms of all IOs. I have therefore chosen to assess the accountability mechanisms applicable in three particular cases.

A case is the unit of analysis in a case study and reflects the phenomenon the study seeks to explain.[15] A potential case in the present study could have been an IO and the accountability mechanisms applicable to it. However, as mentioned, IOs are a far from homogeneous crowd. Some IOs perform a multitude of disparate functions, with distinct accountability mechanisms attached to each function. I have therefore chosen to delimit my cases both with reference to organization and function. For example, one of the case studies is on accountability mechanisms applicable to the International Criminal Court [the organization] Detention Centre [the function of detaining individuals].

Given the lack of in-depth and systematic research on IO accountability mechanisms, the present study necessarily has to be exploratory. Case studies have a natural advantage in research of an exploratory nature: they are hypothesis-generating.[16] The purpose of the three case studies conducted in Chapters 4–6 is, in other words, to generate knowledge also beyond their individual contexts, in particular in the form of hypotheses.[17]

[14] According to *Yearbook of International Organizations*, "Number of International Organizations by Type" (Edition 55, 2018/2019) <https://ybio.brillonline.com/system/files/pdf/v5/2018/2_1.pdf> accessed October 10, 2019, there are over 280 "conventional intergovernmental organizations." This is a reasonable estimate but it is not fully accurate. A look at the underlying data in the *Yearbook of International Organizations Online* database <http://ybio.brillonline.com/ybio> reveals two things: (1) that many organizations that lack international legal personality are included, and (2) that some organizations are missing.

[15] John Gerring, "The Case Study: What It Is and What It Does" in Robert E Goodin (ed.), *The Oxford Handbook of Political Science* (OUP 2011) 1137.

[16] Ibid. 1141.

[17] Ibid. 1141–1142; Robert K Yin, *Case Study Research and Applications: Design and Methods* (6th ed., SAGE 2018) 37–38.

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In the selection of cases I was guided by three criteria. First, the form of power wielded by the IO in the context of the case. All three cases reflect situations where IOs exercise power over individuals in a quite direct manner. Admittedly, it is unusual for IOs to wield so much power over individuals as they do in the three case studies. I nevertheless chose to focus on powerful IOs because, as we shall see, accountability is intimately related with power.[18]

Although all three case studies concern situations where IOs exercise significant power over individuals, the degree varies. The case of the International Criminal Court (ICC) Detention Centre represents an exceptionally direct exercise of power, with the premises of the Detention Centre and the guards being under the direct and exclusive control of the ICC. The case of UN High Commissioner for Refugees (UNHCR) refugee camp administration involves a substantial, but less intense exercise of power. The case of the EU's Common Security and Defence Policy (CSDP) missions is characterized by the fact that the power is at times exercised through and in tandem with EU member states.

The second criterion is the *prima facie* potential for human rights violations. This is closely linked, but not fully correlated with, the first criterion. Although the case of the ICC Detention Centre is an instance of the most direct exercise of power, the risk of human rights violations is nevertheless rather low given the good conditions of detention. In contrast, the risk is high in the case of UNHCR refugee camp administration, where power is exercised under challenging conditions and over very vulnerable persons that are highly dependent on the organization.

Third, among the cases selected for study I sought to have significant inter-case variation in the types of accountability mechanisms available, while at the same time ensuring an opportunity to assess as many types of accountability mechanism between the cases. To seek out maximum variation in one dimension is a recognized and useful form of case selection, insofar as it can generate knowledge concerning the significance of those variations.[19]

1.2 METHODOLOGY

The research question calls for an assessment of the accountability mechanisms available in the context of the three case studies. This implies going

[18] Similarly: Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013) 68–69. On the relationship between power and accountability, see section 1.4.2.

[19] Bent Flyvbjerg, "Five Misunderstandings About Case-Study Research," *Qualitative Inquiry*, 12 (2006), 219, 229–231.

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beyond the *lex lata* and establishing normative yardsticks against which the sufficiency of the law can be assessed. Taking such an external, normative approach is key to the academic study of law.[20] As Smits explains:

> law is about ideas and arguments, turning legal science into an argumentative discipline in which the various arguments in favour of, or against, certain rules or outcomes should be identified and thought through.[21]

At the same time, it is necessary to use doctrinal legal analysis to identify the *lex lata* before it can be assessed critically in light of normative yardsticks. In the following I will briefly discuss the method of doctrinal legal analysis (section 1.2.1), before introducing the theoretical approaches that I base my normative yardsticks on (section 1.2.2). Finally, in addition to these two core methods, the research is supported by a qualitative interview study. I discuss certain methodical aspects of the interview study in section 1.2.3.

1.2.1 *Doctrinal Legal Analysis*

What is doctrinal legal analysis?[22] Legal scholars rarely reflect on this issue, and this has led to calls for them to articulate their methods more explicitly.[23] Doctrinal legal analysis is arguably a form of qualitative research, because it is "a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation."[24] Moreover, doctrinal legal research "involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary

[20] Jan M Smits, "Redefining Normative Legal Science: Towards an Argumentative Discipline" in Fons Coomans, Fred Grünfeld, and Menno T Kamminga (eds.), *Methods of Human Rights Research* (Intersentia 2009) 50.

[21] Ibid. 51.

[22] Sometimes also referred to as dogmatic, *lex lata*, or positivist legal research.

[23] Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review*, 17 (2012), 83; Jan M Smits, "What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research" in Rob van Gestel, Hans-W Micklitz, and Edward L Rubin (eds.), *Rethinking Legal Scholarship* (CUP 2017). Likewise: Hans Petter Graver, "Vanlig juridisk metode? Om rettsdogmatikken som juridisk sjanger," *Tidsskrift for Rettsvitenskap*, [2008], 149.

[24] Ian Dobison and Francis Johns, "Qualitative Legal Research" in Wing Hong Chui and Michael McConville (eds.), *Research Methods for Law* (Edinburgh University Press 2007) 21–22; Hutchinson and Duncan (n 23) 116.

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materials."[25] It also has a parallel to discovery in the physical sciences that is often under-recognized.[26]

How one can judge doctrinal legal research – that is distinguish between the good or bad, the defensible or indefensible? Ultimately, doctrinal legal research is judged by the legal communicative community.[27] In a domestic law setting, it is particularly the apex court(s) that set the tone of the relatively well-defined (domestic) communicative community.[28] The present study, on the other hand, is concerned with international law. This study is thus addressed to a communicative community that is broader, more diverse, and with an array of possible guiding stars – all of which lack the bright glow of domestic apex courts.

I have attempted to handle these difficulties by, in the case studies, using a doctrinal method in line with what is generally accepted in the context of each IO. For example, in the case study on the EU's CSDP missions, the doctrinal analysis of Union law is conducted using the method generally accepted in that field of law, where the Court of Justice of the European Union is highly influential. Conversely, the case study on the UNHCR is influenced by the practices and rules of interpretation and application of law particular to the UN. For issues that are not internal to the organizations, my doctrinal method reflects what is accepted within the communicative community (or "invisible college")[29] of general international lawyers – where in particular the International Court of Justice sets the tone.

1.2.2 *Normative Standards for Assessing IO Accountability Mechanisms*

In order for a normative assessment to be more than an expression of the writer's gut feeling, it is necessary to establish a proper assessment framework based on one or more established theoretical approaches. The choice of approach(es) should not be arbitrary – if so the result of any assessment

[25] Council of Australian Law Deans, "Statement on the Nature of Legal Research," (March and October 2005), 3 <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> accessed October 10, 2019.

[26] Ibid.

[27] Jan Fridthjof Bernt and David R Doublet, *Vitenskapsfilosofi for jurister: en innføring* (Fagbokforlaget 1998) 249; Jan Fridthjof Bernt, "Et hermeneutisk perspektiv på rettsvitenskap og juridisk metode" in Alf Petter Høgberg and Jørn Øyrehagen Sunde (eds.), *Juridisk metode og tenkemåte* (Universitetsforlaget 2019) 604–607.

[28] Bernt and Doublet (n 27) 249.

[29] Oscar Schachter, "Invisible College of International Lawyers," *Northwestern University Law Review*, 72 (1977), 217.

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