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JMWP 2/16

Jan Klabbers

**Sins of Omissions: The Responsibility of International
Organizations for Inactions**

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NYU School of Law • New York, NY 10011
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www.JeanMonnetProgram.org

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**ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Jan Klabber 2016
New York University School of Law
New York, NY 10011
USA**

**Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]**

Sins of Omissions: The Responsibility of International Organizations for Inaction

Jan Klabbers¹

Table of Contents

- I. Introduction
- II. Why Omissions? The Case of Rwanda
- III. The Omission in the Law of Responsibility
- IV. Conceptualizing Omissions
- V. Analogical Institutions
- VI. Some Practical Considerations
- VII. Concluding Remarks

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I. Introduction

Students of political science are taught early on that non-decisions can be as relevant as decisions. What does not reach the agenda can be as important, and perhaps even more so, as the topics that do reach the political agenda. Indeed, it is a truism that sometimes, not acting can be as effective, or as deadly, as acting.² Consequently, the law on international responsibility sees to it that states and international organizations alike can, in principle, be held responsible for their omissions. Actors can be held responsible for their internationally wrongful acts and these, in turn are defined as encompassing omissions as well as acts. Thus, article 4 of the Articles on Responsibility of International Organizations (ARIO) specifies that there is an internationally wrongful act when 'conduct consisting of an action or omission' is attributable to an international organization and breaches an obligation resting on the organization.³

Holding actors responsible for their omissions is easier said than done, though, in particular in the context of international organizations. According to the Articles on the Responsibility of International Organizations (ARIO), adopted by the International Law Commission (ILC) in 2011, international organizations can be held responsible for acts and omissions that can be attributed to them and that violate an international legal obligation resting on the organization concerned. Both sides of the equation are problematic: chains of attribution can be complicated in the law of international organizations, and it is by no means clear how organizations come to be bound by international law. Absent a clear basis of obligation, and absent a clear and expansive set of international legal obligations, it becomes very difficult to hold organizations responsible, whether for actions or omissions. The present paper zooms in on the latter, and aims to develop a standard to help evaluate the omissions engaged in by international organizations. Examples abound, with none more infamous than the United Nation's inaction in the midst of genocide taking place in Rwanda and, a little later, Srebrenica. But there are other (possible) examples of situations in which organizations did not act as could have been expected, or acted insufficiently. In recent

² See the discussion in Steven Lukes, *Power: A Radical View* (London: MacMillan, 1974).

³ This repeats almost verbatim article 2 of the 2001 Articles on State Responsibility (ASR).

years, the UN has done little to stop violence in Georgia and Ukraine, in Darfur, and in Syria and Libya. Well known is that during the early 1980s, the Food and Agriculture Organization (FAO) did very little to provide support to starving East Africans.⁴ Some might mention the World Health Organization's (WHO) response to the outbreak of swine flu a number of years ago as an example of an insufficient response; others might point out that the United Nations High Commissioner for Refugees (UNHCR), while focusing on providing immediate relief, has neglected to concentrate on facilitating and organizing asylum.⁵ The financial institutions may make lots of money for their shareholders, but do relatively little that actually helps develop their poorer member states.⁶ The International Labour Organization (ILO) is not, perhaps, generally considered as an organization that is expected to respond to unfolding crises, but even so it seems to have missed the boat when it comes to addressing the plight of migrant workers.⁷ It is possible to evaluate the organizations concerned for their relative inaction in these cases; whether they can also be legally addressed as omissions giving rise to international responsibility remains, however, to be seen.

This paper will posit that omissions of international organizations can be captured by a manifestation of what might be termed 'role responsibility': the underlying idea is that some obligation flows directly from the function that has been delegated to the international organization (its mandate), without the need to identify a separate legal obligation contained in some primary rule or other. Hence, even if it remains unclear which primary obligations rest on international organizations, they can possibly be held responsible for not living up to their assigned roles – i.e. their mandates. This paper will not discuss in any detail how the mandate of international organizations should be interpreted or understood, or how to understand the facts of a particular case and apply the organization's mandate to them; instead, it aims to create a framework for thinking

⁴ See Graham Hancock, *Lords of Poverty* (London: Mandarin, 1989), 84-88. The FAO might even have obstructed support, but if so, active obstruction might be difficult to construe as omission.

⁵ See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012).

⁶ See Ngaire Woods, *The Globalizers: The IMF, the World Bank and Their Borrowers* (Ithaca NY: Cornell University Press, 2006).

⁷ The mantle is picked up instead by academics: see, e.g., Jennifer Gordon, 'Transnational Labor Citizenship', (2007) 80 *Southern California Law Review*, 503-588.

about the mandate and responsibility to begin with. Doing so is not made any easier by the circumstance that few have treaded here before. As will be suggested below, specific legal literature on the notion of ‘omission’ in the law of responsibility is very rare, and discussions in the ILC when preparing the various sets of articles on responsibility are neither rich in detail nor in conceptualization, so the argument has to be built from the ground up.

The notion of the responsibility of international organizations presupposes, naturally, that international organizations are considered separate actors in their own right, with their own legal personality and moral agency. Whether this is actually the case, on a deep ontological level, is for present purposes irrelevant: suffice it to say that the articles on the responsibility of international organizations presuppose both international legal personality and moral agency, and is even highly explicit with respect to international legal personality.⁸ In other words, adherents of the idea that international organizations are merely vehicles for their member states (or ‘machines’ to be used by those same member states) might find the entire discussion esoteric: on such a conception, organizations cannot bear responsibility on their own; instead, whatever responsibility will be incurred must come to rest on the member states.⁹ Whether once the responsibility of the organization is established, there should be further attribution to individual officials or member states that are implicated is, for the moment, neither here nor there. The interest resides in identifying what it means, or can mean, to speak of omissions when discussing international organizations.

The argument goes, in a nutshell, as follows. International organizations can be held responsible for omissions attributable to them. These will rarely be based directly on what Hart referred to as ‘primary obligations’ in international law, mainly because it is plausible to claim that few primary obligations apply to international organizations.¹⁰

⁸ See article 2 ARIO.

⁹ It is no coincidence that earlier discussions of the responsibility of international organizations quickly lapsed into discussions of the responsibility of member states. A leading example is Clyde Eagleton, ‘International Organization and the Law of Responsibility’, (1950/I) 76 *Recueil des Cours*, 319-425.

¹⁰ At the risk of stating the obvious, while in Hart’s scheme rules on responsibility (including responsibility for omissions) are counted among the secondary rules of international law, these are unable

Hence, the basis for responsibility for omissions must be found elsewhere, and the most likely place is the mandate of the organization. This entails holding organizations responsible without being able to point to directly applicable obligations, but doing so is not unique: individuals in high positions sometimes incur responsibility by virtue of their position ('command responsibility'), and sometimes organizations benefit from their mandates, in the absence of any directly applicable rights. While turning the omission into a practicable cause of action will often stumble upon other obstacles, at least an understanding of the role responsibility of international organizations may inform public debate.

It should be noted from the outset that my interest lies with the omission that is, somehow, the result of a decision-making process. White briefly distinguishes omissions in two classes, intentional omissions and negligent omissions.¹¹ While there is room to investigate the role of negligent omissions in the day-to-day operation of international organizations (the Haiti cholera crisis, for instance, is often said to have resulted from the UN's negligence¹²), my interest lies with what White calls the 'intentional omission': it is here, rather than with negligent omissions, that any connection to the organization's role assumes relevance. And this, in turn, might help integrate considerations of responsibility in the dominant functionalist theory of international institutional law.¹³ For this is, eventually, the heart of the problem: the functionalist theory of international organizations law as it stands leaves little room for issues of responsibility. After all, one cannot, find fault with organizations for living up to their mandates. But perhaps the reverse can be done: finding fault with international organizations for not living up to their mandates – for omitting to do what they should do.

to ground responsibility on their own: one cannot be held responsible for being responsible. Hence, when primary rules offer no relief, one cannot simply look to the secondary rules for relief.

¹¹ See Alan R. White, *Grounds of Liability* (Oxford University Press, 1985), at 23, describing the intentional omission as a 'failure to do what we ought to have done ... because we forbore to do it..'.

¹² See, e.g., Kristen E. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility', (2016) 16 *Chicago Journal of International Law*, 341-385, at 361.

¹³ See Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law*, 9-82.

The paper is structured as follows. I will first, in section II, illustrate just how important omissions can be, and how important it may be to conceptualize them legally, by zooming in on the Rwandan genocide. Subsequently, section III will discuss the notion of omissions in the international law of responsibility, suggesting that very little work has been done to conceptualize the omission. Section IV will do the required conceptualizing work and situates the omission in international organizations law in the broader framework of role responsibility. In doing so, it points to the mandate of international organizations as the single relevant in identifying legally relevant omissions. Section V will discuss what role the mandate can play by drawing on two international analogies: the notion of ‘superior responsibility’ in humanitarian law, and the creation of the UN Administrative Tribunal as justified by the International Court of Justice in the *Effect of Awards* case. Section VI will discuss some practical obstacles impeding the invocation of omissions before courts and tribunals, while section VII concludes.

II. Why Omissions? The Case of Rwanda

The most-discussed omission on the part of an international organization in recent decades is surely the refusal of the UN to intervene in the ongoing genocide taking place in Rwanda. In April 1994, as is well-known, Rwanda became the site of the largest post-World War II massacre, when in the space of a few months some 800.000 people were slaughtered. The UN had received reports that something dramatic was about to happen yet, scarred and paralyzed as it may have been by earlier failed interventions in Somalia and the Balkans¹⁴, it did not act in any meaningful way, and even withdrew such troops as were present, in what Samantha Power refers to as ‘the single most shameful act in

¹⁴ See, e.g., Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca NY: Cornell University Press, 2004).

the history of the United Nations'.¹⁵ Most notoriously, the UN did not intervene to prevent the massacre or bring an end to it, although it did, *ex post facto*, establish a criminal tribunal to prosecute some of those suspected of taking part in the genocide.¹⁶

There is a widely held sentiment – and justifiably so - that the UN did wrong in refraining from intervention, but two circumstances require further discussion. First, and without in any way wishing to absolve the UN from any blame, it is useful to point out that as a matter of legal analysis, there was and is no clear obligation for the UN to intervene in such matters. Indeed, it is precisely the point of the present paper to add clarity to the discussion by providing a (relatively clear) legal basis for evaluating omissions such as those concerning Rwanda. Second, as it transpires from the memoirs of the leading military man on the spot, Canada's Romeo Dallaire, the UN was working in difficult circumstances and met with a lot of obstruction.¹⁷ While I will suggest that the UN incurs legal responsibility under international law for failing to act in Rwanda, I am sympathetic to some of the difficulties experienced by the UN people on the spot – although some of these difficulties stemmed from the UN itself, in particular its Security Council, its then-Secretary-General, and its Department of Peacekeeping Operations (DPKO).¹⁸ More broadly, some of those difficulties may also stem from the internal

¹⁵ She does so in the Foreword to Romeo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York: Carroll and Graf, 2004), at x.

¹⁶ See Security Council resolution 955, 8 November 1994, establishing the ICTR. The ICTR closed down at the end of 2015.

¹⁷ Methodological note: much of what follows in this section is culled from Dallaire's expansive and detailed memoirs, *Shake Hands*, and by and large corroborated by other sources, in particular Barnett's eyewitness account: see Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca NY: Cornell University Press, 2002). This was published before Dallaire's memoirs and read by him, but it seems Dallaire's memoirs are not based on Barnett's book. Either way, even if what Dallaire writes would be exaggerated, it does give a decent picture of the sort of circumstances that enter the picture, and can thus fully well serve as illustrative, even if not conclusive.

¹⁸ The assumption here is that political action (and inaction) invariably takes place in messy settings, far away from the luxury of the Ivory Tower which would allow for unencumbered reasoning from first principles, unhampered by concerns about available resources, or time running out. The messy situatedness of political action is all too often forgotten in discussions on responsibility, but should have a bearing on how behavior is evaluated. See generally, amongst others, Raymond Geuss, *Philosophy and Real Politics* (Princeton NJ: Princeton University Press, 2008), and Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

design of the UN: it has been suggested, e.g. that DPKO was rather small and 'overwhelmed', plagued by 'widespread crises and logistical headaches'.¹⁹

One well-known circumstance is that few states displayed any interest in the matter, with the exception of Belgium and, to a lesser extent, France.²⁰ Qualified peacekeepers were hard to come by, and in particular a Bangladeshi contingent turned out to be ill-trained, ill-equipped, and under instructions not to take any risks. As Dallaire concludes, 'Bangladesh had only deployed its contingent for selfish aims: the training, the financial compensation and the equipment they intended to take home with them.'²¹ Moreover, when the going got tough, the Bangladeshi commander had been instructed by his national authorities to stop taking risks. Dallaire angrily concludes that the commander 'did exactly as he was ordered, ignoring the UNAMIR chain of command and the tragedies caused by his decisions.'²²

Dallaire also had problems with the Belgian contingent. These were among his best soldiers, but some of them were also aggressive or racist, drinking too much, and fraternizing with local women and therewith raising suspicions of partiality. Things went so far that at some point, Dallaire considered asking the UN that the Belgians would be pulled from the mission – most likely an unprecedented gesture.²³

Logistics formed another serious problem. According to Dallaire, the mission was underfunded, and such military material as was forthcoming had to be brought first to Tanzania and from there, over land, to Rwanda. Tanzania refused to give UNAMIR permission to guard vehicles destined for Rwanda, the UN lacked capacity to provide security, and to add insult to injury, the UN signed a contract with the lowest bidder to drive the vehicles to Kigali. Inexperienced civilian drivers were involved, meaning that a number of vehicles were lost, while others were stripped of anything from windshield

¹⁹ See Samantha Power, *'A Problem from Hell': America and the Age of Genocide* (London: Harper, 2003), at 341.

²⁰ France got more deeply involved in the later stages, by launching a unilateral and hopelessly misguided operation, in effect rescuing some of the worst culprits. Barnett has unflinchingly referred to the French position as 'scandalous': see Barnett, *Eyewitness to a Genocide*, at 171.

²¹ See Dallaire, *Shake Hands*, at 205. UNAMIR stands for United Nations Assistance Mission for Rwanda.

²² *Ibid.*, at 244.

²³ *Ibid.*, at 183-185.

wipers to radios.²⁴ In addition, other everyday items were difficult to come by: early on Dallaire complained that he had ‘hundreds of troops arriving, and [he] had no kitchens, no food and no place to billet them.’²⁵ And at a later stage basic plumbing facilities for the peacekeepers’ camp were still lacking.²⁶ National contingents were supposed to bring at least two months worth of rations with them, but if they did not do so, the mission was in trouble.

Internal bureaucracy elements also played an unfortunate role. Dallaire recalls that the person in charge of logistics was a UN appointed civilian rather than the military commander²⁷, and while this makes sense from a checks and balances perspective, it also implies that things will not always proceed at great speed, especially if the chief logistics officer and the military commander disagree about priorities, as was sometimes the case in Rwanda. Most curiously perhaps, UNAMIR was denied a request for extra troops in order to address the changed situation following a coup in neighbouring Burundi. The request was refused because Dallaire had not requested those extra troops in his earlier technical report. Dallaire laments: ‘How could I have, when the coup hadn’t yet happened?’²⁸ UNAMIR’s situation was also not helped by another element of the international bureaucracy intervening: the World Bank, fed up by Rwanda’s political crisis in early 1994, threatened to cut off Rwanda from further financial help if the so-called Broad-Based Transitional Government was not put in place (it never was, eventually).²⁹ Needless to say, adding financial crisis to political impasse is hardly a guaranteed recipe for political stability.

Related, UNAMIR seemed to lack basic support from the UN. The civilian police contingent arrived late and did not seem overly interested in the mission³⁰, and UNAMIR never received a legal adviser, human rights officers or a humanitarian

²⁴ *Ibid.*, at 181.

²⁵ *Ibid.*, at 107.

²⁶ *Ibid.*, at 177.

²⁷ *Ibid.*, at 100.

²⁸ *Ibid.*, at 131.

²⁹ *Ibid.*, at 174.

³⁰ Dallaire scathingly observes that upon its arrival, for the most part ‘the UN Civilian Police Division only worked the day shift, Monday to Friday. There was no one manning its headquarters on a Saturday.’ *Ibid.*, at 160.

coordinator.³¹ Given the fact that much of the violence was ethnically motivated and that many humanitarian and human rights oriented non-governmental organizations were active in Rwanda performing their own mandates, surely some streamlining and communication could have been useful.

Dallaire was also little impressed with the political leadership of the UN mission on the spot. Not only was political leadership late to arrive – Dallaire himself had to act as chief in the first stages – when it arrived it was disappointing. Secretary-General Boutros-Ghali had appointed as his Special Representative a former Cameroonian diplomat, Jacques-Roger Booh-Booh, who is icily described as being ‘a proper gentleman who kept diplomatic working hours.’³² Booh-Booh is introduced as a friend of Boutros-Ghali³³, and constantly depicted as vain and lazy, more interested in maintaining a comfortable lifestyle than in actually doing the job. Typically, military reports were watered down by Booh-Booh and his staff, suggesting that the situation was steadily improving prior to the outbreak of violence.³⁴

What is also clear is that UNAMIR lacked the support from important member states of the UN, in particular on the Security Council. Dallaire is convinced that the Russians, Chinese and Americans³⁵ all wanted the mission to end even before the violence broke out³⁶, and suggests that France had gone so far as to write to the Canadian government to request Dallaire’s removal.³⁷ While there may be explanations for member state fatigue at the time (missions in the Balkans took a lot of energy and attention – and

³¹ *Ibid.*, at 112; also at 173.

³² *Ibid.*, at 118

³³ *Ibid.*, at 98.

³⁴ *Ibid.*, e.g. at 132.

³⁵ Barnett, *Eyewitness to a Genocide*, likewise is very critical of the US role, and another observer notes how the US ambassador to the UN at the time, Madeleine Albright, mostly engaged in ‘ducking and pressuring others to duck’, referring to Rwanda as the ‘absolute low point in her career as a stateswoman.’ See Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will be Killed with Our Families* (London: MacMillan, 1998), at 151.

³⁶ See Dallaire, *Shake Hands*, at 219.

³⁷ *Ibid.*, at 209.

money - and the disastrous intervention in Somalia was still a fresh memory, especially in American minds), nonetheless not all explanations can also serve as justifications.³⁸

Perhaps even more importantly and devastatingly, Dallaire also felt he lacked support from the UN's Department of Peacekeeping Operations (DPKO), run at the time by the future Secretary-General Kofi Annan and his chief of staff Iqbal Riza. Dallaire writes about Annan and Riza with great courtesy, so much so as to almost suspect that he 'doth protest too much'. The two are introduced in tandem, with Dallaire noting that he was 'tremendously impressed'. He says this of Annan: 'Annan was gentle, soft-spoken and decent to the core. I found him to be genuinely, even religiously, dedicated to the founding principles of the UN and tireless in his efforts to save the organization from itself...' Riza, in turn, 'wasn't as personable as his boss', but his 'occasional intellectual arrogance was offset by his sound common sense and political sophistication.'³⁹ Still, DPKO was not all that supportive. In September 1993 there was little enthusiasm for yet another mission in yet another troubled country⁴⁰, and this attitude would never change.⁴¹ UNAMIR had its hands tied: while its rules of engagement allowed intervention in case of crimes against humanity taking place, nonetheless Riza and Annan continued to insist that UNAMIR was to avoid conflict. The troops were not allowed to fire unless fired upon, and 'must not create any incident that could be exploited.'⁴²

In the end, much of what went wrong in Rwanda, if Dallaire's account is at all credible, was the result of a series of mishaps, combined with vanity and incompetence,

³⁸ Kofi Annan himself notes that during the genocide, no government wished to help out: '... we spent endless days frantically lobbying more than a hundred governments around the world for troops. I called dozens myself, and the responses were all the same. We did not receive a single serious offer.' See Kofi Annan with Nader Mousavizadeh, *Interventions: A Life in War and Peace* (New York: Penguin, 2012), at 59.

³⁹ See Dallaire, *Shake Hands*, at 50.

⁴⁰ *Ibid.*, at 80.

⁴¹ Kenneth Cain, a long-standing UN employee with lots of experience in the field, once summarized it with some vitriol: 'The UN was here [in Rwanda – JK] when the massacres started, twenty-five hundred troops. UN headquarters in New York knew it was being planned, they had files and faxes and informants and they sat in their offices, consulted each other, and ate long lunches.' See Kenneth Cain, Heidi Postlewait and Andrew Thomson, *Emergency Sex (and Other Desperate Measures)* (New York: Hyperion, 2004), at 209.

⁴² See Dallaire, *Shake Hands*, at 229.

bureaucratic in-fighting, logistical issues, and a lack of political and administrative support from the highest echelons. The latter in particular is confirmed by Michael Barnett, at the time deployed at the US mission to the UN, and thus able to observe first-hand what was going on. Barnett is sympathetic (if not entirely without criticism) to the plight of Riza and Annan⁴³, but has little good to say about Boutros-Ghali's role.⁴⁴ The net result was that when all hell broke loose on 7 April 1994, UNAMIR was powerless to do anything. Dallaire observes with respect to that particular day, but in words that deserve wider application, 'that this was a day not of one or two isolated incidents and a few decisions. It was a day that felt like a year, where there were hundreds of incidents and decisions that had to be made in seconds.'⁴⁵

There is a widely held view that the UN did wrong in refraining from intervention yet, as a matter of positive international law, it is difficult to pinpoint what exactly it was that the UN did wrong. The UN Charter does not specify that there is a duty on the UN or any of its organs to intervene in particular situations.⁴⁶ It does, to be sure, allow the UN to authorize or order intervention in case the Security Council determines the existence of a threat to the peace, breach of the peace, or act of aggression, but it neither creates a duty to make such determinations, nor a duty to act in case such a determination is made.⁴⁷ In other words, the UN (or its Security Council) could have intervened in Rwanda if it had wanted to, based on Chapter VII of the UN Charter, but was not under any strict legal obligation to do so. As a result, it becomes difficult to argue, as a matter

⁴³ Annan's biographer suggests that Annan failed when deciding on how to handle events, but 'he did not fail in a dishonorable way'. See Stanley Meisler, *Kofi Annan: A Man of Peace in a World of War* (Hoboken NJ: Wiley, 2007), at 102.

⁴⁴ Boutros-Ghali often claimed he had been ignorant about what was going on, but Barnett suggests a conscious detachment: if Boutros-Ghali was ignorant 'it was because he wanted to be.' Barnett, *Eyewitness to a Genocide*, at 160. Journalist James Traub observed that at least Annan was willing to accept institutional blame, 'as Boutros-Ghali never would'. See James Traub, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* (London: Bloomsbury, 2006), at 115.

⁴⁵ See Dallaire, *Shake Hands*, at 239.

⁴⁶ For a useful overview, see Nico Krisch, 'Introduction to Chapter VII: The General Framework', in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford University Press, 2012), 1237-1271.

⁴⁷ See André Nollkaemper, 'Failure to Protect' in International Law', in Marc Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 437-461, at 450.

of law, that the UN committed an ‘internationally wrongful act’ in the generally accepted sense of that term when it failed to intervene.⁴⁸

If the UN Charter contains no specific duties to act in cases such as Rwanda, perhaps the operative law should be looked for elsewhere. After all, in 1980 the International Court of Justice (ICJ) opined that international organizations, being subjects of international law, are bound by the treaties to which they are parties, by their internal rules, and by the ‘general rules of international law’.⁴⁹ The latter phrase in particular has given rise to considerable controversy, but at least the passage acknowledges that there is no problem in principle with international organizations being subject to international legal obligations.

Still, identifying the internationally wrongful act in case of Rwanda is problematic. There are few treaties to which the UN is a party. It is, to make a trite point, not a party to any human rights convention⁵⁰, and thus, as a matter of treaty law, under no legal obligation to act in defense of human rights. One could try to argue around this by suggesting that without being a party strictly speaking, nonetheless obligations can be grounded in human rights treaties, and such argument can take two forms.

First, it could be suggested that the UN is under some kind of special obligation with respect at least to those treaties which were concluded under its auspices. The mere fact of facilitating the conclusion of a human rights convention is thought to create a strong enough legal connection to hold the UN bound by the treaties concerned. Thus, under this line of reasoning, the UN would be bound by the Genocide Convention because this Convention was concluded under its auspices. It was based on a preceding resolution

⁴⁸ This is not to deny any moral responsibility. Erskine suggests (without spelling it out) that the moral responsibility of the UN may stem from the UN having ‘explicitly assumed a moral responsibility to intervene in cases of mass atrocity, and has claimed a monopoly on authorizing interventions conducted by other agents’. See Toni Erskine, ‘Coalitions of the Willing’ and the Shared Responsibility to Protect’, in André Nollkaemper and Dov Jacobs (eds.), *Distribution of responsibilities in International Law* (Cambridge University Press, 2015), 227-264, at 237.

⁴⁹ See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, [1980] ICJ reports 73, para. 37.

⁵⁰ Moreover, status of forces agreements usually regulate what UN forces are expected to do, but will not be creative of a duty to intervene – typically, they are concluded once a decision to intervene, in one form or another, has already been taken.

adopted by the General Assembly⁵¹, and unanimously adopted by the General Assembly. In such a setting, so the argument seems to suggest, it would be close to hypocritical for the UN to argue that it is not legally bound by the resulting convention. And with some human rights treaties the UN is closely involved in monitoring and other mechanisms; in such a case, surely there exists a strong enough legal bond to hold the UN legally bound by the treaty's provisions.

Attractive as the argument is from a normative perspective, it does not survive closer scrutiny. Substituting any state's name for the abbreviation 'UN' in the previous paragraph should make this clear: surely, Italy can convene an intergovernmental conference, sponsor the conclusion of a convention negotiated in Rome, Palermo or Florence, and yet decide not to become a party. No one would argue that in the absence of Italian ratification, Italy would nonetheless be bound because there would be a special connection between it and the treaty concerned. Italy would be entitled to claim that it never actually expressed its consent to be bound, and while it would be diplomatically awkward to sponsor a convention without joining its regime, as a matter of law such would be perfectly acceptable.⁵²

In order to make the argument work with respect to the UN, a different rule should first be identified: a rule to the effect that by contrast to the position of states, if and when international organizations sponsor the conclusion of conventions, they become bound by virtue of the act of sponsoring. Such a rule is unlikely to exist, and even less likely to be fleshed out with any degree of precision: what exactly counts as 'sponsoring'? Either way, the 1986 Vienna Convention on the Law of Treaties With or Between International Organizations, while not in force, contains no hint that such a possible rule was ever even contemplated, and if such a rule were to be launched, it would require a normative justification for treating organizations different from states.

⁵¹ See General Assembly Resolution 96(I) of 11 December 1946.

⁵² By the same token, it is perfectly acceptable to host an international organization on one's territory without being a member state: Austria is the state where OPEC is headquartered, and for many years Switzerland was the European headquarters of the UN without Switzerland being a member state.

A second argument to circumvent the treaty consent problem is a different species of the same genus, as it also suggests that there is a special bond between the organization and the treaty concerned without any recognized expression of consent to be bound. Sometimes the UN can be said to be the beneficiary of a treaty; it follows, so the argument could go, that with being a beneficiary may come obligations.⁵³ Again, the argument is at first sight normatively attractive, in that it taps into the idea of reciprocity, often considered an element of fairness.⁵⁴

But again, operationalization is problematic: there is no general rule in international law which specifies that being a beneficiary of a treaty helps to create corresponding duties. Indeed, the law of treaties positively militates against this, by making a principled distinction between the creation of a right (including any benefit) for third parties and the creation of an obligation for third parties.⁵⁵ Moreover, for the argument to work both the benefit or right and the obligation ought to be part of the same convention. There might be, *ex hypothesi*, some traction in saying that the UN is bound by a specific treaty if it benefits from that same treaty; but it would be clumsy to suggest that the UN is bound by a human rights treaty because it benefits from a treaty on privileges and immunities. And to argue that the UN derives concrete benefits from human rights treaties is difficult: it might benefit in a general sense (the world would be a better place if human rights were respected, and that would be benefit the UN, along with everyone else), but is unlikely to benefit in a concrete sense.

Arguments based on the internal rules of the UN fare no better, if only because there are no relevant internal rules (at least none that are publicly available). The closest perhaps is the Secretary-General's Bulletin to respect the principles of international humanitarian law⁵⁶, but this sees to the observance by UN troops of humanitarian rules

⁵³ There is a trace of such an argument in the classic *Reparation* opinion, in which the ICJ opined that the UN's international legal personality derived in part from its treaty-making activities, including the 1946 General Convention on Privileges and Immunities. Still, curiously, the UN was not – and still is not – a party to the 1946 General Convention. See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion [1949] ICJ Reports 174.

⁵⁴ For instance by John Rawls, *A Theory of Justice* (Oxford University Press, 1971).

⁵⁵ See articles 34-37 of both Vienna Conventions. A right can be accepted by using it; an obligation must be accepted expressly and in writing.

⁵⁶ See UN Doc. ST/SGB/1999/13.

and by no means creates a duty to intervene. Moreover, it was promulgated by Secretary-General Kofi Annan as late as 1999⁵⁷, which renders it inapplicable to the Rwanda genocide at any rate.⁵⁸

Since treaties are rarely applicable to the UN, and internal rules offer little solace, much of the normative weight is carried by the possibility of the UN being bound under customary international law. While this is by no means an obvious conclusion to draw from the ICJ's statement that international organizations are bound by the 'general rules of international law'⁵⁹, it is nonetheless a popular argument, made in various forms and with minor differences by many international lawyers.⁶⁰

Even accepting this as the basis of obligation, though, is not unproblematic, as the idea of the customary obligation fails to specify why precisely the UN would be singled out. Under this idea, it is beyond debate that a convention such as the Genocide Convention has become part of customary international law, perhaps even *jus cogens*, and thus creates on all members of the international community a duty to 'prevent and punish', in the words of article I of the Convention.⁶¹ If so, and if the UN is to be considered bound by customary international law and *jus cogens*, it follows that the UN indeed can be held responsible for failing to prevent the Rwandan genocide⁶² – even if afterwards it

⁵⁷ As early as 1975 the Institut de Droit International had called on the Secretary-General to unilaterally accept the general body of rules on armed conflict. See 'Conditions of Application of Rules, other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces may be engaged', adopted at Wiesbaden.

⁵⁸ The Bulletin specifies its entry into force date as 12 August 1999.

⁵⁹ See Jan Klabbers, 'The Sources of International Organizations Law', in Samantha Besson and Jean d'Aspremont (eds.), *Oxford Handbook of the Sources of International Law* (Oxford University Press, forthcoming).

⁶⁰ The more sophisticated versions include those made by Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, 2011); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), and Olivier de Schutter, 'Human Rights and the Rise of International Organisation: The Logic of Sliding Scales in the law of International Responsibility', in Jan Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010), 51-128.

⁶¹ Gourevitch recalls meeting a US military intelligence officer with a rather less elevated attitude to the Genocide Convention, which merely 'makes a nice wrapping for a cheese sandwich'. See Gourevitch, *We Wish to Inform You*, at 171.

⁶² Note, however, that the Security Council long refused to think of what was going on as genocide, and it has been suggested that it may have done so precisely because a characterization of the massacre as genocide would have entailed a duty to intervene on the basis of the Genocide Convention. See, e.g., David

created a tribunal to help punish individuals implicated in the genocide. But if the obligation rests on the UN, it also rests on, e.g., Belize: yet few suggest that Belize did anything wrong when it too failed to intervene.⁶³ It also rests on Belgium, Belarus and Bulgaria, as well as all other states.⁶⁴

Indeed, by the same logic, one could at first sight castigate all international organizations for not intervening. In addition to holding the UN responsible, why not also the International Monetary Fund (IMF), or the European Forest Institute (EFI), or the WHO, or the Inter-American Tropical Tuna Commission (IATTC)? Asking the question this way provides a glimmer of a possible answer: surely, when it comes to matters of peace and security, different things are expected from the UN than from the IMF, the EFI, the WHO or the IATTC. There is little in the mandate of these organizations to suggest they would have a role to play in preventing genocide: while the customary logic suggests they may be under an obligation to help prevent genocide from occurring, their own mandates give them little scope for acting in any relevant manner – any armed intervention ordered or authorized by the Universal Postal Union (UPU) would be regarded as an *ultra vires* act on the part of that institution. Hence, there is something in the mandate of the UN which directs us to blaming the UN when genocide occurs in Rwanda, but not blaming the UPU or any other international organization, and the relevant distinction, it would seem, resides precisely in the mandate. This will be further explored below, but before doing so, it will prove useful to have a closer look at the concept of omission.

Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (Oxford University Press, 2009), at 190.

⁶³ Belize, as it happens, acceded to the Convention in 1998 and thus could not be held bound as a matter of conventional obligation, but surely, if the Convention establishes customary international law or *ius cogens*, could be held bound even in 1994 on that basis.

⁶⁴ The ICJ confirmed as much in its *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro, [2007] ICJ Reports 43, para. 430, though with the caveat that not all states are equally well-placed to intervene. Much depends, so it suggested in a convoluted paragraph, on capacity, and this, in turn, depends on geographical proximity, political relationships between the state concerned and the state in which genocide takes place, and legal criteria too might play a role – although it remains unclear what these could relate to.

III. The Omission in the Law of Responsibility

Those who have attempted to codify the international law of responsibility realized early on that states (and other actors, no doubt) should not only incur responsibility for certain acts, but also for their omissions.⁶⁵ The venerable Institut de Droit International resolved, as early as 1927, that states would be responsible for damage caused to aliens ‘par toute action ou omission contraire à ses obligations internationales’.⁶⁶ Unfortunately, the notion of what constitutes an ‘omission’ was not further defined or elaborated. It seems as if the omission was expected to be the mirror image of ‘act’: an act means doing something; an omission, therefore, means doing nothing – it means doing nothing in such a way as to violate an international obligation.

A few years later, the League of Nations Codification Conference of 1930 allowed for a little more detail. It did not say much about omissions in general (except for briefly stating that responsibility could attach to acts as well as omissions, without clarification)⁶⁷, but noticed several times that states could be held responsible for failing to enact the legislation necessary to implement an international obligation, thus suggesting that failure to implement might constitute a legally relevant omission.⁶⁸ Moreover, it also accepted the position that a state could be held responsible for failing to grant foreigners access to their courts, as well as for failing to exercise due diligence

⁶⁵ It is somewhat curious to note that major textbooks on administrative law from both the common and the civil law tradition pay no attention to administrative omissions, even in fairly recent editions. See H.W.R. Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988), and Georges Vedel and Pierre Delvolvé, *Droit Administratif*, 8th ed. (Paris: PUF, 1982).

⁶⁶ See Institut de Droit International, ‘Responsabilité internationale des Etats à raison des dommages causes sur leur territoire à la personne et aux biens des étrangers’, resolution adopted at the Lausanne session, 1 September 1927, prepared by Leo Strisower.

⁶⁷ See ‘Official Documents: Conference for the Codification of International Law, 13 March 1930’, reprinted in (1930) 24 *American Journal of International Law (Special Supplement)*, at 53. It further specified that this could encompass also omissions in violation of concessions or contracts: at 54.

⁶⁸ *Ibid.*, e.g. at 49.

in the protection of foreigners.⁶⁹ Nonetheless, these examples and concerns also suggest that omissions were generally still treated as the mirror image of acts.⁷⁰

After the ILC had started to work on the codification of state responsibility, its first special rapporteur on the topic, Garcia-Amador, paid some attention to the concept of omission in his second report – but still very little. In something of a throwaway remark, he noted that omissions typically assume relevance with respect to acts of private persons or internal disturbances that damage foreign interests.⁷¹ As was perhaps to be expected given his academic work, the second special rapporteur, Roberto Ago, delved a little deeper into the matter, but he too by and large limited himself to discussing the omission as an instance of non-implementation. His main focus rested on the distinction between obligations of conduct and obligations of result, both of which could be negated by the state's omission to enact the proper domestic legislation. Whether the omission could take on other forms, however, was left without discussion⁷², though a year later he paid some attention to a failure to prevent events as a possible ground for responsibility. He concluded that this would only incur responsibility if the event in question actually took place. Hence, a failure to prevent an assassination attempt (e.g.) would remain immaterial unless and until the assassination attempt actually took place.⁷³ Nonetheless, his distinction between obligations of conduct and obligations of result turns out to be of some relevance, as will be discussed below⁷⁴, although it has not survived the drafting processes within the ILC.⁷⁵

⁶⁹ *Ibid.*, at 55, 64.

⁷⁰ *Ibid.*, 56-57.

⁷¹ See F.V. García Amador, 'Second Report on International Responsibility', reproduced in (1957) *Yearbook of the International Law Commission*, vol. II, 104-130, at 106.

⁷² See in particular Roberto Ago, 'Sixth Report on State Responsibility', (1977) *Yearbook of the International Law Commission*, vol. II, 3-43. He also presented a rather convoluted draft article on the exhaustion of local remedies, which managed with considerable lack of clarity to both posit that exhaustion of local remedies constituted an admissibility condition, while denial of access to local remedies could classify (so we may conclude) as an omission.

⁷³ See Roberto Ago, 'Seventh Report on State Responsibility', (1978) *Yearbook of the International Law Commission*, vol. II, 31-60.

⁷⁴ See section IV of this paper.

⁷⁵ The ASR, as adopted in 2001, do not mention the distinction, largely because the consequences of a breach were thought to be the same, in the absence of a procedural framework within which the distinction could do some work. See the discussion in James Crawford, *The International Law*

The subsequent three special rapporteurs did not add much to the discussion (limited as it was) on omissions, with one minor exception. In his first report, the final special rapporteur, James Crawford, briefly notes that the term internationally wrongful act covers both action and omissions, and refers to earlier ILC work, in particular the Commission's 1973 annual report.⁷⁶ This report, however, stipulates a few terminological points, but does little to elucidate the idea of an omission beyond noting, somewhat tangentially, that in French the proper noun would be 'fait' rather than 'acte', as the latter would suggest 'a manifestation of will intended to produce the legal consequences determined by that will', and such would unduly limit the reach of any rules on state responsibility.⁷⁷ While this suggests that the word 'act' in 'internationally wrongful act' should not be taken too literally, it does not say much of additional value.

Still, the Commentary to the Articles on State Responsibility, as adopted in 2001, reminds the reader that in several judgments of the ICJ⁷⁸, states have been found responsible for not acting, and it even posits that cases where state responsibility is invoked for omissions are 'at least as numerous' as those based on positive acts.⁷⁹ This echoed an earlier claim made by special rapporteur Ago, who pointed out that given the relatively large number of claims concerning injury to aliens, one might say that cases decided on the basis of omissions are 'perhaps more numerous' than those involving positive acts of states, given that injury caused by private persons usually can be re-conceptualized as state responsibility for omissions: the state has taken insufficient measures to either prevent or punish the private wrongdoing.⁸⁰

Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002), at 20-22.

⁷⁶ See James Crawford, 'First Report on State Responsibility', UN Doc. A/CN.4/490 (1998), at 27.

⁷⁷ See (1973) *Yearbook of the International Law Commission*, vol. II, at 176 (para 14.)

⁷⁸ Reference is made to Albanian inaction in the Corfu Channel, and Iran's inaction when confronted with hostage taking by militant students: in both cases the Court considered that non-action breached an obligation to act. See, respectively, *Corfu Channel*, merits, [1949] ICJ Reports 4; *United States Diplomatic and Consular Staff in Tehran* (USA v Iran), [1980] ICJ Reports 3.

⁷⁹ See ASR commentary to art 2, para. 4. See Crawford, *The International Law Commission's Articles*, at 82.

⁸⁰ See Roberto Ago, 'Second Report on State Responsibility', UN Doc. A/CN.4/233, reproduced in (1970) *Yearbook of the International Law Commission*, vol. II, 177-197, at 188, para. 35. I am indebted to Katja Creutz for bringing the passage to my attention.

If the *travaux* to the Articles on State Responsibility do not provide much to go on, neither does the work preceding the Articles on Responsibility of International Organizations. In 2011, after more than a decade of serious work on the basis of reports prepared by special rapporteur (now Judge) Giorgio Gaja, the ILC adopted a set of articles on the responsibility of international organizations. Many aspects of both the process of developing these articles and their eventual contents have been addressed in the literature⁸¹, but what has gone virtually unnoticed has to do with the very basis of responsibility: responsibility can be incurred for actions, but also for omissions. As noted, article 4 ARIO holds that organizations can incur responsibility for any act action or omission, as long as it is attributable to the organization and breaches an international obligation of the organization.⁸²

The commentary to article 4 ARIO does little to elucidate what is meant by omission. The commentary, in fact, does not address it at all, other than by providing a re-statement. It states that attribution of conduct is of relevance, and that '[t]he term "conduct" is intended to cover both acts and omissions on the part of the international organization.'⁸³ Beyond this, the commentary devotes some attention to the basis of obligation and the notion of breach, and specifies that damage is not a relevant concern, but says nothing further about either actions or omissions – it seems that, much like in the earlier codification efforts of the Interbellum, the omission is still simply treated as the mirror image of the act.

If the ILC Commentary does not offer much insight, Special rapporteur Gaja's reports on the responsibility of international organizations likewise do little to elucidate the idea behind holding organizations responsible not just for their actions but also for their omissions. His first report addresses the concept of the wrongful act, but is by and large limited to explaining that there is little point in embarking on an approach that would

⁸¹ For a fine overview, see Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013).

⁸² Article 4 ARIO. The articles plus commentary are reproduced in (2011) *Yearbook of the International Law Commission*, vol. II, 52-172.

⁸³ ARIO Commentary (*ibid.*), at 14.

substantively differ from the approach chosen in the articles on the responsibility of states.⁸⁴

The one occasion at which the concept of the omission was discussed was occasioned by a comment by the International Monetary Fund (IMF) concerning what was, at the time, draft article 3. The IMF's representative made two relevant comments. First, it was noted that an omission could well result from the regular decision-making process, and thus the lawful exercise of their powers by member states.⁸⁵ This followed (and this is the second comment) an earlier question, rhetorical if nothing else, about the justiciability of a failure to perform according to the mandate of the organization: 'how would an international organization be held responsible for a finding by a national court or international tribunal that it had failed to fulfil the mandate for which it was established ...?'⁸⁶

The IMF's questions were never taken up, it seems, although one of Gaja's later reports contains a throwaway remark related to the matter. Referring to the opinion of the IMF, Gaja holds that one cannot say 'that an organization is free from international responsibility if it acts in compliance with its constituent instrument.'⁸⁷ The special rapporteur refrained from explaining why this would be the case. Perhaps (but this remains speculative) Gaja's reluctance to enter into a debate with the IMF found its cause in the circumstance that the IMF rather overtly flagged a clear political agenda⁸⁸: it was worried that general international law, in the form of responsibility, would come to prevail over its internal law and the wishes of its member states.

⁸⁴ See Giorgio Gaja, 'First Report on the Responsibility of International Organizations', UN Doc A/CN.4/532 (2003).

⁸⁵ See 'Comments and Observations received from International Organizations', UN Doc A/CN.4/545 (2004), at 25-26.

⁸⁶ *Ibid.*, at 25.

⁸⁷ See Giorgio Gaja, 'Seventh Report on the Responsibility of International Organizations', UN Doc A/CN.4/610 (2009), at 7.

⁸⁸ The IMF expressed its fear, e.g., that any judicial decision relating to the mandate 'could, in effect, override the will of the organization's member States.' See UN Doc A/CN.4/545 (2004), at 25. And when discussing omissions, the IMF made clear that organizational charters remained the primary sources of law; any general principles of law could only complement this, and would need to be consistent with the organizational charters. *Ibid.*, at 26.

The relevant international legal literature too is sparse, to say the least – Roberto Ago remarked much the same on the eve of the Second World War⁸⁹, and little has changed since then.⁹⁰ Learned commentaries on the law of responsibility generally pay little attention to the notion of omission: if discussed at all, it is usually in connection with state responsibility (rather than responsibility of international organizations), and in connection with attribution: states cannot be held responsible for the acts of private persons, including armed groups, but can be held responsible for failure to protect or failing to act in due diligence.⁹¹

Writing in 1939, Roberto Ago pointed out that the omission should not be seen as referring to something material, but rather as referring to a juridical characteristic. While the positive act violates a rule not to engage in a specific act, the omission violates a rule ordering engagement in a specific act.⁹² And as with positive action, the omission too rests on intention: an omission resulting from force majeure, e.g., would be excusable.⁹³ However, things would be different when discussing, e.g., causality: typically, an omission cannot be said to cause an event in quite the same way as positive action can: surely, the refusal of security forces to prevent an assassination attempt on a politician may contribute to the event, but cannot meaningfully be said to cause it; instead, the more relevant question to ask is whether by not acting the event was able to materialize.⁹⁴

Ago spotted yet a second difference, this time in the realm of consequences. When a state violates an obligation by its action, it gives rise to new obligations: to cease and desist, and to repair in one way or another. With omissions, however, this is not the

⁸⁹ See Roberto Ago, 'Le délit international', (1939) 68 *Recueil des Cours*, 415-553, at 501.

⁹⁰ Even recent forays into the philosophy of international responsibility at best mention that omissions are worth paying some attention to, but do not go much further. See, e.g., James Crawford and Jeremy Watkins, 'International Responsibility', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 283-298, and Liam Murphy, 'International Responsibility', in *ibid.*, 299-315.

⁹¹ See e.g. Brigitte Stern, 'The Elements of an Internationally Wrongful Act', in James Crawford, Alain Pellet and Simon Ollesen (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 193-219, at 208-209. See also Franck Latty, 'Actions and Omissions', in *ibid.*, 355-364.

⁹² Ago, 'Le délit international', at 501.

⁹³ *Ibid.*, at 502.

⁹⁴ *Ibid.*, at 503.

case: one cannot meaningfully ‘cease and desist’ an omission, and as long as the event continues, so will the putative duty to act.⁹⁵ Here it should probably be noted that Ago was addressing predominantly bilateral relations between states: many of his examples concerned breaches of contractual undertakings or, occasionally, the use of force. In other words, what he did not address (and hardly could have addressed at the time he wrote) is the question of the omission to exercise public power by international organizations.

Importantly, Ago the academic realized that the omission was not merely the mirror image of the act. Ago the special rapporteur, however, seems to have forgotten that lesson, as discussed above – or maybe he felt that for the pragmatic purpose of drafting a set of rules on state responsibility, things should not be needlessly complicated by considerations stemming from the philosophy of action. Still, as we will see, those complications could only be ignored for so long.

What becomes clear from the work of the ILC and other codification fora, with support from the sparse academic literature, is that to the extent that omissions are conceptualized to begin with, they are conceptualized as violations of specific duties or obligations to act.⁹⁶ Their identification is symmetrical, along with those of positive acts as wrongful acts: in both cases, a duty is violated, either by means of acting or through omission.

This is generally no doubt a sensible approach, and when it comes to acts of states there are, arguably, few alternatives. To the extent that states can still be called sovereign and international law is still seen as fundamentally grounded in sovereignty, the old *Lotus* idea still seems valid: restrictions on the independence of states are not lightly to be presumed.⁹⁷ Hence, states can only be held responsible, in such a horizontal, sovereignty-oriented legal order, for failure to act when there is a clear duty to act, laid

⁹⁵ *Ibid.*, at 504-505.

⁹⁶ One example sometimes mentioned is article 25 of the 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, according to which the parties are under an obligation to prevent violations of neutrality in their ports, roadsteads and waters. The example is given in M.G. Cohn, ‘La théorie de la responsabilité internationale’, (1939) 68 *Recueil des Cours*, 207-325.

⁹⁷ See *Case of the SS Lotus*, [1927] Publ. PCIJ, Series A, no. 10.

down in a positive legal rule. Note though that even this logic is not airtight, and consequently not always applied in practice. While Iran was held responsible in *Tehran Hostages* for having violated some readily identifiable international legal obligations⁹⁸, Albania's responsibility in *Corfu Channel* has become famous for not having been based on clear legal rules alone: Albania was held to be responsible, in part, on the basis of 'elementary considerations of humanity'. Few authors have looked into the matter of state responsibility for omissions, but they typically invoke some non-consensual basis for responsibility for some omissions, for instance as the corollary of territorial control⁹⁹, or as the elaboration of a duty to be a *bona res publica*.¹⁰⁰

With respect to international organizations, the non-consensual obligation by necessity has to play a bigger part. Not only can international organizations hardly be called 'sovereign' (other than by stretching that notion, possibly beyond its breaking point¹⁰¹) but, more importantly, international organizations have very few hard and fast consensual obligations under international law. As noted earlier, they are parties to very few treaties, and the reach of customary international law is debatable. It follows, that the concept of an omission by an international organization could well be an empty category: international organizations have few obligations to begin with, and even fewer to act in any positive manner. Indeed, the traditional examples taken from the law of state responsibility have little or no bearing: a duty to protect heads of state visiting an international organization, e.g., will typically rest on the host state of the organization, rather than on the organization itself, and much the same applies to a duty to protect permanent representations of states to organizations or the headquarters of

⁹⁸ Note however that at least one author found that Switzerland could not be held responsible when the Roumanian legation in Berne had been under attack in the 1950s, as it had not acted negligently. See G. Perrin, 'L'Agression contre la légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission', (1957) 61 *Revue Générale de Droit International Public*, 410-447.

⁹⁹ See Denis Lévy, 'La responsabilité pour omission et la responsabilité pour risque en droit international public', (1961) 65 *Revue Générale de Droit International Public*, 744-764.

¹⁰⁰ See Cohn, 'La théorie', at 305.

¹⁰¹ A rather functionalist idea of sovereignty is launched by Carmen E. Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford University Press, 2015).

organizations.¹⁰² Moreover, it is doubtful whether there exists any duty to implement treaty commitments into the internal legal order of the organization.

Yet, as will be demonstrated below, the concept of organizational omissions might be given new impetus by focusing not solely on the existence of specific obligations to act (*vel non*), but by including the mandate of the organization in the analysis. With states, this is difficult to imagine, as states typically do not have a mandate, at least not in the same form as international organizations. At best (or at worst) states may be said to owe obligations to their citizens to secure the survival and possibly the well-being of the state, often summarized somewhat pejoratively under the heading '*raison d'état*'.¹⁰³ But states typically cannot refer to foundational documents in which their founders assigned them specific tasks. While the function of the World Health Organization (WHO) may be summarized as promoting and securing global health, states have no such functions; the function of Germany, Nigeria and Brazil is simply to be Germany, or Nigeria, or Brazil. To put the point differently: the constitutions of states do not usually refer to the tasks of the state. And where they do, such tasks are typically cast in abstract form as providing for security and well-being.

There is, hence, little to be gained, for purposes of identifying omissions, by investigating the purposes of states: these are either not given or conceptualized in more or less identical form as consisting of the security and well-being of citizens. And if that is the case, then it follows that the purposes of, say, Nigeria or Brazil will be much the same as those of, say, Norway, Uruguay, or even North Korea. By contrast, international organizations boast a wide variety of functions and tasks between them, so much so that a focus on these tasks is analytically defensible.

This in turn raises the questions why so little is known about the omission in the law of responsibility, and the answer, while it has to remain speculative, most likely resides in

¹⁰² Thus, section 16 of the 1947 UN-US Headquarters Agreement provides that the US remains responsible for protecting headquarters.

¹⁰³ Note that the duty to obey the law in any given state may well be derived from the tasks or functions of the state, but that these are less relevant for purposes of international responsibility. See, .e.g., G.E.M. Anscombe, 'On the Source of the Authority of the State', in G.E.M. Anscombe, *Collected Papers. Vol. III: Ethics, Religion and Politics* (Oxford: Blackwell, 1981), 142-173.

the very concept of responsibility. For everyday purposes, we tend to hold people responsible for things we feel they do wrong. In a sense, we have adopted the old Christian idea of sin, and transposed it to our current prevailing morality. What has been lost in the process, though, is the surrounding framework: notions of sin presuppose such things as remorse, regret or grace and, of greater practical importance perhaps, presuppose intentionality: sinning by accident is almost a contradiction in terms. We sin, instead, because we are weak of character – because we give in to temptation, and do so wittingly and willingly. The consequence is this: closely connected as it is to intentionality, sin is something only individual moral agents are capable of. It makes little sense, in our everyday language, to speak of the sins of Russia, or Nazi Germany, or any other collectivity. It is for this reason that moral philosophers are concerned with establishing the moral agency of collective agents, and it is this circumstance that helps explain why, in international law, the idea of individual responsibility has gained considerable ground in the past few decades: we dimly realize that individual responsibility is most easily compatible with our everyday ‘pragmatic’ concept of responsibility, inherited as it is from the Christian tradition.¹⁰⁴

It follows that international law has been forced to think of alternatives when it comes to state responsibility and, by extension, the responsibility of international organizations.¹⁰⁵ If it is counter-intuitive to think of such actors committing sins, it was sensible for the discipline to start to think of different ways in which to capture wrongdoings: not by thinking of sin, but by thinking of objectively verifiable data. It is no coincidence that the international law of responsibility (except for individual responsibility) does not insist on fault, *culpa*, or any suchlike notion. All that is required is the internationally wrongful act, regardless of any kind of intention to engage in wrongful behaviour. And such acts are, in principle, cognizable and objectively

¹⁰⁴ See generally Marion Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (Chicago Ill: University of Chicago Press, 1992); see similarly Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge MA: Harvard University Press, 1986 [1964]), 45-48.

¹⁰⁵ It may be added that our working concept of responsibility still sees responsibility predominantly in terms of either a relationship with oneself or with God, but rarely takes the relational dimension into account. For a critique along these lines, see Daniel Warner, *An Ethic of Responsibility in International Relations* (Boulder CO: Lynne Rienner, 1991).

verifiable: it is, in principle, possible to determine whether state X breached treaty provision Y, or whether international organization X violated a treaty commitment to do Y. And this is possible because, in the standard scenario, there is but a limited range of options available to give effect to an international obligation, and most of them ask states to refrain from behaving. *Ergo*, once they act, it can be verified whether their behaviour was in accordance with the prohibition at stake.

It is different with omissions though, as the range of options is, as we will see, almost literally unlimited: the omission is structured in a different way, and is not just the reverse side of the act. This will be further discussed below, in section IV of this paper. For the moment, it suffices to note that with respect to international organizations, there exist few hard and fast rules, and even fewer obligations to act. That is, international organizations are subject to few international legal obligations (if any) demanding positive action in such a way that one can meaningfully conclude that the absence of action clearly breaches an obligation to act.

The problem is then compounded when at issue are collective actors, who cannot meaningfully be said to sin or, what amounts to the same, have any kind of intention to engage in wrongful behaviour. It is no coincidence that most discussions on the responsibility of international organizations revolve around behaviour that can at best (or at worst) be characterized as negligent. Thus, in a recent contribution, Lewis Kornhauser suggests that the United Nations Children's Fund (UNICEF) might be held responsible for failing to guarantee water safety in a project it was sponsoring in Bangladesh, and that the UN incurs responsibility for failing to properly oversee the deployment of peacekeepers in Haiti and failing to check their waste management.¹⁰⁶ In both cases, what the organization is accused of is not intentional wrongfulness, but something a lot closer to negligence. This presupposes, however, that particular forms of behaviour could have been expected, and this in turn presupposes that we have ways of identifying whence those expectations stem. It will be my contention that they can be derived, at least up to a point, from the mandate of the organization concerned.

¹⁰⁶ See Lewis A. Kornhauser, 'Incentives, Compensation, and Irreparable Harm', in Nollkaemper and Jacobs (eds.), *Distribution of Responsibilities*, 120-152.

This entails that negligence as such cannot be made operational in this scheme: my interest resides with the omission that can be said to be intentional, the omission which is the result of a decision to refrain from acting – and this distinguishes the omission from related notions such as negligence or failure to observe due diligence.¹⁰⁷ It is problematic to think of the omission as merely the mirror image of the act: omissions cannot usually be said to be causal in quite the same way as acts, and they cannot be ceased in quite the same way as acts. But what is of relevance (and this will be further discussed in section IV below) is that omission must somehow be the result of a conscious decision – it is here that the act and the omission have something in common. It is quite likely the case that ‘intention’ may not be the best way to describe the process leading to the conscious decision not to act, but that merely pays testimony to the poverty of language.¹⁰⁸

IV. Conceptualizing Omissions

Philosophically speaking, omission is a deceptively complicated term. In a sense, any action not taken at any given moment can be regarded as omission. As a result, there are probably thousands of omissions committed by every single one of us every minute of the day, yet we are often not even aware of their existence or the possibility of doing something about them. As Joseph Raz caustically exemplifies, he should not incur responsibility for omitting to call ‘the person whose name is first in the Munich telephone directory’.¹⁰⁹ Hence, it would be absurd to suggest that blame and responsibility could be incurred for each and every of these omissions. Surely, already as

¹⁰⁷ On negligence in particular, see Ernest J. Weinrib, *The Idea of Private Law* (Oxford University Press, 2012 [1995]).

¹⁰⁸ Note for instance the problems experienced by Bin Cheng, who describes the omission as a ‘voluntary inaction’, adding that this means ‘not necessarily an *intended* inaction but simply an inaction which is not due to impossibility of acting otherwise’. See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006 [1953]), at 174 (emphasis in original – JK).

¹⁰⁹ See Joseph Raz, ‘Being in the World’, in Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011), 225-254, at 248.

a starting point it seems clear that at least two conditions must be met: somehow there must exist an obligation that remains unperformed, and somehow the actor must be in a position to perform that obligation; otherwise, any finding of responsibility is unrealistic and unfair.¹¹⁰ Simply put: people can be blamed for not rescuing a drowning man if it can be established that people are under an obligation to rescue drowning people (this is the easy part – most ethicists would agree to the existence of such an obligation), and if they are in a position to do so.¹¹¹ If the man is drowning in a different city, e.g., then surely those not close by cannot be held responsible.¹¹²

Leaving the requirement of being in a position to act aside, the obligation to act would stem, most typically, from a concrete and positive rule or principle: this is what George Fletcher refers to as the proper ‘failure to act’, exemplified by such omissions as failing to file a tax return or failing to protect diplomatic premises, and distinguishing it from such acts as not intervening when a child is drowning.¹¹³ James Crawford seems to have much the same in mind. As he once put it, the ‘omission is more than simple ‘not-doing’ or inaction: it is legally significant only when there is a legal duty to act which is not fulfilled, and its significance can only be assessed by reference to the content of that duty. So an omission is the failure to do that which should be done; the absence of any primary obligation ‘to do’ will mean that no omission may be complained of.’¹¹⁴ Note that Crawford’s words still leave intact the suggestion, discussed above, that the omission is, really, the mirror image of the act. He is surely right in saying that the legally relevant omission demands a legal duty to act, but equally surely, positing that

¹¹⁰ As Tony Honoré put it with characteristic clarity, ‘one can omit to do something only when, for whatever reason, the situation calls for it to be done.’ See Tony Honoré, ‘Are Omissions Less Culpable?’, reproduced in Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999), 41-66, at 47.

¹¹¹ See generally John Martin Fischer, ‘Responsibility and Failure’, (1985-86) 86 *Proceedings of the Aristotelian Society*, 251-270, at 268: ‘...if an agent is to be morally responsible for failing to do X, he must be able to do X.’

¹¹² Moreover, what looks like inaction from one perspective might constitute action if seen from a different perspective. Lucy notes that snoozing in an armchair might look like inaction, but is itself a form of action, which only takes on an air of inaction if it takes the place of some other activity. See William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007), at 148. More generally, omissions can often be re-described as actions, and *vice versa*. *Ibid.*, at 149.

¹¹³ See George Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998), at 45-50.

¹¹⁴ See James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), at 218.

the legally relevant omission depends on a legal obligation to act cannot be the complete story.¹¹⁵

Weinryb suggests that omissions should be distinguished from two close related notions.¹¹⁶ On the one hand, there is failure. While an omission may be akin to a failure to act (and in this sense there is correspondence between the terms), there is nonetheless a distinction between not acting, and acting badly, or mistakenly. The doctor prescribing the wrong treatment may fail, but his failure is not an omission – unless one would want to argue that all incorrect actions are akin to omissions, but surely such an argument is untenable. Weinryb's second distinction is between omission and inactivity: omissions encompass inactivity, but it cannot be said that all inactivity amounts to omissions – following Weinryb, it seems that something more is needed.

Perhaps the nature of this 'something more' is best caught by Jonathan Bennett's distinction between 'positive instrumentality' and 'negative instrumentality'. The former corresponds to the act in the law of international responsibility, whereas the latter – negative instrumentality – corresponds to the omission. Negative instrumentality suggests that not all omissions qualify, but rather those that are instrumental to a certain consequence. Hence, this posits a relationship between omission and result, yet does so without insisting on the result being intentional – as intentionality, in this respect as in others, is hugely problematic.¹¹⁷ This also helps to distinguish the omission from the related doctrine of 'double effect' by circumventing it: according to the doctrine of double effect, actions can have intended as well as unintended consequences (think of collateral damage). Here then the question often arises to what extent the actor can be held responsible for damage that was unintended, yet consciously inflicted in the process of aiming to reach a different result.¹¹⁸

¹¹⁵ Fletcher seems to deny this mirror image: see Fletcher, *Basic Concepts*, at 45-46.

¹¹⁶ See Elazar Weinryb, 'Omissions and Responsibility', (1980) 30 *Philosophical Quarterly*, 1-18, esp. at 5-7.

¹¹⁷ See Jonathan Bennett, *Morality and Consequences* (Oxford: Tanner Lectures, 1980).

¹¹⁸ The standard example is the bombing of a military installation likely to result in civilian casualties. Making civilian casualties is not the intended result, but is often foreseeable. See, e.g., Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 2000), 152-156.

It might be possible for an international organization to fail to exercise due diligence when acting, but it is unlikely that a legally relevant failure to act can be derived from the principle of due diligence alone. Due diligence presupposes an obligation to be latched onto and, like good faith, cannot create obligations where otherwise none would exist.¹¹⁹ And this means, as a practical matter, that the conceptualization of the omission in international institutional law still requires either an applicable specific obligation resting on the international organization, or may possibly be derived from elsewhere: the main candidate for this ‘elsewhere’ then has to be the organization’s mandate.

As noted, with respect to international organizations there may be very few applicable legal duties. International law, perhaps like law in general¹²⁰, is better at telling actors what not to do than at instructing them what to do; consequently, there are not all that many explicit duties to act, at least not in international law. Indeed, in international law the situation is compounded by the nature of the legal order: its largely horizontal character is not conducive to creating duties to act. A legislator can, hypothetically at any rate, tell people that action is required under certain conditions, but such is less likely the case if the law-makers are the subjects themselves. It is no coincidence that the one principle often referred to as creative of a duty to act is the due diligence principle: being a principle, it does not rest on specific acts of consent, and can be applied in a variety of contexts.¹²¹ Had it required specific acts of consent, it might not have come into being.

That is not to say that duties to act are fully absent, as some international duties clearly fall into that category. One can think of several examples from diplomatic law, e.g., including the duty to facilitate the acquisition of embassy premises, or the duty to protect diplomatic missions.¹²² Consular law, as is well-known, contains a duty to offer

¹¹⁹ See *Border and Transborder Armed Actions* (Nicaragua v Honduras), Jurisdiction and Admissibility, [1988] ICJ Reports 69, para. 94.

¹²⁰ The observation was made by Hannah Arendt that law is characterized in general by telling people what not to do, rather than telling them what to do: she refers to this as both the greatness and perplexity of law. See Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt Brace and Company, 1979 [1951]), at 467.

¹²¹ This owes something to the conceptualization of principles by Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977).

¹²² See articles 21 and 22 of the Vienna Convention on Diplomatic Relations.

consular assistance to foreigners.¹²³ Likewise there are duties to act in a certain manner contained in international humanitarian law, e.g. the duty to provide humane treatment to the wounded and the sick¹²⁴ or to prisoners of war.¹²⁵ And one of the relatively few acknowledged rules of customary international environmental law posits a duty to conduct an environmental impact assessment.¹²⁶

All this is of little help though in connection with international organizations, as these are parties to few treaties and, as shown before, as the binding force of customary international law may have little bearing on the organization's work. What matters with respect to international organizations then, absent direct obligations to act, is whether a duty to act can and must be derived by other means. Honoré suggests that, in general and in the abstract, obligations to act can stem from a number of different sources (in addition to specific rules). They can stem from engaging in risky activities; they can emanate from being well-placed to meet a need; from receiving a benefit; from making a promise; and they can stem from occupying a specific office or social role – the latter is sometimes referred to as 'role responsibility'.¹²⁷ As the example of Rwanda above suggested, there may be something in the role or mandate of the organization which would make it reasonable to hold an organization to account for failing to perform where it should have performed.

The general problem with linking omissions to responsibility is, so it seems, that often enough it will be extremely difficult to bring the two together. Most often, an omission cannot be said to have much causal effect. The doctor who refuses to perform emergency surgery on the victim of a drive-by shooting and instead goes and drinks coffee for an hour may be guilty of a lot of things, but it will be difficult to argue that his coffee-

¹²³ See Article 36 of the Vienna Convention on Consular Relations. This provision came before the ICJ on three different occasions, see, e.g., *Avena and Other Mexican Nationals* (Mexico v United States), [2004] ICJ Reports 12.

¹²⁴ Geneva Convention I, article 12.

¹²⁵ Geneva Convention III, article 13.

¹²⁶ See *Pulp Mills on the River Uruguay* (Argentina v Uruguay), judgment of 20 April 2010, confirmed in *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica), judgment of 16 December 2015.

¹²⁷ See Honoré, 'Are Omissions Less Culpable?', 55-60.

drinking caused the patient's death. And even the refusal to perform surgery cannot be said to have caused the death – at least not on its own. Surely, if the patient had been the victim of a shooting, then the shooter must be considered as having caused the patient's death, rather than the non-performing doctor. If the patient had a heart attack, it is the heart attack which we consider as the cause of death. We might agree that the non-performing doctor *contributed* to the patient's death, but would usually not claim that she *caused* the patient's death.

So, if causality is out of reach, something else is required to connect the omission to its consequences. One option – the one central to this paper – is what might be termed 'dereliction of duty', even if and when that duty is not explicitly spelled out. As Elazar Weinryb points out, it is precisely here, with role responsibility, that the absence of a causal link between omission and consequences can be overcome: 'the sphere of responsibility attached to the role' is what connects the omission to the nefarious consequence.¹²⁸

In its simplest form, the notion of 'role responsibility' refers to the idea that in everyday morality (and law as well), different roles come with different sets of responsibilities, perhaps even to the extent that specific obligations rest on individuals specifically on the basis of the role or roles they occupy. If this is the case with individuals, then perhaps the same can also be said with respect to other, corporate or organizational, actors.

Though philosophically controversial, it is not uncommon to think that individuals may carry different responsibilities when acting in different capacities. Thus, it seems generally accepted that a captain has responsibilities involving the ship under her command which do not apply to others – passengers may quickly leave the sinking ship, but the captain is not supposed to do so. It is, in other words, from the captain's role or mandate that responsibility may arise.¹²⁹ And should the captain fail to act in

¹²⁸ See Weinryb, 'Omissions and Responsibility', at 16.

¹²⁹ See, e.g., H.L.A. Hart, 'Post Script: Responsibility and Retribution', in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 210-237. In virtue theory, this has been explored most prominently by Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001).

accordance with her role, she may be held responsible, at least morally and possibly legally as well.¹³⁰

This much seems generally accepted. What is less generally accepted is whether individuals may derive ‘responsibility benefits’ from their role or, in other words, whether the obligation to perform a specific task can also qualify as an excuse for failing to respect general duties. If lying is generally wrong, as Kant famously held, then why accept that persons in some positions may nonetheless tell lies? As a result, in all likelihood, Kant’s maxim has been re-interpreted so as to uphold the idea that lying is acceptable in some circumstances, but the relevant point to note is that the acceptability of lying is tied to circumstances, rather than to professional roles.¹³¹ This holds intact the essentially liberal concern with the equality of all individuals: liberalism suggests that all individuals be treated equally, regardless of their professional roles, their status in life, and whatnot.¹³² Thus, a doctor may lie to a terminal patient that he or she will not be dead tomorrow, but this derives its acceptability from the circumstance that the patient is terminally ill, not from the speaker being a doctor. The central banker may downplay a coming financial crisis not because she is a central banker, but because of the consequences of a financial crisis and the likely self-fulfilling prophecy involved in warning against one.

Some roles are, for the better part, merely – or largely - social roles. Thus, while there might be rules on the behaviour to be expected from a law professor (to teach, to conduct research, to supervise students at all levels, to participate in committee meetings), few of these will be found in legal instruments. Most are the result of social expectations and long traditions, perhaps in combination with a code of conduct on

¹³⁰ The captain of the Italian cruise ship *Costa Concordia* that sank in 2012 was sentenced to 16 years in jail for manslaughter. Part of the blame went to him losing control of the evacuation process after sinking, and abandoning the ship. See <http://www.aljazeera.com/news/2015/02/italian-cruise-ship-captain-16-year-jail-sentence-150211114054688.html> (last visited 29 February 2016).

¹³¹ See e.g. Martin Jay, *The Virtues of Mendacity: On Lying in Politics* (Charlottesville VA: University of Virginia Press, 2010); John Mearsheimer, *Why Leaders Lie: The Truth about Lying in International Politics* (London: Duckworth Overlook, 2011). An earlier classic is Hannah Arendt, ‘Lying in Politics: Reflections on the Pentagon Papers’, reproduced in Hannah Arendt, *Crises of the Republic* (San Diego CA: Harcourt Brace & Company, 1972), 1-47.

¹³² The point is made by Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton NJ: Princeton University Press, 1999).

specific topics (e.g. on the kind of supervision PhD students may legitimately expect, or on the sort of relations deemed acceptable between professors and students). Beyond this, law professors occupy no special legal position: they are not given the right to perform acts with legal effects on their own (such as issuing law degrees), and are generally considered subject to regular legislation. Thus, like other individuals, the law professor shall not kill, commit theft, *et cetera*.

Other roles are likewise socially constructed, but result from the exercise of power rather than merely expectations (obviously the borderline will be porous). Thus, society decides, in opaque manner, what the responsibilities of parents are, and within this category tends to differentiate still further between the responsibilities of fathers and those of mothers. With the label 'mother' come certain expectations; not meeting those expectations will result in qualification, socially, as a 'bad mother', while surpassing the expectations will result in the classification 'great mother'.¹³³

With other professions, the attached responsibilities may not stem from social convention but rather from legal description. Police officers are licensed to arrest suspects and may, in the process, use force in ways that do not apply to the rest of us. Judges are expected to dole out punishment, in appropriate circumstances. Soldiers may even be expected to kill people, at least in certain circumstances. Central bankers may announce monetary measures; in some jurisdictions doctors may assist in voluntary suicides, and members of the clergy may perform wedding ceremonies. Indeed, some acts can only be done by persons occupying specific roles. While ordinary people may end up forgiving a criminal, it usually takes a head of state to pardon a criminal. The act here is inextricably tied to the office.¹³⁴

Sometimes acts also assume a specific gravitas against the background of a particular role. To proclaim a suspect guilty of a crime is different when done by someone in a private capacity at a barbecue from when done by that same person as the foreman of a

¹³³ See, e.g., Anthony F. Lang, jr., 'Shared Political Responsibility', in Nollkaemper and Jacobs (eds.), *Distribution of Responsibilities*, 62-86.

¹³⁴ See generally R.S. Downie, *Roles and Values: An Introduction to Social Ethics* (London: Methuen, 1971).

jury during criminal proceedings.¹³⁵ In a private capacity one may neglect the opinions of other jurors, perhaps even some of the evidence; but one may not do so when acting as foreman.

In short, it seems that there is some traction to the idea that different roles can come with different responsibilities. Even if a person's beliefs will have to remain constant through a variety of roles, nonetheless one's roles place different demands at different moments on one's actions.¹³⁶ While these may or may not excuse wrongful behaviour¹³⁷, at the very least it seems to be clear that roles can imply the converse: they may be creative of responsibilities.

If this holds true with respect to individuals, it holds true *a fortiori* with respect to organizational and corporate actors.¹³⁸ This is so not because such actors can be reduced to aggregates of individuals – they cannot. Instead, such actors tend to be defined in part precisely by their roles, by the functions assigned to them. Meir Dan-Cohen puts the matter with considerable clarity: 'at any given point in time and within a particular normative scheme, organizational behavior is amenable to analysis and interpretation in terms of the organization's instrumental nature, that is, in terms of its pursuit of some predetermined individual or social goals...'.¹³⁹ Indeed, doing so is a necessity: the acts and omissions of organizational actors can only be understood against the background of the tasks assigned to them. The proverbial visitor from Mars may not get a proper understanding of the UN by solely looking at the UN Charter, but would surely miss

¹³⁵ I borrow the example (and happily decontextualize it) from Meir Dan-Cohen, 'Interpreting Official Speech', as reproduced in his *Harmful Thoughts: Essays on Law, Self, and Morality* (Princeton UP, 2002) 246-261, earlier published in Andrei Marmor (ed.), *Law and Interpretation* (OUP 1995).

¹³⁶ Cohen suggests that a person's beliefs do not change when his or her roles change, but says little about the different circumstances in which people act professionally and which thus may have a bearing, if not on their beliefs, then at least on their acts. See G.A. Cohen, 'Beliefs and Rôles', (1966-67) 67 *Proceedings of the Aristotelian Society*, 17-34.

¹³⁷ This will need to be the subject of a separate paper.

¹³⁸ A different question relates to whether institutions can be held responsible as collective actors, or whether it would be better, by some measure, to hold individuals in positions of responsibility responsible for the behaviour of such institutional actors. The latter option is advocated by Thompson, among others. See, e.g., Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge MA: Harvard University Press, 1987), and Dennis F. Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (Cambridge University Press, 2005).

¹³⁹ See Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (Berkeley CA: University of California Press, 1986), at 38.

something of relevance about the UN if he or she (it?) were not to look at the UN Charter at all.¹⁴⁰

V. Analogical Institutions

In essence, the idea of holding international organizations responsible for omission based on their mandates rather than on violations of specific primary obligations taps into an important consideration. It aims to fill a gap in international law. As noted, the chance of organizations being held to account on the basis of violating their positive obligations is rather slim, yet there clearly are situations where they are implicated, in that their failures to act seem difficult to reconcile with the very reason for which they were established. This raises the question whether international law resists such an approach as a matter of principle, or whether the international legal order knows close analogies - other doctrines where responsibility can be incurred in the absence of an immediately cognizable internationally wrongful act on the part of the actor held responsible or, conversely, where an international organization was held to be entitled to act in a particular way in order to give effect to its mandate at large – without being able to point to a specific provision, and beyond the generally accepted doctrine of implied powers.¹⁴¹

The doctrine of command responsibility (sometimes also referred to as superior responsibility) in international criminal law in essence suggests that superior officials can be held responsible for failing to act in circumstances where their roles would suggest they should act. Indeed, command responsibility is by definition linked to failure to act, and one recent observer refers to the doctrine of command responsibility

¹⁴⁰ The figure of the benevolent Martian is borrowed from Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).

¹⁴¹ On this, see Jan Klabbers, *An Introduction to International Organizations Law*, 3d ed. (Cambridge University Press, 2015), 56-63.

in international criminal law as a ‘sui generis form of liability for omission’.¹⁴² The core of the doctrine is precisely that individuals can be held responsible not for their actions but for their failure to act in situations where acting had been due. For this reason, issuing wrongful orders, however bad in itself, is not properly to be regarded as falling in the scope of command responsibility; instead, it serves as a separate offense, and is usually recognized as such.¹⁴³

While some have found traces of the idea of command responsibility in ancient sources, the modern foundations of the doctrine are often traced back to the *Yamashita* trial, and the logic behind it seems to be this.¹⁴⁴ In times of armed conflict, it is often the case that atrocities are being committed by low-ranking soldiers, but that a greater share of the moral responsibility rests with political and military leadership¹⁴⁵: these either give orders to commit atrocities, or look away when individuals under their command commit them. While the former gives rise to legal responsibility at any rate, the latter is the more subtle kind. International law would leave an undesirable gap if the failure to prevent or punish could not be prosecuted; hence, the ascription of command responsibility. As Martinez posits, ‘a military commander’s duty to control his troops is the necessary corollary of his power.’¹⁴⁶

The most recent legislative formulation is to be found in article 28 of the ICC Statute, which confirms that the doctrine concerns crimes of omission, linking it to ‘failure to exercise control properly’ in cases where a commander knew or should have known what her troops were up to¹⁴⁷, and failed to take the necessary measures to prevent or

¹⁴² See Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009), 38.

¹⁴³ See article 71 of the Lieber Code, e.g.

¹⁴⁴ See Mettraux, *Command Responsibility*, at 5-6. General Yamashita, a Japanese officer, was held responsible after World War II for the conduct of some of the troops under his command, despite the circumstance that he was cut off from his troops and, arguably, not in a position to exercise much control. He was first convicted by a US military commission and the verdict was upheld by the US Supreme Court. See, briefly, Jan Klabbers, *International Law* (Cambridge University Press, 2013), at 227.

¹⁴⁵ See also Jenny Martinez, ‘Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaskic* and Beyond’, (2007) 5 *Journal of International Criminal Justice*, 638-664, at 639.

¹⁴⁶ *Ibid.*, at 662.

¹⁴⁷ See also article 86, paragraph 2, of the First Additional Protocol to the Geneva Conventions.

punish. Interestingly, article 28 ICC does not limit command responsibility to military commanders, but also addresses civilian commanders.¹⁴⁸

While there are many uncertainties regarding the precise scope of the doctrine of command responsibility and the conditions for its application¹⁴⁹, no one claims that the doctrine should have no place in international law, and International Criminal Tribunal for the Former Yugoslavia has repeatedly held that it is ‘a well-established norm of customary and conventional international law.’¹⁵⁰ Instead, it seems to play a useful role in filling what would otherwise be an awkward gap, and allows for a modicum of legal control over acts of those who would otherwise remain outside the reach of international law.

The *Effect of Awards* opinion of the International Court of Justice, rendered in 1954, provides authority for the proposition that international law is no stranger to recognizing that international organizations can sometimes act in ways that can only be derived from their mandates broadly speaking.¹⁵¹ In the late 1940s, the United Nations General Assembly created an administrative tribunal for the UN (UNAT¹⁵²) in order to allow for the handling of claims made by UN employees against their employer, and in doing so followed the model earlier used by other international organizations, including the League of Nations and, most notably, the International Labour Organization. Those earlier administrative tribunals were never contested; instead, their creation was deemed a logical consequence of the legal immunity enjoyed by international organizations under domestic law. As the Italian Court of Cassation put it in *Profili*, ‘a more progressive system’ might be useful to counter the awkward situation where a staff

¹⁴⁸ For commentary, see Elies van Sliedregt, ‘Article 28 of the ICC Statute: Mode of Liability or Separate Offense?’, (2009) 12 *New Criminal Law Review*, 420-432.

¹⁴⁹ For an overview, see Ilias Bantekas, ‘The Contemporary Law of Superior Responsibility’, (1999) 93 *American Journal of International Law*, 573-595.

¹⁵⁰ See, e.g., the *Celebici* case, case IT-96-21-T, 16 November 1998, para. 333.

¹⁵¹ See *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, advisory opinion, [1954] ICJ Reports 47.

¹⁵² It was replaced in 2009 by a two tier mechanism consisting of a UN Dispute Tribunal and Appeals Tribunal, the latter also, awkwardly, using the abbreviation UNAT.

employee could only appeal to the very same body with whom she was having a dispute.¹⁵³

Likewise, UNAT's existence went, at first, uncontested, but this would change once UNAT not merely rendered declaratory judgments but also started to award compensation. At this point, several member states of the UN, concerned about the possible financial ramifications, started loudly to wonder whether the UN General Assembly had not overstepped its powers when it created UNAT, and the matter was referred to the ICJ for an advisory opinion.

The ICJ held that in creating UNAT, the General Assembly had not overstepped its proper powers: the UN had the power to set up an administrative tribunal. The interest for present purposes resides in the Court's reasoning, as it derived the required legal power from, broadly, the UN's mandate. Having an administrative tribunal was considered necessary despite the absence of an express provision because, so the Court opined, it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.'¹⁵⁴

The interesting aspect therewith resides in the Court's reliance on the mandate of the UN rather than on any particular textual gloss: since the UN's mandate included individual justice, it followed that establishing a staff tribunal to guarantee individual justice was something that could not be argued with. The validity of UNAT's creation was derived not from any specific Charter provision nor even, as is usually the case with implied powers¹⁵⁵, from the need to have the organization function effectively, but from

¹⁵³ See *International Institute of Agriculture v Profili*, Italian Court of Cassation, 26 February 1931, as reported in 5 *Annual Digest* 413, at 415.

¹⁵⁴ *Effect of Awards*, at 57.

¹⁵⁵ See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174.

the mandate itself. It was not considerations of effectiveness that were considered decisive; instead, it was the organization's mandate which was considered decisive.¹⁵⁶

Put differently, and starkly: the Court's argument in *Effect of Awards* could not be applied to most other organizations. The logic that promoting justice for individuals legitimizes the creation of an administrative tribunal might have applied to the UN, but could not have been applied with respect to, say, the IMF, or the North Atlantic Treaty Organization (NATO), or the WHO let alone the European University Institute, since none of these are in any direct manner dedicated to the promotion of justice for individuals – unless the notion of justice is stretched so as to include monetary stability, military security, public health and academic research and teaching.

If in *Effect of Awards* the ICJ referred to the mandate of an organization in order to justify an activity not specifically provided for in that organization's constituent document, in the *WHA opinion* it did the reverse, holding that it could not be derived from the mandate of the WHO that this organization could entertain questions relating to the legality of nuclear weapons.¹⁵⁷ The opinion was somewhat unorthodox, for a variety of reasons. These include the Court's introduction of a principle of 'speciality' to referring to functional organization; the fact that the Court drew conclusions regarding the proper province of the WHO's field of activity on the basis, in part, of the constitutions of other organizations (mostly the UN)¹⁵⁸; and what was decidedly surprising, at the time, was that the Court refused to find that the WHO possessed an implied power to address the legality of nuclear weapons.¹⁵⁹ None of this matters for present purposes though – instead, what matters is the Court's methodology: it

¹⁵⁶ A strong critique of the implied power finding (on different grounds) is offered by Judge Hackworth in his dissent to *Effect of Awards*. To his mind, the fact that the Charter contains a clause allowing for the creation of subsidiary organs by the Assembly entails that resort to the implied powers doctrine is difficult to justify.

¹⁵⁷ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, advisory opinion, [1996] ICJ Reports 66.

¹⁵⁸ For a critique along these lines, see Jan Klabbbers, 'Global Governance at the ICJ: Re-reading the WHA Opinion', (2009) 13 *Max Planck Yearbook of United Nations Law*, 1-28. See also Evelyne Lagrange, 'Les relations entre les organisations internationales', in Michele Vellano (ed.), *Il future delle organizzazioni internazionali: prospettive giuridiche* (Naples: Editoriale Scientifica, 2015), 131-166.

¹⁵⁹ See generally Jan Klabbbers, 'The Changing Image of International Organizations', in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: UNU Press, 2001), 221-255.

resorted, as in *Effect of Awards*, not to the functioning of the organization in abstraction in order to find an implied power, but rather resorted to a close analysis of the WHO's mandate, and found it wanting.

The conclusion then presents itself that if the mandate of an organization can be utilized in order to buttress a finding of implied powers (as in *Effect of Awards*) or in order to deny such a finding (as in *WHA*), then it is at least conceivable that the mandate may be used for other purposes as well. In particular, the mandate can be seen as a decent guide as to the sort of activities that may be expected from the organization, even in the absence of highly specific provisions. If behavior can be justified on the basis of the mandate, should it not follow that it can also be expected on the same basis? Admittedly, justification and expectation are not the same thing (although they may coincide), and it is perfectly possible to suggest that some acts, although justifiable, could never have been expected, but the reverse does not seem to hold: if acts can be expected on the basis of a mandate, then surely they can also be justified on that basis. Note that the expectation, in such a case, must be based on the mandate, not on presumptions regarding human behaviour generally or on other extraneous factors.

It is this type of reasoning that would make it possible to suggest that the UN failed to act in Rwanda in 1994, and that therefore it incurs responsibility, not only morally, but legally as well. As noted above, it is not self-evident that the UN's inaction in Rwanda should give rise to legal responsibility because of an applicable primary obligation. The only primary obligation that comes to mind is the obligation to prevent and punish genocide, and if this rests on the UN, it equally rests on numerous other actors, who are rarely singled out for blame over Rwanda.

The better view then must be that instead of basing the UN's responsibility for inaction on the obligation to prevent and punish genocide, it should be based on the UN's mandate. The UN's main task, many would agree, is to help maintain and secure

international peace, and the UN Charter suggests that human rights considerations form an integral part hereof, as Article 1 of the Charter makes clear.¹⁶⁰

This has two (at least) relevant ramifications. First, as the mandate is by definition not directing any specific activities but rather of a general nature, it cannot give rise to any obligations of result.¹⁶¹ At best, the mandate can inform us how the organization should behave; it cannot tell us that the organization shall be successful. This follows logically from the broad guidance provided by the mandate, but also from other considerations. International organizations typically lack their own resources and their own implementation organs (police, military, medical corps, *et cetera*) and are usually dependent on their member states. As the sad story concerning Rwanda demonstrates, even if the UN's Department of Peacekeeping Operations and the Organization's Secretary-General had been pro-active (which, to be sure, they were not), and all internal procedures had been geared towards accomplishing the task at hand rather than say, budgetary sobriety (which, to be sure, they were not), even then it is not very likely that the UN would have acted very differently, given the opposition of influential member states such as France and the US, and the reluctance of other member states to do anything. In a sense, the organization can only be as good as circumstances and its member states allow it to be. Hence, it might be unfair to castigate the UN for failing to prevent the Rwandan genocide altogether; but at least it could have made a stronger effort, and the argument can be made that while the organs and officials of the UN need not be blind to political realities (i.e. the reluctance of influential member states), they must be mindful that they represent the mandate. In these circumstances, it is probably better to try and fail to spur the relevant actors into action, than not to try at all.¹⁶²

¹⁶⁰ The argument is sometimes made that the constituent instruments of other international organizations can also incorporate human rights, but surely, doing so is far more plausible with respect to the UN than with respect to, say, the Universal Postal Union or the World Intellectual Property Organization. A brief rendition of the argument is Edward Kwakwa, 'An International Organisation's Point of View', in Jan Wouters et al (eds.), *Accountability for Human Rights Violations*, 591-600.

¹⁶¹ In a similar vein, Perrin held that since Switzerland had not acted negligently when the Roumanian legation in Berne was under attack in 1955, it could not be held responsible under international law. See Perrin, 'L'Agression contre la légation de Roumanie'.

¹⁶² This taps into the civil law distinction between obligations of conduct and of result. For useful discussion, see Pierre-Marie Dupuy, 'Reviewing the Difficulties of Classification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', (1999) 10 *European*

Second, it would also seem to follow that when it comes to making predictions as to what the international organizations will do, the mandate is not a very good guide. Instead, its use is mostly in evaluations *ex post facto*. Precisely because the mandate will speak in general terms and precisely because the organization is dependent on others for implementation and resources, from financing to personnel, there is no way of knowing in advance what will happen, might happen, or is likely to happen. Organizations operate in the messy world of real life politics and struggles, and are subject to all kinds of constraints, from a lack of resources to a lack of information, and need to cater to the demands of diverging constituencies, including their member states. What is important to realize though is that those member states are not the only relevant constituency: regardless of precise legal conceptualizations, surely the citizens of Rwanda are also among the constituencies of the UN, and should not have been left out to dry. The UN may represent its member states, as the theory of functionalism teaches, but it also represents the mandate, the mission, the idea behind the organization. This is often a lofty ideal, which should be given pride of place, even at the cost of the immediate organizational interest. Again, the analogy with the captain may be instructive: she is not just a captain in nice sailing weather, but also when the seas are rough and survival is at stake. The idea of the captain is bigger than any individual holding that position, and likewise, the idea behind collective security is bigger than the main institutional form it has taken since 1945.¹⁶³

VI. Some Practical Considerations

Journal of International Law, 371-385. Note how in its 2007 judgment in *Application of the Genocide Convention* (para. 430), the Court did not hesitate to lend force to the distinction: responsibility for genocide does not depend on the end result, but can be incurred if the relevant actor 'manifestly failed to take all measures ... which were within its power...'

¹⁶³ The literature on organizational ethics oozes a similar spirit. See, e.g., Larry D. Terry, *Leadership of Public Bureaucracies: The Administrator as Conservator*, 2d ed (Armond NY: M.E. Sharpe, 2003); Robert Jackall, *Moral Mazes: The World of Corporate Managers. Twentieth Anniversary Edition* (Oxford University Press, 2010); Joseph L. Badaracco jr., *Leading Quietly: An Unorthodox Guide to Doing the Right Thing* (Boston MA: Harvard Business School Press, 2002), and Robert Audi, *Business Ethics and Ethical Business* (Oxford University Press, 2009).

There is, in practice, not much prospect of omissions of international organizations ending up before a court, with the broad exception of the EU. With domestic courts, the main reason is well-known: international organizations, as a general rule, enjoy immunity from suit, and while ostensibly this immunity is meant to be functional, in practice it is often indistinguishable from absolute immunity.¹⁶⁴ Thus, as a general rule, international organizations cannot be sued before domestic courts, neither over their acts nor over their failures to act.

There is an interesting catch, however, relating to precisely the organization's mandate. Often, though not invariably, immunity of the organization is granted for functional reasons. Article 105 of the UN Charter, e.g., underlines that the UN shall enjoy such privileges and immunities 'as are necessary for the fulfilment of its purposes', and taken literally, this stops short of a grant of absolute immunity. If it is accepted that immunity is functional, then this opens the door for suing an organization for its omissions if and when a *prima facie* case can be made that the organization has failed to act in conflict with its main function. After all, there is no way in which inaction in conflict with the mandate can be justified on functional grounds. Likewise (though perhaps a bit of a stretch), often the immunity of officials extends to acts performed in their official capacity – no mention is usually made of omissions by officials, whether made in an official capacity or not.¹⁶⁵

There are, however, additional reasons, inherent to the concept of the omission, that suggest that it is unlikely for an omission to end up before courts or tribunals – any court, whether domestic or international. The first is, arguably, the more complicated. As noted earlier, whenever we do something, we also refrain from doing many other

¹⁶⁴ The literature is voluminous. A fine relatively early discussion is Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and certain Other International Organizations* (The Hague: Martinus Nijhoff, 1964). More recent excursions include P.H.F. Bekker, *The Legal Position of International Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff, 1994) and August Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000).

¹⁶⁵ See, e.g., section 19 of the 1947 Convention on the privileges and Immunities of the Specialized Agencies, which provides that officials of these agencies shall be 'immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.' At least on the face of it, this protection does neither cover non-official acts, nor inaction.

things, something economists cover (in part if not in whole) under the heading of ‘opportunity costs’. To engage in one course of action means, by definition and by implication, that other courses of action are not pursued. Hence, from one perspective, every policy choice implies a multitude of failures to act.

With international organizations, the failure to act – the omission – enters the discussion because the organization did not act as it could have been expected to. There is, in other words, an expectation, informed by a number of factors, which points to a relevant omission, rather than just any omission. The demand for organizational action usually arises when a specific type of situation occurs. For the WHO, it is the outbreak of a medical urgency. For the World Food Programme, it is the outbreak of a famine. For the UN, it is such things as a threat to the peace or the outbreak of violence. The circumstances, in other words, suggest that there is but a limited number of options available, often limited in essence to two possibilities: either to act (in one way or another), or not to act at all.

So what informs the expectation? The most obvious response is, that the expectation is related to the organizational mandate, not merely as written down in its constituent documents but also as developed in the organization’s practice. We expect the WHO to act when medical crises break out, because that is – at least in part - why the WHO was created.¹⁶⁶ And we expect the UN to intervene when genocide takes place because, in some measure, this is why the UN was created. While one might argue that the UN was not created to intervene in domestic affairs, including domestic genocides, such argument is both a little distasteful and overtaken by the UN’s subsequent practice: surely, since its sanctions against Rhodesia in the 1960s and South Africa some time later, and its overt intervention in Haiti in the early 1990s, the argument that the UN shall not intervene in a state’s domestic affairs can no longer be made with full

¹⁶⁶ See article 2 of the WHO Constitution.

conviction, and it could always be superseded under Chapter VII of the UN Charter at any rate.¹⁶⁷

Nonetheless, there are limits to what can be expected from any organization, and these too are related to the mandate. One should not expect the WHO to intervene by military means, as the WHO has never been given to act in ways that involve the use of force. And this entails that the WHO cannot intervene to stop or prevent genocide, and it entails that the WHO cannot intervene militarily, even in order to halt an ongoing medical emergency. Nor should one expect the IMF to be involved in medical emergencies, or a refugee crisis, or an environmental crisis.¹⁶⁸

While the failure to act is at its most obvious when organizations fail to respond to crises related to their field of operation, there is the additional issue whether the organization's failure to act also involve failures in ordinary times, absent any sense of crisis. While the principled answer should no doubt be in the affirmative (an omission is an omission, after all), the practical answer is bound to be more controversial, perhaps paradoxically so. The paradox is this: in times of crisis, a failure to act might lead to great human suffering and cost many people their lives. Hence, in times of crisis, a failure to act seems unjustifiable. In ordinary times, however, the failure to act may not lead to any immediate problems, damage or suffering, and will thus be taken less seriously. In fact, it might even be seen as prudent leadership, with the organization resisting the temptation to engage in 'mission creep'.

Either way, administrative propriety as embodied in many systems of administrative law often demands the existence of a legally cognizable instrument in order to be fruitfully invoked. The application of administrative law criteria and in particular remedies is considered only possible on the basis of a legal instrument: after all, a decision not to act can be quashed, but a non-decision cannot be quashed. Perhaps the problem is of limited scope in relation to the discretion of domestic administrative agencies, which

¹⁶⁷ Later developments, moreover, render plausible the argument that the UN has earmarked an important piece of authority in case states do not take care of business properly themselves. For such an argument, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

¹⁶⁸ Except, perhaps, if and to the extent that the scenario also involves a clear financial aspect.

can be rather precisely circumscribed¹⁶⁹; but in the international setting, the discretion of international organizations can be well-nigh unlimited. In terminology developed elsewhere, discretion by international organizations is often either ‘unbridled’ or ‘numinous’; neither can easily or fairly be reviewed.¹⁷⁰

The example of the European Union (EU) may prove instructive. The EU is the one example of an international organization (if that label is still fitting¹⁷¹) whose legal order explicitly allows for legal action against a failure to act. Under article 265 TFEU (originally article 175 EEC), such legal action can be commenced by the member states and the institutions of the EU against a failure to act by any of the institutions.¹⁷² Moreover, it can also be invoked, albeit in more limited form, by individuals and legal persons. The leading case is case 13/83, in which the European Parliament started proceedings against the Council over the latter’s failure to create a Common Transport Policy. The Court adopted a fairly broad initial approach to the failure to act, when it held that proceedings need not involve a specific single act that had not been taken, but could, in principle, also concern a series of acts that ought to have been taken.¹⁷³ Still, in light of the obligation to remedy under article 266 TFEU (article 176 EEC, at the time), some specificity was required: judicially, it would not hold to complain about the absence of policy in the abstract.¹⁷⁴

The Court also made a point of underlining the objective nature of the analysis: if the Treaty ordered the institutions to act, it followed that practical obstacles could not provide an excuse for failure to act: Article 265 TFEU ‘takes no account of how difficult

¹⁶⁹ See Peter H.A. Lehner, ‘Judicial Review of Administrative Inaction’, (1983) 83 *Columbia Law Review*, 627-689.

¹⁷⁰ See Charles H. Koch, jr., ‘Judicial Review of Administrative Discretion’, (1986) 54 *George Washington Law Review*, 469-511. Note that Koch has difficulties in defining ‘numinous’ discretion with any precision, describing it as discretion ‘in the strong sense’.

¹⁷¹ See Jan Klabbers, ‘Unity, Diversity, Accountability: The Ambivalent Concept of International Organization’, (2013) 14 *Melbourne Journal of International Law*, 149-170.

¹⁷² See generally Ole Due, ‘Legal Remedies for the Failure of European Community to Act in Conformity with EEC Treaty Provisions’, (1990) 14 *Fordham International Law Journal*, 341-358.

¹⁷³ Case 13/83, *European Parliament v Council*, [1985] ECR 1513, para. 34.

¹⁷⁴ *Ibid.*, paras. 35-36. See also para. 53: ‘The absence of a common policy which the Treaty requires to be brought into being does not in itself necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article 175.’

it may be for the institution in question to comply with the obligation.¹⁷⁵ Still, it accepted that the Treaty left the Council considerable discretion as to how to implement the obligation¹⁷⁶, and more generally the existence of discretion on the part of the institutions of the EU entails that actions brought against failure to act are rarely successful.¹⁷⁷

Article 265 TFEU solves the issue of the ‘missing decision’ by insisting that proceedings concerning failure to act can only be started once the institution has been invited to act.¹⁷⁸ This is a strict condition of admissibility under article 265: action is admissible only if the institution has first been ‘called upon to act’. The institution then has two months to define its position; if so, it is this position which is subject to review. Still, in order to prevent permanent or semi-permanent deferring¹⁷⁹, if the institution does not define its position, the complaint can go ahead – but in this case it is the original failure to act, rather than the offered explanation, which will have to form the heart of proceedings. Moreover, an explicit refusal to act does not count as ‘action’. As the Court once put it, ‘A refusal to act, however explicit it may be, can be brought before the Court under Article 175 since it does not put an end to the failure to act.’¹⁸⁰

The net result seems to be a proceduralization of the notion of omission. What matters is not whether a specific obligation is met substantively, but whether the institution concerned has taken a procedural step. The Court put it plainly in 2013: ‘A failure to act, for the purposes of Article 265 TFEU, means a failure to take a decision or to define a position, and not the adoption of a measure different from that sought or considered

¹⁷⁵ *Ibid.*, para. 48.

¹⁷⁶ *Ibid.*, para. 49.

¹⁷⁷ See, e.g., case 247/87, *Star Fruit v Commission*, [1989] ECR 291, in which the Court underlined that in administrative decisions the Commission often enjoys discretion.

¹⁷⁸ See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed. (Oxford University Press, 2015) at 539.

¹⁷⁹ The risk hereof is not entirely without foundation: the Commission in particular has been criticized for playing fast and loose with time limits. See John Temple Lang and Colin Raftery, ‘Remedies for the Commission’s Failure to Act in “Comitology” Cases’, (2011) 36 *European Law Review*, 264-275.

¹⁸⁰ See Case 302/87, *European Parliament v Council (Comitology)*, [1988] ECR 5637, para. 17.

necessary by the applicant.¹⁸¹ Any decision or any position will do; there is no mention of the substance of said decision or position.¹⁸²

International organizations are not in the habit of formally deciding not to act. Such decisions emerge from practice; they may be what results once a resolution to act has been defeated, or has not even been tabled because it would clearly be defeated. Or they may simply never even make it to the relevant political agenda. Hence, in order to apply the law to an omission, one might first need a decision; yet, typically, such decisions are not taken in any explicit form, and the EU's invitation to act presupposes a rather more highly developed administrative apparatus and legal order than the one which applies to most international organizations.

In addition there is often the problem that in matters of financial governance, putative decisions come with conditions: bailing out a state often entails that the state accepts the conditions, and its refusal to do so means that the organization can hardly be blamed for failing to act unless it consciously introduced conditions that no one in a similar position would have, or could have, accepted.

In short, what renders judicial proceedings over inaction unlikely is the absence, often enough, of a cognizable legal instrument, and this may even give rise to a general 'presumption of unreviewability'¹⁸³ of the omissions of international organizations. As the Court of Justice of the EU has demonstrated, there might occasionally be ways around this: this Court has been bold and creative in holding that also non-decisions or informal decisions can be seen as sufficiently cognizable to discuss, analyze and, where necessary, invalidate.¹⁸⁴

¹⁸¹ See Case C-196/12, *Commission v Council*, 19 November 2013, para. 22.

¹⁸² For critical discussion, see Inga Dauksiene and Arvydas Budnikas, 'Has the Action for Failure to Act in the European Union Lost its Purpose?', (2014) 7 *Baltic Journal of Law and Politics*, 209-226.

¹⁸³ The term is used in US administrative law to discuss much the same general phenomenon. See Ace E. Rowley, 'Administrative Inaction and Judicial Review: The Rebuttable Presumption of Unreviewability', (1986) 51 *Missouri Law Review*, 1039-1058.

¹⁸⁴ See, classically, case 22/70, *Commission v Council (ERTA)*, [1971] ECR 273, holding 'conclusions' of a Council meeting to constitute a reviewable legal act.

A second reason why omissions are not, generally, likely to come before a court is that often, it may be difficult to identify who the victims of failures to act are or, indeed, whether there are identifiable victims to begin with. In some cases, it will be obvious that there are victims: when 800.000 people are slaughtered, as in Rwanda's genocide, it would be highly obnoxious to somehow claim that victims are difficult to identify. And it would probably not be amiss to attribute at least some of Ethiopia's famine victims in the 1980s to the FAO's reluctance to do anything about it.¹⁸⁵

In other cases, however, this identification may be more problematic. Could it seriously be maintained, for instance, that prior to the conclusion of the Tobacco Convention under WHO auspices, lung cancer victims were victims of the WHO's failure to act against tobacco?¹⁸⁶ Or that the plight of any individual migrant worker owes something to the circumstance that the ILO has done little in recent years to protect migrant workers as a group? Surely, to think of the legal responsibility of the ILO or the WHO in such matters is less than persuasive; even if it could be argued (which seems debatable), on the basis of their mandates, that ILO and WHO failed to act where action would have been appropriate and to be expected, the chain of causation may simply not be strong enough.

And even where causality is less problematic, administrative law systems typically are limited with respect to standing. If everyone could contest every legal decision taken, administrative tribunals would be working overtime.¹⁸⁷ Hence, there are usually strict conditions with respect to standing. Again, the EU example is illustrative in the limits it applies. On the one hand, article 265 TFEU singles out a number of actors that can start proceedings regarding failure to act: these are, effectively, the EU's member states and its institutions (i.e. the European parliament, the Council, the European Council, the Commission, and the European Central Bank), while proceedings may be started against

¹⁸⁵ Journalist Graham Hancock reports that the FAO made action conditional on the resigning of an Ethiopian official or representative: see Hancock, *Lords of Poverty*, at 85.

¹⁸⁶ This presupposes, needless to say, that somehow the WHO would have been under an obligation to fight specifically against tobacco; the presumption is not immediately compelling.

¹⁸⁷ See Jan Klabbers, 'Straddling Law and Politics: Judicial Review in International Law', in Ronald St.J. MacDonald Douglas M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005), 809-835.

these same actors (minus the member states) as well as against other EU entities, such as the European Chemicals Agency.

Things are more problematic however when it comes to natural and legal persons. These, under article 265 TFEU, may complain that the institutions have failed to address any acts to them, which is a convoluted way of referring to settled case-law concerning legal standing in the EU. Under the so-called *Plaumann* doctrine, going back to the 1960s, natural and legal persons can commence proceedings if and when they are directly and individually affected by EU action (and omissions).¹⁸⁸ This, in turn, has always been strictly interpreted, effectively ruling out class actions or the *actio popularis*. While with large scale events emanating from omissions, an *actio popularis* would be the proper response, the *actio popularis* has not been accepted in international law generally. The CJEU declined to hear a case brought by Greenpeace relating to environmental protection brought a number of years ago¹⁸⁹, and in doing so followed a refusal by the International Court of Justice to entertain a complaint against South Africa's administration in South West Africa.¹⁹⁰

VII. Concluding Remarks

This paper has attempted to come to terms with the fact that often, when there are public outcries about international organizations, these emanate not from specific acts those organizations engage in (although this happens too, of course), but rather from their omissions: the infamous inactivity of the UN during the Rwandan genocide is merely the most well-known example of such an omission. Under traditional international legal methodology, most omissions by international organizations are

¹⁸⁸ See case 25/62, *Plaumann & Co. v Commission*, [1963] ECR 95.

¹⁸⁹ See case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and others v Commission*, [1998] ECR I-1651.

¹⁹⁰ See *South West Africa* (Ethiopia v South Africa; Liberia v South Africa), *Second Phase*, [1966] ICJ Reports 6.

hardly even cognizable as such. This traditional methodology envisages omissions as breach of obligations resting on international organizations, relatively oblivious to the awkward circumstance that organizations are parties to few treaties and cannot without further argument be considered subject to general customary international law.

In such circumstances, where no primary obligations under international law exist, this paper argues that recourse can be had to the mandate of the organization in question, as the mandate suggests what kinds of action may be expected from any particular organization. In other words, the inaction, or omission, can be tested against the mandate of the organization, in much the same way as the behavior of a captain at sea is informed by the confines and demands of the role of 'captain'. The role of the UN is, in part, to help prevent massacres as in Rwanda from occurring; hence, the UN can be held responsible, legally as well as morally, for failing to do so.

An additional benefit may entail coming to terms with voting by member states so as to prevent the organization from taking the expected action. This does not work in all circumstances: surely, not every vote against every draft decision can be taken as 'obstruction'.¹⁹¹ But where the draft decision would unequivocally give effect to the organization's mandate, a decision against (and *a fortiori* a veto) can be so regarded.

Still, focusing on the mandate will not cure all evils of global governance. As the example of the EU suggests, with its specific procedure for combating 'failure to act', legal responsibility often requires the presence of a specific legal instrument to complain about, and may often also involve particular rules on standing. But this need not be a deterrent. Issues of responsibility, even legal responsibility, are not limited to courthouses alone; they are also fought out in public debate, in global diplomacy, or in interactions between states and other actors.¹⁹² And such debates can be the more

¹⁹¹ For a suggestion coming a bit closer to this position, see Monica Hakimi, 'Distributing the Responsibility to Protect', in Nollkaemper and Jacobs (eds.), *Distribution of Responsibilities*, 265-289.

¹⁹² Recent examples include Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011), and Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations', (2014) 25 *European Journal of International Law*, 991-1018.

detailed the clearer it is that organizations can be held responsible not just for their acts, but also their omissions.

There is further the theoretical ramification that linking omissions to the mandate may assist in overcome the blind spot of the dominant functionalist theory in the law of international organizations. Under this theory, control of the organization by anyone other than its member states is well-nigh unthinkable, as all claims from third parties can be met with a function-based defense: the organization can always claim that whatever it was doing was necessary to give effect to the wishes of its founders, as this is so strongly protected by the law. The one moment however where this is not the case is precisely when claiming about the omission, as long as the omission is connected to the mandate (as it has been conceptualized above). Surely, the UN can claim immunity for acting, as almost all acts can be hooked up to its function; but precisely when it is not acting, such a defense becomes difficult to sustain: the UN cannot plausibly claim that its inaction in Rwanda was necessary in order to enable it to function effectively. In making this visible, then, the omission carves open a space, however limited, for allowing third parties some form of control over international organizations, and in doing so allows for an important modification of functionalist theory.

