

KLUWER LAW INTERNATIONAL

**International
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Edited by: **Daniel D. Bradlow and David B. Hunter**

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Daniel D. Bradlow
David B. Hunter

List of Abbreviations

African Commission on Human and People's Rights	ACHPR
African Development Bank	AfDB
AfDB Independent Review Mechanism	IRM
Alien Tort Claims Act	ATCA
Articles on State Responsibility	ASR
Asian Development Bank	ADB
Association of Southeast Asian Nations	ASEAN
Board Inspection Committee (Asian Development Bank)	BIC
Bolivarian Alternative Plan for Latin America Bank	APLA
Bretton Woods Institutions	BWIs
Carbon Partnership Fund (World Bank)	CPF
Caribbean Basin Economic Recovery Act	CBERA
Caribbean Catastrophe Risk Insurance Facility	CCRIF
Civil Society Organization	CSO
Climate Investment Funds	CIFs
Climate Technology Fund	CTF
Committee on Economic Social and Cultural Rights	CESCR
Compliance Advisor/Ombudsman	CAO
Confederación General del Trabajo de la República Argentina	CGT
Consultative Group on International Agriculture and Research	CGIAR
Convention Against Torture	CAT
Convention for the Elimination of Discrimination Against Women	CEDAW
Convention on the Rights of the Child	CRC
Convention on the Rights of Persons with Disabilities	CRPD
Critical Ecosystem Partnership Fund	CEPF
Enhanced Structural Adjustment Facility	ESAF

List of Abbreviations

Environmental and Social Impact Assessment	ESIA
Environmental Assessment	EA
European Bank for Reconstruction and Development	EBRD
EBRD Independent Recourse Mechanism	IRM
European Community	EC
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Investment Bank	EIB
Exogenous Shocks Facility	ESF
Export Credit and Insurance Agency	ECA
Federal Communications Commission (US)	FCC
Financial Stability Board	FSB
Food and Agriculture Organization of the United Nations	FAO
Foreign Direct Investment	FDI
Forest Investment Program	FIP
Forest Carbon Partnership Facility	FCPF
Foreign Sovereign Immunities Act	FSIA
Free, Prior and Informed Consent	FPIC
General Agreement on Tariffs and Trade	GATT
General Arrangement to Borrow	GAB
Global Environment Facility	GEF
Heavily Indebted Poor Countries	HIPC
Human Rights Accountability	HRA
Human Rights Impact Assessment	HRIA
Independent Evaluation Group	IEG
Inter-American Commission on Human Rights	IACHR
Inter-American Development Bank	IDB
IDB Independent Investigation Mechanism	IIM
IDIB Independent Consultation and Investigation Mechanism	ICIM
International Bank for Reconstruction and Development	IBRD
International Centre for Settlement of Investment Disputes	ICSID
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	MWC
International Court of Justice	ICJ
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Development Association	IDA
International Environmental Law	IEL
International Finance Corporation	IFC
IFC's Environment and Social Review Procedure	ESRP
IFC's General Resources Account	GRA
International Financial Institution	IFI
International Fund for Agricultural Development	IFAD
International Law Association	ILA
International Law Commission	ILC

List of Abbreviations

International Labour Organization	ILO
International Monetary Fund	IMF
IMF Extended Fund Facility	EFF
IMF General Resources Account	GRA
International Law Commission	ILC
International Organization	IO
International Organizations Immunities Act	IOIA
Islamic Development Bank	IsDB
Letter of Development Policy	LDP
Letter of Intent	LOI
Memorandum of Economic and Financial Policy	MEFP
Millennium Development Goal	MDG
Multilateral Development Bank	MDB
Multilateral Investment and Guarantee Agency	MIGA
New Arrangement to Borrow	NAB
Newly Industrializing Countries	NICs
New International Economic Order	NIEO
Non-Governmental Organizations	NGOs
Official Development Assistance	ODA
Operational Directive	OD
Operational Manual Policy	OMS
Operational Policy	OP
Organization for Economic Cooperation and Development	OECD
OECD Working Party on Aid Effectiveness	WP-EFF
OECD Development Assistance Committee	OECD DAC
Ozone Depleting Substances	ODS
Palestine Liberation Organization	PLO
Persistent Organic Pollutants	POPs
Pilot Program for Climate Resilience	PPCR
Policy Framework Paper	PFP
Policy Support Instrument	PSI
Poverty Reduction and Growth Facility	PRGF
Poverty Reduction Strategy Paper	PRSP
Prototype Carbon Fund	PCF
Reduce Emissions from Deforestation and Forest Degradation	REDD
Special Drawing Right	SDR
Stand-By Arrangement	SBA
Strategic Climate Fund	SCF
Structural Adjustment Credit	SAC
Structural Adjustment Facility	SAF
Structural Adjustment Loan	SAL
Structural Adjustment Participatory Review International Network	SAPRIN
Structural Adjustment Program	SAP
Third World Approach to International Law	TWAIL

List of Abbreviations

Trade Promotion Authority	TPA
UK Department for International Development	DFID
United Nations	UN
United Nations Committee on the Elimination of Racial Discrimination	CERD
United Nations Declaration on the Rights of Indigenous Peoples	UNDRIP
United Nations Declaration on Human Rights	UNDHR
United Nations Development Programme	UNDP
United Nations Economic and Social Council	ECOSOC
United Nations Economic Commission on Latin America	ECLA
United Nations Educational, Scientific and Cultural Organization	UNESCO
United Nations Office of the High Commissioner for Human Rights	OHCHR
United Nations Permanent Forum on Indigenous Issues	PFII
United States Dollar (\$)	USD
United States Executive Director	USED
Universal Declaration of Human Rights	UDHR
Western European Union	WEU
World Bank Group	WBG
World Bank Inspection Panel	WBIP
World Bank Office of Claims Resolution	OCR
World Development Report	WDR
World Health Organization	WHO
World Summit on Sustainable Development	WSSD
World Trade Organization	WTO

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Introduction

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Any discussion of the relationship of international law to the operations of international financial institutions (IFIs) must start with the international law applicable to all international organizations. The fundamental international legal issues relating to the status of international organizations, which are inter-governmental organizations created by treaties, are settled. Since the *Reparations* case in 1949, the international community has accepted that international organizations are subjects of international law.¹ It is also acknowledged that the international legal rights and obligations of international organizations are based on their constitutive treaties, any other treaties that the organizations may have signed, and applicable customary international legal principles.²

Beyond these general propositions, the international law pertaining to international organizations is less well established. This lack of clarity is attributable to a number of factors. First, the situation of international organizations as subjects of international law differs in important ways from the position of states. While states have general powers, rights, and responsibilities that they exercise relatively freely within their legally recognized geographical space, international organizations have defined powers and responsibilities determined by the organization's functions and purposes as spelled out in their constitutive treaties and as they are implemented in practice,³ and not by geography. Following the *Reparations* case it is also accepted that, in addition to their explicitly conferred powers,

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1. 'Reparation for Injuries Suffered in the Service of the United Nations', Advisory Opinion, I.C.J. Reports 1949, 174 (hereinafter *Reparations*).
 2. See 'Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt', ICJ Reports 1980, 73, para. 37.
 3. *Reparations*, *supra* n. 1, 180.

international organizations have whatever additional implied powers may be necessary for them to perform their functions.⁴

Second, international organizations are created by states to perform functions that are of interest to their Member States. This means that, although international organizations clearly have a legal existence that is independent from their Member States, their governance, and thus their decision-making, is formally dominated by their Member States, or more accurately their most powerful Member States. This raises some issues relating to the functional independence of international organizations.⁵ For example, the fact that the Member States play a role in the decisions taken by the organizations raises questions about the division of responsibility between the organization and the Member States for the consequences of these decisions.⁶ In particular, it raises concerns about who is responsible for the decisions and actions of international organizations. In principle, there are three possibilities for assigning responsibility: the organizations are independently responsible for their decisions and actions; the organizations and their Member States are jointly responsible; or the international organization has primary responsibility and the Member States can be found to have a secondary responsibility for these decisions, at least in certain circumstances.⁷ The legal independence of international organizations would suggest that the organization alone should be responsible for its own decisions and actions. However, this can be problematic if international organizations make decisions or undertake actions that the states themselves could not do – for example, decisions or actions that are not in compliance with treaties signed by the majority of their Member States but not signed by the organization. There are also issues relating to the legal implications arising from international organizations signing treaties separately from their Member States.⁸ For example, would an international organization signing a treaty bind

4. *Ibid.*, 182.

5. See generally, Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford & Portland, OR: Hart Publishing, 2007); José Alvarez, *International Organizations as Law-Makers* (Oxford & New York: Oxford University Press, 2005); Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, 4th rev. edn (Boston, MA: Martinus Nijhoff Publishers, 2003).

6. See International Law Commission's work on the responsibility of international organizations. The reports of the International Law Commission's Special Rapporteur on Responsibility of International Organizations are available on the International Law Commission's website. International Law Commission, Search Page, <http://untreaty.un.org/ilc/dtSearch/Search_Forms/dtSearch.html> (hereinafter ILC Search Page). The Special Rapporteur issued his seventh report, on 27 Mar. 2009. Giorgio Gaja, ILC Special Rapporteur, 'Seventh Report on Responsibility of International Organizations', A/CN.4/610 (Geneva, 27 Mar. 2009). See also, International Law Association, 'Final Report of the Committee on Accountability of International Organizations' (2004) (hereinafter 'ILA Report').

7. See, e.g., Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of Their Obligations Towards Third Parties', report for Institut de Droit International (1995), in *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, ed. Rosalyn Higgins (Oxford & New York: Oxford University Press, 2009).

8. See Brölmann, *supra* n. 5. This concern with the implications of international organizations signing treaties not signed by all the Member States was one of the factors underlying the ILC's

only the organization, or does it also have international legal implications for their Member States, even if these Member States have not signed the treaties themselves?⁹

Third, the organization's relationship with its members, in principle, is conducted at the level of the state. This means that all interactions between the international organization and non-state actors in its Member States are expected to be indirect and involve the mediation of the state. Only the state has a direct relationship with the organization. This suggests that only the state should be able to hold the organization accountable for its decisions and actions that affect the state and its citizens. This in turn places emphasis on the role of each Member State in the governance of the international organization and on the existing mechanisms for Member States holding the organization accountable. This formal legal relationship is challenged by the functional reality of the active and direct engagement of many international organizations with non-state actors in their Member States, and of their ability to have significant impacts on the lives and activities of these non-state actors. Examples of the direct relationships that can exist between non-state actors and international organizations include, the work of the United Nations in refugee camps, the role that the United Nations played in the governance of Namibia and Timor-Leste during their transitions to independence, and the role of the World Bank and the International Monetary Fund (IMF) in many poor countries during their structural adjustment programmes.¹⁰

These direct non-contractual relations between international organizations and non-state actors raise two sets of important questions. The first relates to the actual ability of an individual Member State to hold the international organization accountable for the impact of its operations on the citizens of that Member State. This can be problematic because the state may be a partner with the organization in an operation that is of interest to the state, and so the state may have little incentive to raise the non-state actors' concerns with the international organization. In addition, the state may occupy a relatively weak position in the governance of the international organization and therefore may experience difficulty in having its concerns actually heard in the organization.

decision to treat treaties involving international organizations in a separate convention from the one dealing with international agreements only between states. See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969, entered into force 27 Jan. 1980), available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 Mar. 1986) (this treaty is not yet in force because it has yet to be ratified by the requisite thirty-five states), available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>.

9. See Brölmann, *supra* n. 5.

10. See, e.g., Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake', *ILSA Journal of International and Comparative Law* 12 (2006): 395 & sources cited therein.

The second deals with the ability of adversely affected non-state actors themselves to hold the international organization accountable.¹¹ This ability can be constrained because to ensure that these international organizations can perform these functions effectively and freely, they are typically granted immunity from legal process in their Member States. This limit on the ability of non-state actors to ensure that the activities of international organizations do not negatively affect their lives has important implications for the organization's accountability for its actions.

In addition to the issues related to the international legal status of international organizations, there are many unresolved issues regarding both the international legal responsibilities of international organizations and the content of the international law applicable to their operations. Evidence of the former can be seen in the attention being paid to this topic by the International Law Commission (ILC) in its work on the responsibility of international organizations,¹² the International Court of Justice's rebuff of the World Health Organization's (WHO) efforts to provide advice on the legality of the use of nuclear weapons in armed conflict,¹³ and the uncertainty surrounding the responsibilities of the United Nations (UN) for misconduct in its refugee camps and peace-keeping operations.¹⁴ Evidence of the latter can be seen, for example, in the lack of clarity surrounding the human rights obligations of international organizations and in deciding exactly which international legal principles are applicable to the operations of the international organizations.¹⁵

The issue of which international legal principles are applicable to the operations of international organizations is further complicated by the number of international organizations, and the diversity in their functions and scope of operations. This suggests that, in addition to the general principles that are applicable to all international organizations, specific principles may apply to particular international organizations or groups of organizations and may lead to special legal outcomes. In this regard, it is important to note that, while legal scholars have written about many different international organizations, the organization that has received the greatest attention is the United Nations, and the subjects that have generated the most interest are its powers to deal with peace and security and its responsibilities in regard to these operations. This focus is understandable,

11. See, e.g., 'ILA Report', *supra* n. 6.

12. ILC Search Page, *supra* n. 6; Gaja, 'Seventh Report on Responsibility of International Organizations', *supra* n. 6.

13. 'Legality of the Use by a State of Nuclear Weapons in Armed Conflict', Advisory Opinion, I.C.J. Reports 1996, 66.

14. See Wilde, *supra* n. 10; Frédéric Mégret & Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Responsibilities', *Human Rights Quarterly* 25 (2003): 314–342, available at <http://muse.jhu.edu/journals/human_rights_quarterly/v025/25.2megret.pdf>; Alvarez, *supra* n. 5.

15. See, e.g., Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford & Portland, OR: Hart Publishing, 2003); Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001).

given that peace-keeping operations have been the most high-profile activities of the United Nations and that these operations are relatively novel and complex.

On the other hand, the developmental work of international organizations has received relatively less attention from international legal scholars. In fact, it is striking how little attention has been paid to the international legal issues relating to the operations of the IMF, the World Bank Group, and the regional development banks (collectively the IFIs).

This gap in the literature is somewhat surprising. The IFIs play important roles in global economic governance and are key actors in shaping the development trajectories in their developing Member States. Their operations can also have profound social and environmental impacts on their Member States, as well as on their economic policies. In addition, these institutions combine their public status as international legal subjects with financial operations that, by their nature, may be indistinguishable from private financial transactions. All of which suggests that the law applicable to their operations could involve both novel and important international legal issues. In addition, it suggests that a better understanding of these legal issues could help both the organizations and their Member States structure their transactions in ways that are more compatible with their developmental objectives and their international responsibilities. Consequently, the issue of what international legal principles are applicable to the operations of the IFIs is an important topic that would benefit from more rigorous study.

The purpose of this book is to address this deficiency in the treatment of international law and IFIs. It hopes to stimulate thought, debate, research and analysis, and action on the topic. It also hopes to contribute to the development of a clearer and better defined legal regime to govern the work of the IFIs. Towards this end it contains a set of contributions that address the various aspects of this topic from diverse perspectives in terms of experience, political viewpoint, and focus. Collectively, the contributions address a broad range of issues that we hope will help define the topic with greater clarity and depth.

The book is divided into two parts. The first part focuses on general issues related to the IFIs and international law. The purpose of this section is to set out the general principles of international law that are applicable to the IFIs and to consider how these are or should be evolving to produce IFIs that are respectful subjects of international law and accountable to all relevant stakeholders for their compliance with international law. The second part focuses on selected aspects of the IFIs' operations that both raise important and challenging international legal issues and that have substantial impacts on both the different stakeholders in the operations of the IFIs, and on the sustainability and success of the operations.

Part I: General Issues

The first chapter in this part provides a general overview of the international law applicable to the operations of the IFIs. In this chapter, the author, Daniel Bradlow, begins his analysis with a brief description of the two key universal IFIs – the IMF and the World Bank Group – and their operations. He then identifies the