
Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act

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Abstract

This article investigates whether international organizations can be held responsible under international law when they fail to act. It aims to conceptualize the notion of 'omission' in the international law on the responsibility of international organizations and does so in four broad steps. First, a discussion of the most well-known failure (the United Nations' refusal to intervene in the Rwandan genocide in 1994) suggests that there is a need to conceptualize the omission and to reflect on the sort of factors that may cause a failure to act. Second, the article investigates how omissions have been addressed in the literature and in the codification of the law on responsibility and finds that little attention has been paid to omissions, and where attention has been paid, it has been limited to viewing the omission as the mirror image of the act. Third, the article addresses as one element of a relevant concept of omission that the organization must be in a position to act, and, fourth, it establishes the basis of an obligation to act in some circumstances on the basis of the organization's mandate, thus introducing a version of what can be called 'role responsibility' into international law.

1 Introduction

It is a truism to claim that sometimes an omission or a failure to act can be as effective, or as deadly, as an act. 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,

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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.¹

Holding actors responsible for their omissions is easier said than done, though, particularly in the context of international organizations. According to the 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 elements 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 difficult to hold organizations responsible, whether for actions or omissions. The present article zooms in on the latter and aims to develop a standard to help evaluate the omissions engaged in by international organizations.

The article is not concerned with sketching the consequences of omissions in any great detail or the practicalities involved in suing international organizations over omissions. Instead, its aim is to conceptualize the omission: what can the notion of omission possibly refer to? Surely not all omissions are relevant; a refusal by the United Nations (UN) to organize the next soccer World Cup is probably not best seen as the sort of omission for which it could incur responsibility (for reasons to be discussed below), but, in other situations, one may legitimately wonder. Can failure by the UN to intervene against climate change be seen as a legally relevant omission on its part? Can failure by the International Labour Organization (ILO) to address the plight of migrant workers be construed as a legally relevant omission? Since the UN Charter does not contain an obligation on the UN to address climate change, and the ILO Constitution likewise does not contain an obligation on the ILO to address migrant labour, the answer cannot be found by the simple deontological exercise of pointing to a positive obligation. Instead, it must be construed by different means, and my contention is that the mandate of the organization concerned may help flesh out the notion of omission.

Conceptualizing the omission is not an ivory tower exercise, but it will have practical application.² Over the last decades, there have been several prominent discussions concerning possible omissions, and, in public debate, international organizations are easily and quickly castigated for what are thought to be omissions, with none more infamous than the UN’s inaction in the midst of the genocide taking place in Rwanda

¹ This repeats almost verbatim International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR), Doc. A/56/10, Supplement no. 10, November 2001, Art. 2. ILC, Articles on the Responsibility of International Organizations (ARIO), Doc. A/66/10 (2011).

² I do not, at present, claim that role responsibility as developed here represents *lex lata* nor even that it should become law; instead, I claim that it might add clarity to think along the lines suggested in this article.

and, a little later, in Srebrenica. Other (possible) examples of situations in which organizations did not act as could have been expected, or acted insufficiently, include the UN's inactivity to stop violence in Georgia and Ukraine, in Darfur, and in Syria and Libya. During the early 1980s, the Food and Agriculture Organization did very little to provide support to starving East Africans.³ 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;⁴ others might point out that the United Nations High Commissioner for Refugees, while focusing on providing immediate relief, has neglected to concentrate on facilitating and organizing asylum.⁵ The financial institutions may make a lot of money for their shareholders but do relatively little that actually helps develop their poorer member states.⁶ What remains to be seen is whether, and if so how, these inactions can legally be addressed as omissions giving rise to international responsibility. While sometimes one may intuitively sense that an organization should incur responsibility for an omission, an appeal to intuition alone does not suffice. As Alasdair MacIntyre once sternly put it, appealing to intuition in moral argument is 'always a signal that something has gone badly wrong with an argument' – and the same would apply to legal argument.⁷

This article 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 obligation 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 – that is, their mandates. This article 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 address a preliminary question and create a framework for thinking about the mandate and responsibility to begin with.

Few have treaded here before. 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. In doing so, I do not make a principled distinction between omissions in times of crisis and omissions in ordinary times, but, since much writing about the role of international organizations tends to

³ See G. Hancock, *Lords of Poverty* (1989), at 84–88. The Food and Agriculture Organization might even have obstructed support, but, if so, active obstruction might be difficult to construe as omission.

⁴ It has been suggested that the response was lacking in transparency, rather than being insufficient. For discussion, see Dushman, 'Horizontal Review between International Organizations: Why, How and Who Cares about Corporate Regulatory Capture', 22 *European Journal of International Law (EJIL)* (2011) 1089.

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

⁶ See N. Woods, *The Globalizers: The IMF, the World Bank and Their Borrowers* (2006).

⁷ See A. MacIntyre, *After Virtue: A Study in Moral Theory* (2nd edn, 1985), at 69.

focus on crisis situations, so will this article – but without prejudice to the question whether the ‘role responsibility’ of the organization can be expected to influence its everyday operations.⁸

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.⁹ Whether this is actually the case on a deep ontological level is for present purposes irrelevant – suffice it to say that the ARIIO presuppose both international legal personality and moral agency.¹⁰ 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.¹¹ Whether there should be further attribution to individual officials or member states that are implicated once the responsibility of the organization is established 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.

In a nutshell, the argument goes as follows. International organizations can be held responsible for omissions attributable to them. These will rarely be based directly on what H.L.A. Hart referred to as ‘primary obligations’ in international law, mainly because it is plausible to claim that few primary obligations apply to international organizations.¹² 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.

It should be noted from the outset that my interest lies with the omission that is, somehow, the result of a decision-making process, rather than the omission that

⁸ Reasons of space prevent a discussion of the question whether the faithful execution of the mandate may nonetheless result in responsibility, e.g., if third parties are affected.

⁹ On the theory behind international organizations law, see Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26 *EJIL* (2015) 9.

¹⁰ See ARIIO, *supra* note 1, Art. 2. Note that under ARIIO, only organizations with international legal personality can incur responsibility.

¹¹ 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 Eagleton, ‘International Organization and the Law of Responsibility’, 76 *Recueil des Cours (RDC)* (1950-I) 319. Some of the social science literature goes in the same direction. See, e.g., the fine study by R.W. Stone, *Controlling Institutions: International Organizations and the Global Economy* (2011).

¹² 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 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. See H.L.A. Hart, *The Concept of Law* (1961).

occurs from oversight, negligence or thoughtlessness. Alan White briefly divides omissions in two classes: intentional omissions and negligent omissions.¹³ 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 negligence¹⁴), 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.

The notion of responsibility employed in this article is a generic one and does not depend on the existence of specific tribunals or procedural devices. As an international lawyer, my main interest is to flesh out what the notion of omission means or can mean in the law of international organizations (and, thus, under international law). When can international lawyers – and the public at large – meaningfully claim that international organizations are somehow to blame for their failures to act and when is such blameworthiness legally difficult to sustain?

My answer, in a nutshell, will be that an organization can be held responsible for not living up to its mandate, and that mandate will be defined in terms of the general (or main) function assigned to the organization. This is broad but not overly broad in light of the dominant approach to the law of international organizations. If the organization's function or mandate can play a role in delimiting powers, or delimiting privileges and immunities, as is commonly thought,¹⁵ then it must also be deemed to have some analytical rigour in delimiting the relevant from the irrelevant omission for purposes of assigning responsibility.

The mandate should also be distinguished from the organization's powers. Organizations may, and often do, enjoy discretionary powers – for example, powers that complement the main function but are not central to it. If so, a failure to act need not result in responsibility. By way of example, the WHO cannot be held responsible for the failure to set up a particular committee, despite having the power to establish such a committee as its plenary may deem necessary. Likewise, it will not be held responsible for a failure to adopt regulations on the advertising of pharmaceutical products, despite having the power to do so.¹⁶ The mandate of the organization is not identical to the sum total of the organization's powers nor, indeed, to any particular compulsory power to be exercised – since, in such a case, no resort to the mandate would need to be had.¹⁷

Among the reasons why the mandate should not be confused with the organization's powers is the circumstance that those powers will always need to be exercised by

¹³ See A.R. White, *Grounds of Liability* (1985), at 23, describing the intentional omission as a 'failure to do what we ought to have done ... because we forbore to do it'.

¹⁴ See, e.g., Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility', 16 *Chicago Journal of International Law* (2016) 341, at 361.

¹⁵ For a sophisticated discussion, see P.H.F. Bekker, *The Legal Position of International Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994).

¹⁶ See, respectively, World Health Organization Constitution, Arts 18, 21.

¹⁷ See also V. Engström, *Constructing the Powers of International Organizations* (2012).

or with the member states. The WHO is not in a position itself to adopt regulations – it needs the member states to do so, through its organs and procedures. Moreover, sometimes the foundational document creates possibilities for member states to prevent the organization from acting; the best-known example is the veto within the UN Security Council. This is, to be sure, something the organization must live with: the legally complicated relationship with member states always shines through, always lurks behind the organization's acts.¹⁸ But, as the discussion of the example of Rwanda will indicate, there is, nonetheless, often a role possible for the organization itself, and it is precisely here that the mandate can form a useful yardstick.

The article is structured as follows. Section 2 will first illustrate the significance of omissions and the importance of conceptualizing them legally, by zooming in on the Rwandan genocide. Subsequently, section 3 will discuss the notion of omissions in the international law of responsibility, suggesting that very little work has been done to conceptualize the omission and virtually no work at all in the context of international organizations. Hence, sections 2 and 3 first spell out what the problem is and suggest that little work has been done so far, after which sections 4 and 5 will do the required conceptualizing work. They will focus, first, on being in a position to act and, second, on the obligation to act and, in doing so, will situate the omission in international organizations law in the broader framework of 'role responsibility', pointing in particular to the mandate of international organizations as the single relevant element in identifying legally relevant omissions. Section 6 concludes.

2 Insights from 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 in Rwanda. In April 1994, 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 paralysed as it may have been by earlier failed interventions in Somalia and the Balkans,¹⁹ 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 the history of the United Nations'.²⁰ 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.²¹

¹⁸ The leading conceptual study is C.M. Brölmann, *The Institutional Veil in Public International Law* (2007).

¹⁹ See, e.g., M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004).

²⁰ She does so in the foreword to R. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2004), at x.

²¹ See SC Res. 955, 8 November 1994, establishing the International Criminal Tribunal for Rwanda (ICTR). The ICTR closed down at the end of 2015.

There is a widely held sentiment – and rightly 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, there was, and is, no clear legal obligation for the UN to intervene in such matters. Indeed, it is precisely the point of the present article 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.²² 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, even though 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).²³ More broadly, some of those difficulties may also stem from the internal design of the UN. It has been suggested, for example, that the DPKO was rather small and 'overwhelmed', plagued by 'widespread crises and logistical headaches'.²⁴

Few states displayed any interest in the matter, with the exception of Belgium and, to a lesser extent, France.²⁵ Qualified peacekeepers were hard to find, 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'.²⁶ 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'.²⁷ Dallaire also had problems with the Belgian contingent. These were

²² Methodological note: much of what follows in this section is culled from Dallaire's expansive and detailed memoirs, *Shake Hands* (Dallaire, *supra* note 20), and by and large corroborated by other sources in particular, Barnett's eyewitness account; see M. Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (2002). This was published before Dallaire's memoirs and read by him, but it seems Dallaire's memoirs are not in any relevant manner 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 serve as illustrative, even if not conclusive.

²³ 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 situated-ness of political action is all too often forgotten in discussions on responsibility, but should have a bearing on how behaviour is evaluated. See generally, among others, R. Geuss, *Philosophy and Real Politics* (2008); F. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (2014).

²⁴ See S. Power, *A Problem from Hell: America and the Age of Genocide* (2003), at 341.

²⁵ 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, *supra* note 22, at 171.

²⁶ See Dallaire, *supra* note 20, at 205.

²⁷ *Ibid.*, at 244.

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 if the Belgians could be pulled from the mission; most likely, an unprecedented gesture.²⁸ Logistics formed another serious problem, and 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 commander,²⁹ and, while this makes sense from a checks-and-balances perspective, it implies that things do 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. The UN Assistance Mission for Rwanda's (UNAMIR) situation was also not helped by another element in the intervening international bureaucracy. The World Bank, fed up by Rwanda's political crisis in early 1994, threatened to cut Rwanda off from further financial help if the so-called Broad-Based Transitional Government was not put in place (it never was, eventually).³⁰ Adding financial crisis to political impasse is hardly a guaranteed recipe for political stability.

UNAMIR seemed to lack basic support from the UN. The civilian police contingent arrived late and did not seem overly interested in the mission,³¹ and UNAMIR never received a legal adviser, human rights officers or a humanitarian coordinator.³² 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, communication and legal advice 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, it was disappointing when it arrived. Secretary-General Boutros Boutros-Ghali had appointed as his special representative a former Cameroonian diplomat, Jacques-Roger Booh-Booh, who was icily described as being 'a proper gentleman who kept diplomatic working hours'.³³

What is also clear is that UNAMIR lacked the support from important member states of the UN, particularly on the Security Council. Dallaire is convinced that the Russians, Chinese and Americans all wanted the mission to end even before the violence broke out,³⁴ and he suggests that France had gone so far as to write to the

²⁸ *Ibid.*, at 183–185.

²⁹ *Ibid.*, at 100.

³⁰ *Ibid.*, at 174.

³¹ 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.

³² *Ibid.*, at 112, 173.

³³ *Ibid.*, at 118

³⁴ See *ibid.*, at 219. Barnett, *supra* note 22, likewise is very critical of the US role, and another observer notes how the US ambassador to the United Nations (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 P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (1998), at 151.

Canadian government to request Dallaire's removal.³⁵ While there may be explanations for member state fatigue at the time (missions in the Balkans took a lot of energy and attention – and money – and the disastrous intervention in Somalia was still a fresh memory, especially in American minds), not all explanations can also serve as justifications.³⁶

Dallaire also felt he lacked support from the UN's DPKO, which was 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'.³⁷ Still, the DPKO was not all that supportive. In September 1993, there was little enthusiasm for yet another mission in yet another troubled country,³⁸ and this attitude would never change.³⁹

In the end, much of what went wrong in Rwanda was the result of a series of mishaps, combined with vanity and incompetence, 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, who was 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 Annan,⁴⁰ but he has little good to say about Boutros-Ghali's role.⁴¹

If there is a widely held view that the UN did wrong in refraining from intervention, it is difficult, as a matter of positive international law, to pinpoint what exactly it was

³⁵ Dallaire, *supra* note 20, at 209.

³⁶ Kofi Annan notes that, during the genocide, no government wished to help out: '[W]e 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 K. Annan with N. Mousavizadeh, *Interventions: A Life in War and Peace* (2012), at 59.

³⁷ See Dallaire, *supra* note 20, at 50.

³⁸ *Ibid.*, at 80.

³⁹ Kenneth Cain, a long-standing UN employee, once summarized it with some vitriol: 'The UN was here [in Rwanda] 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 K. Cain, H. Postlewait and A. Thomson, *Emergency Sex (and Other Desperate Measures)* (2004), at 209.

⁴⁰ Annan's biographer suggests that Annan failed when deciding on how to handle events, but 'he did not fail in a dishonorable way'. See S. Meisler, *Kofi Annan: A Man of Peace in a World of War* (2007), at 102.

⁴¹ 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, *supra* note 22, at 160. Journalist James Traub observed that at least Annan was willing to accept institutional blame, 'as Boutros-Ghali never would'. See J. Traub, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* (2006), at 115.

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.⁴² To be sure, it does 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.⁴³ In other words, the UN (or its Security Council) could have intervened in Rwanda had it wanted to, but it was not under any strict legal obligation to do so. As a result, it becomes difficult to argue, as a matter of law, that the UN committed an ‘internationally wrongful act’ in the generally accepted sense of that term when it failed to intervene.⁴⁴

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’.⁴⁵ The latter phrase, in particular, has given rise to considerable controversy, but at least it acknowledges that international organizations can be subject to international legal obligations. Still, identifying the internationally wrongful act in the 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 convention⁴⁶ and, thus, under no treaty-based legal obligation to act in defence of human rights.

One could try to argue around this by suggesting that, without being a party strictly speaking, obligations, nonetheless, 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 to treaties concluded under its auspices. Thus, under this line of reasoning, the UN would be bound by the Genocide Convention because this Convention was concluded under its auspices.⁴⁷ A second argument to circumvent the treaty consent problem might hold that with being a beneficiary of a

⁴² For a useful overview, see Krisch, ‘Introduction to Chapter VII: The General Framework’, in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (3rd edn, 2012), 1237.

⁴³ See Nollkaemper, ‘“Failure to Protect” in International Law’, in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015) 437, at 450.

⁴⁴ 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 Erskine, ‘“Coalitions of the Willing” and the Shared Responsibility to Protect’, in A. Nollkaemper and D. Jacobs (eds), *Distribution of Responsibilities in International Law* (2015) 227, at 237.

⁴⁵ See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, para. 37.

⁴⁶ 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.

⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 1948, 78 UNTS 277.

treaty may come obligations.⁴⁸ The argument is normatively attractive, in that it taps into the idea of reciprocity, which is often considered an element of fairness.⁴⁹

But, in both cases, operationalization is problematic; there is no general rule in international law that specifies that facilitating the conclusion of a treaty, or being a beneficiary of a treaty, helps to create duties. Indeed, the law of treaties positively militates against this by distinguishing between the creation of a right (including any benefit) for third parties and the creation of an obligation for third parties.⁵⁰ Moreover, for the second 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.

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 law,⁵¹ but this policy refers to the observance by UN troops of humanitarian rules and by no means creates a duty to intervene. Moreover, it was promulgated by Secretary-General Kofi Annan as late as 1999,⁵² which renders it inapplicable to the Rwanda genocide at any rate.⁵³

Since few treaties are 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',⁵⁴ it is nonetheless a popular argument, made in various forms and with minor differences by many international lawyers.⁵⁵ Even accepting

⁴⁸ 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 General Convention on Privileges and Immunities 1946, UN Doc. A/RES/59/38 (2005). 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, 11 April 1949, ICJ Reports (1949) 174.

⁴⁹ See, e.g., J. Rawls, *A Theory of Justice* (1971).

⁵⁰ See the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Arts 34–37. A right can be accepted by using it; an obligation must be accepted expressly and in writing.

⁵¹ See UN Doc. ST/SGB/1999/13 (1999).

⁵² 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, Wiesbaden, 1975.

⁵³ The Secretary-General's Bulletin specifies its entry into force date as 12 August 1999.

⁵⁴ For discussion, see Klabbbers, 'The Sources of International Organizations Law', in S. Besson and J. d'Aspremont (eds), *Oxford Handbook of the Sources of International Law* (forthcoming); Daugirdas, 'How and Why International Law Binds International Organizations', 57 *Harvard International Law Journal* (2016) 325.

⁵⁵ The more sophisticated versions include those made by G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011); A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); De Schutter, 'Human Rights and the Rise of International Organisation: The Logic of Sliding Scales in the law of International Responsibility', in J. Wouters *et al.* (eds), *Accountability for Human Rights Violations by International Organisations* (2010) 51.

this as the basis of obligation, though, is not unproblematic since the idea of a customary obligation fails to specify why precisely the UN would be singled out. Yet it does provide a possible starting point for conceptualizing the omission.

Under this idea, it is beyond debate that a convention such as the Genocide Convention has become part of customary international law, probably 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.⁵⁶ If so, and if the UN is to be considered bound by customary international law and *jus cogens*, it follows that the UN can indeed be held responsible for failing to prevent the Rwandan genocide,⁵⁷ even if afterwards it created a tribunal to help punish the individuals implicated in the genocide and, thus, can claim to have performed its obligations at least in part.⁵⁸ But, if the obligation rests on the UN, it also rests on, for example, Belize; yet few suggest that Belize did anything wrong when it too failed to intervene.⁵⁹ It also rests on Belgium, Belarus and Bulgaria as well as all other states.⁶⁰

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), the European Forest Institute (EFI) 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 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 EFI could be regarded as an *ultra vires* act on the part of

⁵⁶ Gourevitch recalls meeting a US military intelligence officer with a rather less elevated attitude to the Genocide Convention, *supra* note 47, which merely ‘makes a nice wrapping for a cheese sandwich’. See Gourevitch, *supra* note 34, at 171.

⁵⁷ Note, however, that the UN 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 was perceived to entail a duty to intervene on the basis of the Genocide Convention, *supra* note 47. See, e.g., D. Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (2009), at 190.

⁵⁸ For the record, such a claim would manifest abject moral failure: it is rather obnoxious to suggest that you have done your duty after first allowing hundreds of thousands of people to be slaughtered.

⁵⁹ Belize, as it happens, acceded to the Genocide Convention, *supra* note 47, 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 *jus cogens*, it could be held bound on that basis in 1994.

⁶⁰ The International Court of Justice (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) (Application of the Genocide Convention)*, Merits, 26 February 2007, ICJ Reports (2007) 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.

that institution. Hence, there is something in the mandate of the UN that directs us to blame the UN when genocide occurs in Rwanda but not to blame the EFI or any other international organization, and the relevant distinction, it would seem, resides precisely in this 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.

3 The Omission in the Law of Responsibility

Attempts to codify the international law of responsibility realized early on that states (and other actors, no doubt) should incur responsibility not only for certain acts but also for their omissions.⁶¹ 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*'.⁶² 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, while an omission, therefore, means doing nothing. It means doing nothing in such a way as to violate an explicit primary international obligation, and this, as we shall see, has been the dominant trend in the scarce literature. Yet, with organizations, this cannot hold in a meaningful way; as discussed above, few primary obligations rest on international organizations.

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 general⁶³ but noticed repeatedly that states could be held responsible for failing to enact the legislation necessary to implement an international obligation. Failure to implement might thus constitute a legally relevant omission.⁶⁴ 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 in the protection of foreigners.⁶⁵ Nonetheless, these examples and concerns also suggest that omissions were generally still treated as the mirror image of acts.⁶⁶

After the ILC had started to work on the codification of state responsibility, its first special rapporteur on the topic, Francisco Garcia-Amador, suggested that omissions were mostly failures to act in violation of an obligation to offer protection to aliens

⁶¹ 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 edn, 1988); G. Vedel and P. Delvolvé, *Droit Administratif* (8th edn, 1982).

⁶² 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 prepared by Leo Strisower, adopted at the Lausanne session, 1 September 1927.

⁶³ See 'Official Documents: Conference for the Codification of International Law, 13 March 1930', reprinted in 24 *American Journal of International Law (AJIL)* (Special Supplement) (1930). It further specified that this could also encompass omissions in violation of concessions or contracts (at 54).

⁶⁴ *Ibid.*, at 49.

⁶⁵ *Ibid.*, at 55, 64.

⁶⁶ *Ibid.*, 56–57.

and their property.⁶⁷ The second special rapporteur, Roberto Ago, delved a little deeper into the matter, but he too limited himself, by and large, 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 discussion,⁶⁸ 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.⁶⁹ His distinction between obligations of conduct and obligations of result turns out to be of some relevance, as will briefly be discussed below,⁷⁰ although it has not survived the drafting processes within the ILC.⁷¹

The next three special rapporteurs on the responsibility of states added little to the discussion on omissions. Still, the commentary to the Articles on State Responsibility, as adopted in 2001, reminds the reader that in several judgments of the ICJ,⁷² states have been held responsible for not acting in violation of an obligation to act in specific circumstances, and the commentary even posits that cases where state responsibility is invoked for omissions are 'at least as numerous' as those based on positive acts.⁷³ 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.⁷⁴ Again, the omission is derived from an explicit primary obligation to act.

If the omission is not fleshed out in great detail in the law of state responsibility, it has received even less conceptualization in the law of international organizations. In 2011, the ILC adopted ARIIO, prepared by Special Rapporteur (now Judge) Giorgio

⁶⁷ See García Amador, 'Second Report on International Responsibility', 2 *ILC Yearbook* (1957) 104, at 106.

⁶⁸ See, in particular Ago, 'Sixth Report on State Responsibility', 2 *ILC Yearbook* (1977) 3. 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 the exhaustion of local remedies constituted an admissibility condition, while denial of access to local remedies could classify (so we may conclude) as an omission.

⁶⁹ See Ago, 'Seventh Report on State Responsibility', 2 *ILC Yearbook* (1978) 31.

⁷⁰ See section 5 of this article.

⁷¹ The ASR, *supra* note 1, 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 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 20–22.

⁷² 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 ICJ considered that non-action breached an obligation to act. See, respectively, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4; *United States Diplomatic and Consular Staff in Tehran (USA v. Iran) (Tehran Hostages)*, Judgment, 24 May 1980, ICJ Reports (1980) 3.

⁷³ See ASR, *supra* note 1, commentary to Art. 2, para. 4. See Crawford, *supra* note 71, at 82.

⁷⁴ See Ago, 'Second Report on State Responsibility', 2 *ILC Yearbook* (1970) 177, at 188, para. 35. Thanks to Katja Creutz for bringing the passage to my attention.

Gaja. Widely discussed as ARIO already is in the literature,⁷⁵ what has gone virtually undiscussed has to do with the very basis of responsibility – responsibility can be incurred not only for actions but also for omissions, as Article 4 of ARIO confirms.⁷⁶ The commentary to Article 4 of ARIO does not elucidate what is meant by omission, merely providing a restatement when defining ‘conduct’, which ‘is intended to cover both acts and omissions on the part of the international organization’.⁷⁷ Beyond this, the commentary devotes some attention to the basis of the obligation and the notion of breach and specifies that damage is not a relevant concern, but it says nothing further about actions or omissions – much like in the earlier codification efforts of the inter-war years, the omission is still simply treated as the mirror image of the act, intuitively cognizable perhaps and not worthy of special attention.

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 for their omissions. The one time the concept of the omission was briefly discussed was occasioned by a comment by the IMF. 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, from the lawful exercise of the powers of member states.⁷⁸ Second, such an omission followed 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?’⁷⁹

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’.⁸⁰ 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 agenda.⁸¹ 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.

⁷⁵ For a fine overview, see M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013).

⁷⁶ ARIO, *supra* note 1, Art. 4. The articles plus commentary are reproduced in 2 *ILC Yearbook* (2011) 52.

⁷⁷ ARIO, *supra* note 1, at 14, Commentary.

⁷⁸ See Comments and Observations Received from International Organizations, UN Doc. A/CN.4/545 (2004), at 25–26.

⁷⁹ *Ibid.*, at 25.

⁸⁰ See Gaja, ‘Seventh Report on the Responsibility of International Organizations’, UN Doc. A/CN.4/610 (2009), at 7, 2 *ILC Yearbook* (2007) 73.

⁸¹ The International Monetary Fund (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 Comments and Observations, *supra* note 78, 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 (at 26).

The relevant international legal literature too is sparse, to say the least. Ago remarked much the same on the eve of World War II,⁸² and little has been added since then.⁸³ 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 states (rather than 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 with due diligence.⁸⁴

Writing in 1939, Ago insightfully remarked 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.⁸⁵ And, as with positive action, the omission too rests on intention: an omission resulting from *force majeure*, for example, would be excusable.⁸⁶ However, things would be different when discussing, for instance, 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 it 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.⁸⁷ For this reason alone, the idea of the omission as mirroring the act must be dismissed.

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 offer reparation. With omissions, however, this is not the case; one cannot ‘cease and desist’ an omission in quite the same way, and as long as the event continues, so does the putative duty to act.⁸⁸ Hence, Ago the academic, realized that the omission was not merely the mirror image of the act. Ago, the special rapporteur, however, must have felt – unfortunately perhaps – 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.

What becomes clear from the work of the ILC, other codification fora and the sparse academic literature is that, to the extent that omissions are conceptualized to begin

⁸² See Ago, ‘Le délit international’, 68 *RDC* (1939) 415, at 501.

⁸³ 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., Crawford and Watkins, ‘International Responsibility’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 283; Murphy, ‘International Responsibility’, in *ibid.*, 299.

⁸⁴ See, e.g., Stern, ‘The Elements of an Internationally Wrongful Act’, in J. Crawford, A. Pellet and S. Ollesen (eds), *The Law of International Responsibility* (2010) 193, at 208–209. See also Latty, ‘Actions and Omissions’, in *ibid.*, 355.

⁸⁵ Ago, *supra* note 82, at 501.

⁸⁶ *Ibid.*, at 502.

⁸⁷ *Ibid.*, at 503.

⁸⁸ *Ibid.*, at 504–505.

with, they are conceptualized as violations of specific duties or obligations to act.⁸⁹ Their identification is symmetrical, along with those of positive acts as wrongful acts – in both cases, a duty is violated, either by 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. Even this is not airtight though and, consequently, not always applied in practice. While Iran was held responsible in *Tehran Hostages* for having violated some readily identifiable international legal obligations, Albania's responsibility in *Corfu Channel* has become famous for not having been based on clear legal rules alone.⁹⁰ Albania was held to be responsible, in part, on the basis of 'elementary considerations of humanity'. Indeed, the limited number of authors who have looked into the matter of state responsibility for omissions typically invoke some non-consensual basis for responsibility for some omissions – for instance, as the corollary of territorial control⁹¹ – or as the elaboration of a duty to be a *bona res publica*.⁹² In other words, not even with states can the omission compellingly be conceptualized as the violation of a consent-based primary obligation.

With respect to international organizations, the non-consensual obligation by necessity must play a bigger part. Not only can international organizations hardly be called 'sovereign', but, more importantly, international organizations have very few consent-based obligations under international law. As noted earlier, they are parties to very few treaties, and the reach of customary international law is debated. It follows, then, 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, for example, 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 representatives of states or organizations or the headquarters of organizations.⁹³ Moreover, it is doubtful whether there exists any duty to implement treaty commitments into the internal legal order of the organization.

⁸⁹ One example sometimes mentioned is Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War 1907, 187 CTS 227, Art. 25, 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 Cohn, 'La théorie de la responsabilité internationale', 68 *RDC* (1939) 207.

⁹⁰ *Tehran Hostages*, *supra* note 72; *Corfu Channel*, *supra* note 72. 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 Perrin, 'L'Aggression contre la légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission', 61 *Revue Générale de Droit International Public* (1957) 410.

⁹¹ See Lévy, 'La responsabilité pour omission et la responsabilité pour risque en droit international public', 65 *Revue Générale de Droit International Public* (1961) 744.

⁹² See Cohn, *supra* note 89, at 305.

⁹³ Thus, the UN–USA Headquarters Agreement 1947, 12 UNTS 147, s 16 provides that the USA remains responsible for protecting headquarters.

Yet, as will be demonstrated below, the concept of organizational omissions might be given new impetus by concentrating on the responsibility stemming from the role assigned to that organization and 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 – the function of Canada, one might say, is mostly to be Canada. 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.

4 Conceptualizing Omissions: The Possibility to Act

Having established, in sections 2 and 3 of this article, that omissions can have terrible consequences but that the law on international responsibility, whether relating to states or to international organizations, has not paid the omission much attention,⁹⁴ the question remains how the omission can be conceptualized in legally workable terms. When (if at all) is it possible to suggest that an organization can be held responsible for failing to act? The answer, I will suggest, owes much to the role the organization was given.

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 notes, he should not incur responsibility for omitting to call ‘the person whose name is first in the Munich telephone directory’.⁹⁵ After all, he is probably not in a position to do so and probably not under an obligation to do so either. Hence, it would be absurd to suggest that blame and responsibility could be incurred for each and every single omission. Surely, 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.⁹⁶ Simply put, people can be blamed for not rescuing a drowning child if it can be established that people are under an obligation to rescue drowning children (this is the easy part as most ethicists would agree to the existence of such an obligation) and if they are in a position to do so.⁹⁷ If the child is drowning in a different city, for example, then surely those individuals who are not close by cannot be held responsible.⁹⁸

⁹⁴ Note that with respect to individual responsibility in international law, the omission assumes relevance in the doctrine of ‘command responsibility’. This will briefly be discussed below.

⁹⁵ See Raz, ‘Being in the World’, in J. Raz, *From Normativity to Responsibility* (2011) 225, at 248.

⁹⁶ As 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 Honoré, ‘Are Omissions Less Culpable?’, in T. Honoré, *Responsibility and Fault* (1999) 41, at 47.

⁹⁷ See generally Fischer, ‘Responsibility and Failure’, 86 *Proceedings of the Aristotelian Society* (1985–1986) 251, at 268: ‘[I]f an agent is to be morally responsible for failing to do X, he must be able to do X.’

⁹⁸ 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

There is possibly a third requirement – that of having knowledge of the situation. In other words, one cannot be expected to act if one is not aware of there being a situation demanding action.⁹⁹ Partly, however, this can probably be subsumed under ‘being in a position to act’; partly, with respect to international organizations, it may translate into a preliminary obligation, stemming from the mandate of remaining informed. Surely, the WHO would be to blame if it remained unaware of any large-scale outbreak of Ebola. Still, in the normal course of events, such is to be expected, even without legal obligation. Information may be filtered and framed; outbreaks may be downplayed and massacres may be presented as falling short of genocide, but total ignorance by an international organization of major things going on in their general sphere of competence will be rare indeed.

The requirement of being in a position to act is mostly a matter of fact: one either is or is not in such a position, and, while there may be uncertainty at the fringes, the basic principle is clear enough. Or, rather, the most that the law can say is that those in a position to act should act, and it is then a matter of analysis whether those who are said to have been in a position to act were, indeed, in such a position. It remains to be seen though how far this can go – the hypothetical example of the drowning child is not very well equipped to discuss the duties of international organizations. After all, it is not to be hypothesized that the Universal Postal Union or the IMF is often in a position to jump into a river to save a drowning child – neither *qua* organization nor *qua* agents of the organization. Hence, different concerns arise with international organizations. Are they in a position to act without a local presence? Can they be expected to act if they do have a local office but not the necessary equipment (think, for example, of the WHO and vaccinations), and logistics are complicated by the reluctance of a vital third party (a state, a private sector company) to cooperate? And can they be expected to act if the annual budget has been reached and leaves no place for urgency action?

Analogies derived from the law on command responsibility in armed conflict can only have limited value, but they at least suggest that international law is not structurally incapable of conceptualizing omissions. The doctrine of command responsibility (or superior responsibility) 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 in international

action, which only takes on an air of inaction if it takes the place of some other activity. See W. Lucy, *Philosophy of Private Law* (2007), at 148. More generally, omissions can often be re-described as actions and *vice versa*. *Ibid.*, at 149.

⁹⁹ Judge Röling, discussing the omission in international criminal law in his dissenting opinion at the Tokyo Tribunal, forcefully summarized the relevant requirements as ‘knowledge, power, and duty’. Generally, it would seem that knowledge plays a far greater role in matters of individual responsibility than of organizational responsibility. Röling’s dissent is reprinted in B.V.A. Röling and C.F. Rüter (eds), *The Tokyo Judgment of the International Military Tribunal for the Far East*, vol. 2 (1977) 1043, at 1063.

criminal law as a ‘sui generis form of liability for omission’.¹⁰⁰ The core of the doctrine is precisely that individuals can be held responsible not for their actions but, rather, for their failure to act in situations where acting has 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 offence and is usually recognized as such.¹⁰¹

The modern foundations of the doctrine are often traced back to the *Yamashita* trial, and the logic behind it seems to be this.¹⁰² 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 leadership, who either give orders to commit atrocities or look away when individuals under their command commit them.¹⁰³ 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 Jenny Martinez posits, ‘a military commander’s duty to control his troops is the necessary corollary of his power’.¹⁰⁴ Article 28 of the Rome Statute 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 to and failed to take the necessary measures to prevent or punish.¹⁰⁵ Still, as noted, the analogy has but limited application: international organizations do not normally encounter the type of situations encountered by military leaders.

5 Conceptualizing Omissions: The Obligation to Act

The obligation to act is usually thought to stem from a concrete and positive rule or principle, which 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.¹⁰⁶ James Crawford seems to have much the same in mind when suggesting that the:

¹⁰⁰ See G. Mettraux, *The Law of Command Responsibility* (2009), at 38. See generally also Bantekas, ‘The Contemporary Law of Superior Responsibility’, 93 *AJIL* (1999) 573.

¹⁰¹ See, e.g., Lieber Code, 24 April 1863, Art. 71.

¹⁰² See Mettraux, *supra* note 100, 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. See *In Re Yamashita*, 327 US 1 (1946).

¹⁰³ See also Martinez, ‘Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaskic* and Beyond’, 5 *Journal of International Criminal Justice* (2007) 638, at 639.

¹⁰⁴ *Ibid.*, at 662.

¹⁰⁵ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90. See also Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 6 August 1977, 1125 UNTS 3, Art. 86, para. 2.

¹⁰⁶ See G. Fletcher, *Basic Concepts of Criminal Law* (1998), at 45–50.

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.¹⁰⁷

Note that Crawford's words still leave intact the suggestion, discussed above, that the omission is little more than 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 the legally relevant omission depends on a legal obligation to act cannot be the complete story.¹⁰⁸

Elazar Weinryb suggests that omissions should be distinguished from two closely related notions.¹⁰⁹ 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. Likewise, an unsuccessful intervention by an organization in a massacre is not an omission, unless one would want to argue that all failures are akin to omissions, but such an argument is probably untenable.¹¹⁰ 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 (and, indeed, Fletcher and Crawford), 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, only those that are instrumental to a certain consequence. Hence, this posits a relationship between an omission and a result, yet does so without insisting on the result being intentional since intentionality, in this respect as in others, is hugely problematic.¹¹¹ 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).¹¹²

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

¹⁰⁷ See J. Crawford, *State Responsibility: The General Part* (2013), at 218.

¹⁰⁸ Fletcher seems to deny this mirror image. See Fletcher, *supra* note 106, at 45–46.

¹⁰⁹ See Weinryb, 'Omissions and Responsibility', 30 *Philosophical Quarterly* (1980) 1, at 5–7.

¹¹⁰ Here there is the additional problem of measurement: when exactly is intervention unsuccessful?

¹¹¹ See J. Bennett, *Morality and Consequences* (1980).

¹¹² 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., M. Walzer, *Just and Unjust Wars* (3rd edn, 2000), at 152–156.

would exist.¹¹³ 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 that the ‘negative instrumentality’ 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 obligations to act (failure of which can then be construed as omission) as organizations are parties to few treaties and, as shown before, as the binding force of customary international law may have little bearing on international organizations. 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 – whether a ‘negative instrumentality’ can be derived from elsewhere. Tony 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; from being well placed to meet a need; from receiving a benefit; from making a promise and from occupying a specific office or social role – the latter is sometimes referred to as ‘role responsibility’.¹¹⁴ As the example of Rwanda above suggests, there may be something in the role or in the mandate of the organization that 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. It cannot be said with great conviction that the UN’s failure to act in Rwanda caused the genocide; at best (or worst), it can be claimed that the UN’s failure to act contributed to it.¹¹⁵ That is bad enough but not quite the same as causing it. Thus, if causality is out of reach, something else is required to connect the omission to its consequences. One option – the one central to this article – is what might be termed ‘dereliction of duty’, even if and when that duty is not explicitly spelled out. As 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.¹¹⁶

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 actors, corporate or organizational. It is not uncommon to think that individuals may carry different responsibilities

¹¹³ See *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, 20 December 1988, ICJ Reports (1988) 69, para. 94.

¹¹⁴ See Honoré, ‘Are Omissions Less Culpable?’, *supra* note 96, at 55–60.

¹¹⁵ And the role of the UN cannot quite be captured by notions such as ‘complicity’ or ‘aiding and abetting’.

¹¹⁶ See Weinryb, *supra* note 109, at 16.

when acting in different capacities.¹¹⁷ Thus, it seems generally accepted that a captain has responsibilities involving the ship under her command that do not apply to others – passengers may quickly leave the sinking ship, but the captain is not supposed to do so. In other words, it is from the captain's role or mandate that responsibility may arise.¹¹⁸ And should the captain fail to act in accordance with her role, she may be held responsible, at least morally and possibly legally as well.¹¹⁹

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. Other roles are likewise socially constructed. 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' comes certain expectations; not meeting these expectations will result in the qualification, socially, as a 'bad mother', while surpassing the expectations will result in the classification 'great mother'.¹²⁰

With other professions, the attached responsibilities may not (only) 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, such as pardoning, can only be performed by persons in their specific roles. While ordinary people may end up forgiving a criminal, it usually takes a head of state to pardon a criminal. The act of pardoning is inextricably tied to the office.¹²¹ 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 it is done by someone in a private capacity at a barbecue from when it is done by that same person

¹¹⁷ This is not particularly controversial, though what is controversial is the stronger claim that with changing roles they also change beliefs and values. As Cohen has suggested, this is highly implausible. See Cohen, 'Beliefs and Rôles', 67 *Proceedings of the Aristotelian Society* (1966–1967) 17.

¹¹⁸ See, e.g., Hart, 'Post Script: Responsibility and Retribution', in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 210. In virtue theory, this has been explored most prominently by Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (2001).

¹¹⁹ 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 'Italian Cruise Ship Captain Gets 16-Year Jail Sentence', *Aljazeera*, available at www.aljazeera.com/news/2015/02/italian-cruise-ship-captain-16-year-jail-sentence-15021114054688.html.

¹²⁰ See, e.g., Lang, Jr., 'Shared Political Responsibility', in Nollkaemper and Jacobs, *supra* note 44, 62.

¹²¹ See generally R.S. Downie, *Roles and Values: An Introduction to Social Ethics* (1971).

as the foreman of a jury during criminal proceedings.¹²² In a private capacity, one may perhaps neglect the opinions of other jurors; but one may not do so when acting as a 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. While these may or may not excuse wrongful behaviour,¹²³ 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.¹²⁴ 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: '[A]t 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.'¹²⁵ 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 something of relevance about the UN if he or she (it?) were not to look at the UN Charter at all.¹²⁶

Two advisory opinions of the ICJ provide 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. This applies, first, to the 1954 opinion in *Effect of Awards*¹²⁷ and, second, to the 1996 opinion in *World Health Assembly*.¹²⁸ In the late 1940s, the UN General Assembly created an administrative tribunal for the UN (the UN Administrative Tribunal [UNAT]¹²⁹) in order to allow for the handling of claims made by UN employees against their employer.

¹²² I borrow the example (and happily decontextualize it) from Dan-Cohen, 'Interpreting Official Speech', in M. Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality* (2002) 246.

¹²³ This will need to be the subject of a separate article.

¹²⁴ 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., D.F. Thompson, *Political Ethics and Public Office* (1987); D.F. Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (2005).

¹²⁵ See M. Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (1986), at 38.

¹²⁶ The figure of the benevolent Martian is borrowed from T.M. Franck, *The Power of Legitimacy among Nations* (1990).

¹²⁷ See *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954) 47.

¹²⁸ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66.

¹²⁹ 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.

UNAT's existence went, at first, uncontested, but this changed once UNAT started to award compensation. At this point, several member states of the UN, concerned about the possible financial ramifications, wondered 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.¹³⁰

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 UN Charter provision nor even, as is usually the case with implied powers,¹³¹ from the need to have the organization function effectively but, rather, from the mandate itself. It was not considerations of effectiveness that were considered decisive; instead, it was the organization's mandate that was considered decisive.¹³²

If the ICJ in *Effect of Awards* referred to the mandate of an organization in order to justify an activity not specifically provided for in that organization's constituent document, it did the reverse in *World Health Assembly*, 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.¹³³ Eventually, the main point to note resides in the Court's methodology. It resorted, as in *Effect of Awards*, not to the functioning of the organization in abstraction in order to find an implied power but, rather, 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

¹³⁰ *Effect of Awards*, *supra* note 127, at 57 (emphasis added).

¹³¹ See *Reparation for Injuries*, *supra* note 48.

¹³² A strong critique of the implied power finding (on different grounds) is offered by Judge Hackworth in his dissent to *Effect of Awards*, *supra* note 127. To his mind, the fact that the UN Charter contains a clause allowing for the creation of subsidiary organs by the General Assembly entails that resort to the implied powers doctrine is difficult to justify.

¹³³ For a critique along these lines, see Klabbbers, 'Global Governance at the ICJ: Re-reading the WHA Opinion', 13 *Max Planck Yearbook of United Nations Law* (2009) 1. See also Lagrange, 'Les relations entre les organisations internationales', in M. Vellano (ed.), *Il future delle organizzazioni internazionali: prospettive giuridiche* (2015) 131.

order to deny such a finding (as in *World Health Assembly*), then it is at least conceivable that the mandate may be used to establish responsibility as well. In particular, the mandate can be seen as a guide to the sort of activities that may be expected from the organization, even in the absence of highly specific provisions. If behaviour 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, unless the mandate itself would be unjustifiable.¹³⁴ 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 also legally. 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 thereof, as Article 1 of the UN Charter makes clear.¹³⁵ This has (at least) two relevant ramifications. First, since 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. At best, the mandate can inform us how the organization should behave; it cannot tell us that the organization shall be successful. This chimes with other considerations. International organizations typically lack their own resources and their own implementation organs (police, military, medical corps, and so on) and are usually dependent on their member states.

Even if the UN's Department of Peacekeeping Operations in Rwanda and the organization's secretary-general had been proactive (which, to be sure, they were not), and if 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

¹³⁴ But this requires extreme and (hopefully) implausible scenarios about organizations established in order to commit genocide, torture or some suchlike activity.

¹³⁵ 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 provided by Kwakwa, 'An International Organisation's Point of View', in Wouters *et al.*, *supra* note 55, 591.

influential member states 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 (that is, the reluctance of influential member states), they must be mindful that they represent the mandate.¹³⁶

Second, it would also seem to follow that the mandate is not a very good guide to predicting how an organization will act. Instead, its use is mostly in evaluations *ex post facto*. Precisely because the mandate speaks in general terms and precisely because the organization depends on others for implementation and resources, 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 they need to cater to the demands of diverging constituencies, including their member states and other stakeholders. Surely, the citizens of Rwanda (in addition to the state) 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 and the idea behind the organization.¹³⁷

6 Concluding Remarks

This article 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 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 article argues that recourse can be had to the mandate of the organization in

¹³⁶ This taps into the civil law distinction between obligations of conduct and of result. For a useful discussion, see Dupuy, 'Reviewing the Difficulties of Classification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *EJIL* (1999) 371. Note how in its 2007 judgment in *Application of the Genocide Convention*, *supra* note 60, 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'.

¹³⁷ The literature on organizational ethics oozes a similar spirit. See, e.g., L. Terry, *Leadership of Public Bureaucracies: The Administrator as Conservator* (2nd edn, 2003); R. Jackall, *Moral Mazes: The World of Corporate Managers* (20th anniversary edn, 2010); J.L. Badaracco, Jr., *Leading Quietly: An Unorthodox Guide to Doing the Right Thing* (2002); R. Audi, *Business Ethics and Ethical Business* (2009).

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 behaviour 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, in legal as in moral debate, for failing to do so.¹³⁸

That is not to suggest that the courts will have to start to work overtime, as there are a number of practical issues associated with legal responsibility for omissions – the generic notion of responsibility employed in this article will need some adaptation before it can be turned into a workable administrative law device. One practical obstacle is that international organizations often are immune from suit, whether for their acts or for their omissions.¹³⁹ Other practical obstacles would include the circumstance that even if the omission can be conceptualized, nonetheless organizations typically enjoy considerable discretion. It may be the case that domestic administrative agencies typically operate within strict legal frameworks, making the relevant omission relatively cognizable,¹⁴⁰ but in the international organizations setting, such is not the case. In terminology developed elsewhere, discretion by international organizations is often either ‘unbridled’ or ‘numinous’; neither can easily or fairly be reviewed.¹⁴¹

Given the necessity, in order to start proceedings of an administrative nature, of there being a positive decision to be squashed, yet another obstacle presents itself. Typically, omissions do not result in or from formal decisions not to act; usually, they do not relate to decisions at all. The result may well be a ‘presumption of unreviewability’.¹⁴² And then there might be issues of standing to figure out first. Even merely suggesting that all victims of omissions should have standing to sue does not quite cover it, for this demands that, first, the notion of a victim must be delimited. It is one thing to suggest that those killed in Rwanda were victims of UN inaction and to have this definition also cover their immediate relatives. But this leaves unaddressed whether the notion can also cover inaction in times other than crisis. Can it be claimed, for example, that those who suffer from lung cancer, contracted before the WHO decided to tackle tobacco, are somehow victims of the WHO’s earlier inaction?¹⁴³ Or that

¹³⁸ Note, however, that the scope of the analysis has remained limited to the intentional omission (the ‘negative instrumentality’); the question of negligence on the part of international organizations requires different, and separate, treatment.

¹³⁹ That said, to the extent that immunity is functionally limited, it could perhaps be argued that the relevant omission (that is, where the organization does not do what it should do) goes beyond functional immunity: where the organization neglects its function, it cannot hide behind that same function.

¹⁴⁰ See Lehner, ‘Judicial Review of Administrative Inaction’, 83 *Columbia Law Review* (1983) 627.

¹⁴¹ See Koch, Jr., ‘Judicial Review of Administrative Discretion’, 54 *George Washington Law Review* (1986) 469. Note that Koch has difficulties in defining ‘numinous’ discretion with any precision, describing it as discretion ‘in the strong sense’.

¹⁴² The term is used in US administrative law to discuss much the same general phenomenon. See Rowley, ‘Administrative Inaction and Judicial Review: The Rebuttable Presumption of Unreviewability’, 51 *Missouri Law Review* (1986) 1039.

¹⁴³ This presupposes, needless to say, that somehow the World Health Organization would have been under an obligation to fight specifically against tobacco; the presumption is not immediately compelling.

migrant workers, shamefully treated in some states, could hold the ILO responsible for its relative neglect of their plight in recent decades?

In short, developing a concept of omission related to the mandate of international organizations is not likely to result in increased administrative litigation before the further development of an administrative law framework, and, even then, as the example of the EU suggests,¹⁴⁴ no miracles should be expected. Still, a legal concept of omission can play a role in proceedings other than those of an administrative nature – for example, in the tort proceedings currently underway in the US courts concerning the outbreak of cholera in Haiti, commonly attributed to Nepalese peacekeepers and, therewith, to the UN. Second, much of the discourse on legal responsibility in general takes place not before courts but elsewhere: in diplomacy and in public debate.¹⁴⁵ Here, it may be of some use that the vague intuition that an organization ‘did something wrong’ can be given more precision with the help of the notion of omission, as developed above.

An additional benefit may entail coming to terms with voting by member states so as to prevent the organization from taking the expected action, thus possibly giving rise to member state responsibility. This does not work in all circumstances; surely, not every vote against every draft decision can be taken as ‘obstruction’.¹⁴⁶ 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. This article has aspired to flesh out a concept of the notion of ‘omission’ in the law on the responsibility of international organizations and does so by linking the omission to the organization’s mandate. Hence, organizations can incur responsibility for failing to act in circumstances where, according to their mandate, they should have acted. This is not the same as saying the organization is responsible for failing to exercise its powers, if only because its powers can be discretionary or complementary. Instead, the mandate offers a separate ground of responsibility, inspired by the notion of role responsibility.¹⁴⁷

¹⁴⁴ Under European Union law, inaction is reviewable but under strict procedural conditions, so much so that it is suggested that the very notion has become ‘proceduralized’. The substance of the omission is not considered very relevant as long as the required procedural steps are taken. For a critical discussion, see Dauksiene and Budnikas, ‘Has the Action for Failure to Act in the European Union Lost Its Purpose?’, 7 *Baltic Journal of Law and Politics* (2014) 209.

¹⁴⁵ Recent examples include I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011); Daugirdas, ‘Reputation and the Responsibility of International Organizations’, 25 *EJIL* (2014) 991.

¹⁴⁶ For a suggestion coming a bit closer to this position, see Hakimi, ‘Distributing the Responsibility to Protect’, in Nollkaemper and Jacobs, *supra* note 44, 265.

¹⁴⁷ For a strong argument that international affairs often rest on role and status, see N. Onuf, *The Republican Legacy in International Thought* (1998).