doi:10.1017/aju.2019.53

SYMPOSIUM ON KRISTINA DAUGIRDAS, "REPUTATION AS A DISCIPLINARIAN OF INTERNATIONAL ORGANIZATIONS"

REPUTATION AND THE ACCOUNTABILITY GAP

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In her recent article on the reputation of international organizations (IOs), Kristina Daugirdas concludes that reputation's constraining effect has some serious shortcomings in the context of sexual exploitation and abuse (SEA).[1] This essay extends those conclusions to recent mass torts cases against IOs. In particular, it argues that member states and IOs have independent and overlapping concerns that have contributed to devaluing the relevance of a "good reputation," particularly when it comes to providing compensation for wrongful conduct. IOs, it seems, do not want to develop a reputation for deep pockets. Nonetheless, this essay also demonstrates that when compensation is not at issue, there are instances in which reputation matters to IOs. It concludes by discussing recent cases related to responsibility and organizational immunities and suggests that the trend of narrowing immunities may change the reputational calculus for IOs and member states significantly.

Reputation Matters When There is No Claim for Compensation

As a preliminary matter, reputation has been a driving force behind institutional developments in some situations. For example, the International Criminal Court (ICC) was widely criticized for its "Africa bias" based on its failure, in its first decade of existence, to investigate situations in areas other than Africa.[2] Facing mounting member state withdrawals from the Court, the ICC eventually expanded its investigations to other regions. Although legal criteria in the ICC's statute determine the scope and admissibility of the new issues under consideration, there was a widespread perception that a change in prosecutorial strategy was necessary in order to protect the Court's legitimacy.[3] The various signals of selective justice, neocolonialism, and perhaps even perceptions of racism became deeply problematic for the Court's reputation, even though there was a debate about the accuracy of

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[1] Kristina Daugirdas, *Reputation as a Disciplinarian of International Organizations*, 113 AJIL 221, 222 (2019).

[2] Thanks to Michael Byers for this point. *Cf.* M. Cherif Bassouni & Douglass Hansen, *Africa Debate: Is the ICC Targeting Africa Inappropriately?*, ICC Forum (Mar. 17, 2013); Zaya Yebo, *Is Africa on Trial?* Global Pol'y F. (Apr. 8, 2015).

[3] *See, e.g.*, Layton Charra, *Burundi's Challenge to the ICC's "Africa Bias"*, 39 Mich. J. Int'l L.: Associate Editor (Nov. 2017) ("As long as the ICC's prosecutorial activities are concentrated in Africa, the institution will continue to be perceived as reinforcing global structures of inequality. Thirty-four of the ICC's member states are African, indicating that the continent was largely on board with the project at its inception, but perhaps now believes that its hopes in the institution were misplaced. This predicament only emboldens the dictators from whom Africans seek protection and allows them to exploit disappointment in the ICC for their advantage, as is evinced by the many indications of withdrawal.").

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https://doi.org/10.1017/aju.2019.53 Published online by Cambridge University Press

the allegations.[4] One would be hard pressed to suggest that the ICC was not motivated to change its geographical focus based on reputational concerns. Significantly, however, it was never alleged that the ICC committed an internationally wrongful act or that there was a basis for a compensation claim.

Notwithstanding the ICC example, reputational concerns do not always prompt IOs to alter their behavior. For instance, Daugirdas's conclusion that reputational sanctions have been generally ineffective in the SEA context can be extended to the UN's handling of recent torts cases.[5] Although the UN's policy has long been to compensate victims for wrongful acts,[6] it has recently failed to do so in the context of large torts cases.[7] In fact, the UN's recent responses to claims make clear that both it and a number of influential states have sought to avoid creating a reputation for compensating victims.[8]

For example, in March 2017 UN Secretary General António Guterres expressed his "profound regret" for the suffering of Roma populations in Kosovo, who the UN resettled in camps contaminated with lead.[9] However, he stopped short of making a formal apology, admitting responsibility, or offering compensation.[10] His language and approach were almost identical to that used by former Secretary General Ban Ki Moon in addressing the UN's handling of the cholera crisis in Haiti in 2016.[11] Despite Ban Ki Moon's statement on Haiti that "[t]he United Nations should seize this opportunity to address a tragedy that also has damaged our reputation and global mission," reputational concerns did not then lead to a different outcome.[12] The UN has not yet implemented a 2016 decision by the Human Rights Advisory Panel that the UN does owe compensation and should make an apology to the Kosovar victims.[13] Nor has it ever admitted responsibility or paid compensation to victims of cholera in Haiti. At the time of writing, the Haiti Cholera Fund has only 10 percent of requested contributions and the Kosovo trust fund remains unfunded.[14] As José Alvarez observed, the UN behaves as though it is immune not only in national courts, but also in the court of public opinion.[15]

[4] For example, most of the African cases were referred by African states themselves. Nonetheless, the perception of bias remains. *See, e.g.*, Alexandra Zavis, *Only Africans Have Been Tried at the Court for the Worst Crimes on Earth*, L.A. Times (Oct. 23, 2016).

[5] The same conclusions may also apply to the International Financial Corporation, as illustrated by the *Jam* case, discussed *infra* note 32.

[6] *See* Comments and Observations of the United Nations on the Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations, UN Docs. A/CN.4/637/ and Add.1, at 161–62 (Feb. 17, 2011) [hereinafter Comments].

[7] However, there is precedent for the UN providing lump sum compensation. *See* Exchange of Letters Constituting an Agreement between the United Nations and Belgium relating to the Settlement of Claims filed against the United Nations in the Congo by Belgian Nations, 1965 U.N. Juridical Y.B.: Part One, Chapter II, 39–42 (Feb. 20).

[8] *See, e.g.*, Colum Lynch, *Trump Won't Pay a Penny for UN Cholera Relief Fund in Haiti*, Foreign Pol'y (June 1, 2017).

[9] Nick Cumming-Bruce, *UN is Rebuked by Own Expert for Neglecting Kosovo Poisoning Victims*, N.Y. Times (Mar. 19, 2019).

[10] *Id.*

[11] *UN's Ban Apologizes to People of Haiti, Outlines New Plan to Fight Cholera Epidemic and Help Communities*, UN News (Dec. 1, 2016) ("In December 2016 Ban said: 'On behalf of the United Nations, I want to say very clearly: we apologize to the Haitian people. We simply did not do enough with regard to the cholera outbreak and its spread in Haiti. We are profoundly sorry for our role. Eliminating cholera from Haiti, and living up to our moral responsibility to those who have been most directly affected, will require the full commitment of the international community and, crucially, the resources necessary.'").

[12] *Id.*

[13] N.M. and Others v. UNMIK, Kosovo Human Rights Advisory Panel (Dec. 2016).

[14] For the current status of these funds, see *Haiti Trust Fund Fact Sheet*, UN Dev. Grp.: Multi-Partner Tr. Fund Office; *Lead Contamination Kosovo – Dialogue with the Secretary General and Lead Contaminations Documents*, UN Hum. Rts.: Office of the High Commissioner (Mar. 13, 2019).

[15] José Alvarez, *The UN in the Time of Cholera*, 108 AJIL Unbound 22, 23 (2014).

https://doi.org/10.1017/aju.2019.53 Published online by Cambridge University Press

In contrast, the UN has addressed corruption quite differently. In the Oil-For-Food scandal, UN officials, companies, and politicians from a number of countries were implicated in taking kickbacks while implementing the sanctions regime in Iraq.[16] The revelations of corruption triggered an independent inquiry led by Paul Volcker, and produced significant reforms to the UN's internal procurement process and oversight mechanisms.[17] In a subsequent U.S. prosecution of a UN staff member on fraud and corruption charges, the United Nations waived the immunity of its employee, one of the few instances in which it has done so.[18] It is important to note, however, that this waiver did not implicate the organization's responsibility itself, but only one of its personnel. Nonetheless, one must distinguish the different outcomes with regards to corruption and SEA. The UN does not exercise general criminal jurisdiction over individuals or states, and has the discretion to forward both types of cases to national jurisdictions for prosecution. The most likely explanation for the stronger reaction to corruption is that SEA usually occurs in the field by peacekeepers, whereas corruption stems from financing or procurement problems at headquarters, where the UN exercises a higher degree of control.

Responsibility Rules Create Incentives for States and IOs to Ignore Reputational Costs

It is well established that the UN has independent legal personality and the capacity to bear rights and obligations.[19] Despite the development of the Articles on Responsibility of International Organizations (ARIO), there is still a considerable lack of clarity about what constitutes an internationally wrongful act by an IO, and how domestic tort or contract law might apply.[20] Current rules create incentives for states to push responsibility to IOs where both are potentially implicated in wrongful activities due to what has been called the "fiction" of exclusive attribution.[21] The rules on organizational immunity have often protected the IO when this has "push" been successful. Because IOs do not have taxing powers, they remain highly—sometimes exclusively—financially dependent on member state contributions.[22] Indeed, control (including budgetary control) of member states over IOs has both led to member states hiding behind the immunities of IOs, and IOs attempting to avoid responsibility because they lack independent income streams.[23]

The case of *Behrami & Saramati* illustrates this push-and-pull dynamic, in which member states shift responsibility to the IO, and the IO then invokes jurisdictional defenses to avoid suit. In *Behrami*, France and Norway used the doctrines of attribution to argue that the UN was responsible for wrongful acts that French and Norwegian troops had committee in Kosovo.[24] The European Court of Human Rights (ECtHR) agreed, and in an

[16] *See, e.g.*, Robert McMahon, *The Impact of the Oil-for-Food Scandal*, CFR BACKGROUNDER (May 11, 2006) (additional related materials). *See also* UN Sec'y-Gen. Press Release, Secretary-General Waives Legal Immunity of Staff Member Under Investigation for Procurement Misconduct, UN Docs. SG/SM/10710-ORG/1475 (Nov. 2, 2006).

[17] UNSC Press Release, Independent Inquiry Finds Maladministration, Evidence of Corruption in UN 'Oil-for-Food' Programme, Security Council Told, UN Docs. SC/8492 (Sept. 7, 2005).

[18] *See, e.g.*, United States v. Bahel, 662 F.3d 610, 610–26 (2d Cir. 2011).

[19] Reparation of Injuries Suffered in Service of the United Nations, Advisory Opinion, 1949 ICJ REP. 174, 180 (Apr. 11).

[20] Katarina Grenfell, *Effective Reparation for the Victims of Wrongful Acts Committed During UN Peace Operations: How Does It Work Concretely?*, 12TH BRUGES COLLOQUIUM 126 (2011).

[21] James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility*, 40(3) VAND. J. TRANSNAT'L L. 611, 638 (2007).

[22] *See, e.g.*, Comments, *supra* note 6, at 161 (noting that IOs have no taxing power).

[23] Jean d'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT'L ORG. L. REV. 91 (2007).

[24] Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 EJIL 501 (2008).

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admissibility decision, determined it had no jurisdiction and dismissed the case.[25] While the ECtHR wrongly applied an "ultimate authority and control" test[26], and excluded the possibility of dual attribution, the successful allocation of responsibility to the UN met the states' goal of avoiding it. However, there were few reputational consequences for either the states themselves or the UN in this strategy.[27]

Some academics and courts have tried to work around these push-and-pull forces by generating concepts of shared responsibility. The general principle in the law of international responsibility is independent responsibility, such that each state or IO is only responsible for its own wrongful conduct. However, both the Articles on Responsibility of States for Internationally Wrongful Acts and ARIO leave open the possibility for concurrent or secondary attribution of responsibility to multiple actors.[28] While the current rules acknowledge (but do not develop) concepts of shared responsibility, there are an increasing number of situations in which states act interdependently.[29]

In the *Mothers of Srebrenica* case, which challenged the failure of Dutch troops under UN command to protect the Muslim enclave of Srebrenica against attack by the Bosnian Serb army, a Dutch district court found that although the UN was immune, the Dutch state might nonetheless be responsible. On appeal, a court ordered the Dutch government to compensate the victims.[30] Here, the UN avoided gaining a reputation for making compensation through immunity rules, although the state was not so protected in its own courts. Importantly, in *Al-Jedda v. United Kingdom*, the UK Supreme Court found that the acts of soldiers within the Multinational Force in Iraq did not cease to be attributable to troop-contributing countries even if they were also attributable to the UN, laying further judicial grounds for shared responsibility.[31] It is perhaps not surprising, however, that neither states nor IOs have embraced concepts of shared responsibility to date in any binding form, as it serves to increase their exposure to suit.

How Immunities Can Change the Reputational Calculus

It is therefore significant that courts are highly engaged with issues of organizational immunity at present. The Second Circuit's decision in *Georges v. United Nations* involving the cholera case follows the trend of upholding absolute UN immunity.[32] Nonetheless, it is notable that the U.S. Supreme Court recently chose to limit the immunity of a different IO—the International Financial Corporation, which is part of the World Bank Group. Indeed, the Supreme Court's decision in *Jam v. IFC* interprets the immunities conveyed in the International Organizations Immunities Act as tracking those in the Foreign Sovereign Immunities Act, such that exceptions applicable to states, including the commercial activities exception, would apply to IOs designated under the Act.[33] This case

[25] Behrami v. France, Application No. 71412/01 & Saramati v. France, Germany and Norway, Application No. 78166/01, 693 Eur. Ct. H.R. (2006).

[26] Larsen, *supra* note 24, at 509.

[27] Frédéric Mégret, The Civilianization of War: The Changing Civil-Military Divide, 1914–2014 at 310, 319 (Andrew Barros & Martin Thomas eds., 2018).

[28] Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (André Nollkaemper & Ilias Plakekofalos eds., 2014).

[29] *Id.* at 4.

[30] *Mother of Srebrenica v. The Netherlands*, Nos. 200.158.313 & 200.160.317, Gerechtshof [Hof] [Court of Appeals] Den Haag, 2017 (Neth.). *The State of the Netherlands v. Mothers of Srebrenica*, No. 17/04567, Supreme Court of the Netherlands, 2019.

[31] R. v. Secretary of State for Defense, [2007] UKHL 58 (appeal taken from [2006] EWCA Civ 327). *See also* Al-Jedda v. the United Kingdom, App. No. 27021/08 (Eur. Ct. H.R. 2011) (same).

[32] Georges v. United Nations, 834 F.3d 88 (2d Cir. 2016).

[33] Jam v. Int'l Fin. Corp., 139 S. Ct. 304 (2019).

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demonstrates that the rules of immunity may be starting to change: some courts have read down IO immunity where third parties are denied access to justice within an IO's internal accountability mechanism.[34] Although there are only a few cases to suggest this direction at present, a narrowing of IO immunity may in turn change the calculus on reputational costs. If IOs assess that they may eventually have to pay, they will be more careful in their actions in order to protect their reputations.

Like legitimacy, reputation is not a zero-sum game: when one entity loses it, the other does not automatically benefit. Nonetheless, because the current rules on responsibility remain incomplete,[35] states and IOs have much to gain by using the rules of attribution to shift responsibility to IOs and then assert immunity. This strategy is further rewarded because there is a widespread understanding that one cannot find member states residually responsible for the wrongful acts of an IO.[36] Thus, current rules of responsibility and immunity contribute to the reputational impasse, particularly where a claim for compensation is the end goal.

[34] *See, e.g.*, Waite and Kennedy v. Germany, Application No. 26083/94; Beer and Regan v. Germany, Application No. 28934/95, ECHR 1999-I

[35] By this, I mean ARIO and the Articles on the Responsibilities of States for Internationally Wrongful Acts exist side by side but are not unified. Moreover, individual responsibility exists in the criminal domain internationally, while there is no other developed responsibility regime for nonstate actors such as corporations.

[36] This was the conclusion reached by the Institut de Droit International on the Legal Consequences for Member States of the Non-fulfillment by International Organizations of their Obligations towards Third Parties (Session of Lisbon, Sept. 1, 1995). *See also* d'Aspremont, *supra* note 23, at 95, who discusses exceptions to this general principle.

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