INTERNATIONAL LAW ASSOCIATION

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ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS

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FINAL REPORT

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INTRODUCTION

This introduction deals with the scope of the Committee's work, the terminology used and the notion of accountability; the recommended rules and practices the Committee is proposing; and the overall structure of the Committee's Final Report.

The Committee was established in May 1996, with the mandate: "to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international Organisations to their members and to third parties, and of members and third parties to such Organisations. In particular, the Committee may consider such issues as:

(a) the relations between member states, third parties and international Organisations;
(b) redress by and against international Organisations, including access to the International Court of Justice and other courts and tribunals, and related issues of procedure;
(c) the relations between different forms of accountability of international Organisations (legal, political, administrative, financial);
(d) the dissolution of international Organisations and related questions of succession."

The First Report of the Committee was presented to the 68th Conference of the ILA at Taipei, 1998,[1] and laid down the legal framework for accountability of IO-s.
The second Report, presented to the 69th Conference at London, 2000, comprised a discussion of relevant general principles,[2] to which was annexed a Co-Rapporteurs' draft of recommended rules and practices.
The Third Report, presented at the 70th Conference at New Delhi, 2002, contained a consolidated, revised and enlarged versions of recommended rules and practices.[3]

The scope of the Committee's work

The Committee's focus ratione personae is on intergovernmental Organisations in the traditional sense, i.e. created under international law by an international agreement amongst States, possessing a constitution and organs separate from its Member States.[4] The Committee's work is intended also to cover Organisations where not only States are members, but not to cover anomalous cases in which intergovernmental Organisations do not possess a legal personality of their own in international law. Since autonomous institutional arrangements established by treaty (treaty-organs) and entrusted with monitoring functions over the implementation of such treaties by the States parties to them generally have not been created as international legal persons, they are not covered by the present Report unless stated otherwise. However, treaty organs are usually closely linked to IO-s and their functioning has raised a number of accountability questions of a similar nature to those relating to IO-s. This Report will therefore where appropriate make reference to treaty organs in particular in Part One, Section Two.

Although accountability operates both from IO-s towards their members and third parties, and from members and third parties towards the IO,[5] the Committee decided to limit the focus of its work to the former, as the latter falls within the traditional mechanisms of international law i.e. fact-finding and monitoring of Member States' conduct.[6]

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[1] Report of the Sixty-eighth ILA Conference held at Taipei, at p. 584.
[2] Report of the Sixty-ninth ILA Conference held at London, at p. 878.
[3] Report of the Seventieth ILA Conference held at New Delhi, at p. 772
[4] Taipei Conference, at p. 587.
[5] Ibidem, at pp.587 – 588.
[6] Report of the Sixty-ninth ILA Conference held at London, at p. 877. Active accountability i.e. where the IO monitors the behaviour of third parties may arise from non-compliance by States with status-of-forces or other agreements; see e.g. the Report of the Secretary-General. Instances for which the UN is entitled to restitution as the result of non-compliance with status-of forces or other agreements (A/56/789). Passive accountability refers to cases where the IO itself is the respondent party.

Terminology used

Throughout the report the terminology is used in a neutral way that does not specifically refer to meanings in use in particular domestic or regional legal systems.

The notion of accountability

The starting point for the rules and recommended practices is that, as a matter of principle, accountability is linked to the authority and power of an IO. Power entails accountability, that is the duty to account for its exercise. There is no exact equivalent in various languages for the term "accountability". Italian, Spanish and French "all need to borrow the English word if they wish to indicate '*la responsabilité des gouvernants devant le peuple, au double sens de lui rendre compte et de tenir compte de lui'*. The cluster of ideas contained in the notion may be found here: "the classical 'responsabilité'; the verb 'rendre compte', used in the sense of 'account for', and 'tenir compte de' in the sense of 'take into account' ".[7]
Accountability of IO-s is a multifaceted phenomenon. The form under which accountability will eventually arise will be determined by the particular circumstances surrounding the acts or omissions of an IO, its member States or third parties.[8] These forms may be legal, political, administrative or financial. A combination of the four forms provides the best chances of achieving the necessary degree of accountability.
The Committee considers that accountability of IO-s consists of three levels which are interrelated and mutually supportive:

- [First level] the extent to which international Organisations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;
- [Second level] tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);
- [Third level] responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires or violate the law of employment relations).[9]

The interrelationship between these three components or levels of accountability has been explained in the Committee's First Report.[10] The mixture of the various forms of accountability will be different for each of the three levels.

The constituency entitled to raise the accountability of IO-s consist of all component entities of the international community at large provided their interests or rights have been or may be affected by acts, actions or activities of IO-s.[11] Accordingly the list of addressees of the rules comprises: intergovernmental Organisations, including their staff, member States of intergovernmental Organisations, non-members of intergovernmental Organisations, supervisory organs within intergovernmental Organisations, domestic and international courts and tribunals, supervisory and monitoring organs within domestic systems (e.g. parliaments) and non-governmental Organisations working on both the national and international level, and private parties (both legal and natural persons).[12]

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[7] Carol Harlow, Accountability in the European Union, Oxford University Press, 2002, 198pp, at p. 14 referring to Pierre Avril
[8] Report of the Sixty-eighth ILA Conference held at Taipei, at p. 598
[9] Ibidem, at pp. 599-600.
[10] Report of the Sixty-eighth ILA Conference held at Taipei, at pp. 600-601.
[11] Ibidem, at p.602
[12] Ibidem, at p. 587.

The diversity of forms of accountability clearly rules out, from the start, any requirement that only legal interests may trigger accountability.[13]

Procedural and substantive limitations on the institutional and operational authority and power of IO-s and treaty-organs can be derived from two sources: from primary rules of international and domestic law, and from the rules of the IO, meaning, in particular, the constituent instrument, decisions and resolutions adopted in accordance with them and established practice of the Organisation, including mechanisms for supervision and monitoring (reporting, financial and administrative control, judicial review).[14]

It should be recalled that States might be more willing to transfer power to an IO if some guarantee is given that the transfer is accompanied by appropriate mechanisms to ensure public accountability.[15] The recommended rules and practices (hereinafter referred to as RRPs) "are aimed at making accountability operational by *inter alia* restraining the use of power, fostering the effectiveness and appropriateness of the use of power and sanctioning the abuse or derailment of power."[16]

The Committee considers it crucial that its proposals should maintain the delicate balance between preserving the necessary autonomy in decision-making for the IO-s and treaty-organs and responding to the need, both in the sphere of international law and international relations, to have these actors accountable for their acts and omissions.[17]

Recommended rules and practices (RRPs)

The existence and continuous refinement of a consolidated body of primary and secondary rules and practices governing both institutional and operational activities of IO-s is a vital prerequisite for a well functioning accountability regime. As the Committee's activities were, pursuant to its mandate, measure-oriented, it considered that the identification and formulation of a pragmatic and feasible set of such measures should be the final outcome of the Committee's work.[18]
The most suitable format of the outcome of the Committee's activities was agreed to be a set of "Recommended Rules and Practices" (RRPs) accompanied by commentaries.[19] Primary and secondary RRPs would have to be read in conjunction with one another, as the imposition of RRPs without concomitant provisions regarding remedial action could undermine the capacity to ensure compliance.[20]
The RRPs represent a series of specific rules and guidelines derived from principles aimed at achieving effective accountability. They are intended to be relevant, pragmatic and feasible, and to be of practical help to those interested, both professionally and academically, in the accountability of international Organisations. The general rubric "Recommended Rules and Practices" was specifically chosen so as not to prejudge whether any RRP should be seen as a recommendation for sound internal practice or whether it was operative on a legal level, and in the latter case whether it was de lege lata or de lege ferenda; no qualification of status under international law may be inferred from the use of the term "should". Although many of the RRPs reflect existing rules of international law, the Committee's terms of reference did not preclude it from formulating rules constituting, to a reasonable extent, progressive development.[21] Nor should the use of the term "as a general rule" be understood as leaving no room for flexibility in practice.
Codification of existing practice and the filling of gaps may occasionally result in some rules currently belonging to the first level of accountability[23] being moved in the future to the legal sphere.

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[13] Ibidem, at p. 603.
[14] Report of the Sixty-ninth ILA Conference held at London, at p. 878
[15] Henry Schermers and Niels Blokker, International Institutional Law. Unity within Diversity, Fourth Revised edition, 2003, Martinus Nijhoff Publishers, Boston, Leiden, para. 599.
[16] Report of the Seventieth ILA Conference held at New Delhi, at pp. 773-774
[17] Report of the Sixty-ninth ILA Conference held at London, at p. 878
[18] Ibidem
[19] Ibidem at p. 588
[20] Report of the Seventieth ILA Conference held at New Delhi, at p. 773
[21] Report of the Sixty-eighth ILA Conference held at Taipei, at p. 588.
[22] Report of the Sixty-eighth ILA Conference held at Taipei, at p. 588.

The RRPs contain references to Member States, since IO-s are ultimately composed of Member States and decisions of IO-s are, in most cases,[24] taken as a result of initiatives and proposals of individual Member States.

The RRP-s stem from the yardsticks put forward in the Committee's First Report.[25] The flexibility for IO-s when conducting their operations has to be matched by a comprehensive set of yardsticks at each legal level, -but all parties involved are looking for the necessary degree of predictability and consistency.

The Committee's Final Report

The Committee's Fourth and Final Report consists of four Parts. Part One deals with RRP-s on the first level of accountability i.e. covering internal and external scrutiny and monitoring.
In Part Two primary RRP-s are formulated for application on the second and third levels of accountability[27]: liability for injurious consequences not involving a breach of international or institutional law, and responsibility for acts or omissions which do constitute such a breach.
Parts Three and Four are devoted to the implementation of the accountability of IO-s. In Part Three secondary RRP-s on responsibility are formulated, while the complex question of the establishment and functioning of accountability mechanisms is dealt with in Part Four.

[23] For explanation of the different levels of accountability, see text to n.10 above.
[24] Initiatives may also originate from organs composed of individuals or from Executive Heads of an IO who, under relevant rules of the IO, may be competent to propose items to be included in the agenda of various organs.
[25] Report of the Sixty-eighth ILA Conference held at Taipei, at pp. 601-602.
[26] Ibidem, at p. 598.
[27] see the text at n. 12 above.

PART ONE: THE FIRST LEVEL OF ACCOUNTABILITY (Internal & external scrutiny irrespective of subsequent liability &/or responsibility)

These RRPs do not necessarily reflect a legal obligation for each IO. They are derived from common principles, objectives and notions related to the accountability of IO-s and reflect considerable practice.

Section One: RRPs based upon principles, objectives and concepts common to all IO-s.

The principle of good governance

The principle of good governance (or of good administration), which is of an evolving nature, provides the necessary guidance as to the institutional and operational activities of an IO. As it is commonly understood, it includes the following elements: transparency in both the decision-making process and the implementation of the ensuing institutional and operational decisions; a large degree of democracy in the decision-making process; access to information open to all potentially concerned and/or affected by the decisions at stake; the well-functioning of the international civil service; sound financial management; and appropriate reporting and evaluation mechanisms.
Although these elements will be reviewed separately below, it is clear that their close interconnection is vital to the achievement of good governance by IO-s.

1. Transparency in both the decision-making process and the implementation of institutional and operational decisions.

1. *IO-s should, as a general rule, adopt normative decisions in a public vote*
2. *Meetings of non-plenary organs should in principle be public unless inappropriate.*
3. *Non-plenary organs of an IO should as a general rule grant through their Rules of Procedure an appropriate status to Member States, other States, and non-State entities particularly affected by decisions to be taken or contributing to operational activities.*

The basic standard should be that of the maximum possible transparency of the quasi-legislative procedure engaged in by decision-making organs of an IO. Transparency may in practice differ in format and modalities depending on the stage of the decision-making process.[28] Non-plenary organs acting on behalf of the whole membership under the governing provisions of an IO have a special obligation to act as transparently as possible, and should reduce as far as possible the number of non-public meetings. This special obligation of transparency implies general, collective and individual elements,[29] with regard to member states generally, or state or states specifically affected by the relevant decision being taken. Although transparency cannot be achieved only through formal rules,[30] the Committee proposes the above RRP-s, it being noted that the term "normative decisions" is used in the sense of conduct-setting or rule-making decisions or recommendations.
Member States particularly affected by decisions to be taken or contributing to operational activities should as a general rule be granted an appropriate status by non-plenary organs.[31]

2. Participatory decision-making process

1. *Plenary organs of an IO should make appropriate procedural arrangements enabling all members to participate fully in the decision-making process.*
2. *Plenary organs of an IO should periodically review the membership of non-plenary organs especially those possessing executive powers*
3. *When taking or reviewing decisions on coercive measures, organs should enable Member States whose interests are specially affected to express their views.*

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[28] Sydney Bailey and Sam Daws, The Procedure of the UN Security Council, Third Edition, Oxford University Press, 1998, passim
[29] Ingo Winkelmann, Bringing the Security Council into a New Era, Max Planck Yearbook of United Nations Law, Volume I, 1997, Kluwer Law International, London, The Hague, Boston, pp. 35-90, at p. 51.
[30] Ibidem, at p. 58.
[31] Sydney Bailey and Sam Daws, op. cit., at pp. 63-64.

From an accountability point of view, it is clear that rules on decision-making partly determine the extent to which Member States can control the process by which IO-s employ the powers which have been conferred upon them to carry out their functions[32].
When reviewing the element of participation present in any decision-making process within an IO, the emphasis is inevitably upon the actual point of decision-making. Nevertheless, deliberations and even decision-making processes may take place in non-plenary organs or informally. These informal processes are undoubtedly useful in lubricating the decision-making process, especially in IO-s of a universal or quasi-universal character. However the intervention of closed or informal processes, on an institutionalised basis, necessarily reduces opportunities for external scrutiny[33] and there is a close connection between the transparency of decision-making and its participatory character.
The term "coercive" is here used in its widest sense, including not just economic coercion, but also measures related to, for example, membership.

3. Access to information

1. *Documents of an IO should, as a general rule, be available to all Member States. Competent organs should, at regular intervals, review restrictions on access to documents.*
2. *IO-s should as a general rule formulate and publish plans setting the general orientation of their programmes and establishing the objectives to be achieved and the strategies to be followed.*
3. *When engaging in operational activities of a humanitarian, development or peacekeeping nature, IO-s should provide appropriate channels of communication to the State or non-state entity concerned, and to groups and individuals whose interests are particularly affected by such an operation, to enable them to make their point of view known in a timely fashion.*
4. *Subject to the provisions of paragraph 7 below, IO-s should ensure access by the public to information held by them (including their archives). IO-s should not deny applications for access to information except for compelling reasons on limited grounds such as privacy, commercial and industrial secrecy, or protection of the security of Member States or private parties.*
5. *Non-plenary organs of an IO should provide information about their activities to all Member States and wherever possible should make available the text of draft decisions under consideration.*
6. *When direct participation in confidential but formal consultations during private meetings is not possible, the non-plenary organ should organise a briefing for non-members.*
7. *IO-s should ensure effective protection against the disclosure of information which has come to their knowledge in circumstances imposing an obligation of confidentiality, and, when appropriate, should protect the identity of those who provide them with information.*
8. *IO-s should publish regular reports on the measures they have taken to implement the above provisions on public access to and the preservation of confidentiality of documents and information.*

The great majority of IO-s have developed an information strategy not only to project a clear idea of what they are doing and why, but also to respond to criticism. When addressing the issue of access to information held by an IO internal flows of information are as important as those directed to audiences outside[34]. The principle of good governance implies that ensuring full access to information is a fundamental element in the accountable functioning of any organ of an IO, it being understood that the parties whose interests are protected by confidentiality requirements should give consent.

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[32] H. Schermers and N. Blokker, op. cit., para. 382.
[33] S.Bailey and S. Daws, p. cit., pp. 56 and 291.
[34] Bhaskar Menon, The image of the United Nations, in Issues in Global Governance, Papers written for the Commission on Global Governance, Kluwer Law International, London, The Hague, Boston, 1995, pp. 175-193, at p. 193.

All Member States should receive information about the activities of non-plenary organs and should be provided with the text of draft decisions under consideration.[35] Confidential but formal consultations may be held during private meetings, making direct participation by non-members not possible; in such cases the non-plenary organ concerned should organise a briefing of non-members.[36]
IO-s should provide appropriate channels of communication to the beneficiaries of their operational activities so as to enable them to express their views in a timely fashion.[37] In establishing these channels, IO-s should pay due regard to protecting the identity of those non-state actors who choose to utilize these channels of communication and who, as a result, may expose themselves to the risk of reprisals.

4. Well-functioning international civil service

1. *Each IO should secure within its Secretariat the highest standards of efficiency, competence and integrity and enforce the principles of impartiality, loyalty to the aims and purposes of the IO, functional independence and discretion, and the principles of equitable geographical representation and gender balance.*
2. *IO-s should not implement the above principles in such a manner as to prejudice the proper administration of justice.*
3. *IO-s should provide for effective mechanisms of supervision and control over the Executive Head and the Secretariat.*

The principle of good governance requires IO-s to ensure the existence of a well-functioning and independent international civil service. IO-s have formulated principles, recommended practices and issued guidelines and regulations, which have been confirmed, elaborated and guaranteed through the case-law of the various administrative tribunals. Delicate issues are bound to arise when the daily operation of this framework is being confronted with the overriding concern of accountability of the IO. In cases before domestic courts it will be for the Executive Head of the IO to decide, in the interest of the organization, upon the waiver of immunity from jurisdiction.
Particular attention has to be paid to the considerable power of the Secretariat of an IO which is largely based upon being informed regarding all documentation and practices of the IO[38].
The maintenance of an efficient, competent and representative international civil service requires IO-s to enforce inter alia the principles of impartiality, loyalty to the aims and purposes of the IO, functional independence and discretion.[39] This is also dependent on the observance by Member States of their obligation to respect these principles. In December 2002 the UN General Assembly reaffirmed the principles of equitable geographical representation and gender balance.[40]

[35] S. Bailey and S. Daws, op. cit., at pp. 66-67.
[36] S. Bailey and S. Daws, op. cit., at p. 50.
[37] European Court of Justice in Case 17/74 Transocean Marine Paint Association v. Commission {1974} ECR 1063 as referred to by John Usher, General Principles of EC Law, Longman, London, New York, 1998, at p. 76.
[38] C.F. Amerasinghe, Principles of the Institutional Law of International Organisations, Cambridge University Press, 1996, at p. 784.
[39] H. Schermers and N. Blokker, op. cit., paras.516 and 524
[40] Operative Paragraph 38 of Resolution A/57/300 on Strengthening of the United Nations; an agenda for further change, adopted on 20 December 2002.

Sound financial management

1. *IO-s should ensure as wide a participation as possible by Member States in the budgetary process.*
2. *IO-s should maintain as far as possible a consistent methodology of budgetary presentation.*
3. *IO-s should ensure that the budget is presented in such a way as to facilitate internal and external audit and accountability. Accordingly:*
    a) *the budget should be presented in such a way as to demonstrate that each budgetary item has been duly authorised;*
    b) *operational expenditure should be separately identified and accounted for;*
    c) *the role of extra-budgetary resources, including the resources utilised by agencies and quasi-autonomous bodies, should be made clear;*
    d) *the same presentation and budget methodology should be utilised for both regular budgetary and extra-budgetary resources.*
4. *The organ vested with the powers of approval of the budget should allocate appropriate funding for activities duly decided upon by competent organs of the IO. However, it should not approve appropriations, which it considers, in good faith, to be unnecessary or excessive.*
5. *During the course of the budgetary period interim financial and programme performance reports should be made available to governing bodies at regular intervals.*
6. *IO-s should establish rules and standards for the acceptance of voluntary contributions, gifts and donations from whatever source, and for the creation of trust funds, designed to ensure that such contributions, gifts, donations and trust funds are consistent with the policies, aims and activities of the Organisation. An IO which accepts voluntary contributions, gifts and donations, remains accountable to the Member States both for having accepted them and for the way they are spent.*

Since financing is at the heart of the functioning of any IO,[41] the requirement of sound financial management constitutes an important aspect of the principle of good governance and thus of the overall accountability of IO-s. A transparent and consistent budgetary process occupies a central role. Since the bulk of the revenue of the vast majority of IO-s is derived from Member State contributions, it is clearly desirable that all major groups of Member States fully support decisions on budgetary matters. Thus, IO-s should ensure as wide a participation as possible by Member States in the budgetary process.
In addition to the scrutiny which Member States are entitled to exercise, there should also be a mechanism of internal auditing which reviews the regularity of all transactions, the conformity of obligations and expenditures with the appropriations and the economic use of the resources of the IO[42]. Furthermore, a mechanism of external auditing should review whether the funds appropriated in the budget have been spent in accordance with the provisions of the budget and of the financial regulations of the IO[43].
The budget should separately identify and account for operational expenditures.[44] There should be clarity with regard to the role of extra-budgetary resources.[45] The same presentation and methodology for both categories of regular and extra-budgetary resources should not affect their respective procedure for approval.
The organ vested with the powers of approval of the budget should not approve appropriations which it considers to be unnecessary or excessive.[46]
At regular intervals during the course of the budgetary period, governing bodies should receive interim performance reports.[47]

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[41] C. F. Amerasinghe, op. cit., at p. 291.
[42] Ibid. at p. 296.
[43] Ibid. at p. 297.
[44] H. Schermers and N. Blokker, op. cit., para. 1095
[45] Joachim Müller, Planning, Budgeting and Performance Reporting in the United Nations, in C. De Cooker, (Ed.), International Administration. Law and Management in International Organisations, Kluwer Law International, loose-leaf publication, II. 8, 17 and 20.
[46] C. F. Amerasinghe, op. cit., at p. 321.
[47] J. Müller, op. cit., 2-3.

6. Reporting and evaluation

1. *IO-s should publish periodic general reports on the institutional and operational activities undertaken in the period in question.*
2. *Organs to which other organs report under the rules of the IO, should ensure that such reports are regularly received in an appropriate form and properly debated whenever required.*
3. *Prior to engaging in operational activities IO-s should articulate their objectives and the internal lines of responsibility so as to provide a reliable yardstick for subsequent evaluation.*
4. *IO-s should establish appropriate mechanisms such as functional operational lessons units to evaluate operational activities effectively and to contribute to more effective future activities.*
5. *Subsidiary organs should be required to submit periodic reports to their parent organ.*

The processes of reporting and evaluation are situated at a crucial juncture of the principle of good governance and the implementation of accountability of IO-s. They constitute the vital preconditions for its implementation, and at the same time form an integral part of the whole process of implementation.
The accountability of plenary organs consists of both internal mechanisms and external accountability: the former based on internal mechanisms, the latter taking into account the broad legal environment in which the IO operates.
Reporting should take place in accordance with a number of procedural and substantive requirements in order to ensure efficient supervision and control. Accordingly the report should not only contain a genuine account of action or inaction but also explanations for the course of conduct undertaken during the relevant period. Moreover IO-s should not automatically use past operations as a model for future operational activities.
Evaluation of operational activities should take place using the objectives and the internal lines of responsibility articulated by the IO prior to the conduct of such activities.[48] Objectives should be understood to include expected outcomes.
In accordance with the RRPs on access to information, periodic reports submitted to their parent organ by subsidiary organs, e.g. sanctions committees, should, as a general rule, be available to Member States.

The principle of good faith

IO-s, their organs, and their agents are under a general legal obligation to act in all their dealings in accordance with the principle of good faith.

The fundamental principle of good faith conditions all acts, activities and conduct of IO-s, irrespective of their individual or particular category features, and this to the same extent as it operates vis-à-vis states and other actors on the international scene. The principle of good faith applies to both organs and agents of an IO. According to the International Court of Justice an "Agent" is "any person who, whether paid official or not, and whether permanently employed or not, has been charged by an organ of the Organisation with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."[49]
The fundamental nature of the principle of good faith has given rise to other important principles with regard, for example, to the need for standards of honesty, fairness and reasonableness. The principle of consistency in treatment in like cases, for example, may in certain situations, give rise to legitimate expectations. The principle of good faith also encompasses the prohibition of abuse of rights.

The principles of constitutionality and institutional balance

1. *Each IO is under a legal obligation to carry out its functions and exercise its powers in accordance with the rules of the organisation.*
2. *Organs of an IO in carrying out their functions must respect the institutional balance laid down in the constituent instruments of the IO.*

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[48] Ibidem, 9
[49] Reparations for Injuries Suffered in the Service of the United Nations, Advisory opinion of 11 April 1949, I.C.J. Reports, 1949, p. 174 at p. 177

3. *Organs and agents of an IO, in whatever official capacity they act, must ensure that they do not exceed the scope of their functions.*

The principle of constitutionality entails a legal obligation for each IO to carry out its functions and exercise its powers in accordance with the rules of the IO.[50] Since IO-s are based on the rule of law, Member States and organs of the IO should ensure that decisions and measures of the IO are in conformity with the rules of the organization. Since IO-s can only act legally in accordance with an express or implied power founded upon an express functional provision, they may only function in circumstances laid down directly or indirectly in their constituent instrument.
Organs and agents of an IO must respect the limits on the scope of their functions set by the rules of the IO.[51]
The principle of institutional balance entails that organs of an international Organisation cannot overstep the institutional restraints laid down in the constituent instrument determining how they exercise their powers, and perform "a function which is antithetical to the processes of decision-making with which they have been invested."[52].

The principle of supervision and control

1. *Parent organs have a duty to exercise a degree of control and supervision over subsidiary organs which corresponds to the functional autonomy granted.*
2. *Parent organs should use their supervisory and controlling power to overrule a decision by a subsidiary organ if that decision is contrary to applicable legal rules.*
3. *The supervisory and controlling power implies the right of the parent organ to question the way in which the subsidiary organ has exercised its competence.*
4. *These RRPs do not apply to organs of a judicial or quasi-judicial character when acting in the exercise of their judicial or quasi-judicial function.*

The principle of supervision and control through periodic evaluation of the activities of an IO and of its constituent organs is developing into a general principle of contemporary international institutional law. Principal organs of an IO have an inherent power to establish subsidiary organs to assist them in the exercise of their own express and implied powers under the constituent instrument.[53] The relationship between a parent or principal organ and its subsidiary or subordinate organs, operating within the framework of validity of the former, but possibly extending beyond its range of functions, is pivotal in terms of accountability. IO-s remain fully accountable for the actions and omissions of subsidiary organs and their agents.
The fourth RRP does not preclude the exercise of normal financial supervision and control.
The case of delegation or authorisation of powers or functions, or sub-contracting to a State or a group of States (or other external entity), raises particular and important questions regarding supervision and control; these are dealt with in greater detail in Part Three, Section Three.

The principle of stating the reasons for decisions or a particular course of action

1. *Organs of an IO should state the reasons for their decisions or particular courses of action whenever necessary for the assessment of their proper functioning or otherwise relevant from the point of view of their accountability.*
2. *With regard to decisions of a general nature, the reasons may relate to the general character of such a decision only.*
3. *With regard to a decision directly and immediately affecting rights and obligations of particular States and non-State entities the reasons given should set out the principal issues of law and fact upon which the decision is based.*

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[50] P. Reuter as cited by P.Bekker, The Legal Position of Intergovernmental Organisations. A Functional Analysis of Their Legal Status and Immunities, Martinus Nijhoff Publishers, 1994, at p. 50, note 218.
[51] Difference relating to Immunity of Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I. C. J. Reports 1999, p. 62, para.66.
[52] Danesh Sarooshi, The Legal Framework governing United Nations Subsidiary Organs, B.Y. I. L., 1996, pp.413-478, at p. 464.
[53] Ibidem at pp. 422-431.

4. *Non-plenary organs should reflect in their periodic reports information of a non-confidential nature forming the basis of their decisions.*

This principle has a comprehensive nature that covers norm-creating, prescriptive, and operational decisions. The principle that a proper reasoned basis should be provided for its decisions and actions (or inaction as the case may be) serves multiple purposes with regard to any organ of an IO, as it is clearly connected to several of the other principles listed here. Compliance with this principle will contribute to greater transparency, it will have an impact on the kind of procedure for the decision-making process, it will reduce the possibility to misuse power, and it will undoubtedly enhance the chances of accountability to operate properly, *inter alia* through the exercise of supervision and control, even when no mechanism of judicial review is available or has been put into operation. Compliance with the principle of stating reasons for a decision or for a course of action is in accordance with the requirement that IO-s should behave in a consistent manner, and may contribute to the creation of legitimate expectations[54]

Organs of an IO should provide in their Rules of Procedure for a process for requesting information or assistance from the Organisation's Secretariat or other persons or entities considered competent for the matter under consideration. IO-s should ensure that information forming the basis of their decisions is collected in a comprehensive and reliable manner and that information-gathering is done in an effective and timely manner. Non-confidential information forming the basis of decisions taken by non-plenary organs should be reflected in their periodic reports.[55]

The principle of procedural regularity

1. *IO-s should take necessary steps at all levels to:*
    a) *prevent abuse of discretionary powers;*
    b) *avoid errors of fact or of law;*
    c) *ensure respect for due process and fair treatment, especially when organs are exercising discretionary powers.*
2. *Organs of an IO vested with executive powers should provide in their Rules of Procedure for an express requirement of giving prior notice to a defaulting Member of the IO when coercive measures are being considered.*

The principle of procedural regularity is needed in order to supplement the principles of objectivity and good faith with regard to minorities and individual Member States of an IO, international civil servants and interested or affected third parties .[56]

The principle of objectivity and impartiality

1. *An IO should conduct its institutional and operational activities in a manner which is objective and impartial and can be seen to be so.*
2. *Officers of an organ of an IO should perform their functions in a fair and impartial manner.*

The principle of acting objectively and impartially is of a fundamental nature for the proper functioning of an IO both with respect to its institutional and operational activities. Compliance with the various other principles listed here will create the necessary conditions for any assessment as to conformity by IO-s with the principle of objectivity and impartiality, in particular by officers of organs of an IO.[57]

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[54] John Usher, op. cit., at p. 103.
[55] S. Bailey and S. Daws, op. cit., at p. 289.
[56] H. Schermers and N. Blokker, op. cit., para. 1205.
[57] Yehuda Blum, Eroding the United Nations Charter, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993, at p. 161.

The principle of due diligence.

1. *Member States as members of an organ of an IO, and organs and agents of an IO have a fundamental obligation to ensure the lawfulness of actions and decisions.*
2. *All organs and agents of an IO, in whatever official capacity they act, must comport themselves so as to avoid claims against the IO.*
3. *Members of an IO have a duty to exercise adequate supervision of the IO, i.e. to ensure that it is operating in a responsible manner so as to protect not only their own interests but also that of third parties.*

The fundamental principle of due diligence is relevant to Member States as members of an organ of an IO and to the organs and agents of an IO. Some of the ensuing obligations mirror aspects of other principles listed, such as the principle of procedural regularity.
Under the law of the EU, it has been held that legal responsibility can be incurred if the conduct of an organ was based on a error of judgment which, in analogous circumstances, an administrative or executive authority exercising ordinary care and diligence would not have committed[58].
Conduct of organs and agents of an IO should be such as to avoid claims against the IO.[59]

[58] Fresh Marine Company SA v. Commission of the European Communities, Judgment of the Court of First Instance, 24 October 2000, Case T-178/98, paras. 61 and 82.
[59] Difference Relating to Immunity of Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C. J Reports 1999, p.62, para.66.

Section Two: RRPs for treaty organs.

1. *As a rule treaty-based organs should submit their reports to the meetings of States Parties in order to enable them to exercise political and legal supervision and control; they should also submit their reports at the same time, although not necessarily in the same format, to the IO which is servicing their functioning, in order to enable its primary plenary organ to exercise financial and administrative supervision and control.*
2. *In the case of dual reporting as recommended in the previous rule, additional information provided by the "transit organ" channelling the report should also be made available to the meetings of the States Parties of the treaty.*
3. *Involvement of non-Party States in the process of supervision and control should be limited to the administrative and financial aspects of the functioning of the treaty-organs. Any more comprehensive review of the activities of the treaty-organs should however be reserved to the States Parties.*
4. *Treaty-based organs in the human rights field should continue to make public the texts of both reasoned decisions on admissibility, and views or opinions on the merits, of individual communications which have been addressed to them, as well as the texts of general comments and recommendations made under their respective instruments.*

Although particular IO-s have as one of their key functions the monitoring of compliance with the law of the IO by its Member States, particular categories of treaties concluded independently from an IO or under its auspices may have entrusted supervisory functions to specially established mechanisms or organs e.g. in the field of the protection of human rights, or of the environment or in the area of disarmament. These treaty bodies/organs are a category *sui generis* as they occupy a "semi-autonomous" position.[60]

Such bodies cannot be accountable for financial management as they have no budgets of their own. They nevertheless possess a significant degree of independence, although in the performance of their duties they depend to a great extent on factors that are beyond their control, such as financial resources. Treaty-organs are in fact incomplete IO-s lacking, on the one hand, the structural features necessary to constitute a complete IO and, on the other, full and formal institutional links with an existing IO. Their accountability for the performance of their tasks may be both towards the States Parties to the treaty that established them and towards the IO under whose auspices they operate. The position of these treaty-organs who report to a plenary organ of an IO comprising non-state parties as well as to the meetings of State Parties needs clarification. This is especially so since the IO is not in a position to change the composition, mandate, power or procedures of the treaty-organ it is servicing.[61]
With regard to treaty-organs of a judicial or quasi-judicial character, political and legal supervision does not extend to the exercise of that judicial or quasi-judicial function.

Section Three: RRPs on the Relationship between NGO-s and IO-s.

1. *IO-s should establish appropriate relationships with NGOs active within their field of competence.*
2. *IO-s should as a matter of practice establish at least an NGO liaison service in order to facilitate NGO involvement in their activities.*
3. *The Department of an IO dealing with a particular category of issues should at regular intervals convene a briefing where representatives of particular NGO-s may be given an opportunity to present their views on a particular matter or a range of issues.*

The range of the relationships between NGO-s and IO-s is as broad as the functional areas covered by IO-s themselves, ranging from arrangements having a constitutional basis for the role of NGO-s (such as trade unions in the ILO) to relatively less-developed links with IO-s of a military nature.

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[60] See e.g. R. Churchill and G. Ulstein, Autonomous institutional arrangements in multilateral environmental agreements: a little noted phenomenon in international law, AJIL, 2000, pp. 623-659

[61] Paul Szasz, The Complexification of United Nations Law, Max Planck Yearbook of United Nations Law, Volume 3, 1999, Kluwer Law International, London, The Hague, Boston, pp.1-59, at p. 23

Likewise, many treaty-organs are to varying degrees dependent on input by NGO-s for their functioning, e.g. by providing essential information and expertise, service and support to governmental delegations**.**

NGO-s frequently play a stimulating role in the effective functioning of IO-s and in the process of holding them accountable for their actions or omissions. There are various formalised mechanisms in both these regards: consultative status with a principal organ of an IO, associate status with the Department of Public Information of an IO, accreditation to an international conference organised by or under the auspices of an IO. IO-s should establish criteria and procedures for accrediting NGO-s. Engagement with civil society actors should be based on procedures and policies that reflect greater coherence, consistency and predictability[62].

Issues of shared or joint accountability arise when NGO-s are acting as implementing partners for agencies of IO-s in areas of development or humanitarian assistance.

[62] A/57/387, para.141. Strengthening of the UN: an agenda for further change. Report of the Secretary-general.

PART TWO: THE SECOND AND THIRD LEVELS OF ACCOUNTABILITY: "PRIMARY" RULES AND RECOMMENDED PRACTICES ON THE LIABILITY/RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

The RRPs on liability and responsibility, or at least some of them, may in substance already be incorporated in constituent instruments; they may also be derived from such instruments and from the practice of IO-s. RRPs may also be derived from general principles of law, treaty law and customary international law.
Section One looks at the law which governs IO-s and Member States in their relation to one another.
Section Two deals with the question of the applicable law governing the variety of relationships an IO maintains in performing the functions it has been entrusted with by its founding Members.
Sections Three and Four contain substantive rules on the prevention of damage and the observance of human rights and humanitarian law in the activities undertaken by IO-s.

Section One: the law which governs IO-s and Member States in their relation to one another

There is no reason in principle why primary rules of international law should not apply to collective enterprises undertaken by states in the framework of IO-s.[63] The International Court of Justice has noted that: "international Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."[64]
Brownlie has pointed out that a "State cannot by delegation (even if this be genuine) avoid responsibility for breaches of its duties under international law…This approach of public international law is not *ad hoc* but stems directly from the normal concepts of accountability and effectiveness." [65]
States cannot evade their obligations under customary law and general principles of law by creating an IO that would not be bound by the legal limits imposed upon its Member States. Decisions of regional human rights bodies lend support to the view that a State's human rights obligations continue to apply.[66]
Membership of an IO can thus not be considered to imply a corresponding reduction of state responsibility, although an authorisation granted by an IO to one or more Members could, in certain circumstances, prevent the breach of an international obligation by such Members. The constituent instrument can only depart from otherwise applicable rules of international law as between the members of the IO.
It should be noted that peremptory norms of international law are applicable to both Member States and IO-s.
Individual state responsibility for violations of human rights may be complemented by accession by IO-s, where possible, to such instruments or the incorporation of fundamental human rights into the rules of the IO, thus leading to organisational responsibility for similar violations occurring within an Organisation's sphere of competence.[67]
In the case of the existence of an international obligation for States not only to respect but also to "ensure" (International Humanitarian Law) or "secure" (European Convention on Human Rights) such respect, there is a conventional legal obligation for Member States to ensure through adequate

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[63] Prosecutor v. Simic et al., Case IT-95-9-PT, Decision on motion for judicial assistance to be provided by SFOR and others, 18 October 2000, para. 46: *mutatis mutandis*.
[64] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C. J. Reports 1980, p. 73 at p. 90.
[65] I. Brownlie, State responsibility: the problem of delegation, in Völkerrecht zwischen normativen Anspruch und politischer Realität, Ginther K. et Al. Eds, 1994, pp. 300-301.
[66] This idea is clearly expressed in the *Waite and Kennedy* case where the European Court of Human Rights said:" The Court is of the opinion that where States establish international Organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these Organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the convention in relation to the field of activity covered by such attribution", *Richard Waite and Terry Kennedy v. Germany*, ECHR, 18 February 1999, para. 67.
[67] See eg. Matthews v. United Kingdom, Application No.24833/94, Judgment of 18 February 1999, paras. 32 and 34 and Bosphorus Hava Yollari Turizm ve Ticaret AS against Ireland, ECtHR Decision as to the admissibility of Application No.45036/98, 13 September 2001, page 24.

supervision that IO-s act within the constraints of applicable law.[68] It is also argued that a similar obligation exists under customary international law.
A transfer of powers to an IO cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of the States who transferred powers to an IO.[69] States should "make provision that a potential jurisdictional gap concerning the control of the exercise of such transferred powers does not arise".[70]
The policy-making power vested in the plenary organ of an IO enables Member States to comply individually and collectively with these primary obligations. The foregoing obligations extend to institutional acts, operational activities and omissions by the IO itself and by any of its organs and such responsibility would apply to the Member State(s) concerned, separately and distinctly from the international responsibility of the IO itself. In particular, membership of an IO does not suspend or terminate the responsibility of any State for continuing compliance with rules of international law applicable to that State, and notably those aimed at protecting the interests of third parties and the international community. Of course, Article 103 of the UN Charter establishes that, in the event of a conflict between the obligations of Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. However, IO-s should not require Member States to breach peremptory norms.

Section Two: Applicable law

Given the wide range of levels on which IO-s operate (international and multiple national and regional) there is no single comprehensive legal system governing all relevant responsibility questions concerning a particular IO. At each level, a different legal framework and a different kind of ensuing responsibility might operate. The primary rules on the second level may also be of a soft-law nature, consisting of legally non-binding standards and codes of practice.
The issue of the identity of the set of international legal rules applicable to IO-s is a necessary preliminary to any determination of responsibility problems. What international legal rules are applicable will depend on the relationship they are designed to govern. IO-s will develop and maintain relationships with Member States, non Member States, other IO-s, Staff members and third parties, such as private individuals, NGOs and companies.
Responsibility of IO-s may arise from non-compliance with any of the applicable bodies of law, while their liability will be implicated when (significant) harm has been caused by any of the lawful activities carried out by the IO-s. Although the set of RRPs is destined to operate at the international legal level, compliance by IO-s will inevitably also affect their conduct and operations at the multiple other layers of regional and domestic laws.

The relations between an IO and its Member States

> *The relations between an IO and its Member States are primarily governed by the Organisation's constituent instruments and in addition by any relevant rules of the Organisation, rules of general international law and any agreements binding upon the Organisation and the Member States concerned.*

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[68] Matthews case. See also for instance the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997, referred to by August Reinisch, Governance without Accountability?, German Yearbook of International Law, Volume 44, pp. 270-306, at p. 286, note 77.

[69] In 2000 an application was made to the ECtHR by various companies against the 15 EU Member States collectively in respect of acts of EU organs within an area of exclusive Community competence. Following a judgement of the EU Court of First Instance partly upholding pleas alleging infringements of the rights of the defence of the applicant and annulling the fines on the companies concerned [Cases T-191/98 and T-212/98 to T-214/98, Atlantic Container Lines and Others vs. Commission, para. 477 and 1648 (not yet reported)], the Grand Chamber of the ECtHR unanimously decided the application inadmissible as by the time of the "final decision" in the case – the CFI's judgment of 30 September 2003 – it was clear that the applicant company could not produce reasonable and convincing evidence of the likelihood that a violation affecting it would occur : Decision as to the admissibility of Application 56672/00 (DSR – Senator Lines), 10 March 2004, page 13.

[70] August Reinisch, Securing the Accountability of International Organisations, Global Governance. A review of Multilateralism and International Organisations, 2001, pp. 131-149, at p. 143.

The relations between an IO and its Member States are essentially governed by the basic constitutional texts of the IO, by relevant rules of general international law and by additional agreements binding upon the IO and its Member States. In addition, an agreement between an IO and one or more of its Member States may affect the relationship between the organisation and its membership as such.
The founding documents of an IO govern its constitutional standing, status and dissolution, supplemented if necessary by general international law.
The ultimate responsibility of IO-s towards their Member States is to act in a manner consistent with the founding treaty.
The internal law of an IO consists of general principles, regulations, rules, contracts and guidelines; although in the application of internal law an IO is free from interference by national legal systems, this does not apply *vis-à-vis* international law because "international Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law"[71] in carrying out their functions and in exercising the powers attributed to them.
Article 2(1)(j) of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986, it should be recalled, defines the "rules of the Organisation" in terms of the constituent instruments, decisions and resolutions adopted in accordance with them and established practice of the organisation.

The relations between an IO and its staff members

> *The relations between an IO and its staff members are governed by the provisions of particular employment contracts, relevant rules of the Organization, any agreement binding upon the Organization, and rules of general international law.*

The relations between an IO and its staff members should, because of the combination of institutional and contractual links, not be considered as relations with third parties.
Every IO should establish a special set of rules for its staff members.
IO-s are also able "to entrust missions to persons who do not have the status of an official of the IO"; although "experts on mission" are not "officials" within the meaning of the CPIUN, "practice shows that the persons so appointed" have been regarded as officials for the enjoyment of privileges and immunities necessary to ensure their independence [72].

The relations between an IO and third parties

The term "third parties" is considered to cover victims or wrongdoers who are not members of the IO concerned: states, other IO-s, individuals or legal persons, including private entities.

The relations between an IO and other IO-s, and between an IO and non- Member States

> *The relations between an IO and non-Member states and other IO-s are governed by general international law and agreements binding upon the parties.*

The relations between an IO and third parties are normally governed by international law; however the IO's powers and competences are determined by its constituent documents.

Contractual relations between an IO and third parties

1. *The contractual relations between an IO and third parties are governed by the contract and applicable principles of private international law.*
2. *In order to enhance accountability, each IO should establish and maintain the greatest possible measure of uniformity in its contractual regime.*

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[71] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, I. C. J. Reports 1980, p. 73, at p. 90.
[72] Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177, at p. 194, paras. 47-50.

In situations other than those arising under a treaty, when the third party consents to the relationship with the IO, this relationship is governed by the law applicable to the contract in question. This could be a national law or a mix of national law and international law. A higher degree of accountability could result from a consolidated and unified contractual law regime within each IO.

Non-contractual liability relations between an IO and third parties

1. *Where acts of an IO cause personal injury to state officials or damage to state property, international law will govern the tortious liability of the IO.*
2. *Where acts of an IO cause personal injury to a non-state party or damage to such a party's property, local law will govern the tortious liability of the IO unless in the circumstances the activity causing the injury or damage constitutes a breach by the Organisation of an applicable rule of international law.*

In the situation where the third party did not consent to the relationship with the IO, circumstances will determine the governing law; the applicability of international or local law will be determined by the status of the claimant party under international law.
For instance, there is no evidence of a presumption in law that the UN bears exclusive or primary responsibility for the tortious acts of peacekeeping operations and the law remains underdeveloped,[73] although there is in practice "recognition on the part of the United Nations that liability for damage caused by members of United Nations Forces is attributable to the Organisation."[74] The fact that this has never been tested by litigation stems from the existence of a remedial deficit to be dealt with in Part Four of this Report. Liability for damage caused by members of United Nations Forces during combat-related activities will only be recognised by the United Nations in cases where the Organisation exercises exclusive control.[75]
No regime for non-contractual liability should reflect the lowest common denominator of the domestic laws of the Member States of a particular IO.

Section Three: Prevention of Damage Caused by Lawful Operational Activities

1. *Prior to engaging in operational activities, IO-s should assess the potential damage which these activities may cause. This assessment should be kept under review as the activity proceeds.*
2. *IO-s should take appropriate precautionary measures to prevent the occurrence of unnecessary damage caused by their operational activities or at any event to minimise the risk thereof.*
3. *IO-s should co-operate in good faith and, as necessary, seek the assistance of other IO-s or States in preventing unnecessary damage or at any event in minimising the risk thereof.*
4. *In accordance with the precautionary principle, IO-s should not undertake operational activities involving a risk of causing significant harm to the environment unless:*
    a) *an impact assessment has been carried out;*
    b) *those likely to be affected have been provided with timely notification of the risk and the assessment and*
    c) *the IO has entered into consultations with those entities concerned, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant harm or at any rate to minimise the risk thereof; while the operational activity is being carried out, the IO should continue the exchange of information with all the parties that might be affected.*

The necessity for regulation in this area flows, of course, from the very nature of the accountability regime itself. Operational activities that are lawful under the constituent instruments of the IO and under applicable international law could nevertheless cause significant harm to third parties.

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[73] I. Brownlie, Principles of Public International Law, Oxford, Oxford University Press, 1998, 743pp., at p. 686
[74] Financing the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, The United Nations Preventive Deployment Force and the United Nations Peace forces Headquarters, report of the Secretary-general, UN Doc. A/51/389, paras.6-8.
[75] Ibidem, para. 17

The ILC's draft Articles on Prevention of transboundary harm from hazardous activities [76] could provide useful guidance in this regard.

Any action of an organ of an IO is undertaken in order to achieve the objectives laid down in the constituent instrument and should not go beyond what is necessary to that end (e.g. in relation to the burdens imposed on Member States). Likewise, it is desirable that acts of IO-s should not fall short of what is reasonable and necessary to achieve their objectives. The principle of proportionality is therefore relevant in this and other contexts in order to constitute a relevant framework for the exercise of power.

An IO providing technical assistance or holding a conference will normally conclude an agreement with the host-state. Since the IO may not be fully in control of all the aspects of the activity undertaken, a holding-harmless clause in favour of the IO is usually included. Under this type of clause, the responsibility for dealing with claims resulting from the operation, and which third parties may bring against the IO or its agents, is taken over by the host-state. This transfer of responsibility will not operate with regard to claims involving gross negligence or wilful misconduct on the part of the IO or its agents.
A reversed holding-harmless clause operates to the benefit of participating states contributing to UN peacekeeping operations as contained in Article 9 of the Model Memorandum of Understanding.[77]
With regard to peacekeeping operations, the UN will normally be responsible for dealing with any claim by third parties for loss, damage, death or personal injury caused by the personnel or equipment provided by the government in the performance of services, activities or operations.[78] Gross negligence or wilful misconduct on the part of a member of a contingent or if the damage has entailed the troop member's individual criminal responsibility may lead to the UN seeking recovery from the troop-contributing country.[79]
In the case of the insertion of a holding harmless clause, host states of an operational activity of an IO and/or the IO should provide compensation for third-party claimants, in addition to any compensation due to them under local law, and to the extent of the IO's limited liability.
From the perspective of accountability, the continued insertion and application of holding-harmless clauses in agreements between an IO and a host State should be reconsidered.
Article 13 of the UN Model Status of Forces Agreement (SOFA) provides for negotiations with the mission, a mutually agreed conciliator or arbitration. Host country and the UN participate on an equal footing before the standing claims commission under Article 51 of the SOFA.[80]
Special mechanisms have been established to deal with claims submitted by contributing states on behalf of their nationals for compensation for death or injury attributable to service with a UN peacekeeping operation, as these claims are not regarded as "private law" claims.[81]

Section Four: Observance of International Human Rights and International Humanitarian Law in the activities undertaken by IO-s.

IO-s should comply with basic human rights obligations.

Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon IO-s in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an IO is authorised to become a party to a human rights treaty. The consistent practice of IO-s points to a recognition of this. Moreover, certain human rights obligations may have attained the status of peremptory norms.

Certain categories of primary rules of international law are more vulnerable to violation by IO-s than others as a result of the kind and scope of decisions adopted or operational activities undertaken. When

[76] UN Doc. A/58/10, Report of the ILC on its 55th session, page 106, para. 162.
[77] A/ 51/967 of 27 August 1997.
[78] A/ 50/ 995 of 9 July 1996, para. 9, Article 9.
[79] A / 50 / 389 of 20 September 1996, paras.42-44.
[80] A/46/185 of 23 May 1991.
[81] A/C.5/49/65 of 24 April 1995, p.13, note 9.

taking and implementing decisions such as designing structural adjustment programmes and development projects, IO-s should observe basic human rights obligations.
The potential organisational responsibility for the adoption of such decisions will also have to be considered in the light of other RRPs formulated in other parts of the Report (particularly those concerning the principles of constitutionality, institutional balance and due diligence).
When taking and implementing decisions such as those concerning the use of force, temporary administration of territory, imposition of coercive measures, launching of peacekeeping or peace-enforcement operations, IO-s should observe basic human rights obligations and applicable principles and rules of international humanitarian law[82].
The following examples have been chosen on the basis of their particular relevance from the point of view of accountability.

Temporary administration of territory

IO-s should incorporate basic human rights obligations into their operational guidelines, policies and procedures, particularly when exercising governmental authority in the conduct of temporary administration over a particular territory.

The imposition of non-military coercive measures

1. *When imposing non-military coercive measures, IO-s should:*
   (a) make a human rights impact assessment;
   (b) ensure that the scope and the modalities of these measures respect the right to life, and the right to an adequate standard of living, including access to basic foodstuffs and medical supplies, clothing, shelter, health and education.
2. *Non-military coercive measures should, wherever possible, be targeted against particular individuals and entities rather than against the population as a whole.*
3. *When imposing non-military coercive measures of all kinds, IO-s should establish the necessary mechanisms to ensure compliance with basic human rights guarantees, including the particular issues that arise in the context of listing individuals and entities for the purpose of targeted sanctions.*

[82] See Daphna Shraga, UN Peacekeeping Operations: applicability of international humanitarian law and responsibility for operations-related damage, AJIL, 2000, p. 406. See also Ralph Wilde, From Danzig to East Timor and beyond: the role of international territorial administration, AJIL, 2001, page 583; Ralph Wilde, Quis custodiet ipsos custodes? Why and how UNHCR governance of " Development" refugee camps should be subject to international human rights law, Yale Human Rights and Development Law Journal, 1998, page 5.

There is an increasing awareness of the need to respect human rights and humanitarian law norms in the process of imposing non-military coercive measures, in particular by the UN Security Council[83]. In his 1995 Supplement to an agenda for Peace the UN Secretary-General suggested the establishment of a mechanism to fulfil, *inter alia*, the following relevant functions: to assess, at the request of the Security Council, and before sanctions are imposed, their potential impact on the target country and on third countries, to measure their effects with a view to minimizing collateral damage and to explore ways of assisting member states that are suffering collateral damage[84]. This may require the adoption of accompanying measures for the benefit of particular vulnerable groups.
Since 1990 the Security Council has also increasingly had resort to so-called targeted sanctions[85].
The above RRPs have been formulated with a view to non-military coercive measures notably economic sanctions. In the Committee's view, however, the principles underlying the RRPs could and should be applied to other areas such as structural adjustment programmes and development projects.

Peacekeeping and peace enforcement activities

1. *Troop-contributing countries remain responsible for violations of the applicable international humanitarian law, but IO-s bear a coordinate responsibility with troop-contributing States for ensuring compliance with the applicable principles of international humanitarian law in peacekeeping or other operations conducted under the control or authority of the IO.*
2. *IO-s should include in the Regulations of the Force and in the Agreements concluded between IO-s, troop-contributing States, and troop-receiving States the obligation to observe the applicable principles and rules of international humanitarian law.*
3. *Troop-contributing countries have an obligation to investigate and prosecute any crimes their soldiers may have committed, but IO-s bear a coordinate responsibility for ensuring that this obligation is complied with. The Agreements referred to in 2. above should include provisions requiring troop-contributing States to ensure that domestic criminal jurisdiction is exercised whenever necessary.*

The obligation for States, under Common Article 1 of the 1949 Geneva Conventions, to respect and ensure respect for international humanitarian law applies in all circumstances, whether States are acting individually, collectively or contribute troops to peacekeeping or peace enforcement operations, including those conducted under the auspices of, or under a mandate or authorisation from an IO. The obligation is unconditional.[86] The obligation to abide by international humanitarian law rests wholly on the State when the armed forces remain under its command and control, while the IO that has granted the authorisation, has the special responsibility *to ensure respect* for international humanitarian law by the State. If, on the other hand, operational command rests with the IO, the responsibility of the IO will result from non-observance of the same rules[87], while States have the special responsibility *to ensure respect* for international humanitarian law by the IO.[88] In cases where strategic control formally rests with the IO but where in practice national commanders choose the targets, both the State and the IO share responsibility for a violation of international humanitarian law.[89] In other words, primary responsibility by way of effective control is always accompanied by independent, secondary obligations.[90]

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[83] See Hans-Peter Gasser, Collective economic sanctions and international humanitarian law: an enforcement measure under the United Nations Charter and the right of civilians to immunity: an unavoidable clash of policy goals?, ZAÖRV, 1996, p. 871 at p. 880; W.Michael Reisman and Douglas L. Stevick, the applicability of international law standards to United Nations economic sanctions programmes, EJIL, 1998, p. 86; A. Reinisch, Developing a human rights and humanitarian law accountability of the UN Security Council for the imposition of economic sanctions, AJIL, 2001, pp. 851-872. See also General Comment No. 8 of the Economic and Social Rights Committee.
[84] 1995 Supplement to an agenda for Peace, A/50/60, para.75
[85] See the Millennium Report of the Secretary-General of the United Nations: " We the Peoples": The role of the United Nations in the 21st Century, UN Department of Public Information, 2000, page 49.
[86] Laurence Boisson de Chazournes and Luigi Condorelli, Common Article 1 of the Geneva Conventions revisited: Protecting collective Interests, Revue internationale de la Croix Rouge, 2000, pp. 67-81, at p. 70
[87] R. Kolb, Droit humanitaire et operations de paix internationales, Genève, Bruxelles, 2002, 125 pages, at p. 23.
[88] Ibidem, at p. 25.
[89] Ibidem, at p. 24.
[90] Ibidem, at p. 25.

"Disciplinary command" over their national contingents continues to provide an additional basis for separate State responsibility.[91]

In 1999 the UN Secretary-General unilaterally promulgated "fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control" [92] reflecting a core of principles otherwise found in the Geneva Conventions. The UN Secretary-General has reaffirmed that troop-contributing countries have a legal obligation to investigate and prosecute any crimes their soldiers may have committed[93]. The power to deal with violations of international humanitarian law remains in the hands of national and international criminal courts.

An IO is "subject to international humanitarian law insofar as it is engaging in activities of the kind regulated by international humanitarian law"[94].

[91] Laurence Boisson de Chazournes and Luigi Condorelli, op. cit., at pp. 73-74; see also R. Kolb, op. cit., at p. 6

[92] Observance by United Nations forces of international humanitarian law, UN Secretary-General's Bulletin ST/SGB/1999/13, 6 August 1999, reprinted in ILM, 1999, 1656.

[93] Ibidem section 4

[94] R. Kolb, op. cit., at p. 25

PART THREE: THE THIRD LEVEL OF ACCOUNTABILITY: "SECONDARY" RULES AND RECOMMENDED PRACTICES ON RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

Introduction

State responsibility regime and a responsibility regime for IO-s

No situation should arise where an IO would not be accountable to some authority for an act that might be deemed illegal.[95] The principle that IO-s may be held internationally responsible for their acts is nowadays part of customary international law.

A case-law development of a comprehensive responsibility/liability regime for IO-s is not feasible as in most of them a system of judicial review of acts of the Organisation is absent. The adoption of a coherent body of rules and practices in a different, non-judicial way thus seems inevitable.

The [international] responsibility of IO-s at the international legal level presupposes their possession of an international legal personality, separate and distinct from that of their constituent Member States. The ability of organs of an IO to take decisions pursuant to the relevant rules of the IO constitutes a presumption of a "*volonté distincte*" which is crucial for establishing responsibility of an IO. As has been noted: "An international association lacking legal personality and possessing no '*volonté distincte*' remains the creature of the states members who are thus liable for its acts."[96]

A separate legal personality is a necessary precondition for an IO to be liable for its own obligations, but it does not necessarily determine whether Member States have a concurrent or residual liability[97]. There is a general problem in that Member States are already perceived de facto as dominating IO-s to such an extent that the latter are unable to exercise maximum control over their environment[98]. However, the continuing role of Member States qua members of an organ of an IO is neutral as regards Member States' liability if the Organisation has "*une volonté distincte*"[99]. So, for example, a Member State neither incurs special liability nor avoids existing liability according to whether it is or is not a member of a particular organ.

The question of concurrent or residual liability of Member States for non-fulfilment by IO-s of their obligations towards third parties has already been fully covered in the 1995 Resolution of the Institut de Droit International: "The Legal Consequences for Member States of the Non-Fulfilment by International Organisations of their Obligations toward Third Parties"[100].

The Committee did not therefore feel it necessary to go further into the matter.

The legal capacities of an IO as a subject of international law are limited by the powers and functions they have been entrusted with, together with any necessary consequential powers deemed incidental to or implied by such express powers in relation to the functions prescribed for the IO. When an IO takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the IO, the presumption is that such action is not *ultra vires* the Organisation.[101] Any acts beyond the limits of the explicit and implicit constitutional powers conferred upon them would constitute *ultra vires* acts.

IO-s may only function in circumstances laid down directly or indirectly in their founding instruments; when Member States establish IO-s and entrust them with certain functions they cannot do so without "*the attendant duties and responsibilities*". The nature and range of international obligations of an IO

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[95] Prosecutor v. Simic et al., Case IT-95-9-PT, Decision on motion for judicial assistance to be provided by SFOR and others, 18 October 2000, submissions by the defence during hearings, para. 32.

[96] R. Higgins, The Legal Consequences for Member States of the Non-Fulfilment by International Obligations of their Obligations towards Third Parties, Annuaire de l'Institut de Droit International, vol. 66-I, 1995, p. 254

[97] Ibidem, at page 257

[98] Haas as cited by D.Dijkzijl, The management of multilateral Organisations, The Hague, London, Boston, Kluwer Law International, 1997, at p. 33

[99] R. Higgins, op. cit., at p. 261. In case of non-plenary organs Member States do not sit as of right in such organs in quite the same way as in the case of plenary organs.

[100] Resolution II, The Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties, Annuaire de l'Institut de Droit International, Vol.66-II, 1996,p. 445,

[101] Certain Expenses of the United Nations, Advisory Opinion, I. C. J. Reports 1962, p. 151, at p. 168: mutatis mutandis

"must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice". [102]

Dilemmas in establishing a responsibility regime for IO-s

The expansion in the activities of IO-s widens the range of substantive primary rules of international law applicable to IO-s, but this has not been accompanied by a parallel development in legal theory concerning the international legal responsibility of IO-s. One of the fundamental issues is that, if a universal responsibility regime for IO-s is not developed in the near future, the injured third parties or Member States are likely to engage in "forum shopping", in order to obtain the most favourable solution to the claimant.

The Articles on State Responsibility adopted by the International Law Commission in 2001 contain in Article 57 the following saving clause: "These articles are without prejudice to any question of the responsibility under international law of an international organisation, or of any State for the conduct of an international organisation". [103]

The following questions arise: Do the unique characteristics of IO-s call for or prevent the application of the rules designed to regulate state responsibility? Does every international wrongful act of an IO entail the international responsibility of that IO itself in a similar vein as every international wrongful act of a State entails the international responsibility of that State?

The ILC has recognised the possibility of organisational responsibility, but has stated that "… the responsibility of international Organisations is governed by rules which are not necessarily the same as those governing the responsibility of States".[104] It is widely accepted that the principles of state responsibility are applicable by analogy, but with some variations, to the responsibility of IO-s. In 2003, the ILC Special Rapporteur submitted his First Report, containing *inter alia* draft articles 1-3, subsequently accepted by the ILC. These principles are similar to those laid down in Articles 1 and 2 of the ILC Articles on state responsibility [105].

The focus should be on the variations needed, but as the Committee has pointed out in its First Report the rules of the accountability regime "will have to keep the balance between preserving the necessary autonomy in decision-making of International Organisations and guaranteeing that the International Organisations will not be able to avoid accountability".[106]

In the following pages an attempt is made to lay down a series of propositions that may act as general guide.

Section One: Recommended Rules and Practices on the international legal responsibility of IO-s

1. *Every internationally wrongful act of an IO entails the international responsibility of that IO.*
2. *There is an internationally wrongful act of an IO when conduct consisting of an action or omission is attributable to the IO under international law and constitutes a breach of an applicable international obligation.*
3. *The characterization of an act of an IO as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the IO-s internal legal order.*
4. *An act of an IO does not constitute a breach of an international obligation unless the Organisation is bound by the obligation in question at the time the act occurs.*

Internationally wrongful acts which might entail the international legal responsibility of an IO towards Member States as a body include external ultra vires acts i.e. acts arising or performed in the context of the relations between the IO and other, state or non-state entities or having an effect on such relations,

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[102] Reparations for Injuries Suffered in the service of the United Nations, Advisory Opinion of 11 April 1949, I. C. J. Reports 1949, p. 174 at p. 179 and 180: emphasis added.

[103] UN General Assembly Resolution 56/83, Responsibility of States for internationally wrongful acts, adopted on 12 December 2001.

[104] YB ILC 1975, Vol II (Part Two), at 89-90.

[105] Report of the ILC, 55th Session, (2003), A/58/10, at page 45.

[106] Report of the Sixty-eighth ILA Conference held at Taipei, 1998, p. 602.

breaches of fundamental procedural rules [107] and *détournement de pouvoir*. [108] Internal ultra vires acts, i.e. acts arising or performed in the context of the institutional relations between the IO and its organs or between organs and bodies, do not necessarily constitute wrongful acts of the IO with regard to its Member States.[109]
Acts may be in accordance with the letter and spirit of the constituent instrument of the IO, but this does not prevent them being wrongful under international law because of their non-conformity with other applicable rules of international law. For example, IO-s may incur international legal responsibility to States, other IO-s and individuals for conduct that is not in conformity with their operational policies, procedures and practices – to the extent that these incorporate existing norms and rules of public international law:-

- IO-s may incur international legal responsibility if the exercise of their powers is not in compliance with general principles of law, such as the principles of good faith, unjust enrichment, estoppel, equality, non-discrimination, proportionality and fair hearing.
- IO-s may incur international legal responsibility if their use of force and their imposition of economic coercive measures are not in conformity with relevant rules of international law, and in particular the humanitarian law principles of proportionality and of necessity.
- IO-s may incur international legal responsibility if the exercise of discretionary powers entails a sufficiently serious breach of a superior rule of law such as the right to life, food and medicine of the individual or guarantees for due process of law.[110]
- IO-s may incur international legal responsibility if their activities infringe the rights of third parties, and the Organisation has failed to take all precautionary measures as required by international law in order to avoid such injury.

Section Two: Attribution of wrongful acts to IO-s and responsibility of States for defaults or wrongful acts of an IO.

1. *The conduct of organs, officials, or agents of an IO shall be considered an act of that IO under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (ultra vires).*
2. *An IO is responsible for the conduct of its organs or officials acting in their official capacity regardless of the place where the conduct occurs.*
3. *An IO is responsible for internationally wrongful acts committed by an organ of a State placed at the disposal of an Organisation provided the Organisation has the authority to exercise effective control (operational command and control) over the activities of that organ.*
4. *The responsibility of an IO does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act. There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO.*
5. *A State is responsible for wrongful acts committed by one of its organs which has been placed at the disposal of an IO and over which the State has retained effective control (operational command and control).*

The place where the conduct by an organ of an IO takes place has no influence on the issue of attribution of such conduct to the IO.[111]

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[107] Examples may occur during the decision-making process: Article 27, paras.2 and 3 UN Charter: responsibility of the UN or of the Members of the Security Council, collective or individual, may follow.
[108] Breaches of fundamental procedural rules and détournement de pouvoir could easily be linked in practice as détournement de procédure may result in or amount to détournement de pouvoir. Toshiya Ueki cited the IMCO case in 1960 as another example: Responsibility of International Organisations and the Role of the International Court of Justice in N. Ando et al. (Eds), Liber Amicorum Judge Shigeru Oda, Kluwer Law International, The Hague, London, New York, 2002, Volume 1, pp. 237-249, at pp. 241-242.
[109] The ICJ in the Certain Expenses case made the distinction between external and internal ultra vires acts: I.C.J. Reports 1962, 151, at p. 168.
[110] In case of procedural guarantees for due process of law the condition of serious breach should not be applied rigorously as détournement de procedure may easily amount to détournement de pouvoir.
[111] This will for instance apply to traditional peacekeeping operations of the UN.

Control over organs and individuals by a subject of law is the basis for attribution of acts or omissions by such organs and individuals to the subject of law exercising such control.
In many cases agents of an IO may be in a position similar to that of officials. If his conduct exceeds the authority granted or contravenes instructions given, it has to be considered whether the agent was acting in the performance of his official capacity. This has to be decided on a case-by-case basis.
An IO may also incur responsibility through the employment of sub-contractors, although there is no consensus on the modalities and degree of control required for attribution.
Under the 1986 ICJ judgement in the Nicaragua case devising strategy and directing tactics were required in order to establish "effective control."[112] However, according to the ILC Special Rapporteur on State responsibility, for direction or control (which includes also political and financial aspects) general domination suffices; there is no requirement for detailed instructions or authorisation of a particular act. [113] In the text of article 8 of the ILC Articles, "the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them" .[114]
In the view of the Appeals Chamber in the Tadic case overall control suffices for the purpose of attribution.[115]
International legal responsibility of one subject of international law because of the direction and control exercised over the commission of an internationally wrongful act by another subject of international law seems to imply a larger degree of control.[116]
According to the UN Secretary-General, international responsibility for the activities of forces is vested in the State or States conducting a Chapter VII-authorised operation under national command and control,[117] while liability for damage caused by members of United Nations Forces during combat-related activities will only be recognised by the United Nations in cases where the Organisation exercises effective control.[118]
Although operational control is the first, and ultimately decisive, criterion to be used in any attempt towards a precise delineation of responsibility, it has to be acknowledged that the attribution of wrongful acts to IO-s themselves rather than to Member States poses more complicated problems of attribution than in the case of exclusive state responsibility, even if the principle itself of attribution is clearly deduced from the established rules of state responsibility.
In some areas such an attempt can only be undertaken on a case-by-case basis e.g. incidents occurring during operations of peacekeeping and peace enforcement. Traditional peacekeeping operations are organs of the UN and normal principles of attribution apply. The IO will be responsible for wrongful acts by peacekeeping forces operating under its effective control (operational command and control) and which were committed upon instructions of national authorities or which were in any other way contrary to or going beyond instructions given by the Organisation.[119]
The IO will be responsible for damage caused in breach of obligations under applicable international law by forces under its effective control (operational command and control) and which is attributable to the Organisation. In addition, the IO may also be responsible for damage which results from its failure to exercise sufficient control.
IO-s may wish to consider recognising the concurrent responsibility of the State of nationality for violations of International Humanitarian Law by members of its national contingent and its responsibility to provide compensation[120] in case of insufficient guarantees that the principles of

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[112] Military and Paramiliary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I. C. J. Reports 1986, p. 14, at p. 62, paras. 108 and 109.
[113] Report of the ILC on the Work of its Fiftieth Session (1998), UN Doc. A/ 53/10 and corr. 1, paras. 395 and 422.
[114] James Crawford, (Ed.), The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries, Cambridge University Press, 2002, 387pp, at p. 113, (7).
[115] Prosecutor v. Dusko Tadic, Judgment, Case No. IT-94-1, Appeals Chamber, 15 July 1999, para. 117.
[116] Special Rapporteur, Second Report on State Responsibility, UN Doc. A/CN.4/Add.1, para. 198
[117] A/51/389, para.17
[118] Ibidem
[119] The Special Committee on Peacekeeping operations stressed " the need to ensure the unity of command of UN peacekeeping operations. It recalls that the overall political direction and control of UN-mandated peacekeeping operations devolves upon the Security Council, while their execution remains the responsibility of the Secretary-General" (A/55/1024, para.44).
[120] A/51/389, para. 44: *mutatis mutandis.*

International Humanitarian Law would be respected.[121] The question whether acts of military forces of Member States of an IO are attributable to those Member States provided they are acting under their control and guidance, even as a part of the integrated military force of an IO is currently before the International Court of Justice.[122] Wrongful acts committed by organs a State has placed at the disposal of an IO, but over which the State has retained effective control (operational command and control, give rise to state responsibility.[123]
The participation in or the lack of prevention of the performance of a wrongful act by an IO may entail the separate responsibility of a State or of another IO.[124]
There will be concurrent responsibility of a Member State for an act of implementation of an unlawful measure adopted by an IO if the State is under an obligation to implement such a measure[125]. There will be joint responsibility of both the IO and a State in case of an authorisation given to the State by the Organization to adopt unlawful measures with respect to third parties.
There will be separate responsibility of a Member State for an act of implementation going beyond the scope of an unlawful measure if the State is under an obligation to implement such a measure.
There will be separate responsibility of a Member State for an act of implementation of an unlawful measure of an IO if the State has been given a significant degree of discretion in the process of implementation.
There will be separate responsibility of a Member State for an act of implementation of a lawful measure of an IO if the State in the process of implementation violates rules of international law incumbent upon it.
IO-s incur international legal responsibility if they aid or assist a State or another IO in the commission of an internationally wrongful act by the latter[126]
The question whether Member States remain responsible when they have given permission for a particular action as members of the supreme organ of an IO while retaining sovereign authority within that IO and where none of them has exercised *de facto* power in the decision over the choice of targets was the subject of an application to the European Court of Human Rights.[127] However, the ECtHR did not examine this submission, having rejected the application as inadmissible on the ground of the absence of any jurisdictional link between the persons who were the victims of the act complained of and the respondent States.[128]
The question also arises whether there is room, *de lege ferenda*, for the secondary responsibility of the IO in cases of peace enforcement by States where there has been an initial authorisation granted by an IO.
Regulations with regard to operations carried out jointly by IO-s and Member States (private actors) have been formulated for ultra-hazardous consequences resulting in absolute or strict liability either for States themselves (space activities) or for commercial operators (nuclear activities).

Section Three: Attribution of wrongful acts to IO-s and responsibility of States for defaults or wrongful acts in situations of delegation and authorisation

1. When a State or a group of States acts under a delegation or authorisation by an IO of powers or functions conferred on the IO by its constituent instruments, the international legal responsibility of the IO remains unaffected.

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[121] This is the position of the ICRC: See Memorandum, L'Application des Conventions de Genève par les forces Armées mises à la Disposition des Nations Unies, Revue Internationale de la Croix-Rouge, 1961, p 592.
[122] FRY v. various Member States of NATO for violation of the obligation no to use force.
[123] This rule will apply to peace enforcement operations that have been merely authorised by the UN and thus cannot be considered as subsidiary organs of the Organisation.
[124] E.g. SFOR for an alleged wrongful detention and the Office of the Prosecutor for a wrongful arrest: Prosecutor v. Simic et al., Case IT-95-9 PT, Decision on motion for judicial assistance to be provided by SFOR and others, 18 October 2000, paras.10-32.
[125] Arab Organisation for Industrialisation, Arab British Helicopter Company and Arab Republic of Egypt v. Westland Helicopters Ltd., United Arab Emirates, Kingdom of Saudi Arabia and State of Qatar, Federal Supreme Court of Switzerland, 19 July 1988 (Revue de l'arbitrage, 1989, no. 3, p. 154).
[126] A/CN.4/532, First Report on responsibility of international Organisations, page 17, para.32.
[127] ECHR Application 52207/99 Bankovic et al. v. Belgium and other countries.
[128] ECHR Decision as to the admissibility of Application 52207/99, 12 December 2001.

2. Without prejudice to the previous RRP, the State or group of States incurs international legal responsibility for its own actions undertaken pursuant to the delegation or authorisation.
3. In case of a delegation or authorisation to a State or a group of States, the IO is under a duty to keep itself duly informed about the way in which the delegation or authorisation is being carried out, and, if need be, to modify or countermand the delegation or authorisation. Failure to do so may give rise to the secondary responsibility of the IO for any illegal act committed under the delegation or authorisation.
4. The State or group of States is under a corresponding obligation to keep the IO properly informed at regular intervals of their actions in the exercise of their delegation or authorisation.
5. Conduct by a State or a group of States which is prima facie not attributable to the IO because it exceeds the limits of the delegation or authorisation, or breaches conditions attached to it, shall nevertheless be considered an act of the IO if and to the extent the IO acknowledges and adopts the conduct in question as its own.
6. The above RRPs apply also to cases where a group of States act in the framework of another IO.

Organisational responsibility is based on the imputability of an illegal act to an IO. Many IO-s may lack sufficient expertise as well as material and financial resources to exercise their powers and to perform their functions as well as might be expected. As a result IO-s are forced to resort to a wide spectrum of operational relationships with (Member) States to ensure the attainment of their object and purpose as specified in their constituent treaty: the options range from authorisation to instructions, sub-contracting and delegation. The legal regulation of these processes is of central relevance to a comprehensive accountability regime: unfortunate gaps may result from a lack of clarity in this area.
The Committee points out that a general competence on the part of IOs to delegate is part of the law of IOs [129] but a delegating authority cannot "confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty."[130] In certain cases, without a delegation or authorisation granted by the IO, the State or group of States would not have under international law the competence to carry out the act in question. An IO cannot avoid its international legal responsibility through a process of delegation, authorisation or sub-contracting. Furthermore, the legality of such process is conditioned upon the IO retaining the right to change at any time the decisions taken or actions carried out pursuant to that process. The actual exercise of such a right would normally constitute a circumstance precluding wrongfulness to the benefit of the IO, unless the damage has already occurred.
The IO should in any case review the action or operation undertaken after the event to determine compliance with the conditions imposed.
The primary responsibility for any illegal act committed in the course of the execution of a delegation or authorisation rests with those States[132].
There is no responsibility of the IO when it could not exercise overall authority and control, and when the States concerned have acted *ultra vires* the delegation or authorisation[133].

[129] See eg. Meroni v. High Authority, Case 9/56 [1957-58] ECR 133.
[130] Ibidem, at p. 150.
[131] See eg. Meroni v. High Authority, Case 9/56 [1957-58] ECR 133.
[132] R. Higgins, The Responsibility of Member States for the Defaults of international Organisations: Continuing the Dialogue, in Sabine Schlemmer-Schulte and Ko-Yung Tung, (Eds.), Liber Amicorum Ibrahim F.I. Shihata. International Finance and Development Law, Kluwer Law International, The Hague, London, Boston, New York, 2001,908pp. pp. 441-448. The same approach applies itself in case States retain a substantial degree of residual control over their forces in a peacekeeping or peace-enforcement operation e.g. by variations in each contingent's rules of engagement. Within the UN Special Committee on Peacekeeping Operations many delegations emphasized that the rules of engagement " must be uniformly observed by all United Nations contingents participating in a mission " (Report of the Special Committee on Peacekeeping operations, A/55/1024, para.19).
[133] Danesh Sarooshi, The United Nations and the development of collective security. The delegation by the UN Security Council of its Chapter VII powers, Clarendon Press Oxford, 1999, at page 163.

PART FOUR: REMEDIES AGAINST INTERNATIONAL ORGANISATIONS

The term "remedy" is used as a form of shorthand for an acceptable outcome arrived at through a procedure instigated by an aggrieved party[134] and is intended to include, in addition to remedies of a formal kind, other means of redress which might be more appropriate to the circumstances of the case e.g. prospective changes of policy or practice by the IO.

The focus of Part Four is on the implementation of the accountability regime i.e. the ways of undertaking remedial action against IO-s, and the various difficulties faced by those claiming to raise that accountability.[135] In accordance with the Committee's terms of reference, the emphasis is on a review of the secondary rules that should become applicable once the primary rules of accountability are implemented. The crucial question is whether the available mechanisms assure the accountability of IO-s in an effective and proportional way.
The establishment and refinement of an accountability regime for IO-s may require the development of innovative procedures to allow states and non-state entities actually or potentially affected by the actions or omissions of an IO to bring complaints directly against the IO concerned. As a pre-remedial measure IO-s should inform parties potentially affected by their decisions or actions of the accountability mechanisms that are open to them.

Appropriate remedies for the different levels of accountability

Remedies on the first level of accountability will in most cases be of a more political/administrative nature. The history of IO-s is replete with examples of political remedies available to Member States within the internal sphere of the IO such as withholding reappointment of high officials or challenging before a particular organ one of the decisions it has taken.
Remedial actions belonging to the political/administrative sphere may also give rise to legal problems of a constitutional nature such as in cases of refusal to pay the assessed contribution under the regular budget of an IO, or temporary or permanent withdrawal from the IO.
A decision to terminate the appointment of an Executive Head of an IO will open the way to recourse to an international administrative tribunal, even if the decision is based on political considerations and taken by the IO's highest decision-making body[136].
Within the domestic sphere of Member States national parliaments are one of the most effective natural agents of accountability of IO-s.
In the relationship between IO-s, non-Member states, and non-state third parties the available effective remedies are considerably fewer in number. Non-member States may decide to postpone their application for membership or withhold voluntary contributions they were considering.
The actual expulsion of the agents of an IO from a state's territory or the termination of a Headquarters Agreement, or the institution of judicial proceedings before international courts or tribunals by Member States or non-Member States or staff members belong to the sphere of legal remedies on the second and third levels of accountability. The existence of a difference or a dispute does not require "that any contested decision must already have been carried into effect".[137]
Non-state third parties may commence legal proceedings before domestic courts, an issue to be dealt with later.

Part Four contains four sections dealing with: general features of remedies against IO-s; the procedural aspects of remedial actions; the substantive outcome of remedial actions; and options for alternative remedial action. The main questions are as follows: who has an interest or right to bring a claim? Against which entity or person should a claim be addressed? Which is the forum where the claim should or could be brought? What means of redress are open to the successful claimant?

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[134] M. Evans (Ed.), Remedies in International Law: The Institutional Dilemma, Oxford, Hart Publishing, 1998, p. vii.
[135] This Part is largely based on a recent monograph: K. Wellens, Remedies against International Organisations, Cambridge, Cambridge University Press, 2002, 296 pages.
[136] ILOAT Judgment No. 2232, 16 July 2003 in the Bustani case, para. 10.
[137] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreements of 26 June 1947, Advisory Opinion, I.C.J. Reports, 1988, p. 12, at p. 28, para.38.

Section One: General features of remedies against IO-s.

1. *As a general principle of law and as a basic international human rights standard, the right to a remedy also applies to IO-s in their dealings with states and non-state parties. Remedies include, as appropriate, both legal and non-legal remedies.*
2. *Remedies should be adequate, effective, and, in the case of legal remedies, enforceable.*
3. *A total lack of remedies would amount to a denial of justice, giving rise to a separate ground for responsibility on the part of the IO.*
4. *IO-s should establish the institutional framework to respect and to guarantee the right to a remedy for States and non-state parties who are affected in their interests or rights by actions or omissions of an organ of an IO or one of its agents.*
5. *IO-s should also set up a mechanism to determine criteria for offering ex gratia payments as a speedy and alternative means of remedial action towards non-state parties claiming organisational liability/responsibility.*
6. *IO-s should, upon request, inform parties, who claim to be affected by their decisions or actions, of the remedial mechanisms which are open to them. IO-s should render public the substantive outcome of remedial action against them by private claimants.*

In the process of devising or refining accountability mechanisms several imperatives have to be taken into account.

In its First Report the Committee pointed out that the rules "will have to keep the balance between preserving the necessary autonomy in decision-making of International Organisations and guaranteeing that the International Organisations will not be able to avoid accountability".[138] An IO's functional autonomy is guaranteed by two elements: the mechanisms of jurisdictional immunity before domestic courts and the probable absence of a general rule of international law on co-responsibility of Member States for the non-fulfilment by the IO of its commitments and obligations towards third parties.[139]
Under most human rights instruments the right to a remedy includes both the procedural right of access and the substantive right to a remedy.[140] The right to a remedy may be seen as a norm of customary international law,[141] one of the essential features of which is that the parties are treated as equal.[142]
A comprehensive remedial regime should address both individual and societal concerns and interests and it should leave no loopholes at any level.
The remedial regime has to reflect the corporate character of an IO and the lack of reciprocity in the relationship between IO-s and their member States or third parties. Whereas member states can resort to a limited range of remedial actions against an IO, a similar course of action is not available to non-state entities.
There is no reason why the imperative of the protection of human rights should not permeate both primary and secondary rules for IO-s. "It would be quite ironic to negate the rights of individuals on the assumption that they might be incompatible with the functions of International Organisations".[143]
The ICJ has ruled that not to afford judicial or arbitral remedy would "hardly be consistent with the expressed aim of the Charter to promote freedom for individuals and with the constant preoccupation of the UN to promote this".[144] This principle applies to all IO-s, on the second and third levels of accountability.
The first important element is that the right to a remedy is widely considered to be a general principle of law: individuals and groups of individuals can resort to a system of protection comprising a wide variety of political, administrative and legal remedies when their interests or rights have been affected by their national authorities. States and non-state parties should be able to look for similar mechanisms

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[138] Report of the Sixty-eighth ILA Conference held at Taipei, at p. 602.
[139] V. supra, p. 25.
[140] D. Shelton, op. cit., at pp. 154-5.
[141] Ibidem, at p. 182.
[142] Ibidem, p. 38.
[143] M. Arsanjani, Claims against International Organisations: Quis Custodiet Ipsos Custodes?, Yale Journal of World Public Order, 1980, p. 175, note 172.
[144] Effects of awards of compensation made by the UN Administrative Tribunal, Advisory Opinion of 13 July 1954, I.C.J. Reports, 1954, p. 47, at p. 57

in their dealings with IO-s, including both the procedural right of access and the substantive right to a remedy.[145]
Secondly, the right to adequate means of redress, in case of violation of rights, is a basic international human rights standard, which should always prevail over the functional needs of an IO.[146]
In 1957, the Institut de Droit International expressed the wish "that, for every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision".[147]
The principle of promoting justice, which covers both the internal and external functioning of IO-s and treaty-organs, clearly underpins the need for both categories of actors to provide remedies and other means of redress to all interested parties who want to raise their accountability for not having complied with any of the applicable standards and principles.
Conventional provisions may provide for appropriate remedies and other means of redress,[148] but an IO also has an implied power to establish appropriate accountability mechanisms, on ad hoc or structural basis.
A total lack of remedies would amount to a denial of justice, giving rise to a separate ground of responsibility of the IO.
In order to be adequate remedies have to correspond to the kind and nature of the complaints against the IO-s: the three levels of accountability will each require different kinds of remedies.
A remedy has also to be effective: in the case of a formal remedy the remedial mechanism should therefore be independent from the respondent authority. In case of a legal remedy, the remedy also has to be enforceable, thus excluding mere advice to the ultimate decision-making body.[149]
The different forms of accountability will have an impact on the remedial regime. Accountability mechanisms may be intended to protect or restore not only legal interests, but also political, administrative and financial interests that are not necessarily couched in legal terms.[150] Each form of accountability will determine issues such as availability of, access to and successful use of mechanisms of redress. This is clearly demonstrated by the particular features of non-legal remedies such as the Ombudsman function, Inspection Panels and Commissions of Inquiry.
The identity of potential claimants, their locus standi and the remedies will also be different for institutional acts or decisions and for operational activities, as an IO's institutional and operational authority and powers are constrained by a variety of political and legal guidelines, principles, rules and practices, as reflected in the earlier Parts of this Report.
Because of the functional variety of IO-s, there is, in addition to and beyond the standard minimum requirements of a remedial regime, a quest for more tailor-made remedies.
In determining criteria for ex gratia payments IO-s should take into account considerations of equity.

Remedial action against whom?

Requests for redress or applications for remedies should be addressed to the IO itself.

Actions or omissions by an IO are the direct result of the decision-making by the Organisation's organs or by the Executive Head of the IO. The general rule is that an IO remains fully accountable for the actions or omissions of all its organs or agents. Requests for redress or applications for remedies should thus be addressed to the IO itself.
As most organs of an IO are composed of Member States, it is particularly relevant to consider if, how, and under what circumstances the Member States collectively or individually can be held liable

[145] D. Shelton, op.cit., p.182 and pp. 14-15.
[146] A. Muller, International Organisations and their Host-states: Aspects of their legal relationship, The Hague, London, Kluwer Law International, 1995, p.282. Note that General Comment 20 adopted by the Human Rights Committee in 1992 provides in para. 15 that "States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible", HRI/GEN/1/Rev.6 (2003), p. 153.
[147] Annuaire de l'Institut de Droit International, 1957, Vol. 47, II, p. 478, III, 1.
[148] These may be general provisions in a constituent instrument such as " promotion of justice " or specific provisions in particular conventions such as Headquarters agreements or agreements on privileges and immunities.
[149] D. Harris, M.O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, London, Butterworths, 1995, pp. 450 and 455.
[150] Report of the Sixty-eighth ILA Conference, held at Taipei, at p.603.

or responsible; and to what extent direct, concurrent or subsidiary recourse may be had to Member States.
The legal personality of an IO is essential for its independent functioning. For a remedial action against Member States to be successful, the corporate veil of the IO would have to be pierced at either the domestic or international level.
The problem of the " selection" by potential claimants has been controversial both in doctrine and in practice. Is there room for a residual secondary liability of Member States? Or would such a solution potentially undermine the Organisation's independence? And should not all the Member States become liable?[151]

In its 1995 Resolution, the Institut de Droit International referred to important considerations of policy that could be advanced against the development of a general and comprehensive rule of concurrent or secondary liability for Member States. These considerations include support "for the credibility and independent functioning of international Organisations".[152] The 1995 Resolution appears to have struck the balance between the guarantee for necessary autonomy in the Organisation's decision-making process and the need for an accountability regime without loopholes.
International administrative tribunals exercise their jurisdiction not against an individual or the head of an IO but against the IO itself.[153] When proceedings are instituted against individual agents of the IO before domestic courts, the obstacle of jurisdictional immunity will surface.
It should be noted that IO-s have the inherent power to establish their own internal courts which would have jurisdiction to deal with such cases, and that there is "no alternative jurisdiction which could reasonably contest" the acts of the IO. Although parties to a dispute may attempt to bring an action in an external court, constitutional provisions of an IO may prevent national courts from reviewing the validity of acts of the IO, by "providing for another exclusive mode of settlement of disputes in this respect".[154]

The potential outcome of remedial action

With regard to the potential outcome of remedies, there seems to be a connection between the identity of the party seeking redress, the kind of accountability involved, and the forum before which the remedial action has been brought.
Affected parties may request the IO to take remedial action of a positive, injunctive, corrective or compensatory nature in case of alleged non-compliance with applicable RRPs on the first level of accountability.
On the first level of accountability interested parties seeking to obtain full access to information could for instance ask for a decision to this effect. Alternatively in a case of impending disclosure by the IO of information which is confidential, a potentially affected party could seek injunctive relief. Where incorrect information distributed by the IO has a negative impact on affected parties, corrective measures might be appropriate. Corrective remedial action by the IO may also consist in the overruling of a decision by a superior organ, restoring the right to a fair hearing, or stating the reasons that formed the basis of a general or individual decision. These kinds of mechanism may have an impact on subsequent legal remedies : they may indeed provide the necessary background material or evidence for instituting legal action.
On the second and third levels of accountability, judicial remedies play an important role. Declaratory judgments by international or domestic tribunals may fulfil the following remedial functions: the ruling as a matter of principle that certain conduct is not in conformity with applicable law; a finding of liability could provide an impetus for negotiations as an appropriate solution to the dispute; specific performance may be required as the consequence of the decision of entitlement.[155]

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[151] See the voluminous literature on the Westland Helicopters and International Tin cases.
[152] Article 8 of the Resolution
[153] C.F. Amerasinghe, International Court of Justice cases relating to employment in International Organisations, in V. Lowe and M. Fitzmaurice (Eds), Fifty Years of the International Court of justice: Essays in Honour of Sir Robert Jennings, New York and Cambridge, Grotius Publications and Cambridge University Press, 1996, p. 197.
[154] F. Seyersted, Settlement of Internal disputes of intergovernmental Organisations by Internal and external Courts, ZAORV, 1964, p. 28.
[155] I. Brownlie, The rule of law in international affairs at the Fiftieth Anniversary of the United Nations, The Hague, London, Martinus Nijhoff Publishers, 1998, pp. 126-129.

Advisory opinions of the ICJ on the legality of acts, conduct or course of action of an IO could also provide remedial relief for States.
One should also not underestimate the remedial potential, however limited, of incidental proceedings before international judicial and quasi-judicial bodies, such as intervention and the indication of interim measures of protection.
Although the three levels of accountability will require separate and particular remedies, in most cases the different forms of accountability will bring member states to resort to a combination of corresponding kind of remedies; as a result a maximum degree of implementation of the organisation's accountability could be achieved.

Section Two: Procedural aspects of remedial action against IO-s.

> *The principle of good governance requires IO-s to consider the substance of a complaint with all necessary care and to give a reasoned reply.*

Procedural justice is an essential pre-condition for substantive justice:[156] access to mechanisms that can address harm and implement accountability thus plays a pivotal role. This section reviews the procedural aspects facing the different categories of claimants when alleged contractual or non-contractual liability are involved and they resort to quasi-judicial or judicial remedial mechanisms against an IO.
The first duty for an IO is of course to establish appropriate accountability mechanisms as indicated earlier.
An IO has first to determine whether the particular claimant has submitted a prima facie case. The principle of good governance applies to the IO's handling of every complaint, irrespective of existing mechanisms to review the legality of the decisions or action that forms the subject matter of such a complaint.
Although the procedural aspects of remedial action will vary amongst the different categories of potential claimants, all claimants will face the common procedural obstacle of the jurisdictional immunity of IO-s before domestic courts.[157]

Procedural aspects of preventive or remedial action by states

1. *In order to challenge the legality of a particular decision, Member States should in the first place turn to the organ that is considering adopting or has in fact adopted that decision.*
2. *States may only take up the claim of their nationals, and exercise diplomatic protection vis-à-vis the IO, if all internal remedies have been exhausted, unless there are no appropriate and effective mechanisms available.*
3. *The exhaustion of internal remedies rule applies to all available administrative, quasi-judicial and judicial mechanisms established by the IO on a permanent or ad hoc basis.*

The exercise of diplomatic protection by a State towards an IO on behalf of one of its nationals is rare, although States may decide to do so if there are no remedial mechanisms available to their nationals.[158]
This principle has however only a very limited application to staff cases, because of the special nature of the international civil service, and would be confined to exceptional cases such as those in which no remedial mechanism of any kind is available to the staff member.
The common view is that there is no general principle that the exhaustion of local remedies rule is *automatically* applicable to third-party individual claimants towards the IO. The putting into place of an efficient, proportional and dissuasive remedial regime should not rule out the possibility of the exercise of diplomatic protection by states. The rationale underlying the exhaustion of local remedies rule in inter-state relations, i.e. providing an opportunity to redress the situation, would call for its application towards IO-s as well. In certain circumstances (but not for example in staff cases), the IO may decide to waive the application of this rule.
The rule should be applied " with some degree of flexibility and without excessive formalism" and with a realistic assessment of the general and political context in which the remedies operate and the personal circumstances of the applicant.[159]
In most IO-s there is no system of judicial review for the legality of institutional acts and operational activities.

Procedural aspects of remedial action by staff members

1. *IO-s should establish an adequate pre-litigation mechanism to deal with employment-related disputes between the IO and its staff members.*

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[156] H. Nehl, Principles of Administrative Procedure in EC Law, Oxford, Hart Publishing, 1999, p.24, note 39.
[157] See below, pp. 51-52
[158] J. P. Ritter, La protection diplomatique internationale à l'égard d'une organisation internationale, AFDI, 1962, p.455
[159] Akdivar v. Turkey, Judgment of 16 September 1996, Reports of judgments and decisions, 1996, 1210 as cited by D. Shelton, op. cit., at p. 25.

2. *Each IO should either recognise the jurisdiction of existing international administrative tribunals or establish an administrative tribunal of its own to deal with such disputes.*
3. *International administrative tribunals should be organised and should function under a procedure and under conditions that guarantee their independence. The same principle should govern the appointment of their members.*
4. *International administrative tribunals are not debarred from exercising their jurisdiction to determine complaints by individual staff members merely because the complaint implicates a decision of a general regulatory nature.*

Staff members have a special position under the internal law of the IO with whom they also have a contractual relationship. The majority of claims against IO-s are instituted by staff members. A challenge to the legality of decisions may be based on lack of competence, procedural irregularity, abuse of power, or violation of applicable statutes or institutionalised rules.
In general, IO-s have established their own remedial machinery to deal with employment-related disputes, although a number of IO-s still deprive their staff members of any form of judicial remedy against it.
The internal recourse procedure involves in most cases the following stages: discussion of a challenged decision with the superiors of the staff member; a quasi-judicial stage, which results in non-binding recommendations addressed to the Executive Head of the IO by an internal appeals board of mixed composition; finally the staff member may resort to an international administrative tribunal. If an internal remedy is unavailable as a result of the particular circumstances of the case, a direct appeal to an administrative tribunal must therefore be considered receivable.[160]
There is a high rate of settlement under the pre-litigation mechanisms.
A legality challenge may also concern a legislative decision of general applicability, although in most cases this will only occur with respect to its application in a particular case.

Procedural aspects of remedial action by private claimants

Remedial action instituted by private claimants (other than staff members) against an IO will originate from contractual or tortious acts and decisions. Given the lack of an appropriate mechanism to carry out a legality review, claims of illegality against institutional or operational acts before a domestic court or an arbitral tribunal provide an indirect remedy.

Contractual liability claims

> *Disputes arising out of contracts between private parties and IO-s should be settled by an independent body. Such an independent body could be an arbitral body set up in accordance with the rules of a permanent institution or in pursuance of ad hoc clauses; or a tribunal set up by an IO, or a national judicial body, if this is compatible with the status and functions of the IO.*

Contracts between a private party and an IO are characterised by the superiority of concerns of an international public interest over the binding force of the contractual link.[161] General clauses put in place a system of control and surveillance for the benefit of the IO and are, in practical terms, not subject to negotiation.[162] Private contractors may by way of sub-contracting carry out activities of an operational kind on behalf of an IO. Close control by the IO over the terms of the contract and the way it is being performed does not make the contractor into an instrument of the IO capable of claiming derivative immunity.[163] This could result in the non-state sub-contractors becoming vulnerable to contractual liability claims by private parties arising out of damage sustained and caused by these sub-contractors.

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[160] ILOAT Judgment No. 2232, 16 July 2003, in the Bustani case, para.13.
[161] J.P. Colin, Les relations contractuelles des Organisations internationals avec les personnes privées, Revue de Droit International et de Droit Comparé, 1992, p 20
[162] D. Meyer, Les contrats de fournitures de biens et de services dans le cadre des operations de maintien de la paix, AFDI, 1996, p. 107.
[163] US Court of Appeals for the District of Columbia Circuit, IBRD v. District of Columbia, ILM, 1999, p. 819-826.

Disputes arising out of contracts between private parties and IO-s should be settled by an independent body, in cases where the IO enjoys immunity from jurisdiction. Such an independent body could be an arbitral body set up in accordance with the rules of a permanent institution or in pursuance of ad hoc clauses; or a tribunal set up by an IO, if conferring such jurisdiction is compatible with the rules of the organisation or a national judicial body, if this is compatible with the status and functions of the IO.[164] Standard arbitration clauses are inserted in all commercial contracts and purchase agreements as well as lease agreements between the UN and private parties. These clauses are normally followed by a provision that clarifies that neither the contractual agreement nor its arbitration clause constitutes a waiver of the Organisation's jurisdictional immunity.[165] The vast majority of contractual claims are settled by negotiation.

Tort liability claims

1. *IO-s should establish an insurance mechanism for third-party liability claims.*
2. *With regard to claims originating from private claimants for damage sustained in the course of the operational activity conducted under the control and command of the IO, IO-s should either refer such claims to arbitration or establish a standing claims commission or ad hoc mixed claims commissions to deal with them.*

Third-party liability insurance coverage obtained by an IO remedies any injustice "that its jurisdictional immunity would impose on parties whom it may damage".[166]
There is no standing mechanism available to private claimants who have sustained damage as a result of operational activities undertaken by an IO. Under the holding-harmless clauses, private claimants are obliged to bring their claims before the government that exercises territorial jurisdiction over the operational zone. Claims can only be directed to the IO in cases of gross negligence or wilful misconduct.
For each peacekeeping operation an internal local claims review board composed exclusively of staff members of the IO is established. The independence of these boards and the objectivity of their rulings, which are not made public, give rise to concern; this claims settlement procedure cannot be considered as an adequate alternative mechanism for the protection of private third party interests and rights.

Claims against officials and experts

1. IO-s should establish a communication channel widely known to the local population to receive allegations of misconduct by military and civilian personnel engaged in peacekeeping or humanitarian operations.
2. Within status-of-forces and status-of-mission agreements, IO-s and Member States should put in place adequate mechanisms for the investigation of criminal conduct by military personnel with a provision for referral to the jurisdiction of the contributing country to deal with such cases. Normal legal requirements for IO officials would apply to civilian staff, including possible criminal prosecution as appropriate.
3. IO-s should, in appropriate cases, encourage Member States to adopt legislation criminalizing defined breaches by officials of an IO of certain categories of applicable rules and regimes. Such legislation could also provide for the possibility of civil action against the official by the IO, states and individuals suffering damages by such breaches.

De lege lata officials and experts of an IO are in most cases only legally responsible to the Executive Head of an IO for things done in the exercise of their functions. Whether officials have acted within the limits of the mandate or function given to them is a matter of internal accountability.
This internal accountability of staff members to the Executive Head of an IO constitutes a structural impediment to external accountability of such staff members to third parties.

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[164] Articles 7 and 8 of the 1977 Oslo Resolution of the Institut de Droit International, Annuaire de l'Institut de Droit international, 1977, Vol. 57, II, pp. 335-336.
[165] A/C.5/49/65, p.2
[166] M. Singer, Jurisdictional immunity of International Organisations: human rights and functional necessity concerns, Virginia journal of international Law, 1995, p. 80.

In case of allegations of criminal behaviour made against officials and experts, there seems to be a lack of transparency regarding the procedure and practice applied. Analogous application of international human rights law would require accessible channels for such complaints to be heard, prompt and impartial investigations, ensuring prosecution and punishment where appropriate in a national jurisdiction with reparation provided to the victim.

Should there be, *de lege ferenda*, direct responsibility of both the IO and its officials towards those adversely affected by their operational activities?
In exceptional circumstances such as serious negligence or wilful misconduct should third parties suffering damage as direct result of an internationally wrongful act have a right to demand that the official who actually committed or initiated the wrongful act be punished?
The common interest of an IO is a factor in the decision to respond to such a request and an interest that should not be assimilated to the interest of a State in analogous cases of punishment of state officials.

Can an IO disclaim its own responsibility and confine itself to disciplining the official? In other words is there room for punishment by an IO of a responsible official for (gross) negligence or wilful misconduct, without the IO admitting legal responsibility for the acts or omissions of the official? Rules and practices of most IO-s point to a positive answer.
The disciplinary measures an IO can take "and that are usually provided for in their staff regulations and rules, are basically limited to employment and career-related ones: fines, suspension without pay, demotion, and, ultimately, dismissal".[167]
As IO-s do not possess criminal jurisdiction over their officials, they could encourage Member States to adopt legislation criminalizing defined breaches by officials of an IO of applicable regimes. Such legislation could also provide for the possibility of civil remedies against those officials by the IO as well as by states and individuals damaged by such breaches[168].

Procedural obstacles for representative non-governmental Organisations

> *National and international courts and tribunals whose jurisdiction extends to cases brought before them involving IO-s, should, where appropriate and when within their competence, develop procedures to enable representative non-governmental Organisations duly accredited to the IO in question to submit statements or written observations on cases pending before them involving that IO.*

International representational non-governmental Organisations (NGOs) can play an important role as agents of accountability of IO-s, provided they can resort to mechanisms to implement that accountability. The appropriateness of the remedies will depend on the varying nature of the relationship between IO-s and NGOs. However, the participation by representational NGOs in the process of norm setting by IO-s is not matched by corresponding remedial possibilities and mechanisms to support, in their representational capacity, claims involving IO-s. Domestic recognition of the legal personality of international NGOs would enable them to bring a claim before domestic courts against IO-s for tortious liability or organisational responsibility.
Most international courts and tribunals have now developed procedures to enable third parties to submit statements or written observations on a case pending before them.[169] The above RRP should apply also to internal accountability mechanisms and international administrative tribunals.
A State claimant may for a variety of reasons omit certain issues from international proceedings against an IO, in spite of those issues being of broad public interest. A role for representational non-governmental Organisations would be particularly appropriate where obligations erga omnes are at issue. The proper administration of justice should be the guiding principle for courts and tribunals in this regard.[170]

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[167] Paul Szasz, Disciplining international officials, in R. Yepes-Enriquez and L. Tabassi (Eds), Treaty Enforcement and International Cooperation in Criminal Matters, OPCW, Asser Press, The Hague, 2002, pp. 187-195, at p. 189.
[168] Ibidem, at p. 193.
[169] D. Shelton, The participation of non-governmental Organisations in international judicial proceedings, AJIL, 1994, p.641-642.
[170] Ibidem, p. 615 - 627.

Procedural obstacles common to remedial action by non-state claimants

Claimants are not in general in a position to bring IO-s before an international tribunal. The jurisdictional immunity of IO-s before domestic courts and the burden of proof and evidence can be identified as the common procedural obstacles facing non-state claimants when they attempt to raise and implement the accountability of IO-s.

The jurisdictional immunity of IO-s before domestic courts.

In the framework of the implementation of accountability of IO-s, jurisdictional immunity remains a decisive barrier to remedial action for non-state claimants. This state of affairs should be remedied by the availability of adequate alternative remedial protection mechanisms within IO-s. International Organisations "have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those Organisations heard, when this is required by the imperatives of justice".[171]

A successful claim to jurisdictional immunity combined with the absence of adequate alternative methods of protection could easily amount to denial of justice.[172] Furthermore, the adequacy of existing mechanisms within IO-s is not beyond controversy.
The Executive Head of an IO has the discretionary power to waive immunity in a given case.[174] The findings of recent and comprehensive research into the circumstances under which domestic courts exercise their adjudicatory jurisdiction or refrain from doing so, [175] are relevant for the question of whether national courts do in fact provide an appropriate forum for disputes involving IO-s and which will be dealt with in Section Four.
The paramount rationale for granting jurisdictional immunity is to secure the independence, and guarantee the functioning, of the respondent IO.[176] The problem lies in the precise delineation of the point beyond which influence and interference become undue. A further problem related to institutional immunity arises when the scope of an IO's activity expands to the point that de facto it becomes a participant in the policy making and implementation process in some of its Member States. The two main grounds on which national courts have exercised jurisdiction are: restriction of the scope of immunity and a broad interpretation of applicable waivers.[177] A functional immunity approach may be accompanied by laying down a stringent requirement that the actions of the IO must be inherent or essential for its institutional purposes. The urge on the part of IO-s for a narrow definition of waivers is hardly reconcilable with reasonable and legitimate expectations of parties that deal with them.[178] The principle of fairness towards parties dealing with IO-s and to other third parties affected by their activities calls for limited immunity, in the same way as that principle underpins restricted state immunity.[179]

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[171] Emmanuel Gaillard and Isabelle Pingel-Lenzza, International Organisations and immunity form jurisdiction: to restrict or to bypass, ICLQ, 2002, pp. 1-15, at p. 2.
[172] F. Seyersted, op.cit., p. 79
[173] A. Reinisch, , pp. 163-167.
[174] I. Scobbie, International Organisations and international relations, in R. J. Dupuy (Ed), A handbook of international Organisations, The Hague, London and Boston, Kluwer Law International, 1998, p. 856.
[175] A. Reinisch, International Organisations before national courts, Cambridge, Cambridge University Press, 2000
[176] Ibidem, p. 233.
[177] Ibidem, pp. 185-229.
[178] M. Singer, op. cit., p. 73.
[179] A. Reinisch, op. cit., pp. 261-262.

The burden of proof and evidence

1. *IO-s have a duty to facilitate the proper administration of justice by internal and external, domestic and international judicial bodies in proceedings to which they are a party. This duty entails an obligation to disclose information and documents directly held by them.*
2. *In order not to disclose such information or documents, IO-s should present compelling reasons related to the preservation of their independence and functioning.*
3. *In order to contribute to the proper administration of justice, IO-s should wherever possible waive the immunity and/or the duty of confidentiality of serving or former individual staff members and agents so as to allow them to participate in judicial proceedings.*

Once jurisdictional immunity has been waived or has not been granted, the second procedural obstacle that is common to the category of non-state claimants is the burden of proof and evidence.
The proper administration of justice entails an inherent right for every judicial body to request parties in cases before it to disclose information and documents directly held by them and a duty to respect and guarantee the principle of equality of arms between the parties.
With regard to the burden of proof flexibility seems to be required, given the pre-existing inequality between an IO and parties involved: the causality requirement and thus the standard of proof should not be unduly stringent in cases of tortious claims brought by third parties. Pre-existing contractual links with the IO may render compliance with standards of proof relatively easier.
Protection of the IO's proper functioning or protection of the rights of third parties may lead judicial bodies to grant an exemption from the duty of disclosure for confidential information located in internal communications or which has been obtained from third parties.[181] Alternatively, only parts of a document could form part of the record of the case, while a copy of the whole document is in the possession of the Registry.[182]
The general duty of IO-s to co-operate with host states and other states in the proper administration of justice may however require a shift of the burden upon the IO to present imperative reasons relating to the need to protect its functioning and independence in order to be eligible for such exemption.
The protection of the Organisation's essential interests and of confidential information should be narrowly construed given both the general imperatives of a comprehensive accountability regime and the particular duty of IO-s to contribute to the proper administration of justice. This could be particularly relevant in proceedings before international criminal tribunals because of their specific mandate and features.[183]

[181] See for instance Article 20 of the January 2002 version of the Draft UN/ICC Relationship Agreement: PCNICC/2001/1/Add.1 of 8 January 2002, page 9. On earlier drafts of the text see *inter alia* Paul Szasz and Thordis Ingadottir, The UN and the ICC: The Immunity of the UN and Its Officials, LJIL, 2001, pp. 867-885, at pp. 876-877.
[182] R. Plender, Procedure in the European Courts: comparisons and prospects, RCADI 267, 1997, pp. 175 and 117.
[183] In the January 2002 version of the Draft relationship Agreement between the ICC and the UN measures to protect the safety or security of current or former personnel of the UN or the security or proper functioning of any operation or activity of the UN may accompany the disclosure of information or documents or the provision of other forms of cooperation (PCNICC/2001/1/Add.1 of 8 January 2002, Article 15, para.3). The waiver of officials' obligation of confidentiality shall take place by the UN " with due regard to its responsibilities and competence under the Charter and subject to its rules" (Ibidem, Article 16, para.1). If a person allegedly responsible for a crime within the jurisdiction of the ICC enjoys privileges and immunities, the UN undertakes to waive such privileges and immunities (Ibidem, Article 19). On these and other problems involved in the UN/ICC relationship see P.Szasz and T. Ingadottir, op. cit.

Section Three: Substantive outcome of remedial action against IO-s.

1. *Except where special rules are required in order to reflect the difference between the functions and powers of States and the functions and powers of IO-s, the traditional rules for the implementation (mise en oeuvre) of international responsibility should apply to IO-s as they apply to States, in particular those relating to proof of damage, causality, remoteness and quantifiability of damage, and contribution to the damage by the injured party.*
2. *The protection of international societal interests may in appropriate cases be an element to be taken into account in the assessment of the level of damages.*
3. *Appropriate modes of satisfaction should be determined taking into account the specific nature of IO-s, but may include an apology expressed by the Executive Head of the IO or the punishment of the official concerned.*
4. *IO-s could provide guarantees of non-repetition in a set of operational guidelines for the future.*
5. *IO-s should always take proper account, as regards their future conduct, of guidance in that respect contained in the judgment of a competent court.*

Article 57 of the 2001 ILC Articles on State responsibility reads: "These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization". At its fifty-second session, the ILC decided to include the topic of responsibility of IO-s in its long-term programme of work, and the UN General Assembly in resolution 55/152 of 12 December 2000 endorsed this decision. The question whether the study should include matters relating to implementation of responsibility of international Organisations was however left open.
In the spring of 2003 the Special Rapporteur (Professor Giorgio Gaja) submitted his First Report containing inter alia draft articles 1-3 on the scope of the draft articles, the use of terms and general principles relating to responsibility of international Organisations[184].
The Committee hopes that its work will prove of value to the ILC in its further consideration of this topic.

In the Committee's view, the range of available remedial outcomes is almost identical to claims against States under secondary rules of liability and responsibility. There is no inherent reason why the remedial outcomes of restitution, damages, specific performance, satisfaction and injunctive relief should not become available under the law of organisational responsibility. The surrounding circumstances, the modalities of the alleged harm/violation may vary and the implementation of the remedies by IO-s may be different, but this does not affect the prominent place the issue of remedial outcome occupies within the overall accountability regime for IO-s.

An order by a judicial body for the repeal or alteration of measures taken by an IO to implement an institutional act that has been declared illegal would constitute an example of a *legal* restitutio in integrum.[185]
The reparation of the damages caused by the prior application to all categories of addressees of an institutional act that has been declared illegal would be an example of a *material* restitutio in integrum.[186]
Unilateral action by a Member State to refuse further application of an institutional act it considers to be illegal would create a situation of legal uncertainty to the detriment of the IO's institutional order. [187]
Declaratory judgments and damages may be considered as relatively non-intrusive remedies.[188]
Because of the distinctive features of the overall accountability regime for IO-s, remedial orders for specific performance may constitute a more appropriate and more comprehensive remedy than

[184] A/CN.4/532, First Report on responsibility of international Organisations, 21 pages.
[185] C. Gray, Judicial remedies in international law, Oxford, Clarendon Press, 1987, p. 13.
[186] Ibidem. See also the IMCO case, ICJ Reports, 1960, p. 150.
[187] P. Klein, La responsabilite des Organisations internationals dans les ordres juridiques internes et en droit des gens, Brussels, Editions Bruylant and Editions de l'Universite Libre de Bruxelles, 1998, pp. 88-89.
[188] D. Shelton, op. cit., p. 55.

compensation to individual claimants.[189] The invocation of the concept of functional necessity by IO-s should not operate as a bar to orders for specific performance at the cost of the claimant's rights.[190] The substantive outcome of remedial action based on a contractual liability claim is decisively determined by the application of the IO's own internal law to its contractual activity. The utmost discretion with which IO-s guard this remedial outcome renders the formulation of relevant RRPs rather difficult.

In the determination of compensation, account should be taken of the contribution to the injury by the injured party, when the latter must have been aware of manifest lack of competence and as result could have avoided the harmful results. As the accountability regime of IO-s also protects international societal interests, higher levels of damages may be considered than the protection of individual interests of the individual claimant would seem to require.[191] The law of the territorial jurisdiction where alleged damage has occurred will govern the merits of a tort liability claim against an IO, and this entails an infinite variety of potential outcomes.

Apologies expressed by the Executive Head of an IO could follow the results of an independent inquiry into events preceding and during the course of an operational activity undertaken by the IO. Operational mechanisms such as the establishment of Child Protection Advisers in UN Peacekeeping operations (e.g. in Sierra Leone and the DRC) could provide guarantees of non-repetition.[192]

[189] Ibidem, p. 79.
[190] Ibidem, p. 293.
[191] D. Shelton, op. cit., p. 43.
[192] On guarantees and assurances of non-repetition see La Grand (Germany v. United States of America), Merits, Judgment of the ICJ, 27 June 2001, paras. 124, 125 and 127 and the Court's judgment of 31 March 2004 in Avena and other Mexican Nationals (Mexico v. United States of America) at paras. 149-50.

Section Four: Non-judicial remedial action against IO-s

1. *IO-s should consider, when appropriate, resorting to less formal mechanisms, such as mediation or other ad hoc mechanisms, to deal with complaints addressed to them by non-state parties*
2. *IO-s should establish, when appropriate, ombudsman offices to deal with claims of maladministration by organs or agents of the Organisation.*
3. *If an IO does not settle the case of maladministration to the satisfaction of the complainant, the ombudsman may issue recommendations addressed to the IO concerned.*
4. *IO-s should establish, when appropriate, an inspection panel as a body to investigate complaints by two or more people sharing common interests or concerns, that their rights or interests are likely or have been adversely affected by the Organisation's failure to comply with its own policies and procedures during the course of an operational activity.*
5. *An inspection panel may issue recommendations for remedial action to the Executive Head or to other competent organs of the IO.*
6. *IO-s may consider the establishment of an international commission of inquiry into any matter that has become the subject of serious public concern.*
7. *In conducting its investigation an inspection panel or an international commission of inquiry (depending on their terms of reference) should carefully distinguish between failures exclusively attributable to the IO or to other entities and those attributable to both.*
8. *Member States have a legal duty to cooperate with any of the above duly established mechanisms.*

The importance of less formal action by the IO can hardly be overestimated because of its preventive potential. IO-s should act in accordance with the primary RRPs as formulated earlier in this Report and should, where appropriate, resort to mechanisms such as mediation to deal with complaints addressed to them.
The principle of effectiveness is pivotal to the remedial regime. An effective remedy has to be proportional and dissuasive.
To the extent that the major procedural obstacles identified earlier are not removed, they should be counterbalanced by the provision of alternative equivalent forms of remedial protection. The inherent imbalance of power between IO-s and non-state claimants has to be taken into account; otherwise the remedial action would not come within the parameters of adequate alternative settlement mechanisms.
It would be unwise and unrealistic to expect to accommodate adequately the diversity of claims against IO-s originating from such different sources by providing a single, comprehensive mechanism.
Maximum accountability can be achieved by a combination of mechanisms, tailor-made for the level and forms of accountability and for the category of claimant, and thus for the rights and interests that are in need for protection. The establishment of non-judicial mechanisms is an inherent part of the accountability regime for IO-s.
In some areas the institution of an Ombudsman may be appropriate; in other areas the establishment of an inspection panel or of a commission of inquiry may be more appropriate. The particular examples given in the RRPs have proved to be useful, although the mechanisms may not be applicable to all IO-s. IO-s may, of course, establish mechanisms possessing the same features without necessarily endowing them with an identical or similar name. Resorting to quasi-judicial or judicial bodies possessing the power to issue binding decisions addressed to the respondent IO or the official concerned may follow these mechanisms: direct access for individuals to such bodies may render the need for these mechanisms less pressing. The interaction between political and legal remedies is a natural consequence of the inter-linkage between the administrative, financial, political and legal forms of accountability.

Existing mechanisms have revealed deficiencies, inadequacies and an insufficient degree of remedial potential. It is time to review non-judicial alternative remedial actions dealing with claims on the first level of accountability.
The absence of any kind of legal relationship between the IO and a non-state entity results in no accountability being provided towards non-state actors. Non-legal remedies could provide suitable alternatives by granting private parties direct access to a particular mechanism or office.
The ombudsman and an inspection panel are basically open to individual claimants or requesters to protect their individual interests. Conversely the establishment of an independent commission of inquiry would usually fulfil a remedial function relating to collective interests.

The ombudsman is a complaint-handling mechanism, the remedial impact of which is dependent upon the independence, impartiality and broad powers of investigation of the office.[193] An ombudsman uses persuasion to obtain changes in the conduct of a public body through the implementation of recommendations. This kind of non-legal remedial action is exactly what the first level of accountability seems to require.
The remedial potential of resorting to an ombudsman or an office on petitions is open to an unlimited group of non-state claimants.
The procedural review by an organ such as an ombudsman would of course not compensate for the absence of substantive judicial review within almost all IO-s.

Individuals and other non-state entities are unlikely to be successful in bringing liability claims against an IO before domestic courts, because of jurisdictional immunity. They are unlikely to be successful either with claims for organisational responsibility under international law because of a lack of ius standi. The establishment of an Inspection Panel along the lines of the World Bank Inspection Panel, created in 1993, could provide an adequate alternative mechanism. The investigatory powers of an Inspection Panel comprise political, administrative and legal forms of accountability.[194] Its findings cannot be reconsidered or changed through a political process.

Independent expert investigation conducted by an international commission of inquiry could constitute a third form of non-legal alternative remedial action.
The remedial potential of an international commission of inquiry can be found in accommodating the right to know on the part of victims and in meeting the need for establishing separate and individual responsibility on the part of all actors involved, through fact-finding and the reconstruction of the chronological unfolding of events.
Reports of an international commission of inquiry normally encompass the three levels and the four forms of accountability of IO-s.
The preventive, dissuasive and prospective functions of remedial action could flow from the formulation of recommendations by such a commission.
Examples include the Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda[195] and the Report of the Secretary-General pursuant to general Assembly resolution 53/35 into the fall of Srebrenica.[196]
The findings of an international commission of inquiry might subsequently be regarded by a judicial organ as useful for determining facts that became public knowledge, but not as evidence for judicial purposes.
The obligation for Member States to cooperate with these non-judicial mechanisms derives from their duty of cooperation as members of the IO.

Section Five: Judicial remedies

For any accountability regime judicial protection and thus access to adjudication or arbitration, based on equality of arms and a sufficient scope for judicial review, is important.[197] The UN General Assembly emphasized, " that the right to justice as contained in applicable international human rights instruments forms an important basis for strengthening the rule of law through the administration of justice" and reaffirmed "the importance of the full and effective implementation of all UN standards on human rights in the administration of justice" [198].

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[193] Linda C. Reif (ed), The international ombudsman anthology: selected writings from the International Ombudsman Institute, The Hague, London and Boston, Kluwer Law International, 1999, p. xxiii.
[194] See D. Bradlow and S. Schlemmer-Schulte, the World Bank's New Inspection Panel: A constructive step in the transformation of the international legal order, 54 ZaöRV, 1994, p. 392; I. Shihata, The World Bank Inspection Panel, 1994
[195] S/1999/1257, annex.
[196] A/54/549.
[197] E. Schmidt-Assmann and L. Harrings, Access to justice and fundamental rights, European Review of Public Law, 1997, p. 533 and p. 531.
[198] Resolution 56/161 adopted on 19 December 2001.

There is a wide range of autonomous and quasi-autonomous, non-judicial, quasi-judicial, and judicial organs: some have the competence to deal with a particular category of claims coming from all kinds of claimants, others are competent to hear all kind of claims but only from a limited range of entities or persons. It should be duly noted that there is no permanent legal mechanism that is competent and capable to deal with the variety of claims against an IO as a result of its liability or international legal responsibility.

Because of the essential features of the judicial function, the remedial potential of judicial remedies for states and non-state claimants is substantially more important for the effectiveness of the entire accountability regime than when they resort to non-judicial mechanisms. On the other hand, the role of judicial remedies is necessarily restricted, because the extent to which they can modify the status quo is limited, they are a product of a bilateral process, and they are dependent on a finding of responsibility.[199]

[199] C. Gray, op. cit., p. 210.

International Administrative Tribunals

1. *International administrative tribunals should not adopt too restrictive an approach towards admissibility ratione materiae and ratione personae, towards their jurisdiction, and the sources of law at their disposal, or towards the exercise of their judicial powers.*
2. *In carrying out their duties international administrative tribunals should endeavour to follow the best judicial practice.*
3. *IO-s should consider establishing a common mechanism of review of judgments of international administrative tribunals, limited to questions of law, in order to achieve the greatest possible consistency of jurisprudence in international administrative law.*
4. *IO-s are under an obligation to comply with judgments of international administrative tribunals rendered in cases in which they are a party.*

Various reports have been made in recent years on the administration of justice within IO-s.[200] They deal mainly with improving the pre-litigation procedures.
The jurisdiction of administrative tribunals is "compulsory as far as the organisation is concerned, and exclusive as far as the officials are concerned"[201], because of the IO's jurisdictional immunity before domestic courts.
Governing statutes of international administrative tribunals may contain provisions for reform or annulment of the decision under challenge. Tribunals should not narrowly interpret their jurisdiction by explicitly requiring in all cases an actual 'decision' rather than, when appropriate, to resort to the theory of 'implied decisions'.
The need for consistency and coherence in case law and the importance of uniform interpretation of identical or similar provisions is widely recognized. International administrative tribunals should be encouraged to take account of each other's decisions in order to reduce the risk of incompatible case law. There is also growing recognition that the right of review is part of the right to a remedy.
'Judgments' refers to decisions by an international administrative tribunal which are legally binding.

The potential role of domestic courts

1. *Executive Heads of IO-s should waive the immunity of the Organisation if such a waiver is required by the proper administration of justice and would not prejudice the interests of the Organisation. In this connection, Executive Heads of IO-s should follow a restrictive interpretation of the situations where such waiver would prejudice the interests of the IO.*
2. *In cases which can not be decided by domestic courts because there has been no waiver of immunity, the IO remains bound by its obligation to provide adequate alternative procedures for settling the dispute, and should faithfully comply with this obligation.*

The margin of appreciation left to Executive Heads of IO-s in deciding whether or not to waive the immunity of the Organisation or of one of its agents should be restricted to the non-impediment of the proper administration of justice.[202]
Two considerations should be duly taken into account when assessing the potential role of domestic courts. There is an obligation for IO-s to make provision for appropriate methods of settlement under Section 29 of the 1946 [General] Convention on Privileges and Immunities of the UN and its equivalents; and there is an obligation for states under human rights instruments to provide access to court in certain situations. States may violate their own human rights obligations by granting immunity to an IO in the absence of adequate alternative remedial mechanisms.[203] This human rights imperative may result in a limitation or rejection (even by domestic courts?) of jurisdictional immunity claimed by

[200] See with regard to the UN: A/C.5/50/2 of 27 September 1995 by the Secretary-General on the reform of the internal system of justice in the UN Secretariat. See also the 2000 Report on the Administration of justice at the United Nations by the Joint Inspection Unit, A/55/57.
[201] F. Seyersted, op. cit., p. 22.
[202] E. Gaillard and I. Pingel-Lenuzza, op. cit., at p. 5 commenting on the Beer and Regan v. Germany case, Judgment of 18 February 1999, Case No.28934/95.
[203] M. Singer, op. cit., pp. 91-95.

IO-s, and the actual exercise of adjudicatory jurisdiction, as it can never be considered functionally necessary for IO-s to deprive parties dealing with them of all forms of judicial protection.[204]

The potential role of arbitration proceedings

1. *When concluding agreements with States or non-state entities, IO-s should continue inserting a clause providing for compulsory referral to arbitration of any dispute that the parties have been unable to solve through other means.*
2. *IO-s should faithfully comply with their undertakings to resort to arbitration procedures.*

When inserting an arbitration clause into agreements concluded between them, States, IO-s, and non-state entities should consider the compulsory arbitration provided for in such clauses to be governed by the 1996 Optional Rules for Arbitration involving International Organisations drawn up by the Permanent Court of Arbitration.[205]
Although there have been rare cases where IO-s have been reluctant to cooperate with the establishment of an arbitral tribunal, it may be useful to recall their duty to faithfully comply with their undertakings to resort to arbitration procedures. By agreeing to an arbitration clause the IO "waives the right to invoke its immunity before the arbitral tribunal", and this waiver "must be understood as encompassing any means that a party, having accepted the principle of recourse to arbitration, may attempt to invoke in order to hinder the arbitral process".[206]

A role for the International Court of Justice

During the preparation of its Final Report, the Committee devoted particular attention to considering whether the possibilities of remedies before the International Court of Justice could usefully serve to fill some of the accountability gaps identified in the main part of the Report. To do so would necessarily entail that IO-s be placed in a position to become parties to cases before the Court, and the Committee had the benefit of detailed proposals drawn up by one of its Co-Rapporteurs in this connection.
Views differed on the substantive merits of these proposals; some members were strongly in favour, while others doubted whether these proposals would prove to be practicable, or even desirable.
The Committee reached the conclusion, however, that these proposals differentiated themselves from the ideas and propositions in the main part of the Report on a significant point of principle. As a question of policy as well as methodology, the RRPs represent and are intended to represent, a distillation of best practice, without seeking to distinguish propositions de lege lata from those de lege ferenda, or propositions which relate only to practice from those which lie at the legal level. In this sense the RRPs are neutral, in that the Committee did not intend to suggest that any particular IO was under an obligation to change its established rules or constituent instruments (and still less to propose amending the Statute of the International Court of Justice, which can be seen as tantamount to amendment of the UN Charter, to which the Statute is annexed).
The Committee was therefore unanimously of the view that the proposals could not, for these reasons, be considered for inclusion in the main body of the Report. Nevertheless, and without prejudice to the fact that agreement had not been reached on the substance of the proposals, the Committee felt that these proposals should under no circumstances be lost. It has therefore included them in the Appendix to the Report, on the basis described above.

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Epilogue

In fulfilling its mandate in the years since its establishment, the Committee has become more than ever convinced that there is no necessary incompatibility between on the one hand the autonomy which IO-s

[204] A. Muller op. cit., p.271.
[205] Available at http://pca-cpa.org/ENGLISH/BD/2igoenglish.htm
[206] E.Gaillard and I.Pingel-Lenuzza, op. cit., at p. 13, commenting on the Boulois v. UNESCO case before the French courts in 1997 and 1999.

require in their decision-making and operational processes and, on the other, the requirements of an accountability regime which functions well and leaves no loopholes. The balance between the two may indeed be a delicate one, but the Committee expresses the hope, in submitting this Final Report, that it has managed to achieve it.

K.Wellens
M. Shaw

May 2004

APPENDIX **:** A role for the International Court of Justice

Because of their permanent dealings with IO-s through membership links or otherwise, States run a greater risk than other, non-state entities of finding themselves opposed to an IO in a dispute or a difference, but cannot bring a claim against an IO before the International Court of Justice as a result of the wording of Article 34(1) of the Court's Statute. It is clear that this limitation contained in Article 34(1) of the Court's Statute constitutes an obstacle the removal of which may be just as pivotal in establishing a comprehensive and adequate accountability regime for IO-s as is the overcoming of their jurisdictional immunity before domestic courts. However a judicial remedy from the International Court of Justice for the tortious and/or organisational responsibility of an IO might be obtained in either a direct or an indirect way.

Indirect remedial opportunity in an inter-state dispute before the Court.

The legal validity, scope and interpretation of an act adopted by an organ of an IO may play a role in an inter-state dispute before the Court. Parties may challenge the legal validity of such an act: if their argument is upheld by the Court they may thus obtain an indirect remedial ruling against the IO. The legal consequences of declared illegality will have to come from further steps to be taken by the Organisation's competent organs.
States appearing before the Court may also themselves create an indirect remedial opportunity under Article 51 of the Statute when calling officials of an IO as witnesses to answer relevant questions during the oral hearings. An indirect remedial benefit will of course depend upon the subsequent use of this material by the Court, in reaching its decision.
In the situations contemplated under article 34(2) and (3) of the Statute, IO-s could be indirectly involved in an inter-state dispute where a decision of the IO is implicated or constitutes one of the aspects of the case: IO-s have, indeed, " an amicus curiae function and responsibility in cases related to their activities".[207] Information provided by an IO pursuant to Article 34(2) and (3) of the Statute or contained in the report of an inquiry or in an expert opinion carried out under Article 50 of the Statute, may touch upon issues and questions of operational activities of an IO that may eventually bring to the fore aspects of the Organisation's non-contractual liability and/or responsibility.

(In) direct remedial opportunity by way of a (binding) Advisory Opinion

1. *When authorised to do so under Article 96 of the Charter, organs of an IO have the obligation to request from the International Court of Justice an Advisory Opinion concerning any situation in which a claim is made by a member state that the organ has exceeded its jurisdiction or that it has in any other way acted contrary to applicable legal rules.*[208]
2. *IO-s should be allowed to take the initiative to request the International Court of Justice to deliver an Advisory Opinion on any legal question arising in the context of differences and disputes between states and IO-s concerning the non-contractual liability of the IO or its legal responsibility.*
3. *IO-s and States should include such a clause in their international agreements to meet the Court's requirement that the consent of the parties is essential for the advisory procedure to be used as a substitute for contentious proceedings.*
4. *Any request for an Advisory Opinion may include the issue of whether the IO would be required to take corrective measures in terms of damages or otherwise; it may also relate to prospective acts, actions or omissions by the IO.*

A Member State wishing to raise the issue of the liability and/or legal responsibility of an IO, could try to convince a majority of the competent organ to request the ICJ to deliver an Advisory Opinion on the question. The Advisory Opinion may thus be used to obtain a remedy comparable to a declaratory judgment.[209] The practical remedial consequences that would flow from the Advisory Opinion would

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[207] C.W. Jenks, The Status of International Organisations in relation to the International Court of justice, Transactions Grotius Society, 1946, p. 38, para. 54.
[208] See the Resolution adopted by the ILA: ILA Report of the 47th Conference, held at Dubrovnik, 26 August-1 September 1956, London, 1957, p. 104.
[209] C. Gray, op. cit., p. 118.

be a matter for the IO to consider. Although the formal addressee of the Advisory Opinion may be the requesting organ, the real addressees will be the parties, the IO and public opinion.[210]
Differences arising between a state and IO over the interpretation and/or application of the General Convention on Privileges and immunities or of the Special Convention on the Privileges and Immunities of Specialised Agencies and which cannot be resolved in some other way, have to be settled by a binding Advisory Opinion of the ICJ under sections 30 or 32 respectively of the two Conventions. Non-contractual liability and the legal responsibility of an IO may be at the heart of such differences or disputes. The IO may consider it a matter of self-interest to have these accusations tested and rejected by the ICJ at the earliest convenience. Pursuant to Article VIII, Section 30 the 1946 General Convention the initiative to start the remedial action is withheld from the member State and the IO has no discretion in this regard. However, the remedial potential for the member State is real and could include the whole range of remedial consequences that would normally flow from a ruling of the Court on the non-contractual liability and legal responsibility of the IO. A comprehensive remedial regime for IO-s would greatly benefit if this modality would become more generalised beyond the area of privileges and immunities, unless of course access to the ICJ is widened to encompass a right of locus standi for IO-s.
"The question of the effect of the pending request on the interim action of states and organs will generally (not) pose a major difficulty"[211], given the remedial protection stemming from the invocation or motu proprio use of Article 103 of the Rules of the Court.

Direct remedial action by wider access to the Court: amending Article 34.

1. *Any international organisation that has been explicitly authorised by its constituent instrument to appear before the Court should be granted access through an amendment of Article 34 of the Statute of the Court.*
2. *Article 34 of the Statute should read: States and International Organisations, duly authorised by their constituent instrument, may be parties in cases before the Court.*
3. *When becoming parties to the Statute, IO-s should deposit with the Secretary-General of the United Nations a formal declaration that they will comply with the decisions of the Court in any case to which they are a party.*
4. *Relevant parts of Article 36 of the Statute should read:*
    1. *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*
    2. *The parties to the present Statute may at any time declare that they recognise ipso facto and without any special agreement, in relation to any other party accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
    3. *The declarations referred above may be unconditionally or on condition of reciprocity on the part of several or certain parties to the Statute or for a certain time. An International Organisation's constitutional differences or disputes may not be withheld from the Court's jurisdiction.*
    4. *Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties of the Statute and to the Registrar of the Court.*

The second and third level of accountability will continue to give rise to a wide range of matters over which the jurisdiction of the International Court of Justice could be extended. States and IO-s may find themselves in a situation where they both consider it necessary and desirable to refer their dispute to the Court. The dispute may relate to the interpretation of a treaty or any question of international law; it may also concern a tortious act or the existence of a fact which, if established, would constitute a breach of an international obligation by the IO.

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[210] M. Pomerance, The advisory role of the International Court of Justice and its "judicial" character: past and future prisms, in A. Muller, D. Raic and J. thuransky (Eds), The international Court of Justice: its future role after fifty years, The Hague, Boston and London, Martinus Nijhoff Publishers, 1997, p.300, citing Judge Winiarski's Dissenting Opinion in the Peace Treaties case.
[211] Ibidem, pp. 284-285.

The mechanism of (binding) Advisory Opinions is "firmly rooted in the procedural incapacity" of IO-s[212], and they remain "a device, the purpose of which is to alleviate, or compensate for, the lack of direct standing of international organisations before the Court".[213] The need for direct access to the Court for IO-s both as an applicant and as respondent has been recognised by learned societies and scholars since the 1950's. The first detailed proposals on amending Article 34 and originating from states were tabled before the Special Committee on the Charter of the United Nations and on Strengthening the Role of the Organisation in January 1997, but they were withdrawn in April 1999, as their adoption in the foreseeable future appeared most unlikely.

The reasons as to why IO-s do not have locus standi before the ICJ are more political than juridical,[214]and there is " little logic" in refusing access to IO-s.[215] The policy reasons in favour of this long-overdue wider access to the ICJ by amending Article 34 of the Statute flow directly from the need for a comprehensive accountability regime for IO-s and the fact that IO-s do share with states the same systemic interests in abiding by obligations of the international legal system.[216]

The principle of equality between the parties before the Court would be best achieved by the potential respondent IO-s becoming parties to the Statute, thereby depositing with the UN Secretary-General on the occasion of that accession a formal declaration that they will comply with the decisions of the Court in any case to which they are a party.

The consensual basis of the Court's jurisdiction should remain fully intact, even in the light of the remedial imperatives of the accountability regime for IO-s. Article 36(2) and (3) should be amended accordingly. There is no reason why IO-s should not enjoy the same freedom as states of limiting their acceptance of the Court's jurisdiction, provided, of course, that the object and purpose of the accountability regime are not being eroded or nullified. The remedial advantage for applicant states attached to the reciprocity aspect of the methods of acceptance of the Court's jurisdiction should be preserved.

There is no need at the present stage of the debate to review further procedural aspects and rights during a litigation between a state and an IO before the Court such as the right to request the indication of provisional measures of protection, and the request or right of intervention for other IO-s. In handling these procedural questions the Court may give particular weight to the fact that collective interests are being represented by the IO.

The widening of access to the Court by amending Article 34 of the Statute would , of course, not deprive IO-s of their right to obtain bona fide Advisory Opinions form the ICJ.[217]and neither would it rule out the possibility for the Court to reject abusive claims by a state or an IO.[218]

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[212] S. Rosenne, The Law and Practice of the International Court of Justice 1920-1996, The Hague, Boston and London, Martinus Nijhoff Publishers, 1997, p. 1055.

[213] D. Bowett, The Court's role in relation to international organisations, in V. Lowe and M. Fitzmaurice (Eds), op. cit., p. 189.

[214] P. Jessup, A modern law of nations: an introduction, New York, Macmillan, 1948, p. 25.

[215] D. Bowett, op. cit., p. 189.

[216] J. Charney, Is international law threatened by multiple international tribunals? , RCADI 271, 1998, p. 367.

[217] I. Seidl-Hohenveldern, Access of international organisations to the International Court of Justice, in A. Muller, D. Raic and J. Thuransky (Eds), op. cit., p.202.

[218] C. Gray, op. cit., p. 160, note 7.