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COMMITTEE ON ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS

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THIRD REPORT CONSOLIDATED, REVISED AND ENLARGED VERSION OF RECOMMENDED RULES AND PRACTICES ("RRP-S")

Introduction

The Committee on the Accountability of International Organisations was established in May 1996. The First Report of the Committee was presented to the 68th Conference of the ILA at Taipei, 1998 (at p. 584) and laid down the general themes that were deemed appropriate for study and consideration. The Second Report presented to the 69th Conference at London, 2000 (at p. 878) comprised a discussion of relevant general principles, to which was annexed a co-rapporteurs' draft of recommended rules and practices (RRP-s). By the term "recommended rules and practices" was meant a set of relevant rules, principles and guidelines 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 Committee recalls that this general rubric was specifically chosen so as not to prejudge, at least at this stage, whether any given proposal should be seen as a recommendation for sound internal practice or whether it lay at a legal level (and in that case whether it was *de lege lata* or *de lege ferenda*). In the present Report the Committee consolidates, revises, develops and expands on the London RRP-s on the same basis, and presents the attached set of recommended rules and practices which it consider to be appropriate, pragmatic and feasible. The Committee believes it to be crucial that the RRP-s should maintain a delicate balance between preserving the necessary autonomy in decision-making for the IO-s and treaty-based 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.

The Committee intends after the New Delhi Conference to pursue its intention to test the feasibility, practicality and acceptability of the proposals in the present Report by holding a series of informal seminars with International Organisations of various kinds.

At its meeting in The Hague in March 2001, the Committee set up a Drafting Committee which met twice, to review both the London draft RRP-s and a further draft produced by the co-rapporteurs. A revised and consolidated draft was then circulated to all Committee members in advance of a two-day

meeting of the full Committee in December. In the light of the lengthy discussion at that meeting, the draft was further revised by the Chairman and co-rapporteurs and recirculated to all Committee members for final comments before being submitted to Headquarters as the present Report.

The existence and continuous refinement of a consolidated body of substantive primary rules and practices governing both institutional and operational activities of IO-s is a vital prerequisite for a well functioning accountability regime.
It should be recalled that accountability cuts across every category of IO-s and treaty-organs and that specific model rules or practices for particular clusters of IO-s could complement these common standards. All references to an IO include reference to treaty-organs unless the contrary is stated. Primary and secondary RRP-s have to be read in conjunction with one another, as the imposition of RRP-s without concomitant provisions regarding mechanisms for dispute settlement could undermine the capacity to ensure compliance with these safeguards and obligations.
The starting point for the proposed RRP-s is that accountability is linked to the authority and power of an IO or treaty-based organ. Power entails accountability, that is the duty to account for its exercise. States may 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. The RRP-s are aimed at making accountability operational by *inter alia* fostering the effectiveness and appropriateness of the use of power and sanctioning the abuse or derailment of power.
Limitations on the institutional and operational authority and power of IO-s are derived from three sources: institutional and procedural limitations based upon the internal law of the IO; substantive limitations flowing from constitutional provisions and subsequent practice of each individual IO, from primary rules of domestic and international law and the general practice of IO-s; and mechanisms for supervision and monitoring (reporting, financial and administrative control, judicial review).
Codification of existing practice and the filling of gaps may occasionally result in certain draft model rules now still belonging to the first level of accountability to be upgraded in the future to the legal sphere.
No qualification of status under international law may be inferred from the use of the term “should”. Nor should the use of the term “as a general rule” be understood as leaving no room for flexibility in practice .
The RRP-s stem from the variety of yardsticks put forward in the Committee’s First Report. The variety of legal layers providing flexibility for IO-s when conducting their multilevel operations has to be matched by a comprehensive set of yardsticks leaving no loopholes at each individual legal level. Both parties involved - the IO-s and treaty-based organs concerned and the entities asserting control and supervision - although for different reasons, are looking for a certain degree of predictability and consistency in the way the multiple yardsticks are put into operation: any attempt to impose too rigid a system of accountability would not survive the complexities of international reality.

Part One: Recommended Rules and Practices on the first level of accountability.

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

The principle of good governance

The principle of good governance (or of good administration) as it is commonly understood, and which is of an evolving nature, 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, also in practical terms, 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) Normative decisions of an IO should as a general rule be adopted 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 particularly affected by decisions to be taken or contributing to operational activities.

The basic standard should be that of the maximum possible transparency, bearing in mind that transparency may in practice differ in format and modalities depending on the nature and stage of the decision-making process. 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, with regard to member states generally, or to a state or states specifically affected by the relevant decision being taken. Although transparency is hard to achieve through formal rules 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

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.
3) When taking or reviewing decisions on coercive measures, organs of an IO should enable Member States whose interests are specially affected to express their views.

From an accountability point of view, it is clear that rules on decision-making partly determine to what extent Member States can control the process by which IO-s employ the powers which have been conferred upon them to realise the functions for which they have been established.
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, one should also be aware of the practice of deliberations and even decision-making processes that may take place in non-plenary organs or even 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. There is a close connection between transparency of the decision-making process and its participatory character.
It should be noted that 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. Decisions to restrict access to documents should be reviewed at regular intervals by the competent organ.
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) Projects envisaged by IO-s should be notified in good time to interested parties and, in appropriate circumstances, to the public at large.
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, protection of the Organisation's financial interests, 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 of 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.
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.

Every IO has developed an information strategy not only to project a clear idea of what it is doing and why, but also to respond to criticism. When addressing the issue of access to information held by an IO one should be aware that internal flows of information are as important as what is directed to audiences outside. 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 consent should be given by the parties whose interests are protected by confidentiality requirements

4. Well-functioning international civil service.

1) *In order to maintain an efficient, competent and representative international civil service, each IO should maintain and enforce the principles of integrity, impartiality, loyalty to the aims and purposes of the IO, functional independence and discretion.*
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 a well-functioning and independent international civil service which has an indispensable role to play in the performance of their responsibilities. 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 confronted with the overriding concern that the IO should be accountable. In cases before domestic courts it will be for the executive Head of the IO to decide 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 it being well informed on all the documentation and practices of the IO.

5. 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 and 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 a way that demonstrates that each budgetary item has been duly authorised; b) operational expenditure should be individually 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) for both categories of regular budgetary and extra-budgetary resources the same presentation and budget methodology should be utilised.*
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 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 from whatever source, designed to ensure that such contributions are in accordance with its purposes and principles and do not distort its programmes. An IO which accepts voluntary contributions remains accountable to Member States both for having accepted these contributions and for the way they are spent.*

Since financing is at the heart of the functioning of any IO 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.
A mechanism of internal auditing should review the regularity of all transactions, the conformity of obligations and expenditures with the appropriations and the economic use of the resources of the IO.
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.
The use of the same presentation and methodology for both categories of regular and extra-budgetary resources does not affect their respective procedures for approval.

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 reliable yardsticks for subsequent evaluation.
4) IO-s should establish appropriate mechanisms , such as Functional Operational Lessons Units , to evaluate operational activities effectively and to facilitate 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, and at the same time form an integral part of the whole process of its implementation.
The problem of accountability of plenary organs situates itself at the cross-roads of internal and external accountability: the former is based upon internal mechanisms established with regard to the IO in question, the latter is constituted by the broad legal environment in which the IO is created and operates. Reporting should take place in accordance with a number of procedural and substantive requirements in order to enable efficient supervision and control. Accordingly the report should not only contain a genuine account of the action or inaction but also explanations for the course of conduct during the relevant period. It should be added that IO-s should not automatically use past operations as a model for future activities.

The principle of good faith.

Organs and agents of IO-s 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 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 a 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"[1].
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 of treatment in like cases, for example, may in certain situations give rise to legitimate expectations.

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.
3) Organs and agents of an IO, in whatever official capacity they act, must take care not to exceed the scope of their functions

Since IO-s are based on the rule of law, neither their Member States nor their organs can avoid a review as to whether the decisions and measures adopted are in conformity with the basic constituent instrument. 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. This accountability is owed to the Member States collectively and to individual Member States.
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."[2]

The principle of supervision and control.

1) *IO-s remain fully accountable for the actions and omissions of subsidiary organs.*
2) *Parent organs have a duty to exercise a degree of control and supervision over subsidiary organs which corresponds to the functional autonomy granted.*
3) *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.*
4) *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.*
5) *An organ of an IO that has delegated the exercise of any of its powers or functions remains fully accountable for the way in which the power or function is being exercised. An organ delegating any of its powers or functions must ensure that the content of the power or the function, the exercise of which is being delegated, is clearly defined; that there is periodic and comprehensive reporting by the delegatee to the delegating organ of the organisation; and that it retains the right to change at any time the way a power or function is being exercised by its delegatee.*
6) *The principles stated in paragraphs 2,3 & 4 do not apply to organs of a judicial or quasi-judicial character.*

The principle of supervision and control through periodic evaluation of the activities of an IO and of its constituent organs, may be considered to be in the process of developing into a general principle of contemporary international institutional law. The principle of good governance provides the necessary guidance as to the institutional and operational activities of an IO. Principal organs of an IO have an inherent power to establish subordinate organs to assist them in the exercise of their own express and implied powers under the constituent instrument. 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.
In the case of delegation of power to subsidiary organs the scope and frequency of the reporting obligation towards the parent organ should be commensurate with the degree of delegation, it being noted that delegation may take place either with regard to a subsidiary organ or to an external body. Relevant principles apply, mutatis mutandis, to the sub-contracting by an organ of an IO of the exercise of any its functions to an external entity.

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

1) *Organs of an IO are under an obligation to state reasons for their decisions.*
2) *With regard to decisions of a general nature, the obligation upon an organ of an IO to provide reasons will relate to the general character of such a decision only.*
3) *With regard to a decision of an individualised nature, the obligation of an organ of an IO to provide reasons includes clearly setting out the principal issues of law and fact upon which the decision is based .*
4) *Non-plenary organs should reflect in their reports information of a non-confidential nature forming the basis of their decisions.*

The principle that a proper reasoned basis should be provided for its decisions and course of action (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, 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 decisions 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. 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 as comprehensive and reliable manner as possible and that information gathering is done in an effective and timely manner.

The principle of procedural regularity.

1) *IO-s should take necessary steps at all levels: a) to prevent abuse of discretionary powers; b)to avoid errors of fact or of law; c) to 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 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.

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 way .

The principle of acting objectively and impartially, which can be drawn from the spirit of the constituent instrument of an IO, and from the express provision of a competence to adopt internal rules of procedure, is of a fundamental nature for the proper functioning of an IO with respect both to its institutional and its 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.

The principle of due diligence.

1)Member States as members of an organ of an IO, organs and agents of an IO have a fundamental obligation to ensure the lawfulness of their actions and decisions and to ensure financial and administrative efficiency.
2) All organs and agents of an IO, in whatever official capacity they act, should comport themselves so as to avoid claims against the IO.

The fundamental principle of due diligence is relevant to Member States as members of an organ of an IO, to the organs of an IO and to officials, staff members and experts. Some of the ensuing obligations mirror aspects of other principles listed.

The principle of promoting justice.

The principle of promoting justice, which covers both the internal and external functioning of the IO and of a treaty-organ, clearly underpins the need for IO-s and treaty-organs to provide remedies and 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. The complex question of the establishment of these mechanisms for redress is dealt with in Part Two of this Report.

Section Two : RRP-s 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 that 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 to 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, whereas the States Parties to the treaty should carry out a comprehensive review of the activities of the treaty-organs.*
4) *Treaty-based organs should continue to include in their reports the texts of both their motivated decisions on the admissibility and views or opinions on the merits of individual communications which have been addressed to them, as well as general comments and recommendations envisaged in 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.
They constitute an intermediate step between entrusting the IO itself with the supervision over the implementation of the treaty and the creation of a new IO. Treaty-organs are in fact incomplete IO-s lacking some of the structural features to be a complete IO on the one hand, and not having full and formal institutional links with an existing IO on the other hand. 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 are reporting to a plenary organ of an IO comprising non-Party States as well as to the meetings of State Parties needs clarification. This is especially so since the parent IO is not in a position to change the composition, mandate, power or procedures of the treaty-organ it is servicing.

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

1) Each IO should establish criteria and procedures for accrediting NGOs.
2) *IO-s should as a matter of practice establish at least a NGO-Liaison Service operating as an inter-agency unit in order to facilitate accredited 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 for members of plenary and non-plenary organs where representatives of particular accredited 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.
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. 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.
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; these will be addressed in the period after the New Delhi Conference, when major NGO-s will have an opportunity to suggest additional model rules.

Part Two: Draft Primary Rules and Recommended Practices on responsibility/liability of International Organisations

RRP-s on liability and responsibility may in part already be incorporated in the constituent instruments; they may be also be derived from such instruments and from the practice of IO-s. RRP-s may also, in part, be based on general principles of international law, treaty law and customary international law.
Although the set of RRP-s 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 national laws.

Section One : Applicable law

Given the wide range of levels IO-s are operating upon (pure international level, and upon multiple national and regional levels), there is no one 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 involved and invoked may also be of a soft-law nature, consisting of legally non-binding standards and codes of practices.
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, NGO-s 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 activities carried out by them.

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.

These are essentially governed by the basic constitutional texts of the IO, by rules of general international law to the extent that these are not contradicted by these constituent instruments (unless these rules of general international law are of a peremptory nature) and by additional agreements on privileges and immunities, headquarters and status of forces which have been concluded by the IO or on its behalf by one of its organs and which have been approved by the plenary organ of the IO. In addition, even 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 ultimate responsibility of IO-s towards their Member States is to act in a manner consistent with the founding treaty. Matters of constitutional standing and status, dissolution and appointment of the most senior officials are governed by general international law to the extent that this is not inconsistent with the founding constitutional documents of the IO.
The history of IO-s is replete with practice which tests the line between development of constituent instruments and breach of it..
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 as subjects of international law IO-s are under a legal duty to carry out their functions and to exercise the powers attributed to them in conformity with general international law. Article 1 (j) of the Vienna Convention on the Law of Treaties 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 organization.

The relations between an IO and its staff members

The relations between an IO and its staff members are governed by the relevant provisions of its constituent instruments, other rules of the Organisation, including staff regulations, any agreement binding upon the Organisation, general international law and the provisions of particular employment contracts.

These relations should, because of the combination of institutional and contractual links, not be considered as relations with third parties.
IO-s are able " to entrust missions to persons who do not have the status of an official of "the IO"[3] 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 [14]. Every IO should establish a set of Staff Regulations.

The relations between an IO and third parties

1) The relations between an IO and non-Member States and between an IO and other IO-s are governed by general international law and agreements binding upon the parties.
2) When engaging in operational activities of a humanitarian, development or peace-keeping nature, organs of an IO should provide appropriate channels of communication to the beneficiary State or non-state entity, and to groups and individuals whose interests are particularly affected by such an operation, to make their point of view known in a timely fashion[5].
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 way so as to protect not only their own interest but also that of third parties

These relations are normally governed by international law, while the constituent documents of the IO are relevant within the context of powers of the IO.
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.
Member States of an IO may also be considered "third parties" if their rights are breached outside the context of their membership links, as was demonstrated in the ONUC claims cases. Separate rules would apply to non-Members States and other IO-s and other third parties.

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.

In this situation both states and non-states are governed by the law applicable to the contract in question, and 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.

With regard to *non-contractual liability*

1) In circumstances where officials or agents of an IO acting in that capacity cause personal injury to state officials or damage to state property international law will govern the tortious liability of the IO.
2) In circumstances where officials or agents of an IO acting in that capacity 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 this situation, circumstances will determine the governing law
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 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."
Any regime for non-contractual liability should not reflect the lowest common denominator of the domestic laws of the Member States of a particular IO.

Section Two: Non-contractual liability for significant harm caused by lawful operational activities of IO-s

1) Organs of an IO should ensure that the measures taken to achieve the objectives pursued do not go beyond or fall short of what is necessary to that end.
2) IO-s and their organs should ensure that precautionary measures are taken to prevent the occurrence of any harm as a result of their actions and decisions. In particular, IO-s should take appropriate measures to prevent unnecessary significant harm 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 one or more other IO-s or States in preventing unnecessary significant harm, 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:
    a) unless an impact assessment has been carried out;
    b) unless the entities likely to be affected have been provided with timely notification of the risk and the assessment; and
    c) unless 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.
Lawful operational activities undertaken by IO-s could cause significant harm to third parties. Examples could include the following:-

non-consensual use and occupancy of premises during international peacekeeping operations;
FAO might, in the course of some technical assistance or research project, cause to be used a dangerous fertiliser, insecticide or herbicide that cause widespread damage;
FAO might introduce genetically modified crops whose genes unintentionally spread to other plants;
WHO might sponsor a dangerous medicine;
IAEA might cause a nuclear accident.

Is there room for liability of an IO for the significant harmful effects on third parties in their person, property or environment of an act or an operational activity which is considered to be valid under the applicable legal rules?
The Draft Preamble and Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the ILC's Drafting Committee on second reading, could provide useful guidance in this regard [6].
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 (e.g. in relation to the burdens imposed on Member States) or fall short (e.g. in connection with the mandate and further terms of reference of peacekeeping operations) of what is necessary to that end. The principle of proportionality is therefore relevant in this and other contexts in order to constitute a relevant framework for the exercise of power.

Section Three: Human Rights and Humanitarian Law applicable to particular categories of acts adopted by or activities undertaken by IO-s

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 acts adopted or operational activities undertaken. As part of the process of the humanisation of international law, human rights guarantees are increasingly becoming an expression of the common constitutional traditions of States and can become binding upon IO-s as general principles of law. The consistent practice of the UN General Assembly and of the Security Council points to the emergence of a customary rule to this effect.
If the Member states have transferred to an IO the power to impose economic coercive measures, their obligation to comply with peremptory norms of international law or fundamental humanitarian rules is not affected.
Those principles of International Humanitarian Law recognised as part of customary international law are binding on all States and IO-s and upon all armed forces present in situations of armed conflict. The following examples have been chosen on the basis of their particular relevance from the point of view of accountability.

RRP for temporary administration of territory

IO-s should comply with basic human rights obligations contained in international instruments. In consequence, they should incorporate such 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.

This RRP is laid down in order to provide the necessary basis and guidelines for the implementation of accountability that will follow in the remedial section of the RRP-s.

RRP-s for the imposition of economic coercive measures

When imposing economic coercive measures, IO-s should:

a) make a human rights impact assessment.
b) ensure that the scope and the modalities of those measures do not prejudice respect for the right to life, the right to an adequate standard of living, including access to basic foodstuffs and medical supplies, clothing and shelter.
c) [adopt accompanying measures to the benefit of particular vulnerable groups .]

RRP-s for peacekeeping and peace enforcement activities

1) IO-s should bear a coordinate responsibility with troop-contributing States for ensuring compliance with the principles of international humanitarian law in peacekeeping or other operations conducted under their control and authority.
2) The obligation to observe the customary principles of International Humanitarian Law should be inserted in the Regulations of the Force and in the Agreements concluded between IO-s and troop-contributing States. These Agreements should include provisions requiring troop contributing States to ensure that domestic criminal jurisdiction is exercised whenever necessary.

The legal 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 or 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.

Section Four: Monitoring and Verification activities by IO-s .

1) In conducting monitoring and verification activities, IO-s should take the necessary steps to prevent abuse and avoid undue harm to legitimate State interests.
2) IO-s are under a duty to take every precaution to protect the confidentiality of all information acquired or provided to them in confidence

The monitoring and verification of treaties in the field of disarmament and environment may be undertaken by IO-s specifically established for that purpose (OPCW, CTBTO, International Whaling Commission), or by review conferences to be considered as treaty organs of the UN (NPT), whereas control functions may be carried out by existing IO-s (IAEA with regard to NPT).
Treaty bodies/organs in the field of human rights, disarmament and the environment are a category *sui generis* as they occupy a "semi-autonomous" position: they are not organs of a particular IO but of the States Parties to the respective instruments. The question of a separate legal personality of these bodies has never arisen although some cases involving these bodies as a party exist.
They cannot be accountable for their financial management, for 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.
Relevant RRP-s were developed in respect of the IAEA's safeguards for the NPT and could also be drawn from constituent instruments such as the Chemical Weapons Convention and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of anti-Personnel mines and on their Destruction.

Section Five: The Rule of Law for IO-s and Member States

"International Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."[7]
Brownlie has convincingly 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". [8]
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.[9]
States cannot evade the governance of 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: that would entail unacceptable infringement of the rights of third parties.[10] Membership of an IO can thus not be considered to imply a corresponding reduction of state responsibility.
General contemporary trends such as the process of "humanisation" of international law penetrate both primary and secondary rules of the accountability regime of IO-s. Individual state responsibility for violations of human rights may be reconsidered in favour of accession by IO-s to such instruments thus leading to organisational responsibility for similar violations occurring within an Organisation's sphere of competence. [11]
In 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 supervision that IO-s act within the constraints of applicable law.[12]
Recent decisions of regional human rights bodies lend support to the view that a state's human rights obligations continue to apply.
A transfer of powers to an IO cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties nor cannot it exclude the responsibility of the States who transferred powers to an IO.[13]
The policy-making power vested in the plenary organ of an IO enables Member States to comply individually and collectively with these primary obligations. Responsibility extends to acts, actions 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 the continuing compliance with rules of international law applicable to that State, while there is a conventional and/or customary legal obligation for Member States to ensure through adequate supervision that IO-s act within the constraints of applicable international law and in such a way as not to cause unnecessary damage to third parties. Of course, Article 103 of the UN Charter establishes the primacy of obligations contained in the Charter itself, while Member States cannot be required to breach peremptory norms of international law such as fundamental humanitarian rules in the implementation of economic coercive measures imposed upon them by IO-s

Part Three: Draft Secondary Recommended Rules and Practices on Responsibility of International Organisations

Section One : 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.[14] In fact, it can be safely confirmed that the principle that IO-s may be held internationally responsible for their acts is nowadays part of international customary 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 the possession of, and is a concomitant to, their international legal personality, separate and distinct from that of their constituent Member States. The separate legal existence of the IO from its Member States with regard to the independent exercise of power is a central issue for the responsibility of the IO. The ability of organs of an IO to take decisions by majority vote creates or reflects 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" .[15]

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. Any acts beyond the limits of the explicit and implicit constitutional powers conferred upon them would constitute *ultra vires* acts.
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.[16]
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 : "must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" .[17]
IO-s are bound to comply with international customary law with certain adaptations related to their competences and resources, such as in cases of military forces operating under the command and control of an IO and involved in peacekeeping or peace enforcement. In addition they are internationally legally responsible to the extent that their constitution, operational policies, procedures and practices incorporate existing norms and rules of public international law.

Section Two : Dilemmas in establishing a responsibility regime for IO-s

The rapid expansion in the activities of IO-s constantly widens the range of substantive primary rules of international law becoming applicable to IO-s. This expansion of applicable primary rules has not been accompanied by a parallel development in legal theory concerning the international legal responsibility of IO-s. One of the fundamental problems 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", that is seeking a national law that provides the most favourable solution to the claimant .
The Draft Articles on State Responsibility adopted by the International Law Commission in 2001 contains in Article 57 the following saving clause: " These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organisation, or of any State for the conduct of an international organisation". [18]
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 it 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" .[19] It is widely accepted nowadays that the principles of state responsibility are applicable, with some variations, by analogy, to the responsibility of IO-s and the ILC has decided to include responsibility of IO-s into its long-term programme of work .[20]
The legal parameters and principles governing the activities of the main actors on the international scene, i.e. States, may be in need of adjustment, reformulation or re-orientation to avoid becoming counter-productive as a result of their unqualified transposition into the area of responsibility of IO-s. We should focus 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" .[21]
In the following pages an attempt is made to lay down a series of presumptive propositions which may act a general guide.

Section Three: General Rules and Recommended 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 legal rule.
3) The characterisation of an act of an IO as internationally wrongful is governed by international law.
4) An act of an IO does not constitute a breach of an international legal rule unless the Organisation is bound by the rule in question at the time the act occurs.

Types of internationally wrongful acts which might entail international legal responsibility of an IO towards its Member States as a body acting together rather than to individual Member States 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, breaches of fundamental procedural rules [22] and *détournement de pouvoir*. [23] 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 to its member States
Breaches may also be committed by the Executive head of the IO.[24]
Acts may be constitutional because they are 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 by reason of their non-conformity with other applicable rules of international law. IO-s incur international legal responsibility 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 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 incur responsibility if their use of force and their imposition of economic coercive measures are not in conformity with the general international humanitarian law principles of proportionality and of necessity.
IO-s incur responsibility if their conduct was based on a error of judgement which in, in analogous circumstances , an administrative or executive authority exercising ordinary care and diligence would not have committed .[25]
IO-s incur 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 of due process of law.[26]
IO-s incur responsibility if their activities carry the risk of infringing the rights of third parties, and the Organisation has failed to take all precautionary measures as required by law in order to avoid such injury.

De lege lata, officials and experts of an IO are 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 and is of no concern to third parties.
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.
Should there be, *de lege ferenda*, direct responsibility of both the IO and its officials towards third parties ?

In exceptional circumstances such as serious negligence or wilful misconduct there is a right for third parties suffering damage as direct result of an internationally wrongful act to demand punishment of the official who actually committed or initiated the wrongful act .
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 while confining itself to disciplining the official concerned? In other words is there room for *ex gratia* 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 to this question .

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

1) The conduct of organs of an IO or of officials or agents of an Organisation shall be considered an act of that Organisation under international law if the organs or official or agent were acting in their 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 one of its organs acting in that capacity,y regardless of the place where the conduct occurs.[27]

3) 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. [28]

4) An IO is responsible for internationally wrongful acts committed by an organ of a State placed at the disposal of the Organisation provided that the Organisation has the authority to exercise effective control (operational command and control) over the activities of that organ.

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).[29]

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.

There is no consensus on the modalities and degree of control required for attribution.

Under the 1986 ICJ judgement in the Nicaragua case specific instructions given were required in order to establish "effective control". [30] However, according to the ILC Special Rapporteur on state responsibility, for direction or control, which apart from effective control includes also political and financial aspects, general domination suffices; there is no requirement of detailed instructions or authorisation of a particular act. [31]

International legal responsibility of one subject of international law because of 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.[32]

According to the UN Secretary-General, international responsibility for the activities of the forces is vested in the State or States conducting a Chapter VII authorised operation under national command and control,[33] 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 exclusive control.[34]

In the view of the Appeal Chamber in the Tadic case overall control suffices for the purpose of attribution.[35]

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 .

The IO will be responsible for damage caused in breach of international obligations of International Humanitarian Law by forces under its effective control (operational command and control) and which is attributable to the Organisation .

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 for compensation [36] in case of insufficient guarantees that the principles of International Humanitarian Law would be respected .[37] 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 an integrated military force is currently before the International Court of Justice.[38]

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, where none of them has exercised *de facto* power in the decision over the choice of any targets was the subject of an application to the European Court of Human Rights.[39]

The question also arises whether there is room, *de lege ferenda*, for secondary responsibility of the IO in case of peace enforcement by States because of an initial authorisation granted by an IO.

In other areas 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).

Acts of NGOs on behalf of IO-s are dealt with elsewhere.

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

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 possible 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 to sub-contracting to delegation. The legal regulation of these processes is of central relevance to a comprehensive accountability regime: deplorable gaps may result from a lack of clarity in this area. It should be noted that there is a distinction between the delegation of powers to an entity and authorisation to a particular entity to carry out a specified objective. The latter is more limited than the former both in terms of the specification of the objectives to be achieved and the qualitative nature of the powers transferred to achieve the designated objective.[40]

Responsibility in case of delegation

1) An IO remains legally responsible for the exercise of its powers even if it has delegated the exercise of such powers to another entity.
2) An IO is no longer responsible when States have acted ultra vires the powers delegated to them. This is without prejudice to any responsibility which may attach to the IO as a result of its failure to exercise sufficient control or supervision.

A general competence of all IO-s to delegate powers is part of the corpus of the law of IO-s.[41] In the case that an IO purports to delegate powers that were originally conferred on the IO by States, the *delegatus non potest delegare* maxim becomes applicable to the extent that it imposes limitations on the process of delegation.
In the case of delegation a distinction in kind has to be made between delegation of powers where the power to do, or abstain from doing, something is provided and a delegation of functions where such discretion is absent. A number of specific points arise, for example whether there is room for an attempt by an IO to transfer its legal responsibility for any consequences flowing from the delegation of the exercise of powers in question to another entity. It is at this juncture that indirect internal accountability and direct external responsibility inevitably meet: the lawfulness of the actions of a subsidiary organ has to be assessed beyond the applicable constitutional limits (this question relates to the internal order of the IO) in the light of the rules of general international law. An IO cannot transfer its legal responsibility for the exercise of a power to a delegatee, as such responsibility cannot be considered to be part of or within the original powers, but is external to the actual exercise of such powers.
Secondly, there is the issue as to whether an IO can successfully argue that its delegation constitutes a circumstance precluding wrongfulness, when a delegatee commits an internationally wrongful act in the exercise of a delegated power. The legality of a delegation of powers is conditioned upon the delegating authority retaining the right to change the decisions of the delegatee.
The actual exercise of such right would normally constitute a circumstance precluding wrongfulness to the benefit of the delegating IO or organ, unless the damage has already occurred**.**
Thirdly, the issue arises as to whether and to what extent the acts of a sub-contractor may be attributable to the IO.
Fourthly, one needs to consider what the consequences are for the responsibility of the IO and the delegatee when the delegating organ has not complied with the conditions that are applicable to the process of delegation. [42]
Delegation of powers to an entity that is external to an IO raises separate issues of responsibility.
Fifthly, to what extent can member States be considered an external entity for these purposes, as they are the core of every IO?
Finally, one needs to consider the factors or criteria that should be used to ascertain which particular entity is responsible for what and in what circumstances.

Responsibility in case of authorisation

1) In the case of an authorisation granted by an IO to a State or a group of States volunteering to carry out particular tasks or operations, the primary responsibility for any illegal act committed in the course of the execution of such authorisation rests with those States.
2) In the case of an authorisation granted by an IO to a State or a group of States volunteering to carry out particular tasks or operations, the primary responsibility for any claims of default on contract obligations with third parties and which is the direct result of the execution of such authorisation rests with those States.
3) The provisions of paragraphs 1 and 2 above do not exclude any secondary responsibility of the authorising IO which may attach for any illegal acts committed in the course of the execution of such authorisation.
4) Conduct which at first and prima facie is not attributable to an IO shall nevertheless be considered an act of that Organisation under international law if and to the extent that the Organisation acknowledges and adopts the conduct in question as its own.

Although authorisation by an IO to States willing to carry out an action of peace enforcement should, in principle, be granted prior to the start of such operation, implicit authorisation post factum is not to be excluded as in UN Security Council Resolution 788 (1992), the first operative paragraph of which reads : "Commends ECOWAS for its efforts to restore peace, security and stability in Liberia"

Questions unanswered

What are the implications for the attribution of responsibility of the silence of the UN in the face of actions such as the imposition and implementation by the use of force of a no-fly zone? .[43]
What is the allocation of responsibility between UN and another IO said to be acting "under its own procedures" but as agent of the Security Council in the fulfilment of UN objectives? [44]
The Final Report to the Prosecutor of the ICTY by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia seemed to indicate that US and NATO had admitted joint responsibility for the case of the mistaken bombing of the Chinese Embassy in Belgrade.[45] The US had offered to pay compensation (and has indeed done so), but NATO could not legally be held responsible for the mistake despite its admission of responsibility.
China has treated the US, and not NATO as responsible for the bombing of its Embassy, and diplomatic activity regarding that event has been on a bilateral basis.[46]

[Section Six: Concurrent or residual liability of Member States for non-fulfilment by IO-s of their obligations toward third parties [47]

1) There is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an IO of which they are members.[48]
2) In particular circumstances, members of an IO may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights. [49]
3) The question whether States have concurrent or subsidiary liability for the fulfilment of the IO-s obligations due solely to their membership is a matter of international law to be determined by reference to the rules of the IO.[50]
4) The principle of good faith requires the acceptance of the existence of a customary legal duty for both IO-s and their Member States, even without such a request being made to provide parties with the necessary information as to the respective allocation of responsibility between the Organisation and its Member States at an appropriate time i.e. normally prior to or at the latest at the conclusion of the agreement concerned or at the start of the operational activity envisaged by the Organisation and its Member States .[51]
5) There is a corresponding right for the interested third party to demand such information
6) There is an obligation for IO-s and Member States to provide third parties with assurances and guarantees on the respective liability of IO-s and Member states
7) There is a corresponding right for the interested third party to demand such assurances and guarantees.
8) Constituent instruments of IO-s may contain a clause explicitly providing for the Organisation's responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions.

9) *Constituent instruments of IO-s may contain a clause explicitly providing for joint and several liability for acts of the Organisation or for the acts of other states acting within such an Organisation.*[52]
10) *In case of the absence of a clause in the Organisation's constituent instrument excluding or limiting financial liability, there is a presumption that Member state are not liable, unless there is evidence that Member states or the IO with their approval gave creditors reason to assume otherwise.* [53]
11) *In case of the absence of a clause in the Organisation's constituent instrument excluding or limiting financial liability, there is no presumption that Member States are liable,*[54]*, unless there is evidence that Member states or the IO with their approval gave creditors reason to assume otherwise.* [55]
12) *Member States of an IO may normally invoke a clause excluding or limiting their financial liability vis-à-vis third parties unless the latter prove in good faith that such a provision was not disclosed to them and could not otherwise have been known to them.*
13) *In case of an exclusion clause to the benefit of an IO and which was incorporated in an agreement between that IO and States, responsibility for acts and omissions of international personnel carrying out a mandate entrusted to them by the Organisation remains with the States concerned.*[56]
14) *If Member States are required by the constituent instrument to pay their assessed share of expenses allocated for intra vires purposes, the Member States have a legal obligation to pay their share of expenses if a failure to pay such extra sums would entail a failure by the IO towards a third party: liability is towards the IO, not towards third parties.*[57]

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.[58]
There is the general problem that Member States are already perceived as dominating IO-s to such an extent that these are unable to exercise maximum control over their environment. The considerable influence exercised by Member States constrains autonomous behaviour by IOs. Although in "practice *all* Member States together control all powers in every international organisation"[59] this supreme ultimate power is not reflected as such in an automatic supreme responsibility. Conversely, the predominant role played by Member States cannot lead to the conclusion that when the IO deals with third parties they *ipso facto* bind the Member States.[60]
Is the responsibility of Member States towards third parties for acts undertaken by the IO when the IO is unable or unwilling to meet its secondary obligations residual, i.e. does it arise only in the event of default by the IO?
Or is that responsibility concurrent, i.e. does it arise at the same time as the responsibility of the IO?
What is the legal effect on third parties of clause excluding or limiting liability of Member States?
Are the Member States responsible in case of the absence of a limitation or exclusion clause?
These questions seem still to be controversial.
The continuing role of Member States *qua* members of organs of an IO should be considered neutral as regards Member States' liability if the Organisation has "*une volonté distincte*" (a separate will).[61]
There is exclusive responsibility of an IO for non-compliance with a contract concluded by an Organisation with third parties as such acts cannot be regarded as undertaken by a delegate or an organ engaging the Member States, because of the total legal independence of the IO in relation to its Member States.[62]
There will be concurrent responsibility of a 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.[63]
There will be joint responsibility of both the IO and a State in the case of an authorisation given to the State by the Organisation to adopt unlawful measures with respect to third parties.
There will be separate responsibility of a 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 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 State for an act of implementation of a lawful measure of an IO if the State in the process of implementation violates a rule or rules of international law incumbent upon it.
Concurrent or secondary liability is not an issue in IO-s with an open-ended commitment to pay legitimate expenses to the IO itself without a ceiling being imposed.[64]
In contrast the issue does arise in IO-s where only a fixed capital sum is required under the constituent instrument. [65]

The RRP-s proposed at the head of this subsection are derived in part from the resolution of the Institut de Droit International.

Part Four: Remedies against IO-s *[it is planned to deal with this area after the New Delhi conference]*

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Karel Wellens,

January 2002

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[1] Reparation for Injuries Suffered, ICJ Reports. 1949, p. 180.
[2] D. Sarooshi, "The Legal Framework governing United Nations Subsidiary Organs", BYIL, 1996, p. 464.
[3] 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, para. 47
[4] Ibidem, paras 48 and 50
[5] European Court of Justice in Case 17/74 Transocean Marine Paint Association v. Commission { 1974 } ECR 1063 as referred to by Usher, op. cit., at p. 76 .
[6] UN Doc. A/CN.4/L. 601.
[7] Interpretation of the Agreement of 25 March 1950 between the WHO and Egypt, Advisory Opinion , I.C.J. Reports 1980, p.73 at p.90 .
[8] I. Brownlie, State Responsibility: the problem of delegation, in Völkerrecht zwischen normativem Anspruch und politischer Realität, Ginther K. et. Al. Eds., 1994, pp. 300-301 .
[9] 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 .
[10] ILC Commentary on the Draft Convention on the law of treaties between states and international Organisations and between international Organisations, YBILC ,1982, Vol. II, Part Two, p. 56
[11] " The convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be " secured " . Member States' responsibility therefore continues even after such a transfer…the suggestion that (a Member State) may not have had effective control over the state of affairs complained of cannot **a**ffect (that) position…" Matthews v. United Kingdom, Application No. 24833/94, Judgment of 18 February 1999, paras. 32 and 34 .
[12] Matthews v. United Kingdom, Application No. 24833/94, Judgment of 18 February 1999 .
[13] Application before the ECHR by DSR-Senator Lines GMBH of 30 March 2000 , para. 46 .
[14] 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 .
[15] R. Higgins, 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-I, 1995, p. 254 .
[16] Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962, p. 151, at p. 168 : mutatis mutandis .
[17] Reparations for Injuries Suffered in the Service of the United Nations, Advisory opinion of 11 April 1949, ICJ Reports 1949, p.174 at p. 179 and 180 : emphasis added .
[18] Report of the International Law Commission, 53rd Session,2001, A/56/10, Draft Articles adopted by the Commission.
[19] YB ILC 1975, Vol II (Part Two), at 89-90.
[20] Report of the Work of the ILC of its fifty-second session (2000), UN Doc. A/55/10, p. 290 .
[21] ILA, Report of the 68th Conference, Taipei, 1998, p.602 .
[22] Examples may occur during the decision-making process : Article 27, para.2 and 3 UN Charter: responsibility of the UN or of the Members of the Security Council, collective or individual may follow.

[23] 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* . An example may be found in the decisions by the UN General Assembly in the 1970's preventing South Africa's participation in the Assembly's activities.

[24] A waiving clause by the International Organisation " that it shall not be held liable for any breach of confidentiality committed by members of the Technical Secretariat " (OPCW) is presumably valid at least against any Member State and any national of such a State.

[25] 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 .

[26] 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.

[27] This rule will apply to traditional peacekeeping operations of the UN.

[28] 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 .

[29] 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.

[30] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United states of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 , at p. 62 .

[31] Report of the ILC on the Work of its Fiftieth Session (1998), UN Doc. A/53/10 and corr. 1, para.395 and para.422.

[32] Special Rapporteur, Second Report on State Responsibility, UN Doc. A/CN.4/Add. 1, para. 198 .

[33] 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, para. 17 .

[34] Ibidem, para. 17 .

[35] Prosecutor v. Dusko Tadic , Judgment , Case No. IT-94-1, Appeals Chamber, 15 July 1999, para. 117 .

[36] 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, para . 44 ; mutatis mutandis .

[37] Position of the ICRC : Memorandum, L'Application des Conventions de Genève par les Forces Armeés Mises à la Disposition des Nations Unies, Revue Internationale de la Croix-Rouge , 1961, p. 592 .

[38] See eg. Yugoslavia v Belgium, ICJ Reports, 1999, p.124 .

[39] ECHR Application 52207/99 Bankovic et al. V. Belgium and other countries . This application was, however, declared inadmissible on 19 December 2001, Press Release No. 970.

[40] See Application for Review of Judgment No. 158 of the UN Administrative Tribunal, ICJ Reports, 1973, p. 166, 174.

[41] Meroni v. High Authority, Case 9/56, (1958) ECR 133

[42] Delegation by express terms, adequate supervision, reporting, exercise of power of termination as indicated in the London RRPs .

[43] R. Higgins , op.cit., in Shihata , at p. 446 .

[44] Ibidem .

[45] ILM . 2000, p. 1271, para. 84

[46] R. Higgins , op.cit., in Shihata , at p. 447 .

[47] The Committee is undecided at this stage whether and to what extent this particular section needs to be examined, particularly in the light of the treatment of this area by the Institut.

[48] 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, Article 6, a.

[49] 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, Article 5 (b) .

[50] 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, Article 4 (b) and Article 5, (a) .

[51] 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, Article 9 , paragraph 1 .

[52] Canada Oral hearings, CR 99/27, 12 May 2000, in NATO case as cited by R. Higgins, op. cit., in Shihata, at p. 447.

[53] C. F. Amerasinghe, Principles of Institutional Law of International Organisations, 1996, at p. 284.

[54] 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, Article 6
(b) .

[55] C. F. Amerasinghe, op. cit., at p.284.

[56] 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.45 .

[57] R. Higgins, 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-I, 1995, p. 285 .

[58] R. Higgins , 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-I, 1995, p. 257 .

[59] H. Schermers and N. Blokker, International Institutional Law, 1995, para. 162

[60] 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.

[61] R. Higgins, 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-I, 1995, p. 261 . In case of non-plenary organs Member States do not sit as of right in such organs and these Member States do not operate as Member States in quite the same way as is the case in plenary organs.
Is there more room for residual responsibility of such Member States than in case of actions by plenary organs?

[62] 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.

[63] Contrary: exclusive attribution to the international organisation (UN) according to the ECJ in Dorsch Consult IngenieurgesellschaftmH v. Council of the European Union and commission of the European Communities , 15 June 2000, Case C-237/98 : damage suffered as a result of the implementation of binding economic coercive measures imposed by the International Organisation (UN) and not to the International Organisation (EC **)** and/or Member States having enacted the necessary legislative acts of implementation . In Dorsch the Court of First Instance and the ECJ excluded Community liability for sanctions mandated by the UN Security Council **.**

[64] R. Higgins, 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-I, 1995, p.266

[65] Ibidem .