



Declassified*
AS/Jur (2013) 17
10 May 2013
ajdoc17 2013

Committee on Legal Affairs and Human Rights

Accountability of international institutions for human rights violations¹

Introductory memorandum

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1. Introduction

1.1 *Procedure to date*

On 9 March 2012 the Bureau of the Parliamentary Assembly decided to refer to the Committee on Legal Affairs and Human Rights, for report, the motion for a recommendation "Accountability of international institutions for human rights violations" (document 12842). At its meeting on 24 April 2012, the Committee appointed me as rapporteur.

1.2 *The issues at stake*

2. International organisations play an important role in the 21st century. Their steady rise in the decades since the Second World War reflects a trend towards extending and strengthening international cooperation in all domains of modern society. Indeed, the Council of Europe itself is a notable example of this development. At the same time one has to face the consequences of the fact that international organisations have become powerful actors under international law. As their activities expand, their work ever more impacts on the lives of individuals, increasing the likelihood they may infringe human rights. Their diverse functions reach into particularly human rights sensitive areas, such as the maintenance of peace and security, the administration of territories, the fight against terrorism, and international policy-making and standard-setting. This opens a wide range of potential human rights violations.

3. The involvement of international organisations in peace-keeping, peace-enforcement or military operations has given rise to a number of applications by individuals, endeavouring to hold these organisations to account for alleged human rights violations. So far, however, most of these attempts have remained unsuccessful. Also the administration of territories, being a typical governmental function, may affect human rights of the local population in a number of ways. Hence, the UN administration of Cambodia, East Timor or parts of former Yugoslavia, just like the recent increase of activity of the EU in this field, have continuously triggered human rights challenges. This holds equally true for the activities of the UN Security Council. About two decades ago, it seemed virtually impossible that its resolutions were capable of directly affecting the rights of individuals. However, the so-called "smart sanctions", that target particular individuals and the "blacklisting" by the UN Security Council Committee concerning Al-Qaida and associated individuals and entities (Sanctions Committee) in the fight against international terrorism, immediately affect the rights of

* Document declassifié par le Comité le 27 mai 2013.

¹ With the Committee's agreement, I propose that the title of the report be slightly changed so as to read "Accountability of international organisations for human rights violations." I also wish to take this opportunity to put on record my sincere appreciation to Ms Melanie Fink, Lecturer in Public International Law, Department of European, International and Comparative Law, University of Vienna, Austria, for the invaluable assistance she has provided me with in the preparation of this introductory memorandum.

individuals. Also the World Bank and the International Monetary Fund have been accused of not paying due respect to the rights of individuals in the implementation of their projects.

4. This increase of powers of international organisations, in particular in human rights sensitive areas, raises the question whether effective mechanisms exist to hold them to account for their actions. As the International Law Association (ILA) held, “[p]ower entails accountability, that is the duty to account for its exercise”.² In contrast to the remarkable development regarding the number, role and expansion of powers of international organisations, the international legal system governing their activities is still markedly underdeveloped. When entrusting international organisations with far-reaching competences, provision needs to be made for adequate instruments of control.

5. The demands for accountability of international organisations are further fuelled by the fear that states may use international organisations as a tool to escape accountability. Thus, member states might be tempted to “abuse” the international legal personality of international organisations by entrusting them with delicate functions and decision-making competences and “hide” behind their separate international legal personality when it comes to bearing responsibility.

6. At the same time, international organisations need to be able to perform the functions that have been entrusted to them. This requires a degree of autonomy from their member states, and the legitimate quest for accountability should not be used to undermine the position of international organisations by subjecting them to undue pressures. A delicate balance between autonomy and accountability therefore needs to be struck. This involves ensuring proper instruments of control when power is granted. Only if adequate accountability mechanisms are put in place, international organisations will benefit from the confidence required to grant them the degree of autonomy that allows them to fulfil their functions effectively and to contribute to the development of the international legal order. Hence, in order to secure the important place of international organisations in the international legal order, it is crucial to ensure they account for the exercise of their powers.

1.3 *The concept of accountability*

7. The notion of accountability has gained wide attraction in recent decades and has often served as an umbrella term encompassing concepts such as good governance, responsiveness, transparency, democracy or the rule of law. The essential basis of accountability is to scrutinise the performance of power wielders by seeking information, explanation and justification. For the purposes of this introductory memorandum, accountability is understood as an *ex post* mechanism characterised by, first, an obligation of the actor to submit information and explain and justify conduct and, second, a concomitant right of investigation and scrutiny. Accountability can be invoked in a number of fora, dealing *inter alia* with the legal, political or administrative dimension of accountability.

8. Responsibility and liability are forms of the legal dimension of accountability and are often associated with the core sense of accountability. Whereas responsibility under international law is incurred by subjects of international law for wrongful acts committed by them, liability is often associated with civil liability under domestic law or – in the context of international law – refers to incurrance of liability regardless of the lawfulness of the conduct. Accountability is considered as going beyond responsibility and liability and in general also includes models that are characterised by less formal and more open mechanisms.

9. In the context of this introductory memorandum, the benchmark of accountability is international human rights protection, with a focus on human rights in the European context. Given its role as a “constitutional instrument of European public order” in the field of human rights, particular attention will be given to the European Convention on Human Rights (ECHR), focusing on those issues that are of particular relevance to the member states of the Council of Europe. Accountability of international organisations has traditionally been addressed as a matter of accountability towards the member states of the international organisation. This introductory memorandum, in contrast, pays particular attention to the possibilities of the individual applicant to invoke accountability of international organisations. Given the legal nature of the benchmark in the present memorandum, the focus will primarily be on adjudicative means of implementation of accountability.

² ILA, *Report of the Seventy-first Conference, Berlin 2004* (London, International Law Association 2004), ‘Accountability of International Organisations: Final Report’.

2. Preconditions for holding international organisations to account

2.1. *No accountability without personality: international organisations as subjects of international law*

10. The capacity to have rights and obligations under international law is critical to the possibility of being held to account. The question of international legal personality of international organisations therefore forms a necessary prerequisite to a discussion of accountability of international organisations.

11. As opposed to legal personality under domestic legal systems, legal personality under international law is hardly ever explicitly granted to international organisations. Until early twentieth century, states were commonly considered the only subjects of international law. The attribution of international legal personality to international organisations is therefore a relatively new phenomenon, but has been firmly established since the *Reparation for Injuries* Advisory Opinion of the International Court of Justice (ICJ). Arguing that it was necessary to fulfil its functions, the ICJ ruled that the UN possessed international legal personality. This reasoning has since then been extended to other international organisations. Indicators of international legal personality may be the capacity to conclude treaties and the privileges and immunities granted under domestic law.³

12. Hence, it is now well established that international organisations possess international legal personality separate from their member states. This implies that, depending on the scope of the powers that are attributed to it, an international organisation can pursue its rights in its own name at the international plane. Most importantly for the present introductory memorandum, however, it also means that an international organisation can be held accountable under international law for non-fulfilment of its obligations.

2.2. *International organisations as bearers of human rights obligations*

13. Holding an international organisation to account for disregarding human rights not only presupposes them having the capacity to possess rights and bear obligations under international law, but also requires them to be subject to international human rights obligations. In general, international organisations are not bound by human rights as a matter of treaty law, as they are, with few exceptions, not parties to human rights treaties.⁴ Hence, the question is whether there are other sources of human rights obligations of international organisations.

14. As subjects of international law, international organisations are “bound by any obligations upon them under general rules of international law”.⁵ Hence, the obligation to respect human rights could rest on general international law, being either custom or general principles. A strong argument can be made for human rights as general principles of international law, as they have been implemented in a large number of legal systems all over the world. Furthermore, it can also be argued that human rights norms can also form part of customary international law.

15. No matter the source of human rights obligations of international organisations, it is important to note that the most fundamental human rights form part of peremptory norms of international law. As *jus cogens*, these norms, such as the prohibition of torture and the prohibition of slavery, belong to the core of international law and must be respected by all subjects of international law under all circumstances.

16. Hence, it can safely be argued that international organisations are at least bound by some human rights obligations. However, the uncertainty as to the precise source of obligation renders it particularly difficult to define the exact scope of the obligations incumbent on the international organisation. This is unwelcome from the perspective of legal certainty – both for the organisations themselves and for third parties. This raises the question whether it would be desirable that international organisations became parties to human rights treaties in their own right.

3. Rules on accountability of international organisations

3.1. *The International Law Association*

17. The increased likelihood that international organisations might directly impact on individuals' lives has raised the awareness for the need to strengthen accountability mechanisms available to the individuals

³ ICJ, *Reparations for Injuries suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 179.

⁴ The EU is an exception in this regard; it is party to the UN Convention on the Rights of People with Disabilities.

⁵ ICJ, *Interpretation of the Agreement of 25 March 1991 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, paragraph 37.

themselves. From the legal perspective, the focus was often on the notions of responsibility and liability. However, against the background of the remaining uncertainties regarding legally binding obligations of international organisations, this approach was questioned. The first attempt at a more comprehensive approach, not exclusively addressing legal forms of accountability, was the work of the “Committee on Accountability of International Organisations” (Committee) established by the ILA in May 1996. The Committee understands accountability as a “multifaceted phenomenon” and distinguishes legal, political, administrative and financial forms. It suggests that “a combination of the four forms provides the best chances of achieving the necessary degree of accountability”.⁶

18. In 2004, the Committee presented its final report including a number of “Recommended Rules and Practices”, which international organisations should implement to promote accountability. The Committee *inter alia* recommends the application of the principles of good governance, good faith, constitutionality, objectivity and due diligence, against which the performance of international organisations should be evaluated. Furthermore, in the Committee’s view, international organisations should observe human rights obligations and applicable rules of international humanitarian law when engaging in particularly human rights sensitive fields. It points out that the dilemma in establishing a responsibility regime for international organisations is to keep the balance between preserving the autonomy of international organisations and guaranteeing that they will not be able to avoid accountability. As regards remedies against conduct of international organisations, the Committee recognises that, as a general principle of law and as a basic international human rights standard, the right to a remedy also applies in relation to international organisations.⁷

3.2. *The International Law Commission*

19. In 2011, the International Law Commission (ILC) adopted the Articles on the Responsibility of International Organizations (“ARIO”), which were taken note of by the UN General Assembly in December 2011.⁸ The ARIO are to a large extent based on the Articles on State Responsibility (ASR), adopted by the ILC in 2001.⁹ A major challenge for the ILC in “codifying” the law of international responsibility of international organisations was the general lack of extensive and consistent practice. Hence, at least part of the work of the ILC on responsibility of international organisations may constitute progressive development rather than codification of existing international law. However, given the high authority of the texts the ILC produces, it might well contribute to the formation of custom.

20. The ILC starts from the premise that “[e]very internationally wrongful act of an international organization entails the international responsibility of that organization.”¹⁰ An internationally wrongful act consists of two elements, being attribution of the conduct in question and breach of an international obligation. Hence, where an international organisation breaches a human rights obligation by its “own” conduct, it is responsible for it under international law. The most basic rule regarding attribution is contained in Article 6, providing that conduct of organs or agents of international organisations is attributable to that organisation. Particularly important for the purposes of allocating responsibility between international organisations and its member states, is Article 7. It stipulates that organs of a State or organs or agents of an international organisation placed at the disposal of another international organisation are attributable to the latter organisation, if it exercises effective control over that conduct (see in more detail Section 4.4).

21. In addition to responsibility for own conduct, the ARIO provide for a further possibility of incurring responsibility. Under the heading “Responsibility of an international organization in connection with the act of a State or another international organization”, the ILC groups a number of situations that have in common that the internationally wrongful act is committed by “somebody else”, being another state or international organisation. The international organisation incurs responsibility for its involvement therein, which can *inter alia* consist of aid or assistance, direction and control or coercion of a state or another international organisation.¹¹ This has been referred to as “indirect” responsibility.

22. However, the question arose whether the specific relationship between international organisations and their member states would require additional attention. In particular the power of some international organisations to either authorise or even oblige member states to a certain conduct that might be in violation

⁶ ILA, *Report of the Seventy-first Conference* (n 2) 164-234, 168-170.

⁷ *Ibid.* 207.

⁸ ILC, ‘Draft Articles on the Responsibility of International Organizations’, 2011 Yearbook of the International Law Commission, vol II, Part Two (“ARIO”); UN General Assembly Resolution 66/100.

⁹ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’, 2001 Yearbook of the International Law Commission, vol II, Part Two (“ASR”).

¹⁰ ARIO (n 8) Art 3.

¹¹ *Ibid.* Chapter IV.

of human rights has challenged the regime of international responsibility. Article 17 ARIO was included in order to deal with this situation. It stipulates that an international organisation can be held internationally responsible if it circumvents one of its international obligations by either adopting a decision binding member states or authorising member states to commit an act that would be internationally wrongful if committed by the international organisation itself.

23. This potentially remedies the lacuna in the regime of accountability of international organisations in cases where the implementing act in breach of the international obligations is attributable to the member state which is, however, not in a position to lawfully remedy the wrong, as its conduct is determined by an act of an international organisation. This situation for example arose in *Nada v Switzerland* before the European Court of Human Rights (ECtHR).¹² In *Nada*, Switzerland was held responsible for implementation measures of obligations arising from its UN membership, even though it was clear that its conduct was determined by a binding Security Council resolution. The pertinent resolution did not leave states enough room for manoeuvre to remedy the deficiencies in human rights protection without being in violation of their obligations arising from the UN Charter. Article 17 provides a basis for holding the international organisation responsible, which is in a position to abolish the “original” act.

24. The adoption of the ARIO has triggered diverse reactions. They may enhance accountability of international organisations by shedding some light on the set of secondary rules applicable once an international organisation has breached a norm of international law. However, the different roles and tasks and often unique structures of international organisations, have triggered the concern, that a “one size fits it all” set of secondary rules is not feasible. The ARIO are criticised in that they fail to address the real impediments that individuals face when wanting to hold international organisations to account. As will be shown below, it is in particular the lack of mechanisms for individuals to invoke the responsibility of international organisation which provides one of the most serious obstacles.

4. Obstacles to the implementation of accountability

25. Even if we agree that, as subjects of international law, international organisations are bound by human rights obligations and that every infringement thereof, as an internationally wrongful act, entails the international responsibility of that organisation, it is important that mechanisms are developed, through which individuals can implement accountability. Such mechanisms may be established at a national, international or internal level. At all levels, however, the individual victim of human rights violations committed by international organisations faces serious obstacles to bringing a claim.

4.1. Immunity of international organisations before national courts

26. The accountability mechanisms most familiar and best accessible to individuals for remedying human rights violations are often national judicial systems. However, as a rule international organisations are accorded jurisdictional immunity before national courts. Immunity is granted to international organisations in order to enable them to fulfil their functions independently by preventing their member states – and the host state in the first place – from exerting undue influence. It hence shields international organisations from unwarranted pressure from the member states. As a mere procedural obstacle, however, immunity does not exempt international organisations from respecting human rights norms. Human rights obligations continue to apply; it is their enforcement which is impeded by granting immunity.

27. Whereas state immunity has over time been increasingly limited, a comparable development has not taken place as regards international organisations. Even where immunity of international organisations is granted only as far as it is required for the effective fulfilment of their functions (“functional immunity”), or is subject to other restrictions, this has often been interpreted widely, granting *de facto* absolute immunity. In *Mothers of Srebrenica v. The Netherlands & the UN*, the Mothers of Srebrenica Association invoked the responsibility of the Netherlands and the UN for their failure to prevent the Srebrenica genocide in 1995. In 2012, the Dutch Supreme Court ruled that the Dutch courts could not hear the claim as far as it was directed against the UN, as the UN “enjoys the most far-reaching immunity from jurisdiction, in the sense that the UN cannot be summoned to appear before any domestic court in the countries that are party to the Convention”.¹³

28. It is important to note that state immunity, apart from being more restricted than immunity of international organisations, does not place states entirely out of the reach of any judicial review, as they are

¹² ECtHR, 12 September 2012, *Nada v Switzerland*, Application no. 10593/08.

¹³ Supreme Court of the Netherlands, *Mothers of Srebrenica v Netherlands and United Nations*, Judgment of 13 April 2012, International Law in Domestic Courts (ILDC), OUP, Oxford Law Reports, 1760 (NL 2012), paragraph 4.2.

not exempted from the jurisdiction of their domestic judicial system. This also reflects their obligation under Article 13 ECHR, which requires the provision of effective remedies to everyone whose Convention rights are violated. In contrast, with few exceptions, international organisations do usually not have similarly strong internal judicial systems (see Section 4.3).

29. In response to the inherent tension between the independent functioning of international organisations and legal protection against their activity, instruments granting immunity frequently contain an obligation of the international organisation to provide for internal accountability mechanisms. However, internal accountability mechanisms are often not set up at all or only for a very limited range of situations, such as staff disputes. Hence, the granting of immunity to international organisations is regularly not accompanied by alternative means of dispute settlement. Considering the rationale for immunity, it is open to doubt whether such a far-reaching impediment to legal protection is strictly required.

30. Compliance of this immunity with the right to a fair trial under Article 6 ECHR has been addressed by the European Court of Human Rights in the cases of *Beer and Regan* and *Waite and Kennedy*. The Court held that a material factor in addressing whether the interference with Article 6 was proportionate “is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”¹⁴ Some national courts have followed a similar line of argument, making their exercise of judicial review dependent on the availability of other adequate accountability mechanisms.¹⁵ As it induces international organisations to establish effective internal dispute settlement procedures, this may prove beneficial to accountability of international organisations. Would it be desirable that states in general follow this approach of the ECtHR?

31. As the ECtHR has held in *Al-Adsani*¹⁶ and confirmed in *Kalogeropoulou*,¹⁷ states are not even under an obligation to disregard immunity, if alleged breaches of peremptory, non-derogable norms are at stake. According to the ICJ in *Jurisdictional Immunities*,¹⁸ the rules of immunity are procedural in character and merely determine whether or not a state may exercise jurisdiction in a given case but do not bear upon the question whether or not the relevant conduct was lawful. Based on this reasoning, the ICJ held that, because there is no norm conflict, an alleged breach of *ius cogens* norms does not affect the applicability of the law on immunity. Even though these cases concerned state immunity, immunity of international organisations is equally procedural in character, hence similar considerations apply. This raises the question whether granting immunity even in cases of serious human rights violations is too far-reaching.¹⁹

32. In any case, international organisations can always waive their immunity, if they do not consider immunity strictly required to ensure the independent fulfilment of their functions. In this vein, the ILA Committee suggested that immunity should be waived, “if such a waiver is required by the proper administration of justice” and that “situations where such waiver would prejudice the interest of the IO” should be interpreted restrictively.²⁰ This triggers the question how international organisations can be induced to make use of the possibility of a waiver more frequently.

4.2. International organisations before international judicial bodies

33. States, when acceding to treaties, have often accepted corresponding dispute settlement mechanisms of a judicial or quasi-judicial nature. Hence, individuals, even though traditionally not having the capacity to bring claims on the international plane, have been granted mechanisms to hold states to account. One of the areas in which this has taken place is the protection of human rights. As has been noted above, international organisations are usually not signatories to human rights treaties, hence also not subjected to the corresponding dispute settlement mechanisms. This makes it virtually impossible for individuals to hold an international organisation directly to account on the international plane.

¹⁴ ECtHR, 18 February 1999, *Beer and Regan v Germany*, Application no. 28934/95, paragraph 58; ECtHR, 18 February 1999, *Waite and Kennedy v Germany*, Application no. 26083/94, paragraph 95; in the cases at hand, the Court did not find a violation.

¹⁵ See for example Court of Cassation of Belgium, *Western European Union v Siedler*, Appeal judgment, Cass No S 04 0129 F, ILDC 1625 (BE 2009), 21 December 2009.

¹⁶ ECtHR, 21 November 2001, *Al-Adsani v The United Kingdom*, Application no. 35763/97,

¹⁷ ECtHR, 12 December 2002, *Kalogeropoulou and others v Greece and Germany*, Application no. 59021/00.

¹⁸ ICJ, *Jurisdictional Immunities of the State*, Judgment of 3 February 2012 (not yet reported).

¹⁹ See in particular Council of Europe, PACE, ‘The state of human rights in Europe: the need to eradicate impunity’, Report by the Committee on Legal Affairs and Human Rights, Rapporteur Ms Herta Däubler-Gmelin, <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12695&Language=EN>.

²⁰ ILA, *Report of the Seventy-first Conference* (n 2) 228.

34. This has been illustrated in *Behrami and Saramati* before the ECtHR, concerning events that arose out of the international civil and security presences in Kosovo.²¹ *Behrami and Behrami* concerned a group of children encountering undetonated NATO bombs, of which one exploded, killing a boy and seriously injuring another. In *Saramati*, the arrest of Ruzhdi Saramati under the authority of the international presences was at issue. Attributing the conduct in question to the UN, the ECtHR declined its jurisdiction *ratione personae*. Had the conduct been attributed to the involved member states, the application could have been dealt with by the ECtHR. This shows the lacuna in human rights protection that individuals face, once conduct allegedly in violation of human rights is attributed to an international organisation not subject to international accountability mechanisms.

35. So far the only decision to fully subject an international organisation to a human rights treaty including the corresponding accountability mechanism is laid down in Article 6 of the Lisbon Treaty, which provides that the EU “shall accede” to the ECHR. The accession of the EU to the ECHR will fundamentally change the relationship between the two legal systems and subject the EU to the jurisdiction of the ECtHR, opening the possibility for individual applicants to challenge EU action directly before the ECtHR. As all EU member states have ratified the ECHR, and remain so after the EU accedes to the ECHR, this creates the unique situation that the EU and its member states are parties to the Convention and can simultaneously be held to account before the ECtHR.

36. Even though not as far-reaching, but nevertheless remarkable, is the development to voluntarily choose to submit to existing international monitoring mechanisms, without formally becoming a party to the respective human rights treaty. This has been the case for UNMIK and NATO operating in Kosovo. In addition to having unilaterally accepted to be bound by the provisions of a number of human rights treaties, they also submitted to monitoring procedures. The first such act was the conclusion of an agreement between UNMIK and the Council of Europe in relation to the Framework Convention for the Protection of National Minorities in 2004. This requires UNMIK to submit reports to the Committee of Ministers, which may address recommendations to UNMIK. Similar agreements are in place regarding visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to places where persons are deprived of their liberty in Kosovo by UNMIK and NATO.²²

37. If international organisations themselves became parties to human rights treaties this would therefore not only define the exact scope of the obligations incumbent on them (see Section 2.2), but it would also submit them to the respective accountability mechanisms. This raises the question to what extent it is desirable and feasible to provide for the necessary arrangements to allow international organisations to become parties to international human rights treaties.

38. In order to enhance human rights protection at the international level more generally, the establishment of a “World Court for Human Rights” has been proposed. This World Court would be open for ratification by non-state actors, including international organisation and would hence provide a means for individuals to directly hold international organisations to account on the international plane, without subjecting international organisations to existing international accountability mechanisms.

4.3. *Strengths and weaknesses of internal accountability mechanisms*

39. Against the background of the limited possibilities to hold international organisations to account before either national or international judicial bodies, internal mechanisms could provide a means to remedy the accountability shortcomings. Unsurprisingly, those mechanisms that have been voluntarily established by international organisations are as diverse as the international organisations themselves. Hence, this introductory memorandum can only provide a cursory account of some of the mechanisms established. This topic, however, merits further attention.

40. The most common internal mechanisms that have been established are those dealing with disputes arising from employment at an international organisation. Not even covering the whole range of disputes of a private law character, these mechanisms do not provide redress for public activities of international organisations. For activities conceived as particularly human rights sensitive, some international organisations have established human rights accountability mechanisms outside the narrow employment

²¹ ECtHR, 2 May 2007, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Application nos. 71412/01 and 78166/01. Any reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with the United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

²² See UNMIK Regulation No. 1999/1 of 25 July 1999 on the Authority of the Interim Administration in Kosovo, <http://www.unmikonline.org/regulations/1999/reg01-99.htm>.

context. The following examples shall serve to illustrate the attempts that international organisations have made in this regard.

41. The procedure before the World Bank Inspection Panel allows individuals access, if they allege they have been adversely affected by a project. However, the Inspection Panel procedure ensures compliance with the operational policies of the World Bank, therefore taking human rights into account only as far as they are integrated into the operational policies. This has been argued to constitute an important limitation to the effectiveness of the mechanism in terms of human rights protection.

42. Being a classic governmental function, the administration of territories by international organisations directly impacts on the lives of individuals and therefore needs to be accompanied by respective legal safeguards. For the first time in history, human rights complaints mechanisms have been set up in relation to the administration of Kosovo through the United Nations Mission in Kosovo (UNMIK) and the EU rule of law mission in Kosovo (EULEX). In 2000 an Ombudsperson Institution was created, and in 2006 a Human Rights Advisory Panel was established in order to provide for an implementation mechanism regarding UNMIK's human rights responsibilities.²³ A Human Rights Review Panel was established with similar tasks with regard to EULEX. Even though this constitutes a considerable improvement in terms of human rights protection, their recommendations are not legally binding and UNMIK and EULEX are not obliged to act upon them.

43. Also the "blacklisting" of the UN Security Council Committee concerning Al-Qaida and associated individuals and entities has given rise to considerable human rights challenges. Upon information primarily provided by UN Security Council members, the Sanctions Committee draws up a list of individuals allegedly associated with the Taliban or Al-Qaida. All UN member states are under a duty to impose travel bans, an assets freeze and an arms embargo on the listed persons. The "listing procedure" has strongly been criticised as not complying with human rights requirements, *inter alia* for the lack of a mechanism to scrutinise the information on which the listing is based on with a possibility of the listed individual to be heard, as well as the lack of access of listed individuals to an independent and impartial body in order to have the measures adopted reviewed.²⁴

44. The regime has been subject to a number of improvements from a human rights perspective, most notably the establishment of the Office of the Ombudsperson with UN SC Res 1904 (2009) to receive requests from individuals and entities seeking to be "delisted". However, this internal mechanism has been criticised for the limited powers of the Ombudsperson. The major shortcomings were *inter alia* the lack of decision-making power of the Ombudsperson to overturn the listing decision of the Committee, the lack of the possibility in the mandate to make recommendations to the Committee and the fact that access to information by the Ombudsperson was dependent on the willingness of states to disclose information.²⁵ Some of the shortcomings have been remedied with UN SC Res 1989 (2011), providing the Ombudsperson with the power to make recommendations regarding delisting, which automatically take effect if the Committee does not decide otherwise. Notwithstanding these improvements, the question remains whether they suffice to ensure human rights protection of listed individuals.²⁶

45. Even though being a first step towards more accountability, many internal mechanisms do not result in binding decisions and are devoid of enforcement powers. By far the strongest internal human rights accountability mechanism has been established within the EU. Fundamental rights constitute general

²³ UNMIK Regulation No. 2000/38 of 30 June 2000 on the Establishment of the Ombudsperson Institution in Kosovo, <http://www.unmikonline.org/regulations/2000/reg38-00.htm>; UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel, http://www.unmikonline.org/hrap/Documents%20HRAP/Regulations%20Eng/RE2006_12.pdf. See also, in this connection, Venice Commission Opinion on Human Rights in Kosovo: possible establishment of review mechanism, CDL-AD (2004) 033, adopted at the Commission's 60th plenary session, Venice, 8-9 October 2004, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)033-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)033-e)

²⁴ See in particular Council of Europe, PACE, 'United Nations Security Council and European Union blacklists', Report by the Committee on Legal Affairs and Human Rights, Rapporteur Dick Marty, <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=11749&Language=EN>; with regard to ECHR conformity see Council of Europe, 'The European Convention on Human rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions', Report prepared by Professor Iain Cameron, 06/02/2006, http://www.coe.int/t/dlapiil/cahdi/Texts_&Documents/Docs%202006/I.%20Cameron%20Report%202006.pdf.

²⁵ See for example Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin), A/65/258, 6 August 2010, http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.65.258_en_UNcompliance.pdf, in particular paragraph 56.

²⁶ See in particular the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Ben Emmerson), A/67/396, 26 September 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12733&LangID=E>.

principles of the EU legal order and the Charter of Fundamental Rights of the European Union is legally binding having “the same legal value as the Treaties”.²⁷ Even though there is no specific “fundamental rights complaint” procedure, the two principal direct remedies available to the individual against the Union are the action for annulment (which entails a review of the legality of EU measures) and the action for damages. Remarkably, the EU is the only international organisation to have created courts with competence over issues of non-contractual liability. The Court of Justice of the European Union (CJEU) can test human rights conformity of the activity of the institutions and bodies of the Union and of EU member states when they act within the scope of Union law.

46. As this shows, internal mechanisms may indeed even provide “equivalent protection” as the ECtHR itself noted in *Bosphorus*.²⁸ The positive effect of internal mechanisms is that the activity of international organisations can be subjected to review whilst fully safeguarding their autonomy. In addition, internal mechanisms can be more tailor-made to the needs of international organisations, thereby paying due regard to the diversity of international organisations. It would be desirable to collect good practice and encourage international organisations to adopt those. In this regard, it is important that internal mechanisms are strong enough to provide effective protection for individual victims of human rights violations.

4.4. Allocating accountability between multiple actors

47. The work of international organisations is often characterised by a close interaction with its member states. With increasing interaction and cooperation, however, also the likelihood of injury resulting from cooperative action multiplies. In many cases, like in peace-keeping, peace-enforcement, other military operations or the administration of territories, international organisations rely on the personnel of member states to carry out certain tasks. In order to hold the responsible actor to account, it is necessary to determine who has committed an alleged human rights violation, hence, who the relevant conduct is attributable to.

48. The pertinent provision of the ARIIO establishes that “[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”²⁹ This provision has given rise to considerable disagreement as to what is meant by “effective control”. In the view of the ILC, the notion relates to factual control over the impugned conduct, not institutional ties between the individual actor and the state or international organisation.³⁰

49. In *Behrami*,³¹ the ECtHR attributed conduct with regard to the international presences in Kosovo to the UN rather than the involved member states and therefore held the application inadmissible *ratione personae*. Many commentators on *Behrami* took issue with the ECtHR’s application of the rules on attribution of conduct, in particular in relation to the conduct of KFOR. Especially its decision to link the notion of delegation to the assessment of attribution of conduct and the application of the “ultimate authority and control”, rather than “effective control” test was not considered in line with the pertinent provision in the ARIIO. In its later judgement in *Al-Jedda*, the ECtHR, explicitly referring to the threshold of effective control, as laid down in current Article 7 ARIIO, attributed conduct with regard to the international presence in Iraq to the member states instead of the UN.³² This conclusion was welcomed by most commentators not only because it was argued that the result corresponded better to reality, but also for the Court’s consideration of the effective control test.

50. This illustrates that whether at the international, national or internal level, a body entrusted with the protection of individuals against human rights violations committed in the framework of the activities of international organisations will regularly be confronted with the challenge of allocating accountability between the organisation and its member states. The provisions dealing with allocation of accountability are far from clear, which not only challenges their consistent application by the courts at the different levels, but also makes it difficult for individuals to know who they are supposed to bring a claim against.

²⁷ See Article 6 of the Treaty on European Union, OJ C 326/13 (‘codifying’ the case-law of the CJEU).

²⁸ ECtHR, 30 June 2005, *Bosphorus v Ireland*, Application no. 45036/98.

²⁹ ARIIO (note 8) Art 7.

³⁰ Ibid. with commentaries, Art 7, Comm 4.

³¹ ECtHR, *Behrami* (note 21).

³² ECtHR, 7 July 2011, *Al-Jedda v The United Kingdom*, Application no. 27021/08, paragraph 84.

5. Accountability of member states in connection with acts of international organisations

51. Providing international organisations separate international legal personality from their member states, and transferring powers to them, without subjecting them to effective accountability mechanisms to remedy potential human rights infringements, creates an obvious accountability gap. It thus might undermine the basic human rights standard that a remedy should be available to individual victims of human rights violations. The need to close this accountability gap has triggered discussions on whether states can be held to account for actions of international organisations they are members of. Generally, holding member states responsible for acts of international organisations by virtue of their membership alone would be in obvious contradiction to their separate legal personalities. Hence, the fundamental challenge is to provide an effective remedy to individuals, whilst guaranteeing the independent legal personality of international organisations.

52. In general, states do not incur responsibility for human rights violations committed by an international organisation, simply because they are member of that organisation. Having said this, there may, however, be circumstances, under which it seems justified to hold the member states – either instead of or in addition to the international organisation – to account. This may either be due to the degree of involvement of the member state or because – as outlined in Section 4 – individuals often lack remedies directly against international organisations. In particular where member states exercise considerable influence over the conduct of an international organisation involving a breach of human rights, they may be prevented from “hiding” behind the international organisation.

53. The need to hold states responsible for their involvement in the conduct of an international organisation is reflected in Part Five of the ARIO. Articles 58 to 60 set out that aid and assistance to or direction and control or coercion of an international organisation trigger “indirect” responsibility. Even though clearly member states will often have more ways to aid and assist or direct and control conduct of international organisations, Articles 58 to 60 do not address the specific situation of the relationship between international organisations and their member states.

54. In contrast, in Articles 61 and 62 ARIO the state that incurs responsibility is necessarily a member of the international organisation. Article 61 most explicitly addresses the particular relationship between international organisations and their member states and the risk that member states may use international organisations to avoid responsibility. According to Article 61, a member state of an international organisation incurs responsibility if it circumvents its obligations by causing the international organisation to commit an act that, if committed by the State, would have constituted a breach of the obligation.³³ This idea has been developed by the ECtHR, in particular in cases involving the transfer of powers to the EU and the member states’ obligations under the ECHR. As the ECtHR held in *Bosphorus*, “[a]bsolving Contracting States completely from their Convention responsibility in areas covered by such a transfer would be incompatible with the purpose and object of the Convention”.³⁴ States have to ensure that the international organisation they transfer powers to provides equivalent protection in human rights matters. If they fail to do so because the relevant mechanism is manifestly insufficient, they bear responsibility under the ECHR.³⁵

55. The underlying rationale of this line of case law is to prevent states from undermining the effectiveness of the Convention guarantees by transferring competences to international organisations. This very idea is also inherent in Article 61, which similarly aims at barring the possibility for states of circumventing their international obligations by taking advantage of the separate international legal personality of international organisations. However, the *Bosphorus* line of case law envisages the presumption of human rights compatibility as an exception to the rule that a Contracting Party remains responsible “regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.”³⁶ In contrast, according to Article 61 ARIO responsibility of member states is framed as an exception, only applying when a state circumvents its international obligations.

56. One may ask whether these limited circumstances under which member states can incur responsibility for their conduct in connection with acts of international organisations are sufficient. The ILC notes that “[t]he view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous articles, in which a State would be responsible for the internationally

³³ ARIO (note 8) Art 61.

³⁴ ECtHR, *Bosphorus* (note 28) paragraph 154; see also ECtHR, 18 February 1999, *Matthews v The United Kingdom*, Application no. 24833/94, paragraph 32.

³⁵ ECtHR, *Bosphorus* (note 28), paragraphs 155-156; ECtHR, 12 May 2009, *Gasparini v Italy and Belgium*, Application no. 10750/03.

³⁶ ECtHR, *Bosphorus* (note 28), paragraph 153.

wrongful act of the organization.”³⁷ In order to ensure individuals are provided with a remedy against human rights infringements by international organisations, it may be necessary to pierce the veil of international organisations and hold member states to account for the acts of the international organisation as long as no other remedies are accessible. After all, it is the member states themselves that would be in the position to equip the international organisation with effective accountability mechanisms when they create it.

57. In the absence of judicial means of individuals to challenge acts of international organisations, in recent cases, courts have subjected them to indirect review. In *Kadi and Al Barakaat*, the CJEU annulled the EC Regulation implementing the UN Security Council sanctions regime against Mr. Kadi and the Al Barakaat Foundation for infringement of fundamental rights. It therefore opened an avenue for individuals, to indirectly challenge the “terror lists” of the UNSC Sanctions Committee by targeting the implementing measures, even though the human rights violation was not committed within an area of discretion of the implementing body.³⁸ A similar route was taken by the ECtHR in *Nada*, where the Court held Switzerland responsible for a violation of Convention rights when it implemented the UN Security Council sanctions regime against Mr. Nada. Even though the ECtHR held that Switzerland “should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant’s individual situation”, it was quite clear that by taking Nada off the list Switzerland would necessarily have violated its international obligations.³⁹ With the *Nada* case, this approach has gained much wider geographical relevance.

58. This leaves member states in a dilemma. They either disregard their obligations arising from their membership of the international organisation or they fail to comply with their human rights obligations. Indirect review may, however, have repercussions on the possibilities of direct review. On the one hand, being faced with this dilemma could lead member states to advocate for the establishment of effective mechanisms to review conduct of international organisations. On the other hand, if member states continuously disregard their obligations arising from membership of an international organisation because of non-conformity with human rights, this may seriously impair the effectiveness of the organisation. Hence, international organisations may want to make sure that they do not require member states to infringe human rights through implementing measures. Such an effect of indirect review on direct accountability mechanisms was illustrated with the establishment of the Ombudsperson with regard to the Security Council’s “terror lists”, which took place immediately after the CJEU’s judgment in *Kadi*.

6. Preliminary conclusions

59. International Organisations have become important actors within the international legal order and have substantially contributed to the development of international human rights protection. However, this introductory memorandum has shown that despite the increasing impact their work may have on the lives of individuals, there exist a number of lacunae in the protection of individuals against human rights infringements by international organisations. By virtue of the separate legal personalities of international organisations, their member states are in general not responsible for their acts. This opens an accountability gap, where the conferral of legal personality to international organisations is not accompanied by effective accountability mechanisms. In addition, it creates the risk that member states may use international organisations as a “shield” when it comes to bearing responsibility. The most serious challenges are the lack of fora where the individual could implement accountability of international organisations as well as procedural obstacles, such as immunity before national courts.

60. Domestic legal orders usually provide for relatively strong human rights accountability mechanisms. Subjecting international organisations to the jurisdiction of national courts may, however, endanger their autonomy. Hence, international organisations are granted *de facto* absolute jurisdictional immunity before national courts. In order to mitigate the adverse effects of this far-reaching immunity on the possibility for individual victims to hold international organisations to account for human rights violations, a number of options can be envisaged.

³⁷ ARIO (n 8) with commentaries, Art 62, Comm 6.

³⁸ CJEU, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-6351; as Mr. Kadi was relisted by the Council in a new Regulation, he brought a new challenge, which is now under review by the CJEU, see Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Note, however, that Mr. Kadi has in the meantime been delisted by the Sanctions Committee).

³⁹ ECtHR, *Nada* (note 12) paragraph 196.

61. International organisations could be prompted to make use of the possibility to waive immunity, where it is not strictly required to ensure the independent fulfilment of their functions.⁴⁰ Furthermore, in line with the relevant case law of the ECtHR, immunity could be made dependent on the establishment of alternative accountability mechanisms. This would induce international organisations to work more actively towards putting into effect internal accountability mechanisms. Another possibility is to disregard immunity, when alleged breaches of peremptory norms are at stake.

62. The international legal order has an important function in protecting individuals from human rights abuses. However, to date, international organisations mostly not being parties to human rights treaties, they are also not subjected to the accompanying accountability mechanisms. A remarkable exception is the envisaged accession of the EU to the ECHR. A significant advantage of international, as opposed to internal mechanisms, is the prospect of greater independence and objectivity of external accountability mechanisms. It may therefore be desirable that arrangements be made for international organisations to have to submit to international human rights accountability mechanisms.

63. A number of positive developments have taken place at the level of internal accountability mechanisms. Their strength clearly lies in the fact that they do not prejudice the autonomy of international organisations, whilst at the same time they grant human rights protection to individuals. In addition, they may provide for mechanisms that are tailor-made to the specific needs of different international organisations. It would be desirable to collect good practice, in particular practice that is strong enough to provide effective protection for individual victims of human rights violations, and encourage international organisations to adopt those.

64. As long as no other remedies are granted, it could be argued that member states should be held to account not only for their involvement in the acts of international organisations, but more generally directly for acts of international organisations. However, this risks denying the independent personality of international organisations altogether. Indirect review of acts of international organisations by subjecting implementing measures of member states to judicial scrutiny, on the other hand, may prove beneficial to accountability, as it may trigger the establishment of internal accountability mechanisms. However, there may not always be an implementing act of the member states, ruling out the possibility of indirect review. In those situations, the question arises whether, for the lack of alternative remedies, states should bear accountability for acts of international organisations they are members of.

65. Of interest to note is the approach of the Swiss government, which informed the UN Security Council of a motion of the Swiss Parliament that foresees the non-application of sanctions against individuals listed by the Sanctions Committee, where specified minimum guarantees have not been granted.⁴¹ Similarly to indirect review, it may prompt international organisations to make sure they do not require member states to infringe human rights through implementing measures, as member states would otherwise disregard their obligations arising from membership, which could seriously impair the effectiveness of the organisation.

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66. In the light of the above considerations, it might be appropriate for the Council of Europe to respond to the UN General Assembly's invitation, made in Resolution 66/100 of 9 December 2011:

"3. *Takes note* of the articles on the responsibility of international organizations, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments and international organisations without prejudice to the question of their future adoption or other appropriate action..."⁴²

⁴⁰ The budgetary implications of so doing would need to be borne in mind, as a lack of a specific budgetary item might prevent an international organisation from being able to pay compensation.

⁴¹ Letter of the Permanent Representative of Switzerland to the United Nations to the Chair of the Security Council Committee established pursuant to Resolution 1267 (1999), dated 22 March 2010, available in PACE, AS/Jur/Inf (2010) 05, of 7 December 2010, http://www.assembly.coe.int/CommitteeDocs/2010/07122010_blacklists.pdf.

⁴² Emphasis added: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/100. See also paragraphs 19 to 24, above.