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Accountability of international organisations for human rights violations

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

International organisations such as the United Nations, the World Bank and the European Union play an increasingly influential role on the global stage. Such organisations employ staff, administer territories, impose sanctions and engage in military operations, directly impacting the lives of individuals. Yet the mechanisms available to hold them accountable for alleged violations of their human rights obligations are relatively underdeveloped, and in some cases non-existent. Indeed, the few human rights accountability mechanisms that monitor the administration of territories, such as Kosovo*[2] by the United Nations and the European Union, are non-binding, while those reviewing the imposition of targeted sanctions imposed by the United Nations Security Council can be overruled. Also, international organisations generally enjoy absolute immunity from suit in national courts, unless a waiver is provided.

A number of options have been proposed to increase the accountability of international organisations. These include holding States responsible for the actions of international organisations that they assist, contribute to, or of which they are members; limiting immunity where it is not essential for the organisation's functioning or in cases of severe human rights violations; increasing the availability of international legally binding fora in which the acts of international organisations can be challenged; improving their internal accountability mechanisms and subjecting them to independent judicial scrutiny, by ombudspersons or similar bodies, and encouraging international organisations to better scrutinise their own programmes prior to implementation in order to pre-emptively identify and address possible human rights concerns.

1. Reference to committee: Doc. 12842, Reference 3837 of 9 March 2012.
2. *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.

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A. Draft resolution[3]

1. The Parliamentary Assembly recognises that international organisations are subject to human rights obligations under international law and highlights the importance of ensuring that they refrain from violating the human rights of individuals and of the need to hold them accountable for any such violations.

2. Human rights standards must be ensured in activities undertaken by international organisations, as recalled by Assembly Resolution 1675 (2009) "The state of human rights in Europe: the need to eradicate impunity", including human rights abuses by international non-State actors. The Assembly also recalls, in this connection, its Resolution 1597 (2008) on United Nations Security Council and European Union blacklists, concerning the human rights consequences of the United Nations Security Council and European Union targeted terrorism sanctions procedures.

3. The Assembly also notes the danger that States may be shielded from the duty to comply with their own human rights obligations, including under the European Convention on Human Rights (ETS No. 5), when they take actions as part of, or under the direction of, an international organisation.

4. The Assembly welcomes recent judgments of the European Court of Human Rights, including the judgment in *Nada v. Switzerland*, that have held States accountable for measures taken in pursuance of decisions taken by international organisations. It also welcomes the work of the International Law Association and International Law Commission in formulating legal rules and standards of accountability in this area, creating the foundation for further specific action by States and international organisations.

5. The Assembly commends the creation of a number of ad hoc human rights mechanisms to monitor the compliance of international organisations with their human rights obligations and to allow individuals to seek redress for human rights violations, including the World Bank Inspection Panel, the use of human rights advisory panels to monitor the activities of the United Nations Interim Administration Mission in Kosovo (UNMIK) and the European Union Rule of Law Mission in Kosovo (EULEX), and the appointment of an ombudsperson to oversee the United Nations Security Council's anti-terrorism sanctions. However, it also recognises that these mechanisms are not always available or sufficiently effective, and that concerns exist regarding the implementation of their findings.

6. The Assembly views with concern the absolute legal immunity that international organisations are often entitled to under international or national laws, as the existence of non-functional immunity interferes with the duty of States and organisations to scrutinise alleged human rights violations.

7. The Assembly therefore invites all Council of Europe member States, and international organisations of which they are a part, to:

7.1. ensure that international organisations are subject, as appropriate, to binding mechanisms to monitor their compliance with human rights norms and, where such internal accountability mechanisms exist, to ensure that their decisions are enforced;

7.2. encourage international organisations, where possible, to become Parties to human rights treaties;

7.3. formulate clear guidelines regarding the waiver of immunity by international organisations or otherwise limiting the breadth of the immunity they enjoy before national courts, in order to ensure that the necessary functional immunity does not shield them from scrutiny regarding, in particular, their adherence to non-derogable human rights standards;

7.4. ensure that member States remain accountable for breaches of international human rights norms by international organisations when the latter cannot be held directly accountable, including by holding States responsible for their role in the international organisation's decision-making procedures and by assisting them in implementing their decisions and policies.

3. Draft resolution adopted unanimously by the committee on 6 November 2013.

B. Draft recommendation[4]

1. The Parliamentary Assembly refers to its Resolution ... (2014) on accountability of international organisations for human rights violations, which stresses the importance of appropriate mechanisms to ensure the accountability of such organisations for any human rights violations that may occur as a consequence of their activities.

2. The Assembly invites the Committee of Ministers to:

2.1. encourage international organisations of which member States are a part, including the United Nations and its specialised agencies, as well as the European Union, to examine the quality and effectiveness of mechanisms aimed at ensuring compliance with their human rights obligations and to further develop legal standards in this area;

2.2. recommend that member States examine the status of international organisations within their national legal systems and ensure that arrangements be envisaged for waiver of immunity when this is required;

2.3. engage in a reflection on the accountability issues raised by the phenomenon of international organisations taking on responsibilities traditionally held by States with respect to which the European Court of Human Rights does not have jurisdiction, with a view to closing the resulting lack of accountability.

3. The Assembly also considers it appropriate that the Council of Europe, as an international organisation specialising in human rights matters, reflect on how to respond to the call in United Nations General Assembly Resolution 66/100 (2011) relating to the International Law Commission's text on the responsibility of international organisations, and ensure follow-up thereto within the remit of its competence both with respect to its own accountability as well as that of other international organisations.

4. Draft recommendation adopted unanimously by the committee on 6 November 2013.

C. Explanatory memorandum by Mr Beneyto, rapporteur

1. Introduction

1.1. Procedure

1. On 9 March 2012, the motion for a recommendation "Accountability of international institutions for human rights violations" (Doc. 12842) was referred to the Committee on Legal Affairs and Human Rights for report. At its meeting on 24 April 2012, the committee appointed me as rapporteur.

2. On 27 May 2013, the Committee on Legal Affairs and Human Rights held a hearing on the issue at its meeting in Izmir, Turkey, on the basis of an introductory memorandum. The experts invited to the hearing, possessing specialist knowledge in the field of the human rights accountability of international organisations and of the relevant case law of the European Court of Human Rights ("the Court", "the Strasbourg Court"), were: Mr Rick Lawson, Professor of Human Rights Law and Dean of the Faculty of Law, University of Leiden; Ms Nina Vajić, Professor of International Law, University of Zagreb and former judge and Section President, European Court of Human Rights; and Ms Marjorie Beulay from Université Paris Ouest Nanterre La Défense and Director of Studies of the Strasbourg-based International Institute of Human Rights.

1.2. The issues at stake

3. 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 co-operation 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 has ever more impact 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.

4. The involvement of international organisations in peacekeeping, 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. The recent creation, by United Nations Security Council Resolution 2098 (2013), of the first ever "offensive" United Nations-led combat force, which is taking part in operations in the Democratic Republic of the Congo, signals a further expansion of the military role played by certain international organisations. So far, however, most attempts to increase the accountability of international organisations in this area 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 European Union 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 could be 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 individuals. INTERPOL too has been criticised for allegedly placing victims of politically motivated persecution in their databases without sufficient scrutiny. 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, and a number of organisations, including the World Bank and the United Nations, have been subject to criticism regarding their mechanisms for dealing with staff-related disputes.

5. 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".[5] In contrast to the remarkable development regarding the number, role and expansion of powers of

5. ILA, Report of the Seventy-first Conference, Berlin, 2004 (London, International Law Association, 2004), "Accountability of International Organisations: Final Report".

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.

6. 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. Additionally, ensuring that international organisations respect human rights increases public trust in the organisation, facilitating its effectiveness. Allegations of violations of human rights have the potential to reduce the credibility of international organisations, as was the case following the United Nation's infamous "Oil for Food" scandal relating to the Iraq sanctions regime.[6]

7. 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 will international organisations 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

8. The notion of accountability 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 report, 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.

9. 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 incurrence 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.

10. In the context of this report, 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 (ETS No. 5, "the Convention"), 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 report, 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, the focus will primarily be on adjudicative means of implementation of accountability.

2. Preconditions for holding international organisations to account

2.1. International organisations as subjects of international law

11. 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 their accountability.

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6. *New York Times*, "U.N. Chief Admits Oil-for-Food Missteps", 8 September 2005.

12. As opposed to legal personality under domestic legal systems, legal personality under international law is hardly ever explicitly granted to international organisations. Until the early 20th 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 United Nations 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.[7]

13. 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 on the international plane. Most importantly for the present report, 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

14. 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.[8] Hence, the question is whether there are other sources of human rights obligations of international organisations.

15. As subjects of international law, international organisations are "bound by any obligations upon them under general rules of international law".[9] 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. In some cases, international organisations are subject to existing human rights agreements. For example, the advisory panels created to monitor the actions of the United Nations and European Union in Kosovo, which have set up and operate the United Nations Interim Administration Mission in Kosovo (UNMIK) and the European Union Rule of Law Mission in Kosovo (EULEX) respectively, are authorised to apply most major global human rights treaties, and in particular the European Convention on Human Rights, although their findings are non-binding.[10]

16. 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.

17. 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.

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7. ICJ, Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 179.
8. The European Union is an exception in this regard; it is Party to the United Nations Convention on the Rights of People with Disabilities.
9. ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, paragraph 37.
10. UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel; Human Rights Review Panel, 2012 Annual Report, 39.

3. Rules on accountability of international organisations

3.1. 3.1. The International Law Association

18. 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 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" established by the ILA in May 1996. That 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".[11]

19. 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.[12]

3.2. The International Law Commission

20. In 2011, the International Law Commission (ILC) adopted the Articles on the Responsibility of International Organizations ("ARIO"), which were taken note of by the United Nations General Assembly in December 2011.[13] The ARIO are to a large extent based on the Articles on State Responsibility (ASR), adopted by the ILC in 2001.[14] 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.

21. The ILC starts from the premise that "[e]very internationally wrongful act of an international organization entails the international responsibility of that organization".[15] 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 Section 4.4 for more detail).

22. 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

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11. ILA, Report of the Seventy-first Conference, (*supra* footnote 5), 164-234, 168-170.
12. Ibid., 207.
13. ILC, "Draft Articles on the Responsibility of International Organizations", 2011 Yearbook of the International Law Commission, Vol II, Part Two ("ARIO"); United Nations General Assembly Resolution 66/100.
14. ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", 2001 Yearbook of the International Law Commission, Vol II, Part Two ("ASR").
15. ARIO, supra note 13, Article 3.

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.[16] This has been referred to as "indirect" responsibility.

23. 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 of human rights has challenged the regime of international responsibility. Article 17 of the 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.

24. 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 arose, for example, in *Nada v. Switzerland* before the European Court of Human Rights. In *Nada*, Switzerland was held responsible for implementation measures of obligations arising from its United Nations membership, even though it was clear that its conduct was determined by a binding Security Council resolution. The pertinent resolution left States a certain room for manoeuvre to remedy the deficiencies in human rights protection without being in violation of their obligations arising from the United Nations Charter. Article 17 provides a basis for holding the international organisation responsible, which is in a position to abolish the "original" act.

25. 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

26. 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

27. 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.

28. 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 and the UN*, the Mothers of Srebrenica Association invoked the responsibility of the Netherlands and the United Nations 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

16. *Ibid*., Chapter IV.

directed against the United Nations, as the United Nations "enjoys the most far-reaching immunity from jurisdiction, in the sense that it cannot be summoned to appear before any domestic court in the countries that are party to the Convention".[17] The Strasbourg Court agreed with this finding, declaring the application brought against the Netherlands to be inadmissible (as manifestly ill-founded), stating that "the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations".[18]

29. 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 not exempted from the jurisdiction of their domestic judicial system. This also reflects their obligation under Article 13 of the European Convention on Human Rights, 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). Furthermore, action by States is in many cases subject to significant political accountability mechanisms, including parliamentary review and more generally the democratic process. Relative to decisions and acts taken by States themselves, the activities of international organisations receive less media and political attention, reducing the level of informal, extra-juridical accountability. International organisations often act outside the public eye and, unless their activities are sufficiently controversial, a high degree of scrutiny is unlikely to exist. Owing to this lack of safeguards, there is an argument to be made that the same degree of immunity is not justified in the case of international organisations as when dealing with the accountability of States.

30. Additionally, the legal immunity provided to international organisations in domestic courts is, in most cases, absolute and more far-reaching than that provided to foreign governments, despite the lack of the aforementioned accountability mechanisms. While initially absolute, the immunity of foreign States in national courts has been qualified over time. In particular, a distinction exists between *acta jure imperii*, which are acts of a sovereign nature where a foreign nation exercises purely governmental functions, and *acta jure gestionis*, which are acts of a commercial nature. In many States, foreign States are immune from litigation regarding the former but not the latter.[19] In contrast, the immunity of international organisations is usually general and absolute. Unless it is waived by the organisation itself, international organisations are as immune from suits in national courts regarding employment or contractual disputes as they are from attempts to question the legality of policy decisions. Instead of this absolute approach, it may be more appropriate for international organisations to possess only functional immunity. That is, when organisations or their officials act in a manner that is separate from or exceeds the relevant organisation's statutory functions, immunity should not be recognised. Whilst it is difficult to imagine a scenario where international organisations would be implicated in serious human rights violations, such as genocide, slavery or torture, such a functional immunity framework would eliminate immunity in such extreme cases, but also in others involving less serious violations which nevertheless clearly exceed the mandate of the organisation. The possibility of using this distinction in the context of international organisations should be further explored.

31. 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.

32. Compliance of this immunity with the right to a fair trial under Article 6 of the European Convention on Human Rights 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".[20] Some national courts have followed a similar line of argument, making their exercise of judicial review dependent on the availability of other adequate

17. 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. But see also note 25.

18. Stitching Mothers of Srebrenica and Others v. The Netherlands, Application No. 65542/12, judgment of 11 June 2013.

19. See, for example, the Foreign Sovereign Immunities Act in the United States, 28 U.S.C. Sec. 1605. See also Jurgen Brohmer, "State Immunity and the Violation of Human Rights' (1997), Chapter 2, for a survey of the restrictive approaches taken to State immunity in a number of countries, including Germany and France.

accountability mechanisms.[21] In particular, the Belgian Court of Cassation in *Siedler*, unlike the Strasbourg Court in any of its previous case law on the issue, actually found the alternative means provided by an international organisation – here the Western European Union – inadequate to protect the applicants' Convention rights, and therefore voided the immunity. As it induces international organisations to establish effective internal dispute settlement procedures, this use of Article 6, or similar provisions in other human rights regimes, may prove beneficial to the accountability of international organisations. It could be desirable for States and other international courts or tribunals to follow this approach of the Belgian Court of Cassation.

33. It is worth noting, however, that courts have resisted applying even the relatively deferential *Waite and Kennedy* standard to cases concerning United Nations bodies. Article 103 of the United Nations Charter, which sets out the Charter's supremacy over other international legal documents, and the United Nation's unique status as the international body charged with maintaining international peace and security, have allowed it to assert an extremely far-reaching immunity. The Strasbourg Court, in *Stichting Mothers of Srebrenica,* found that the risk of allowing individual States to interfere with this crucial mission of the United Nations and the Security Council meant that the Convention could not require United Nations immunity to be qualified.[22] Thus, while instruments such as the European Convention on Human Rights seem to provide courts with the means to vitiate the immunity of bodies such as the European Union or the World Bank, it is more difficult to do so in the case of United Nations bodies. However, the willingness of the Court of Justice of the European Union (CJEU) in *Kadi* (an implementing act by the European Union) and the Strasbourg Court in *Nada* to examine the human rights compatibility of sanctions issued by the Security Council (both discussed in more detail in section 4.4 below) signals that less reluctance exists when the dispute concerns not the immunity of the organisation, but rather implementing acts taken by States themselves.

34. As the Court has held in *Al-Adsani*[23] and confirmed in *Kalogeropoulou*,[24] States are not under an obligation to disregard immunity, even when alleged breaches of peremptory, non-derogable norms are at stake. The Court stated in *Stichting Mothers of Srebrenica* that the same principle applies to the immunity of the United Nations.[25] According to the International Court of Justice (ICJ) in the *Jurisdictional Immunities case*,[26] 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 may apply. This argument was accepted by the Court in *Stichting Mothers of* Srebrenica, when it upheld the immunity of the United Nations. This raises the question whether granting immunity even in cases of serious human rights violations is too far-reaching.[27]

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20. Beer and Regan v. Germany, Application No. 28934/95, judgment of 18 February 1999, paragraph 58; Waite and Kennedy v. Germany, Application No. 26083/94, judgment of 18 February 1999, paragraph 95; in the cases at hand, the Court did not find a violation. In Stitching Mothers of Srebrenica, *supra* note 18, the Court qualified this finding, stating that it was not essential that alternative means be available to the applicant for an interference with Article 6 to be considered proportionate,

21. 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.

22. Stitching Mothers of Srebrenica, *supra* note 18, paragraphs 152-54. The Court also used a similar form of reasoning in Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Applications Nos. 71412/01 and 78166/01, judgment of 2 May 2007.

23. Al-Adsani v. The United Kingdom, Application No. 35763/97, judgment of 21 November 2001. It is worth noting that eight judges dissented to the Al-Adsani decision.

24. Kalogeropoulou and others v. Greece and Germany, Application No. 59021/00, judgment of 12 December 2002.

25. Stitching Mothers of Srebrenica, *supra* note 18. But see also, in this connection, a recent judgment of the Supreme Court of the Netherlands *The State of the Netherlands v. Nuhanović*, of 6 September 2013, in which the Supreme Court lay emphasis on who had "effective control" over the Dutch forces in the Srebrenica enclave, finding that the Dutch military authorities' conduct could be attributed to not only the United Nations, but also to the State concerned: the notion of "dual attribution" was accepted.

26. ICJ, Jurisdictional Immunities of the State, judgment of 3 February 2012. See, in this connection, R. Higgins "Equality of States and immunity from suit: a complex relationship" in vol. 43 *Netherlands Yearbook of International Law*, 2012, pp. 129-149.

27. See, in particular, Doc. 11934, "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); see also paragraph 23 in Ombudsperson Institution in Kosovo Special Report No.1 of 26 April 2001 "On the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the implementation of the above Regulation"

35. Applying immunity to international organisations, even in the case of such serious violations, could be particularly problematic because, as described above, the alternative accountability mechanisms available to States (including suit in national courts and internal political accountability) do not exist for international organisations. Indeed, even in the case of States, strong dissents were issued in both *Al-Adsani* (in Strasbourg) and *Jurisdictional Immunities* (in The Hague). In particular, the dissenting opinions of Judge Cançado Trindade in *Jurisdictional Immunities* and of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in *Al-Adsani* stressed that the rules of State immunity are not intended to allow States to be shielded from accountability for serious human rights violations and that just as some courts have invalidated immunity in criminal cases involving serious human rights violations,[28] immunity should not exist in civil cases involving violations of non-derogable norms. While the existence of these dissents does not undermine the legitimacy of the courts' findings in either case, they highlight that it is unclear whether an immutable rule of immunity should exist for international organisations. In sum, limiting the immunity of international organisations in cases involving the alleged violation of non-derogable rights remains a possibility for the future, despite the contrary rulings of the ICJ and the Strasbourg Court in their respective case law.

36. Indeed, strong arguments exist in favour of removing an international organisation's immunity in the event of gross human rights violations at the very least. The relevant rights would likely be roughly analogous to the non-derogable rights enumerated in Article 15 of the European Convention on Human Rights: namely the right to life; the right not to be subjected to torture or inhuman or degrading treatment; the right not to be held in slavery and the right not to be punished by retroactively imposed law. Given that these rights cannot be derogated from even during periods of war or emergency, it is not unreasonable to suppose that absolute immunity is inappropriate in these circumstances. Similarly, if the immunity of international organisations is to be functional, such violations of non-derogable rights can clearly never be considered to be part of the statutory functions of international organisations aimed at preserving peace, security and global or regional welfare. While the Court rejected this argument in the case of the United Nations in *Stichting Mothers of Srebrenica*, the unique status of the United Nations as the guarantor of international peace and security means that a model of functional immunity at the very least remains viable in the case of other international organisations.

37. 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 international organisations" should be interpreted restrictively.[29]

38. Although international organisations sometimes waive immunity in accordance with the ILA Committee's recommendation discussed above, this often does not occur outside the context of criminal prosecution of employees of the organisation for their own, independent alleged criminal activity. In the civil and human rights contexts, organisations are particularly unlikely to waive their immunity when dealing with more controversial or highly widespread policies that implicate human rights concerns or actions decided at a high level within the organisation.[30] For example, the United Nations prefers to use either negotiation or small claims tribunals to respond to civil claims arising from peacekeeping operations, instead of waiving immunity.[31] It has declined to waive its immunity in connection with recent attempts to hold it accountable for the actions of peacekeepers in Haiti that caused a cholera outbreak causing the deaths of thousands of Haitians,[32] and has acted similarly in relation to peacekeepers in Bosnia[33] and the actions of UNMIK in Kosovo.[34] This triggers the question of how international organisations can be induced to make use of the possibility of a waiver more frequently.

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28. See, for example, R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, [1998] UKHL 41.
29. ILA, *supra* note 5, 228.
30. This was the position taken by the United Nations when it was subject to suit for the actions of its peacekeepers during the Srebrenica massacre, see Stitching Mothers of Srebrenica, *supra* note 18.
31. See Report of the Secretary General, "Procedures in place for implementation of Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations", 7 April 1995.
32. *The Guardian*, "UN will not compensate Haiti cholera victims", Ban Ki-Moon tells president, 21 February 2013.
33. See Supreme Court of the Netherlands, Mothers of Srebrenica, *supra* note 18.
34. See European Court of Human Rights, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, op. cit.

39. Broadly, a more detailed analysis of the specific and unique circumstances surrounding the immunity of international organisations and the possible limits of that immunity would be beneficial. At the meeting of the Committee on Legal Affairs and Human Rights in Izmir in May 2013, Professor Rick Lawson suggested that it would be worthwhile for the ILC to engage in a discussion of this topic and also encouraged the Strasbourg Court to revisit its case law in this area.

4.2. International organisations before international judicial bodies

40. States, when acceding to treaties, often accept 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, are 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.

41. This has been illustrated in the cases of *Behrami and Behrami* and *Saramati* before the European Court of Human Rights, concerning events that arose out of the international civil and security presences in Kosovo.[35] *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 presence was at issue. Attributing the conduct in question to the United Nations, the Court declined its jurisdiction *ratione personae*. Had the conduct been attributed to the involved member States, the application could have been dealt with by the Court. 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.

42. 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 European Union “shall accede” to the European Convention on Human Rights. The accession of the European Union to the Convention will fundamentally change the relationship between the two legal systems and subject the European Union to the jurisdiction of the European Court of Human Rights, opening the possibility for individual applicants to challenge European Union action directly before the Court. As all EU member States have ratified the Convention, and remain so after the European Union accedes to the Convention, this creates the unique situation that the European Union and its member States are Parties to the Convention and can simultaneously be held to account before the Court.

43. 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 the North Atlantic Treaty Organisation (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 (ETS No. 157) 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 (CPT) to places where persons are deprived of their liberty in Kosovo by UNMIK and NATO.[36]

44. If international organisations themselves became Parties to human rights treaties, this would 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.

45. In order to enhance human rights protection at the international level more generally, it might be possible to modify the Statute of the International Court of Justice to allow for international organisations to be Parties to Court proceedings. Currently, only the principal organs and certain specialised agencies of the United Nations can request Advisory Opinions from the Court at The Hague. As a result of such a change, States or other international organisations could launch legal challenges against actions by international

35. *Ibid*.
36. See UNMIK Regulation No. 1999/1 of 25 July 1999 on the Authority of the Interim Administration in Kosovo.

organisations that offend treaty regimes, customary international law or general principles of (human rights) law. The ILA considered this possibility, although it admitted that at the time the report was published (2004), such a move was politically unlikely.[37]

4.3. Strengths and weaknesses of internal accountability mechanisms

46. 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 report can only provide a cursory account of some of the mechanisms established. This topic, however, merits further attention.

47. 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. Nevertheless, the treatment of staff is one of the clearest and most common ways in which international organisations themselves, rather than in conjunction with States, directly affect the lives of individuals. The area of staff disputes is one that is often subject to little public or political scrutiny, yet it is highly consequential. These disputes can implicate a number of human rights concerns, including the right of access to an effective court or tribunal, and the right to be treated fairly and without discrimination or harassment by one's employer.

48. Due to the immunity of most international organisations in national courts, disputes between international organisations and their employees are generally resolved through the use of internal alternative dispute resolution procedures or tribunals. These tribunals include the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), the World Bank Administrative Tribunal (WBAT) and the International Labour Organisation Administrative Tribunal (ILOAT). However, concerns have been raised regarding the adequacy and effectiveness of these bodies, including worries regarding a low rate of findings against the organisation, access to counsel, the right to appeal, a reliance on written instead of oral hearings and the independence of tribunals that include judges often appointed by the head of the relevant organisation.[38] In response to a 2006 report highlighting these issues, the United Nations instituted a reform of its internal procedures. However, while this new system does address some of the above concerns, including providing greater access to counsel, the right to appeal to an appeals tribunal and greater judicial independence, many applicants may still lack the assistance of qualified counsel, judges are sometimes inexperienced in the relevant law and the tribunals have no clear means to ensure that their decisions are executed.[39] As a result of these concerns, questions exist as to whether the characterisation of these and other procedures by the Strasbourg Court as providing an adequate alternative means of resolving disputes, as was done in *Beer and Regan* and *Waite and Kennedy*, is accurate or has been made following sufficiently detailed scrutiny.

49. It should be stressed that in discussing this issue, it is not the intention here to delve into the details of employment dispute resolution procedures in international organisations or to indicate what procedures are appropriate. This issue is, however, relevant in that the decisions by States to apply the procedural immunity of these organisations in national courts and States' involvement in establishing the procedures themselves, impacts the accountability of these organisations for human rights violations as well as the accountability of member States of the Council of Europe. Indeed, these dispute resolution procedures have been addressed by the Court on a number of occasions.

50. The Court has consistently chosen not to apply the Convention to cases involving disputes between staff and the international organisations they serve. In the aforementioned cases of *Beer and Regan* and *Waite and Kennedy*, the Court upheld the immunity of the European Space Agency in the national courts of the relevant States despite the applicants' claims that such immunity denied them a fair hearing.[40] Similarly, in the cases of *Boivin* and *Connolly*, both dealing with staff disputes in EU institutions, the Strasbourg Court found the applicants' cases to be inadmissible *ratione personae* as the relevant actions were committed directly by international organisations and not by member States Parties to the Convention.[41] However, in

37. ILA, *supra* footnote 5, 230-34.
38. Matthew Parish, An Essay on the Accountability of International Organizations, 7 International Organizations Law Review 9 (2010).
39. See Risha Gulati, The Internal Dispute Resolution Regime of the United Nations, 55-62 (2010).
40. Beer and Regan and Waite and Kennedy, op. cit.

Gasparini, involving a NATO staff dispute, the Court followed a different track, viewing the complaint as relating to a structural deficit in NATO itself, thereby implicating NATO member States and allowing the case to be admissible.[42] Nevertheless, the Court found that the NATO appeals panel provided for protection equivalent to the European Convention on Human Rights and therefore did not uphold the claim. Given that the Court had previously stated that the "equivalent protection" of international organisations need only be comparable and not identical to the protections provided in the European Convention on Human Rights,[43] it is again unclear to what extent a willingness to hold States accountable for the internal staff dispute resolution procedures of international organisations exhibited in *Gasparini* will promote the substantive evaluation of those procedures by the Court.

51. For activities conceived as particularly human rights sensitive, some international organisations have established human rights accountability mechanisms outside the narrow employment context. These mechanisms can facilitate oversight over the organisation's activities and provide an avenue for complaints by individuals regarding possible violations of their human rights. The following examples shall serve to illustrate the attempts that international organisations have made in this regard.

52. 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.

53. 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 been strongly 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 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 adopted measures reviewed.[44]

54. 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 Security Council Resolution 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 Sanctions Committee, the lack of the possibility in the mandate to make recommendations to the Sanctions Committee and the fact that access to information by the Ombudsperson was dependent on the willingness of States to disclose information.[45] Some of the shortcomings have been remedied with UN Security Council Resolution 1989 (2011), providing the Ombudsperson with the power to make recommendations regarding delisting, which automatically take effect if the Sanctions Committee does not decide otherwise. Notwithstanding these improvements, the question remains whether they suffice to ensure human rights protection of listed individuals.[46]

55. The use of ombudspersons or other similar mechanisms to monitor the activities of international organisations holds significant promise as a method of achieving greater accountability. Their use in the anti-terrorism sanctions context, as described above, is commendable, but room remains for improvement in this

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41. Boivin v. 34 Member States of the Council of Europe, Application No. 73250/01, decision of 9 September 2008; Connolly v. 15 Member States of the European Union, Application No. 73274/01, decision of 9 December 2008.
42. Gasparini v. Italy and Belgium, Application No. 10750/03, judgment of 2 May 2009.
43. Bosphorus v. Ireland, Application No. 45036/98, judgment of 30 June 2005. See also Cooperatieve Producentenorganisatie van de nederlandse Kokkelvisserij U.A. v. the Netherlands, Application No. 13645/05, decision of 20 January 2009.
44. See, in particular, Doc. 11464, "United Nations Security Council and European Union blacklists", report by the Committee on Legal Affairs and Human Rights (Rapporteur: Mr Dick Marty); with regard to conformity with the Convention, 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, 6 February 2006.
45. 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, in particular paragraph 56.
46. 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.

area. It is essential that ombudspersons be given sufficient power and authority to act as a true check on the activities of international organisations. For example, while the Ombudsperson for the Al-Qaeda Sanctions Committee has the power to recommend the delisting of an individual, that decision can be overridden if consensus exists within the Committee to the contrary or if the decision is referred to the Security Council.[47] It is also not clear to what extent the Ombudsperson has access to all relevant information, including classified information on which listings of terrorism suspects are frequently based. Thus, while a significant improvement on the prior situation, the power of the Ombudsperson is not equivalent to that of a court exercising judicial review. The potential still exists for political considerations to predominate over a neutral assessment of the evidence and concerns of fairness and due process. Additionally, the use of ombudspersons could be expanded beyond the area of Al-Qaeda sanctions and into other functions of the United Nations, such as peacekeeping. Organisations other than the United Nations could also make greater use of ombudspersons or similar bodies (the World Bank Inspection Panel discussed above is an example of such a body).

56. Another organisation which makes use of such internal review mechanisms is INTERPOL. Under Article 3 of INTERPOL's Constitution, the organisation cannot intervene to assist in political, military, religious or racially related activities of member States.[48] Nevertheless, it has been criticised for issuing "red notices" and other notifications that an arrest warrant has been issued by a member State that are circulated to other member States – in cases of politically motivated prosecutions.[49] For example, concerns have been raised regarding a Russian environmental activist who was later arrested and released by Spanish police,[50] and a West Papuan independence activist.[51]

57. INTERPOL currently utilises a number of procedures to reduce the risk of any complicity in politically motivated prosecutions. The general secretariat undertakes an *ex ante* review of requests it receives and maintains a watch list of questionable cases, though it has little information available to it. Additionally, individuals subject to red notices can challenge their publication with the Commission for the Control of INTERPOL's Files and member States can also challenge requests from other member States, although the latter method is rarely used. The opportunity for challenges by individuals is a positive example of the type of accountability mechanisms that can be developed by international organisations. However, there are concerns as to whether the remedy offered by the Commission meets standards of due process appropriate to the impact on affected individuals, as its procedures are not adversarial, it does not issue reasoned decisions and it cannot issue binding remedies.[52] The alleged failure of these procedures as outlined above suggests that there is room for improvement, perhaps by exercising greater caution and increasing the level of *ex ante* scrutiny by the Secretariat in questionable cases. *Ex ante* review is particularly important given that individuals who are forced to challenge improperly issued red notices may be subject to arrest or other sanctions prior to the review of their case. States could also play a greater role in reviewing red notices prior to acting upon them. In so doing, they could follow the example of the United Kingdom, which does not view red notices as a sufficient basis for arrest and subjects them to risk assessments in cases emanating from outside the European Union.[53] It is important to keep in mind that States are not obliged to act upon red notices and must be held fully responsible and accountable for acts they take in response to information they receive from INTERPOL or similar organisations.

58. 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 UNMIK and EULEX. In 2000, an Ombudsperson Institution was created, and in 2006 a Human Rights Advisory Panel (HRAP) were established in order to provide for an implementation mechanism regarding UNMIK's human rights responsibilities.[54] A Human Rights Review Panel (HRRP) was established with similar tasks with regard to EULEX. The panels have thus far issued a

47. See Chatham House, "UN Sanctions, Human Rights and the Ombudsperson", 17 May 2013.
48. See Chatham House, "Policing Interpol", 5 December 2012, for information on INTERPOL procedures and guidelines as well as the relationship between INTERPOL and the United Kingdom.
49. The Parliamentary Assembly of the Organisation for Security and Co-Operation in Europe (OSCE) has expressed its concern regarding this issue in its 2012 Monaco Declaration, paragraph 93, and again in its 2013 Istanbul Declaration, paragraphs 146-147. See also Fair Trials International www.fairtrials.net/interpol/.
50. See Peter Osborne, *The Telegraph*, "Is Interpol fighting for truth and justice, or helping the villains?", 22 May 2013.
51. See Owen Bowcott, *The Guardian*, "Interpol criticised over attempt to arrest Asian separatist leader", 25 November 2011. By contrast, Interpol has – commendably – deleted a message circulated through its networks by Russian authorities asking member countries to track the movements of William Browder, who successfully campaigned for the United States to impose asset freezes against Russian officials involved in the "Magnitsky case".
52. See Cheah W.L., "Policing Interpol: the Commission for the Control of Interpol's Files and the Right to a Remedy", *International Organizations Law Review* 7 (2010), 375-404.
53. See "Policing Interpol'", supra note 48.

number of decisions, generally relying on the European Convention on Human Rights, and have found the organisations concerned to have violated Convention rights in some cases. They have also been willing to address serious and controversial human rights violations. The HRAP recently found in *Jočić* that UNMIK had violated Articles 2 and 3 of the Convention by failing to adequately investigate the disappearance and death of a Kosovo Serb civilian.[55]

59. Although this constitutes a considerable improvement in terms of human rights protection, these panels have been subject to criticism. Their recommendations are not legally binding and UNMIK and EULEX are not obliged to act upon them. As at November 2013, UNMIK had not provided compensation to the victims of human rights violations as recommended by the panel[56] and the HRRP is not even authorised to recommend the payment of compensation by EULEX.[57] Additionally, HRAP's jurisdiction is limited to actions by UNMIK dating back, primarily, to 23 April 2005, which was after the most significant period of violence in the region, highlighting the importance of instituting human rights view mechanisms at the *beginning* of interventions by international organisations rather than after the organisation has already received a number of human rights complaints (this approach was followed with the HRRP). There is also a lack of awareness within Kosovo of the panels' existence and function. However, both panels do provide a model for possible use in future situations where international organisations take on an administrative role. The future use of such panels, as well as the need to provide for bodies with the purview to monitor the implementation of the panels' decisions, deserves continued attention.

60. Indeed, it is notable that no equivalent human rights monitoring body exists in the case of Bosnia and Herzegovina, despite the presence of the European Union EUFOR ALTHEA military force and the significant powers of the Office of the High Representative (OHR), created by the Dayton Peace Agreement and endorsed by the United Nations Security Council.[58] The OHR is required to provide reports of its activities to the United Nations Secretary General, which are passed on to the Security Council, however, no independent oversight mechanism exists and nor can individuals seek redress for human rights violations by international forces and administration in the same way as is possible in Kosovo. This situation further highlights the need for greater oversight and accountability when international organisations engage in territorial administration.

61. Although they are 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 European Union. Fundamental rights constitute general principles of the European Union legal order and the Charter of Fundamental Rights of the European Union is legally binding having "the same legal value as the Treaties".[59] In interpreting these rights, EU bodies are required to take into account interpretations by the Court of the same rights in the European Convention on Human Rights, and the Charter cannot provide for lesser protections than the Convention.[60] 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 European Union 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 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.

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54. UNMIK Regulation No. 2000/38 of 30 June 2000 on the Establishment of the Ombudsperson Institution in Kosovo; UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel. 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.

55. Human Rights Advisory Panel, 23 April 2013, Svetlana Jočić against UNMIK, Case No. 34/09. See also, in this connection, Kosovo: UNMIK's Legacy. The failure to deliver justice and reparation to the relatives of the abducted, Amnesty International, August 2013.

56. Christine Chinkin, The Kosovo Human Rights Advisory Panel, summary of the meeting held at Chatham House on 26 January 2012. See also Manfred Nowak, "Enforced disappearance in Kosovo: Human Rights Advisory Panel holds UNMIK accountable" in *European Human Rights Law Review*, 2013, pp. 275-283.

57. Human Rights Review Panel, 2012 Annual Report, 39. In 2013, the Panel amended its Rules of Procedure, with a view to enhancing implementation of its recommendations, by way of adopting and publishing follow-up decisions: see www.hrrp.eu.

58. A description of the OHR's role and responsibilities is available on the body's website.

59. See Article 6 of the Treaty on European Union, OJ C 326/13 ("codifying" the case law of the CJEU).

60. See Committee on Legal Affairs and Human Rights, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice", 43, contribution by Christos Pourgourides to the Conference on the Principle of Subsidiarity, 25 November 2010.

62. It may be worthwhile for other international organisations to follow the example of the European Union in some respects. In the context of far-reaching policy decisions taken at a high level of international organisations, such as UN Security Council resolutions or a decision by NATO or a similar body to launch a military operation, it would probably be inappropriate for either national courts or low-level administrative tribunals to rule on the legality of the organisation's decision. Therefore, in the absence of an ability to seek recourse through international courts or tribunals (see section 4.2 above), it could be beneficial for international organisations to follow the European Union's example in subjecting their decisions to internal review to ensure compliance with human rights standards. The European Commission performs impact assessments on proposed legislation in order to assess its likely effects on rights protected by the Charter and must explain these effects in memoranda.[61] The United Kingdom has adopted a similar practice with respect to its *Human Rights Act*, which codified the European Convention on Human Rights on a national level and requires the executive to include a statement of compatibility for proposed bills addressed to parliament, explaining how they are compatible with the Act (or to explicitly state that they are not compatible but that parliament is nevertheless proceeding with the bill).[62] Could not the Security Council or similar bodies be required to include a statement explaining their actions' compatibility with the organisation's human rights obligations (including customary law human rights obligations, any treaty obligations or possible self-imposed human rights requirements)? States could also institute similar internal processes, and take account of the compatibility of acts of international organisations for which they shoulder some responsibility (for example acts that they voted for within the organisation's decision-making structures) with their own national or international human rights obligations.

63. As this shows, internal mechanisms may indeed even provide "equivalent protection", as the European Court of Human Rights noted in *Bosphorus*. 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 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 them. 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

64. The work of international organisations is often characterised by a close interaction with its member States. With increasing interaction and co-operation, however, the likelihood of injury resulting from co-operative action multiplies. In many cases, like in peacekeeping, 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, namely to whom the relevant conduct is attributable.

65. The pertinent provision of the ARIO 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".[63] 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.[64]

66. In *Behrami*, the European Court of Human Rights attributed conduct with regard to the international presence in Kosovo to the United Nations rather than the involved member States and therefore held the application inadmissible *ratione personae*. Many commentators on *Behrami* took issue with the Court'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 ARIO. In its later judgement in *Al-Jedda*, the Court, explicitly referring to the threshold of effective control, as laid down in current Article 7 of the ARIO, attributed conduct with regard to the international presence in Iraq to the member States instead of the United Nations.[65] 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.

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61. See European Commission, "Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments", 5-6, 6 May 2011.
62. Human Rights Act 1998, s. 19.
63. ARIO, *supra* footnote 13, Article 7.
64. Ibid., with commentaries, Article 7, Comm 4.

67. 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 courts at different levels, but also makes it difficult for individuals to know who they are supposed to bring a claim against.

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

68. 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.

69. 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.

70. 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 member States will clearly 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.

71. In contrast, in Articles 61 and 62 of the 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. This idea has been developed by the European Court of Human Rights, in particular in cases involving the transfer of powers to the European Union and the member States' obligations under the Convention. As the Court 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".[66] 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 Convention.[67]

72. 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 to circumvent 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

65. Al-Jedda v. The United Kingdom, Application No. 27021/08, judgment of 7 July 2011, paragraph 84.
66. Bosphorus, op. cit., paragraph 154; see also European Court of Human Rights, Matthews v. The United Kingdom, Application No. 24833/94, judgment of 18 February 1999, paragraph 32.
67. Bosphorus, op. cit., paragraphs 155-156; *Gasparini v. Italy and Belgium*, op. cit. See also, in this connection, *Michaud v. France*, Application No. 12323/11, judgment of 6 December 2012, especially paragraphs 112 to 115.

the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations".[68] In contrast, according to Article 61 of the ARIO, responsibility of member States is framed as an exception, only applying when a State circumvents its international obligations.

73. 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 wrongful act of the organization".[69] In order to ensure that 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. However, to hold States accountable for the acts of international organisations purely on the basis of membership not only runs the risk of holding States accountable for acts over which they had no real control, but also poses logistical difficulties for both the applicant, who will have to contend against a large number of respondent States, and the respondents, who will have to agree on a common defence.

74. One possible method of increasing the availability of remedies, while still ensuring the existence of a clear link between State conduct and accountability, is to hold States accountable for their voting decisions or similar acts in the administration of international organisations. The rationale of ensuring that States remain accountable for acts that occur as a result of the States' input and participation could be interpreted as allowing for liability to be imposed on States for their role in the decision-making procedures of international organisations. For example, Article 59 of the ARIO, which refers to acts "direct[ed] and control[led]" by a State could be applied to hold States accountable for actions they voted for as part of the United Nations Security Council or a similar body.[70] This form of accountability would seem to be most legitimate in cases where a State voted for a programme that involves what could be seen in itself as a *prima facie* human rights violation, such as the UN Security Council sanctions regime, rather than merely where possible human rights violations occur in the implementation of programmes, such as the role of UNMIK in Kosovo. The Court in *Behrami* was unwilling to apply the Convention to acts such as the votes of permanent members of the Security Council or the contribution of troops to UN security missions, stating concerns regarding interfering with the United Nations' mandate to ensure peace and security.[71] However, the Court's subsequent willingness in *Nada* to examine the actions of States taken in response to UN Security Council resolutions suggests a possible opening for applying the Convention to a State's role in the decision-making process. Courts may also be more willing to do so outside the United Nations context, where the concerns highlighted in *Behrami* are less apparent. The viability and consequences of holding States accountable in this way should be investigated further.

75. 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 UN Security Council 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.[72] A similar route was taken by the European Court of Human Rights in *Nada*, where it held Switzerland responsible for a violation of Convention rights when it implemented the UN Security Council sanctions regime against Mr Nada. However, in *Nada,* the Court declined to examine the hierarchical relationship between the United Nations Charter and the European Convention on Human Rights, and

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68. Bosphorus, op. cit., paragraph 153. See also *Cantoni v. France,* Application No. 17862/91, judgment of 11 November 1996.
69. ARIO with commentaries, *supra* 13, Article 62, Comm 6.
70. Ibid., Article 59. See also Article 58 of the ARIO whose threshold – "aid and assistance" – is lower. That said, paragraph 2 of both these articles somewhat undermines this argument, in that member States' decision-making would need to be "in accordance with the rules of the organization".
71. Behrami, op. cit., paragraph 149.
72. 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 before the CJEU. On 18 July 2013, the Court held that as no information or evidence had been produced to substantiate allegations brought against Mr Kadi, of his being involved in activities linked to international terrorism, those allegations were not such as to justify the adoption, at European Union level, of restrictive measures against him, see Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Note that Mr Kadi has in the meantime been delisted by the Sanctions Committee).

whether the United Nations Charter is necessarily supreme by way of Article 103, even when a State's obligations under the Charter require them to breach their Convention obligations. Instead, the Court found that Switzerland had a degree of flexibility under the sanctions regime, which it had failed to exploit. Nevertheless, even though the Court 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 Mr Nada off the list Switzerland would necessarily have violated its international obligations.[73] With the *Nada* case, this approach of using indirect review has gained much wider geographical relevance.

76. This leaves member States in a dilemma in cases where they are subject to international obligations that implicate human rights concerns yet do not allow for any real flexibility (arguably *Nada* was such a case). They must either disregard their obligations arising from their membership of the international organisation or 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*.

77. A way of resolving this dilemma is to require the respondent State to use the influence they possess at the relevant international organisation to lobby and vote for a change in policy. The Court, in *Nada* and in particular the concurring opinion of Judges Bratza, Nicolaou and Yudkivska in that case, pointed in this direction. Phrasing a State's Convention obligations in this manner has the advantage of holding States accountable for their own substantive acts and omissions while still preserving the separate legal personalities of the organisation and its member States by only holding States accountable for the options available to them within the organisation's statutory framework. However, this approach would not eliminate the lacuna that exists with respect to conduct that is independently undertaken by the organisations themselves. While States could also possibly be required to legally challenge the acts of international organisations of which they are a member, if found to be in violation of their human rights obligations, this would require the existence of an appropriate forum in which to challenge the organisation, the absence of which is an issue addressed in more detail above.

78. A second method of addressing this issue would be to take heed of the approach proffered by Judge Malinverni in his concurring opinion in *Nada*. Judge Malinverni accepted that there was a clear conflict between Switzerland's obligations to the United Nations and its human rights obligations, yet argued that these obligations to the United Nations should nevertheless be viewed in light of Convention rights. Thus, in his view, if an international organisation has not introduced human rights mechanisms comparable or equivalent to that instituted by a member State, then States would still be in breach of their human rights obligations even when following that organisation's dictates. This view stems from a conception of resolutions of the UN Security Council as equivalent to secondary legislation within a national system. Thus, these resolutions need not take precedence over other instruments of international law, such as the Convention. Under this understanding, it is only the United Nations Charter itself (equivalent to primary legislation), and not all decisions by United Nations bodies, that is supreme by virtue of Article 103 of the Charter.

6. Conclusions and proposals

79. 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 report 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 the acts of these organisations. 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

73. Nada, op. cit., paragraph 196.

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.

80. 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. In examining these options, it is important to acknowledge that different mechanisms might be better suited for different situations. While the use of national courts or local tribunals may be appropriate in the case of staff disputes or territorial (mal-)administration, such procedures might not be appropriate when examining the legality of a sanctions regime or a military operation. In the latter cases, mechanisms requiring the assessment of a policy's compatibility with human rights requirements, such as the impact assessments utilised by the European Commission, may be more appropriate. Similarly, the use of sometimes slow or expensive international tribunals may not be suitable for small-scale claims by individuals in the context of employment disputes or peacekeeping operations.

81. 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.[74] The United Nations and other organisations could be encouraged to provide clear and up-to-date policies regarding their use of waivers and the Parliamentary Assembly could invite those bodies to debate whether reforms are needed in this area. Furthermore, in line with the relevant case law of the European Court of Human Rights, immunity could be made dependent on the establishment of alternative accountability mechanisms, which could be scrutinised to ensure that they offer an appropriate avenue through which to seek redress, compatible with human rights norms. 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 non-derogable norms are at stake or when the organisation is exceeding its statutory functions. As suggested at the meeting of the Committee on Legal Affairs and Human Rights in Izmir, the International Law Commission could be invited to address the issue of the immunity of international organisations in national courts and it might also be beneficial for the Strasbourg Court to develop its case law in this area.

82. 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 European Union to the European Convention on Human Rights. 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 and for existing courts and tribunals, such as the ICJ, to allow for international organisations to be parties to a dispute.

83. 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 granting 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. It would also be worthwhile to further investigate the strengths and weaknesses of existing oversight mechanisms, such as those in the area of staff disputes or the administration of territories, so that they can be reformed if necessary and in order provide useful knowledge when establishing similar regimes in the future. Finally, the use of ombudspersons and other similar bodies should be expanded into more areas and their powers should be sufficient to enable robust review of organisational decisions.

84. 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 such acts. 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

74. 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.

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 such situations, the question arises whether, for lack of alternative remedies, States should bear accountability for acts of international organisations they are members of or perhaps in a more limited sense for those acts for which they voted for or encouraged, or failed to veto (if they had such a right). However, it is important to also be wary of the difficulties inherent in imposing collective responsibility on a large number of member States.

85. 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.[75] 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.

86. In the light of the above considerations, it might be appropriate for the Council of Europe, as an international organisation specialising in human rights matters, to reflect on how to respond to the call in UN General Assembly Resolution 66/100 (2011) relating to the International Law Commission's text on the responsibility of international organisations, and ensure follow-up thereto within the remit of its competence, both with respect to its own accountability as well as that of other international organisations. The UN General Assembly's invitation, made in Resolution 66/100 of 9 December 2011 reads:

> *"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 ..."*[76]

75. Letter from 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 document AS/Jur/Inf (2010) 05 of 7 December 2010.

76. Emphasis added. www.un.org/ga/search/view_doc.asp?symbol= A/RES/66/100. See also paragraphs 20 to 25 above.