Remedies against international organisations

Karel Wellens.

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Of course, all the errors and mistakes remain my exclusive accountability and the views expressed do not necessarily reflect those of the ILA Committee or of any of its members. I have attempted to render this study up to date as of 30 June 2000. This inevitably implies that important later developments could not be covered.

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Abbreviations

AFDI	*Annuaire Français de Droit International*
AJIL	*American Journal of International Law*
ASIL	American Society of International Law
ATCA	Alien Tort Claims Act
BYIL	*British Yearbook of International Law*
CFI	Court of First Instance
CHR	Commission on Human Rights
DPKO	United Nations Department of Peacekeeping Operations
EBRD	European Bank for Reconstruction and Development
EC	European Community/Communities
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EFTA	European Free Trade Association
EU	European Union
FSIA	Foreign Sovereign Immunities Act
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	*International Legal Materials*

ILO	International Labour Organisation
ILOAT	ILO Administrative Tribunal
ILR	*International Law Reports*
ITLOS	International Tribunal for the Law of the Sea
JAB	Joint Appeals Board
JWTL	*Journal of World Trade Law*
LJIL	*Leiden Journal of International Law*
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NILR	*Netherlands International Law Review*
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OIOS	Office of Internal Oversight Services
ONUC	Opérations des Nations Unies au Congo
OJ	*Official Journal*
OPCW	Organisation for the Prohibition of Chemical Weapons
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RBDI	*Revue Belge de Droit International*
RCADI	*Recueil des Cours de l'Académie de Droit International*
SOFA	Status of Forces Agreement
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNAT	United Nations Administrative Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNRIAA	United Nations Reports of International Arbitral Awards

UNRWA	United Nations Relief and Works Agency for Palestinian Refugees in the Near East
UNSCOM	United Nations Special Commission on Iraq
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTEA	United Nations Temporary Executive Authority
US	United States
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
ZAÖRV	*Zeitschrift für Ausländisches, Öffentliches Recht und Völkerrecht*

Introduction

During the second half of the twentieth century, international organisations have become important actors on the international scene, alongside states and multinational corporations, as a result of their proliferation and the subsequent unprecedented worldwide expansion of their institutional and operational activities. Whereas the international political and legal order has designed and put in place a comprehensive body of primary rules governing the acts, conduct and omissions of the main actors, coupled with an evolving system of secondary rules on the consequences of state responsibility, nothing similar appears to have occurred with regard to international organisations. Even the international legal framework governing the position of the individual, in both its protective and repressive aspect, seems to be well ahead of an analogous development for international organisations.

Although this picture mainly reflects the general perception and claims to correspond to present-day realities, it has to be qualified in several ways. First, it would be incorrect to assume that the conduct of international organisations escapes the governance of the international political and legal order altogether, even if only in terms of the imperatives flowing from the instrument establishing each international organisation in the first place. As subjects of international law, international organisations have to abide in good faith by the treaties to which they have become parties, they are subject to rules and norms of customary international law to the extent required by their functional powers and they have to observe the general principles of law recognised by civilised nations.

Secondly, the expansion of the activities of international organisations has always been and will continue to be the result of and under the

control of the power exercised within every international organisation by its constituent members.

Thirdly, the greater degree of autonomy enjoyed by international organisations in their decision-making and operational activities, especially since the end of the Cold War, has been matched by a growing awareness that they have to account for their acts, actions and omissions. This accountability also covers the way in which they exercise their supervisory and monitoring role towards member states, based upon their constituent instrument, and/or towards all states parties to conventions entrusting them with such a function. International organisations have to comply with the normal requirements of due process of law; as a result, their accountability applies not only to their membership but extends to all actors involved and/or affected by their daily functioning.

This study will look into the implementation of that accountability regime by way of undertaking remedial action against international organisations, and the various difficulties those claiming to be entitled to raise that accountability are facing in their endeavours.[1]

The fundamental question, which deserves the most attention, is whether the mechanisms specifically put in place by international organisations to deal with claims against them or permanent mechanisms serving other purposes as well, and the actual outcome of their utilisation by a variety of potential claimants, have indeed satisfactorily assured the accountability of international organisations.

The analysis of the remedial regime starts at the point in time at which the mere occurrence of the situation that gave rise to the remedial action for organisational liability/responsibility has been established. The problems associated with establishing this organisational responsibility, such as proving that a legal act has caused damage or that an illegal act which can be attributed to an international organisation has been carried out in appropriate cases in circumstances that cannot preclude its wrongfulness – and that will normally constitute the subject-matter of the dispute opposing a claimant to an international

[1] The active and passive accountability of international organisations are by their very nature interconnected. An international organisation being able to be a respondent party flows from the internal logic of the ICJ's Advisory Opinion in the *Reparations for Injuries Suffered in the Service of the United Nations* case, although that particular aspect did not fall within the scope of the question submitted by the General Assembly: P. De Visscher, 'Observations sur le fondement et la mise-en-oeuvre du principe de la responsabilité de l'organisation des Nations Unies', *Revue de Droit International et de Droit Comparé* 40 (1963), 165–73, at 167.

organisation – are beyond the scope of this study. The analysis is limited to the implementation of the accountability of international organisations, leaving untouched the existence and scope of primary rules the infringement of which has allegedly caused the accountability to arise. As inter-organisational accountability is currently the subject of a doctoral thesis under my supervision, that problem will not be covered either. This book concentrates on the basic issues: who might be held accountable by whom, in which situations and by what means?

The focus will be on the general features of remedies against international organisations (Part I), the procedural aspects of remedial actions (Part II), the substantive outcome of remedial actions (Part III) and options for alternative remedial action (Part IV).

The purpose of Part I is to lay down the overall framework of the remedial regime from various perspectives. It will not only constitute the necessary basis for the more detailed analysis of the procedural and substantive aspects in Parts II and III, but it will also provide a sound foundation for the discussion of alternative remedial action in Part IV. The implication of member states in the alleged liability or responsibility of international organisations will only be taken into account from the same perspectives.

This study on remedies against international organisations has been written from a constitutional perspective in an attempt to provide and review the secondary rules that should be applicable in the process of the implementation of the primary rules of accountability governing the relationships between the international organisation and its member states, non-member states, staff members and non-state parties dealing with it on a voluntary or incidental basis.[2]

The views expressed in this study, although mostly based on the practice of the United Nations, do apply to other international organisations as well, with an exception being made for the supranational European Community, which is endowed with its own political and judicial, highly institutionalised system of accountability. Its functioning will remain outside the scope of the present study; one of its structural features – that of institutions being answerable for their (wrongful) acts – is far

[2] In a functional approach the emphasis is on the operational functioning of the international organisation requiring a large degree of autonomy and independence; a reluctant acceptance of the need for and the modalities of an accountability regime for international organisations being put in place, including its remedial aspects, is frequently inherent in this approach.

less evident or indeed not present at all in the constituent instruments of most other international organisations. In order to remedy this structural weakness and in order that these other international organisations are not placed 'virtually' above the law, mechanisms of accountability have to be devised.[3]

[3] J. Usher, *General Principles of EC Law* (London and New York: Longman, 1998), p. 10.

PART I · GENERAL FEATURES OF REMEDIES AGAINST INTERNATIONAL ORGANISATIONS

1 The accountability regime for international organisations

As for remedies against states and individuals – the accountability of the former always having been firmly rooted as one of the cornerstones of the international legal and political order, and the accountability of individuals also having entered into the body of international law[1] – any discussion on the more procedural and consequential issues falling within the scope of redress against international organisations has to be correctly placed against the background of their accountability regime. Albeit in an embryonic form, it has been in place since the establishment of international organisations: such a regime's formulation and adjustment is bound to be a continuous process.

The need for a reasonably comprehensive and consolidated body of applicable rules, recommended practices and guidelines is all the more pressing given the ever-increasing calls from various quarters – states and non-state parties potentially affected in their interests and/or rights by the acts, actions or omissions of international organisations – for appropriate remedies to become available. In further elaborating the body of primary rules, care should be taken not to undermine pre-existing or emerging rules of legal liability or responsibility by inadvertently including them as merely good practice. The codification of principles common to all international organisations, as they have been listed by the ILA Committee on Accountability of International Organisations in its Second Report,[2] could be a first, but crucial, step in establishing a comprehensive accountability regime.

[1] *ILA Report of the 68th Conference*, held at Taipei, Taiwan, Republic of China, 24–30 May 1998 (London, 1999), p. 597.

[2] ILA Committee on Accountability of International Organisations, *Second Report*, submitted to the 2000 ILA Conference (London; 2000), pp. 4–8.

Given the overarching character of accountability as a concept, an exclusively legal approach to the problems and issues involved seems to be prevented; this also has a bearing on the category of relevant secondary rules – that is, the remedies against international organisations. To be adequate, remedies for the implementation of accountability of international organisations should correspond to the kind and nature of the complaints addressed to them.

Levels

The three components or levels of accountability have been identified in the ILA Committee's First Report as interrelated and mutually supportive. Accountability will always and inevitably be triggered by member states and third parties through the proper functioning of mechanisms to monitor the conduct of international organisations. From a remedial perspective this may result in the international organisation maintaining or adjusting its course of conduct; it may eventually lead to the invocation of non-contractual liability as a consequence of damage caused during operational activities or it may result in full-scale organisational responsibility when rules or norms of international and/or institutional law have been violated.[3]

Forms

The different forms of accountability (political, legal, administrative and financial) will be determined by the particular circumstances surrounding the acts, actions or omissions of international organisations, their member states or third parties, and this will have an impact on the question of remedies.[4] However, a precise identification of their corresponding nature in those terms (political, legal, administrative and financial) will not always be possible because of the complexity of the relevant case law. The diverse forms of accountability do, therefore, prevent the situation where only legal interests that have or may have been affected could trigger accountability. Sufficient grounds to raise accountability may also come from political, administrative and financial interests that are not necessarily couched in legal terms.[5]

Furthermore, on the strictly legal level there are a variety of legal layers depending upon the circumstances and matters at issue. This situation reflects the wide range of levels on which international organisations are capable of operating. There is not just the purely international level but also multiple national and regional levels. Contrasting concerns call for greater flexibility because of multilevel operations and for the assertion of control and supervision, including appropriate remedial avenues, from the perspective of the relevant legal order.[6]

[3] *ILA Report of the 68th Conference*, pp. 600–1. [4] *Ibid.*, p. 598.
[5] *Ibid.*, p. 603. [6] *Ibid.*, pp. 591–2.

In contrast to the situation of states there is, generally, no one single comprehensive system governing all relevant questions. The plurality of political and legal guidelines, principles and limitations constraining the exercise of the institutional and operational authority and powers of international organisations[7] is bound to have an impact on the whole question of remedies; that is not surprising as a matter of principle because questions of substantive law cannot be clearly separated from questions of remedies.[8] Fundamental changes in the law of organisational responsibility, such as are currently underway, cannot take place without (judicial) remedies being affected.[9] The degree of development and refinement of the different legal layers and the various branches of law under which international organisations are operating are influencing both the need for and the adequacy of existing or future remedial mechanisms. In addition, the political constellation in which the accountability is being raised should not be ignored. Moreover, a well-functioning accountability regime increases the efficiency of international organisations and is thus also indispensable to them in terms of assisting them to serve their purpose.[10]

The form of accountability at issue will determine the availability of, access to, and selection and successful use of mechanisms of redress. The variety of legal layers providing flexibility for an international organisation when conducting its multilateral operations has to be matched by a comprehensive set of means of redress and remedies so as to leave no loopholes at each individual legal level. The inherent right of an international organisation unilaterally to qualify its activities is not unlimited, but is instead subject to independent review, which will constitute an important element in the implementation of their accountability.

[7] *Ibid.*, p. 601.
[8] C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987), p. 194.
[9] *Ibid.*, p. 224.
[10] As far as the UN is concerned, the establishment of a transparent and effective system of accountability and responsibility is currently underway and is based upon an integrated approach and made operational through a set of procedures aimed at ensuring adequate monitoring and control (A/C.5/49/1 of 5 August 1994, para. 6).

2 Remedies against international organisations

Remedies in international law

Limiting ourselves for a moment to the international legal context within which states, international organisations, non-governmental organisations and individuals are operating, some observations have to be made regarding remedies in international law.

It was commonly understood, sometimes tacitly, that doctrinal writings were neglecting (admittedly to varying degrees) the issue of remedies. Christine Gray was right when she observed, back in 1987, that the question of judicial remedies had generally been regarded as peripheral to the main study of international law; attention had been centred on the substantive rules with little consideration given to the consequences of their violation in general or judicial remedies in particular.[1] The remedies are something to be invented anew in each case.[2] In addition, partly because the statutes of international administrative tribunals govern the appropriate remedies for injuries to officials, these tribunals 'in their generally rather summary discussion of remedies' did not make any substantial theoretical contribution to the general international law on remedies.[3]

Since 1987 not only has the International Law Commission made substantial progress in its work on the draft on state responsibility, but the problem of remedies, not merely the judicial ones, has become the focus of attention, spreading over a wide range of different branches of international law. The creation of the new dispute settlement mechanism within the World Trade Organisation has led to an unprecedented

[1] C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987), p. 1.
[2] *Ibid.*, p. 108. [3] *Ibid.*, p. 164.

flow of studies on remedies in international trade law. The highly institutionalised accountability regime of the European Community has always attracted analysis from a remedial perspective but the focus has certainly increased in recent times,[4] complemented by in-depth comparative studies on the level of coherence, or the lack thereof, in the international law of remedies.[5]

The protective function of accountability has perhaps nowhere been more prominent, from the very start, than in the sector of human rights, but it was only recently that an in-depth study on remedies in international human rights was undertaken by Dinah Shelton.[6] The few previous studies were clearly based on a sectoral kind of approach while at the same time they were mostly limited to the category of judicial remedies. However, the coming into being of particular regimes within the overall system of international law, such as in the areas of disarmament and the environment, each entailing tailor-made non-compliance procedures and remedies, unexpectedly led to an institutional dilemma for those considering resorting to these mechanisms; this was aptly demonstrated in the fascinating volume edited by Malcolm Evans.[7]

This briefly described renewed focus and the main conclusions reached in the research that had been undertaken will undoubtedly influence the further development in practical terms of remedies as a crucial counterpart of the ever-increasing refinement of the primary rules addressed to the various categories of actors in present-day international society. The identification of the particular difficulties stemming from the fact that we are dealing with international organisations and the search for possible solutions must take place within the perspective of the developments just referred to. Lessons may be learned and directions drawn from experiences in various sectors of international life in respect of availability, access to and the outcome of non-legal and legal, judicial and non-judicial remedial action and mechanisms *vis-à-vis* international organisations.

[4] J. Lonbay and A. Briondi (eds.), *Remedies for Breach of EC Law* (Chichester: John Wiley and Sons, 1997).
[5] J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', *RCADI* 271 (1998), 101–382, at 137.
[6] D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999).
[7] M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart Publishing, 1998).

Given the different levels and forms of accountability, this book uses the term 'remedy' as a form of shorthand for an acceptable outcome arrived at by means of the choice of an aggrieved party.[8]

The need for remedies against international organisations

The 'perfect rational desire on the part of governmental officials and international civil servants neither to lose political or administrative control of disputes nor to embarrass other states and organisations'[9] will inevitably have to give way to the need for, and access to, internal and external, impartial, judicial and non-judicial dispute settlement mechanisms for states and non-state entities alike.

The entirely speculative character of the discussion on the responsibility of an international organisation as it was described by Clyde Eagleton half a century ago[10] has clearly been overtaken by events.

It may be useful at this stage to illustrate this development with a few real-life examples.

- Visitors on their way to the headquarters building of an international organisation are injured in an accident involving the car of the chief administrative officer driving at high speed.
- A female staff member is unfairly dismissed after her allegations of sexual harassment by a senior official were not properly dealt with in the course of an internal complaint procedure.
- A commodity organisation is unable to meet the claims of its creditors as a direct result of (unauthorised) speculative market trading by the organisation's buffer stock manager.
- During an armed conflict, international relief organisations decide to withdraw their international staff from a dangerous area, leaving the victims, albeit temporarily, without assistance or protection.
- Refugees or displaced persons do not survive a railway journey operated by a sub-contractor acting on behalf of an international relief organisation.
- A message originating from the head of an observer mission and containing detailed information on an imminent genocide in a country already torn apart by a civil war, is not channelled through headquarters. As a result an executive organ decides to send too small a contingent of peacekeepers with a limited mandate and supported by inadequate resources and equipment.
- An organ monitoring the implementation of economic coercive measures authorised the publication of a report containing detailed but incorrect information about non-compliance by private companies, who, as a result, sustain considerable financial and economic losses.

[8] *Ibid.*, p. vii. On the lack of uniformity in the terminology of the international law of remedies, see S. Haasdijk, 'The Lack of Uniformity in Terminology of the International Law of Remedies', *IJIL* 5 (1992), 245–63.

[9] M. Janis, 'Individuals and the International Court' in A. Muller, D. Raic and J. Thuransky (eds.), *The International Court of Justice: Its Future Role After Fifty Years* (The Hague, Boston and London: Martinus Nijhoff Publishers, 1997), pp. 205–16, at p. 209.

[10] C. Eagleton, 'International Organisations and the Law of Responsibility', *RCADI* 76 (1950), 323–423, at 386.

The questions arising in each of these situations are identical. Who has an interest or a right to bring a claim? Against which entity or person should such a claim be addressed? Before which forum could or should the claim be brought? And finally, what means of redress, what remedies, are open to those who have successfully invoked the applicable rules and norms before the appropriate forum?

The need for the existence of effective, proportional and dissuasive remedies against international organisations cannot only be derived from the expansion of their activities and the ensuing complexity of situations and circumstances in which a plurality of state and non-state entities may find themselves when working closely with international organisations.[11] There are obviously other imperatives and considerations that have to be taken into account when devising or refining mechanisms of redress.

The efficacy of any accountability regime for international organisations depends to a large extent, if not entirely, on the nature of the remedies afforded.

A constitutional obligation

A first and prominent source of obligation and inspiration can be found in conventional requirements aimed at international organisations and

[11] More attention should be paid and efforts made to identify different stakeholders in different operational areas of international organisations: S. Schlemmer-Schulte, during a 'Panel on the Accountability of International Organisations and Non-state Actors', *ASIL Proceedings* 92 (1998), 359–73, at 371. In addition one should consider the long-term impact of privatisation on the structure, functioning and thus also the accountability of international organisations operating in particular areas such as postal services, telecommunications, etc. See in this regard G. Burdeau, 'Les Organisations internationales entre gestion publique et gestion privée' in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of K. Skubiszewsky* (The Hague, London and Boston: Kluwer Law International, 1996), pp. 611–24. See also L. Ravillon, 'Les Organisations internationales de télécommunications par satellite: vers une privatisation?', *AFDI* 44 (1998), 533–51.

providing for appropriate means of redress and remedies. These may be couched in more general terms such as 'promoting justice' as formulated in a constituent instrument, or in more specific provisions contained in particular conventions concluded by an organisation's member states on its privileges and immunities, or agreements entered into by the international organisation such as headquarters agreements with member states or non-member states.

Such provisions of a constitutional or quasi-constitutional nature should be given due regard whenever remedies against international organisations are considered to be defective, moribund, insufficient or lacking altogether. Derek Bowett succinctly provided the starting point for discussion when he wrote 'in justice, the United Nations could scarcely refuse to meet claims as a defendant'.[12] There is no inherent reason why the well-known ruling of the International Court of Justice – that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the UN to promote this aim' not to afford 'judicial or arbitral remedy'[13] – should not apply, on the second and third level of a comprehensive accountability regime, to the settlement of any disputes that arise between an international organisation and all other third-party claimants. And there is, as was pointed out by R. H. Harpignies, no aspect of the relationship between an international organisation as such and third parties, be it contractual or otherwise, which is beyond judicial or quasi-judicial settlement.[14]

The human rights protection imperative

A second and certainly equally important reason why international organisations have to provide appropriate remedies for those entities whose interests have been or may have been affected by their acts, actions and omissions emanates from the imperative of the protection of human rights.

The creation of a comprehensive body of primary and secondary rules on human rights protection has taken place in parallel, although at

[12] D. Bowett, *UN Forces: A Legal Study of United Nations Practice* (London: Stevens, 1964), p. 242.

[13] *Effects of Awards of Compensation made by the UN Administrative Tribunal*, Advisory Opinion of 13 July 1954, *ICJ Reports* (1954), p. 47, at p. 57.

[14] R. Harpignies, 'Settlement of Disputes of a Private Law Character to which the United Nations is a Party: A Case in Point: The Arbitral Award of 24 September 1969 in Re Starways Ltd v. United Nations', *RBDI* 7 (1971), 451–68, at 453.

a different pace, to the proliferation and expansion of international organisations. In numerous cases and at various levels either international organisations have been the initiators of such efforts or the process has at least taken place under their auspices. In a number of conventional human rights instruments, international organisations or treaty-based organs have been entrusted with important supervisory and monitoring responsibilities while, not infrequently, themselves designing, servicing or actually providing the appropriate remedies *vis-à-vis* (member) state parties to such Conventions.

The basic imperative of human rights protection underpinning this network of regional and universal instruments and regimes irreversibly permeates almost every single aspect of the way states conduct their internal and external affairs. Its scope of application has extended to non-governmental organisations and multinational corporations, and its impact has been increasingly felt in the way in which international organisations operate, both those organisations of a general political nature and those active in particular financial, economic or technical areas.

Although there has been for years a reluctance by international organisations to acknowledge in explicit terms a legal obligation to comply with human rights, there is certainly a recent trend by these actors to incorporate, admittedly to varying degrees, protection of human rights into their operational guidelines and directives. The pre-existing reluctance was hardly consistent with the expressed aim of the United Nations to promote and encourage respect for human rights and fundamental freedoms. The human rights imperative may have influenced and entered into internal and external primary rules governing the conduct of international organisations, but it is certainly giving rise to rather far-reaching demands in the important area of remedies against them. We may, at present, merely be witnessing the first stages of a development the ultimate outcome of which is impossible to predict.

Ultimately, 'it would be quite ironic to negate the rights of individuals on the assumption that they might be incompatible with the functions of International Organisations'.[15] The functional needs of an international organisation should always be subordinated to basic international human rights standards, such as the right to adequate means of redress in the case of violations of one's rights.[16] However, it should

[15] M. Arsanjani, 'Claims against International Organisations: Quis Custodiet Ipsos Custodes?', *Yale Journal of World Public Order* 7 (1980–1), 131–76, at 175, note 172.

[16] A. Muller, *International Organisations and their Host-states: Aspects of their Legal Relationship* (The Hague and London: Kluwer Law International, 1995), p. 282.

also not be forgotten that for 'all its revolutionary advances ... human rights law has yet to develop a coherent theory or consistent practice of remedies for victims of human rights violations'.[17] The fact remains, though, that the guarantee of effective legal protection must be considered a general principle of law, which (increasingly) underlies the common constitutional traditions of the member states of international organisations.[18]

The right to a remedy

A third important element to bear in mind is linked to the previous factor but is also distinct from it. In many countries, based on the rule of law a partial or more fully fledged[19] system has been put in place providing protection for individuals and legal persons in their daily dealings with public authorities. The system of protection has been expanding rapidly and comprises a wide variety of political, administrative and legal remedies available to those whose interests or rights have been or may have been affected.[20] Individuals and groups of individuals are increasingly becoming used to some form of redress towards the state under whose jurisdiction they find or have placed themselves, and they cannot really be expected not to look for similar remedial mechanisms when their interests have or may have been affected by acts, actions or omissions on the part of an international organisation. This becomes more relevant given the frequency with which international organisations, separate from the particular cases of systems of integration, assert or exercise some minor or more pronounced attributes of governmental authority: peacekeeping operations, with their infinite variety of mandates and post-conflict transitory authorities, are examples in point.

If a judicial review of governmental and, sometimes, legislative acts by established courts is possible and 'deemed desirable in a democratic

[17] Shelton, *Remedies*, p. 1.

[18] E. Schmidt-Assmann and L. Harrings, 'Access to Justice and Fundamental Rights', *European Review of Public Law* 9 (1997), 529–49, at 530, citing the 1986 judgment of the ECJ in Case 222/84 *Johnstone v. Chief Constable of the RUC* [1986] ECR 1651, at 1682.

[19] Schmidt-Assmann and Harrings rightly stressed that even in countries where there is an absolute guarantee of access to the courts in the constitution not *all* acts of the administration are subject to judicial control: 'Access to Justice', 539.

[20] See, for instance, at the European level (in addition to Article 13 of the European Convention on Human Rights), Principle I of Recommendation R (84) 15 on public liability adopted by the Council of Ministers of the Council of Europe on 18 September 1984 as referred to by Shelton, *Remedies*, p. 22, note 63.

system', Bowett argues, 'the question must be posed: why not in the UN?'[21]

However, as Shelton convincingly stressed, it is not a perfect analogy as the international-level proceedings where the individual victim seeks redress also function as mechanisms to further the treaty regime in the interests of the international community:[22] that certainly applies with the same vigour to the accountability of international organisations, which has to be considered as applying *erga omnes*. Any regime of accountability for international organisations should from its inception be addressing individual and community concerns and carry it through the process of formulating primary rules and secondary remedial ones. One of the consequences of this duality of interests is that even after compliance with a primary rule by an international organisation there is still an interest in pursuing remedial actions in order to establish the basis of liability that the organisation might incur as a result of its default.[23]

The right to a remedy is well established: it is even a norm of customary international law,[24] and therefore also directs international organisations in their dealings with states and non-state entities beyond the first level of accountability; the right would include both the 'procedural right of effective access' and 'the substantive right to a remedy'.[25] From this perspective, a refusal by an international organisation to investigate complaints about its conduct would be a matter for serious

[21] D. Bowett, 'The Court's Role in Relation to International Organisations' in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (New York and Cambridge: Grotius Publications and Cambridge University Press, 1996), pp. 181–92, at p. 190.

[22] Shelton, *Remedies*, p. 3.

[23] As the ECJ ruled with regard to member state responsibility in Case C-361/88 *Commission of the European Communities v. Federal Republic of Germany* [1991] ECR I-2567, at I-2605, para. 1, referred to by Charney, 'Is International Law Threatened?', 248, note 563.

[24] Shelton, *Remedies*, p. 182.

[25] *Ibid.*, pp. 14–15. It should be noted that responsibility of international organisations has been rightly identified as one of the areas where 'customary international law as being generally applicable will govern': C. F. Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge: Cambridge University Press, 1996), p. 19.

The underlying, more fundamental, issue whether international organisations have to observe fundamental customary human rights imperatives is not uncontroversial but it belongs to the sphere of the existence and modalities of primary rules and that is beyond the scope of this study. Exemption from the application of international customary law based upon the argument that operational activities are beyond their reach or that the organisation's functional autonomy would be unduly affected cannot seriously be invoked in the case of the right to a remedy.

concern, given the evidently pivotal role of such a pre-remedial measure for any subsequent action considered by claimants.

Caution is called for as the voluntary submission by private parties to alternative settlement mechanisms has to be assessed against the overall context and background of the fundamental inequality in power between the international organisation and its (contracting) non-state parties. In this sense the ECHR's pronouncement in the *Deweer* case in 1980 that 'a waiver of one's right of access to court frequently encountered in the shape of arbitration clauses in contracts does not *in principle* offend against the Convention'[26] is indeed subject to the particularities of each individual case. Also in the *Waite and Kennedy v. Germany*, and *Beer and Regan v. Germany* cases the ECHR did not go into the concern expressed by the European Commission on Human Rights that the applicants did not receive legal protection within the international organisation that could be regarded as equivalent to the jurisdiction of the competent domestic courts.[27]

In these and similar cases, the prior exhaustion of the available internal remedial mechanisms within the international organisation[28] eventually leading to an inadmissibility ruling would probably compel domestic and international courts to undertake a thorough examination of the equivalent protection requirement instead of assuming that there would be no practical problem. At the same time, such a sequence of procedures would have the additional advantage of underlining the delineation of the respective responsibilities of the different quasi-judicial and judicial actors involved. In doing so, the applicant would still be able to request an international court such as the ECHR to examine whether this degree of access *limited to a preliminary issue* was sufficient to secure the applicant's right of access to a court.[29] The ECHR would

[26] *Deweer*, ECHR, 27 February 1980, Series A, No. 35 cited by A. Reinisch, 'Note on the Judgement of the ECHR of 18 February 1999 in *Waite and Kennedy v. Germany*, Application 26083/94 and in *Beer and Regan v. Germany*, Application 28934/95', *AJIL* 93 (1999), 933–8, at 936, note 24 (emphasis added).

[27] *Ibid.*, 938.

[28] As indicated by the ECHR in the *Waite and Kennedy* and *Beer and Regan* cases: 'they could and should have ...' (*Waite and Kennedy*, para. 69). It should be noted that a failure to have recourse to a remedy which meets the requirements of Article 13 of the European Convention on Human Rights would not necessarily amount to a failure to exhaust domestic remedies in the sense of Article 26: D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), pp. 445 and 449.

[29] *Waite and Kennedy v. Germany*, Application No. 26083/94, ECHR Judgment, 18 February 1999, para. 59.

then have an opportunity to establish whether the rights guaranteed by the European Convention were theoretical or illusory instead of practical and effective.[30]

Although the impact of this third factor on the question of remedies will probably be less than that of constitutional requirements and the human rights imperative, it is certainly not going to diminish in the future.

Comparing remedies against states with remedies against international organisations

The purpose of the following remarks is not to compare exhaustively the two systems of remedies but merely to highlight some of the specific features to be taken into account when devising and adapting remedies against international organisations. There are certainly common elements between international organisations and states with respect to remedial action against them, but far more relevant here are the main features that distinguish them.

Distinctive features

The *first* distinctive feature is related to the kind of jurisdiction normally exercised by international organisations, in Finn Seyersted's terms 'inherent' and mainly comprising 'jurisdiction over the organs of the international organisation, including officials and member states in their capacity as members of such organs'.[31] Disputes between international organisations and individuals other than officials can only arise 'in those fields where such individuals have been placed under the legislative and/or administrative authority of the organisation' – that is, the

[30] *Ibid.*, para. 67. In this particular case an inadmissibility ruling by the organisation's internal Appeals Board would probably have resulted in domestic courts reaching a different conclusion than the one actually reached. The problems caused by these two recent judgments of the ECHR were exacerbated further by the operation of harmless clauses *vis-à-vis* third parties and underwritten by the direct contractors of the international organisation concerned. For international organisations such as financial or commodity organisations, there is the additional concern that in order to protect and maintain their credibility in the marketplace they have to provide appropriate remedies for their partners from both the private and public sector.

[31] F. Seyersted, 'Settlement of Internal Disputes of Intergovernmental Organisations by Internal and External Courts', *ZaöRV* 24 (1964), 1–121, at 4.

extended jurisdiction.[32] This so-called extended jurisdiction, which is inherent for states, is the exception to the rule for international organisations. As a result, one would expect the issue of remedies against international organisations to be rather limited in scope *ratione personae* and *ratione materiae*. However, the proliferation of their operational activities may have caused that distinction to become less relevant than it used to be. The point had already been made by Wilfred Jenks more than half a century ago when he argued, while discussing trusteeship agreements, that 'it should be possible for the UN . . . to be a respondent in such a case in its capacity as administering authority'.[33] In all circumstances in which an international organisation exercises some kind of governmental authority over a particular territory on a temporary basis there is obviously a direct personal jurisdiction. In the *Report of the Commission of Inquiry, established pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which led to Casualties Among Them*, it was observed that the UN has to bear responsibility for at least some of the basic state concerns traditionally appertaining to a government.[34]

When legislative and administrative powers are clearly being conferred upon an international organisation they can be accompanied by judicial powers through the establishment of UN tribunals – as was done by General Assembly resolutions for Libya and Eritrea – 'to decide on the basis of "law" all disputes arising between Italy, the Administering Powers and the government of the territory concerned relating to the interpretation and application of . . . economic and financial provisions "although" the Peace Treaty made no mention of judicial powers'.[35] When concluding the Peace Treaty the parties were probably not 'aware that in doing so they also accepted the compulsory judicial power of the UN in disputes arising out of the legislation enacted by the UN pursuant to the Treaty'.[36] Other historic examples of the increasing number of transitory administrations set up by the UN in a post-conflict peacebuilding context include the UN Temporary Executive Authority (UNTEA) established by the General Assembly in its Resolution 1752 (XVII) adopted on 21 September 1962 and administering the territory of West New Guinea (1962–3) and the UN Council for Namibia (1967–90), which was

[32] *Ibid.*

[33] C. W. Jenks, 'The Status of International Organisations in Relation to the International Court of Justice', *Transactions Grotius Society* 32 (1946), 1–41, at 28, para. 40.

[34] S/1994/653, para. 253.

[35] Seyersted, 'Settlement of Internal Disputes', 49. [36] *Ibid.*

established by the General Assembly in its Resolution 2248 (S–V) adopted on 19 May 1967.[37]

Whereas the competences of states are considered to be of a general and comprehensive nature, subject of course to the limitations imposed by international law on their very existence, range, scope and the means of exercising them, the competences of an international organisation are necessarily of a limited, attributed nature: it has to act *intra vires*[38] and, of course, in compliance with international law.

As a result, the content and scope of applicable primary rules is the *second* most obvious element of distinction between international organisations and states. As there is in practice no limit to the potential scope of rules governing state conduct because of their full statehood and attributes of sovereignty, the situation for international organisations in fact starts from the opposite direction. Indeed, norms and rules are becoming applicable to international organisations only to the extent that this has become necessary because of the range of their expanding institutional and operational activities. The kind and scope of remedies that international organisations will have to make available to their partners will inevitably be affected by this difference, which in turn is bound to become increasingly less pronounced.

A further complicating factor is that the body of primary rules governing the activities of international organisations is still far more in a process of development than those governing state conduct. From a systemic point of view, and in spite of reasonable degrees of differential treatment in particular areas, the governance of primary rules over states is, in principle, uniform, whereas the functional variety of international organisations substantially reduces the range and number of guidelines, rules, norms and standards that may be considered commonly applicable. Thus, in contrast with states, the quest for more tailor-made means of redress and remedies beyond the standard minimum

[37] Other, current, examples are UNTAET (United Nations Transitional Administration in East Timor) established by Security Council Resolution 1272 (1999) of 22 October 1999 and UNMIK (United Nations Interim Administration Mission in Kosovo) established by Security Council Resolution 1244 (1999) of 10 June 1999. Completed examples include UNTAC (United Nations Transitional Authority in Cambodia) established by Security Council Resolution 745 (1992) of 28 February 1992 and UNTAES (United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium) established by Security Council Resolution 1037 (1996) of 15 January 1996.

[38] On the strict and broad view of competences of an international organisation see, *inter alia*, M. Singer, 'Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns', *Virginia Journal of International Law* 36 (1995), 53–165, at 117–23.